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March 7, 2023 **FTC-01/2021 BL&P-RRA-20211004**

The Chief Executive Officer
Fair Trading Commission
Good Hope
Green Hill
ST MICHAEL

Attention: Kevin Webster - General Counsel/Commission Secretary

Dear Madam:

Re: Notice of Motion to Review and Vary the Fair Trading Commission's Decision dated February 15, 2023 on the Barbados Light & Power Company Limited's Application for A Review of Electricity Rates - FTC-01/2021 BL&P-RRA-20211004

Further to the Decision of the Fair Trading Commission (Commission) dated February 15, 2023 in response to the Barbados Light & Power Company Limited's (BLPC) Application for a Review of Electricity Rates dated September 30, 2021, the BLPC hereby submits the attached Notice of Motion for Review and Variation of the Commission's Decision together with the supporting Affidavit of Mr. Roger Blackman.

Yours faithfully,
BARBADOS LIGHT & POWER COMPANY LIMITED

Adrian Carter
REGULATORY MANAGER

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cc: Roger Blackman, Managing Director
Kim Griffith-Tang How, Director Customer Solutions

BARBADOS

THE FAIR TRADING COMMISSION

IN THE MATTER of the Fair Trading Commission Act, Cap.326B of the Laws of Barbados;

AND IN THE MATTER of the Utilities Regulation Act, Cap. 282 of the Laws of Barbados;

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

AND IN THE MATTER of the Application dated the 30th day of September, 2021 by the Barbados Light & Power Company Limited for A Review of Electricity Rates (the 'Application');

AND IN THE MATTER of the Decision of the Fair Trading Commission on the Application dated and issued 15th February, 2023 and numbered **01/2023.**

THE BARBADOS LIGHT & POWER COMPANY LIMITED APPLICANT

AFFIDAVIT IN SUPPORT OF MOTION TO REVIEW

I **ROGER BLACKMAN**, of No. 12 Stepney, St. George, in this island, Managing Director of The Barbados Light & Power Company Limited, **MAKE OATH AND SAY** AS FOLLOWS:

1. I am the Managing Director of The Barbados Light & Power Company Limited (the "Applicant"), and as such am duly authorized to depose to the following facts and matters in this Affidavit on behalf of the Applicant. The statement of facts set out herein are within my personal knowledge unless otherwise stated.
2. The Applicant is a vertically integrated electric utility company which was established on May 6, 1955 and incorporated on December 30, 1986 under the Companies Act, Cap 308 of the Laws of Barbados and has its registered office at Garrison Hill, St. Michael, Barbados. Pursuant to the Electric Light & Power Order, No. 3, set out in the Third Schedule of the Electric Light and Power Act, Cap 278 of the Laws of Barbados, the Applicant was granted the right to supply energy for all public and private purposes for a period of forty-two years from August 1, 1986.
3. On October 04, 2021, the Applicant filed with the Fair Trading Commission ("Commission") an Application for a Review of Electricity Rates, dated September 30, 2021 ("Application"), which Application was assigned number **FTC-01/2021 BL&P-RRA-20211004** by the Commission.
4. The Commission delivered its Decision on the Application by document numbered **01/2023** dated and issued on 15th February, 2023 ('Decision').
5. The Applicant has been advised by Clarke Gittens Farmer Attorneys-at-Law ("CGF") and verily believes the same to be true that the filing, hearing and general management of the Application by the Commission and its determination, Decision and any consequent Order thereon are subject to the provisions of the *Fair Trading Commission Act*, Cap.326B of the Laws of Barbados (as amended) ("FTCA"); the *Utilities Regulation Act*, Cap. 282 of the Laws of Barbados ("URA") and the *Utilities Regulation (Procedural) Rules, 2003* and the *Utilities Regulation (Procedural) (Amendment) Rules, 2009* of the Laws of Barbados (together "URPR") and the principles of administrative law, including the rules of natural justice.
6. The Applicant has been advised by CGF and verily believes the same to be true that the Commission's Decision on the Application breached certain provisions of

the said FTCA, URA and URPR and the principles of administrative law, including the rules of natural justice and that the Decision contains certain errors of law, errors of fact and breaches of important matters of regulatory principle within the meaning of Rule 54 of the URPR and that the Decision also constitutes and evidences the Commission's breach of certain principles of natural justice.

7. In reliance upon the said advice provided by CGF and the Applicant's knowledge and belief concerning the impact of the Decision on the business operations and goodwill of the Applicant, the Applicant has filed its Notice of Motion for Review and Variation of the Decision pursuant to Section 36 of the FTCA dated 07 March, 2023 ('Notice of Motion').

8. I make this Affidavit pursuant to Rule 8(2)(b) of the URPR, in support of the said Notice of Motion.

Threshold Test

9. The Applicant believes based on the legal advice which it has received, that the Decision contains certain errors of law, errors of fact and breaches of important matters of regulatory principle and the principles of natural justice and that such errors and breaches are identifiable, material and relevant and further, based on the legal advice which it has received, that there is enough substance to the issues raised in the Notice of Motion that a review based on those issues could lead to a variation or rescission of the original Decision. The specifics of the errors of law, errors of fact and important matters of principle evident in the Decision are as set out in the Notice of Motion.

Stay of Decision

10. The Applicant believes that it will suffer irreparable harm to its business operations, reputation and goodwill if it is required to implement the Decision prior to its review by the Commission or at all. Specifically that:

    (i) **The Applicant will suffer irreparable financial harm which cannot be remedied by any subsequent award of damages, even if same were available** - despite the Commission's implied acceptance that the Applicant was in a state of 'financial distress' prior to and at the time of issue of the Decision (as evidenced by the Commission's grant of interim rate relief to

the Applicant on the basis of the Applicant's satisfaction of the Commission's test of 'financial distress' in order to be granted that relief) the Commission still proceeded to make a determination which imperiled the Applicant's financial viability, contrary to the Commission's role and function as set out at section 3(2)(b) of the URA. If the Applicant is forced to implement the Decision before review, its rate base will be reduced below acceptable levels, negatively impacting its ability to operate with reasonable financial facility. The Decision is expected to result in the Applicant operating with severe financial challenges for the financial year 2023 and at projected marginal profitability for the foreseeable future, until resolved. Further, that the Applicant's operating income and Return on Equity ('ROE') would continue to fall below accepted industry standards from implementation of the Decision and for the foreseeable future, particularly given the length of time since this Application was filed.

(ii) If the Applicant is forced, before the hearing of a Motion to Review, to implement the Commission's Decision and direction that the Applicant record fifty percent of its 2019 income tax gain as a regulatory liability and amortize the liability over a fifteen-year period (as reflected at paragraph 404 of the Decision) this will contribute to an undue reduction in the Applicant's approved rate base, and ROE below acceptable levels and compromise the Applicant's ability to maintain its plant and equipment and make necessary alterations and improvements to provide service to the public which is safe, adequate, efficient and reasonable as required by Section 20 of the URA;

(iii) If the Applicant is forced, before the hearing of a motion to review, to establish a record of $99.5 million in a regulatory liability account, to first deploy the monies recorded in the regulatory liability account in the event of a covered catastrophic event and to refund to customers the SIF amounts withdrawn that are not re-deposited into the SIF over a 30-year amortization period as a reduction to insurance expense this will contribute to an undue reduction in the Applicant's approved rate base, and ROE below acceptable

levels and compromise the Applicant's ability to maintain its plant and equipment and make necessary alterations and improvements to provide service to the public which is safe, adequate, efficient and reasonable as required by Section 20 of the URA;

(iv) **The Applicant will suffer financial prejudice which cannot be remedied by any subsequent award of damages, even if same were available** - If the Applicant is forced, before the hearing of a motion to review, to use base revenue, customer count, usage and demand values from the period ended June 30th, 2022 for purposes of making an adjustment to test year revenues and within the cost-of-service study (as required at paragraph 404 of the Decision) while maintaining all other costs, expenses and other information from the 2020 test year, this is likely to cause financial prejudice to BLPC in that it will be required to apply rates premised on unbalanced ratemaking, which does not appropriately account for updated Construction Work in Progress (CWIP), costs, expenses and other pertinent details from the period ended June 30th, 2022. CWIP and operating and maintenance expenses from 2022 which should properly be included in this calculation, would therefore be unjustly omitted.

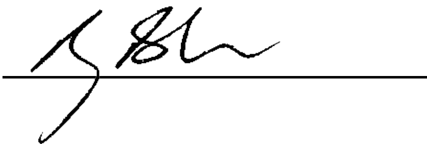
(iv) **The Applicant will suffer irreparable reputational harm and harm to its goodwill which cannot be remedied by any subsequent award of damages, even if same were available** – The Commission's Decision generally, and particularly paragraphs 68, 69, 126, 141, 146 & 146, 153, 179, 197, 221, 405 of the Decision variously suggest that BLPC was untruthful, lacked transparency, provided incorrect or deliberately opaque information, included unsubstantiated costs in its Application, made errors in its calculations, sought to mislead the Commission, failed to implement Orders or directions made by the Commission in its 2010 Rate Review Decision, engaged in self-dealing or misappropriation of assets and other allegations. These assertions in the Decision, whether express or implied, are unsubstantiated by the evidence in the hearing and are likely to cause irreparable injury to BLPC's reputation and goodwill which cannot be made

good by a subsequent monetary award of damages, even if such an award was available. Further, several of these allegations were never put to the Applicant by the Commission in the hearing of the Application or otherwise, to afford the Applicant the opportunity to answer such allegations, to clarify its evidence or any decision or action taken by it.

Grounds for Motion

11. The Applicant relies on the grounds of the Notice of Motion for Review dated March 7, 2023 and the reasons and information reflected therein.

SWORN TO by the said)
ROGER BLACKMAN)
this 7th day of March, 2023)



Before me:

ATTORNEY-AT-LAW

BARBADOS

THE FAIR TRADING COMMISSION

IN THE MATTER of the Fair Trading Commission Act, Cap.326B of the Laws of Barbados;

AND IN THE MATTER of the Utilities Regulation Act, Cap. 282 of the Laws of Barbados;

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

AND IN THE MATTER of the Application dated the 30th day of September, 2021 by the Barbados Light & Power Company Limited for A Review of Electricity Rates (the 'Application') **AND IN THE MATTER** of the Decision of the Fair Trading Commission on the Application dated and issued 15th February, 2023 and numbered **01/2023.**

THE BARBADOS LIGHT & POWER COMPANY LIMITED APPLICANT

NOTICE OF MOTION FOR REVIEW AND VARIATION

A. NOTICE OF MOTION – RULE 8(2)(d) OF THE UTILITIES REGULATION PROCEDURAL RULES

TAKE NOTICE that The Barbados Light & Power Company Limited ('BLPC' or 'Applicant') will make a Motion to the Fair Trading Commission at its offices at Good Hope, Green Hill, St. Michael, at a date and time to be fixed by the Commission.

The Motion will be made pursuant to Rule 53 (2) of the Utilities Regulation (Procedural) Rules 2003 (as amended) of the Laws of Barbados ("URPR") for a Review and Variation pursuant to Section 36 of the Fair Trading Commission Act ('FTCA') of the Decision of the Fair Trading Commission ("Commission") dated and issued on 15th February, 2023 and numbered **01/2023**, on the Barbados Light & Power Company Limited's Application for A Review of Electricity Rates ('Decision').

B. ORDERS SOUGHT BY THE APPLICANT – RULE 8(2)(a) OF THE URPR

The Applicant seeks the following Orders:

1. **AN ORDER** pursuant to Rule 55 (1) of the URPR that the Motion and the grounds upon which it is made meet the threshold test and that the Commission should review the Decision;

2. **AN ORDER** pursuant to Rule 56(1) of the URPR granting a stay of those parts of the Decision which require the Applicant to
   - (i) Declare a regulatory liability of $99.5 million in connection with the SIF fund;
   - (ii) Declare a regulatory liability of $9.5 million in connection with deferred tax liability;
   - (iii) Revisit its accumulated depreciation expense;
   - (iv) Use base revenue, customer count, usage and demand values from the period ended June 30th, 2022 for purposes of making an adjustment to test year revenues and within the cost of service study;
   - (v) Use a financial capital structure of Equity 55% and Debt 45% for rate making purposes in the determination of the rate of return.

(vi) To modify the as filed test year expenses in the development of the revenue requirement in respect of utilizing the 2020 reported insurance expense of $8,198,082.

effective from the date of filing of this Notice of Motion and delaying the implementation of the Decision until the determination of this Motion or such later date as the Commission shall determine, under such conditions as the Commission may prescribe, in exercise of its jurisdiction under Rule 56(1) of the URPR;

3. **AN ORDER** pursuant to section 36 of the FTCA that the Decision is varied in part, so that BLPC is no longer required to:
   (i) retroactively record fifty percent of its 2019 income tax gain as a regulatory liability and amortize the liability over a fifteen-year period (as reflected at paragraph 404 of the Decision);
   (ii) retroactively establish a record of $99.5 million in a regulatory liability account, to first deploy the monies recorded in the regulatory liability account in the event of a covered catastrophic event and to refund to customers the SIF amounts withdrawn that are not re-deposited into the SIF over a 30-year amortization period as a reduction to insurance expense that shall be shown as a separately identifiable amount for regulatory reporting purposes;
   (iii) retroactively establish a regulatory liability to recognise the difference between the accumulated depreciation recorded using the approved regulatory depreciation rates and the accumulated depreciation recorded based on the depreciation rates the BLPC used for its financial statements.

4. **AN ORDER** pursuant to section 36 of the FTCA that the Decision is varied so that the test year is updated to 2022 in its entirety, including non-depreciation expenses and Construction Work in Progress (CWIP).

5. **AN ORDER** pursuant to section 36 of the FTCA that the Decision is varied so that the undepreciated portion of the 5MW energy storage device and operating expense is recovered in rate base.

6. AN ORDER pursuant to section 36 of the FTCA that the Decision is varied so that a financial capital structure of Equity 65% and Debt 35% is used for rate making purposes in the determination of the rate of return.

7. AN ORDER pursuant to section 36 of the FTCA that the Decision is varied so that the cost of insurance utilised in the development of the revenue requirement be as filed, $12,348,641.

8. **SUCH FURTHER AND OTHER ORDERS** as the Commission may deem appropriate in hearing and disposing of this Motion.

C. DETERMINATION OF THE THRESHOLD QUESTION (Rule 55 (1) OF THE URPR)

9. In accordance with Rule 55 (1) of the URPR, the Commission must determine whether a Motion brought under Rule 53 has met the threshold test and thus should be reviewed or whether there is reason to believe the Order should be rescinded or varied.

10. The Applicant notes the Commission's Decision on The Barbados Light & Power Company Limited's Motion to Review and Vary the Decision of the Fair Trading Commission on the Application of BLPC to Recover the Costs of the 5MW Energy Storage Device through the Fuel Clause Adjustment, Document No.: FTCUR/MTNDECESD/BL&P-2019-01 issued on April 23, 2019 ('Storage Device Decision')

11. In the Storage Device Decision the Commission was persuaded by the following findings of the Ontario Energy Board in the Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006- 0322/0338/0340, May 22, 2007, p.

18. The Board, whose procedural rules are almost identical to the URPR, found as follows regarding Motions to Review:

> *'With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that **there must be an identifiable error in the decision** and that a review is not an opportunity for a party to reargue the case. **In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature.** It is not enough to argue that conflicting evidence should have been interpreted differently. **The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision**. In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.' (Emphasis ours)*

12. The Commission stated as follows on the matter of the threshold test in the Storage Device Decision:

> ***"in order for an applicant to meet the threshold test on filing a motion to review, it must demonstrate that the error which it alleges in the decision it wishes reviewed is identifiable, material and relevant to the decision which was made. Such an applicant must show, on a prima facie basis, that there is enough substance to the issues raised in their motion for review that a review based on those issues could lead to a variation or rescission of the original decision. It is insufficient for an applicant to demonstrate that it is dis-satisfied with the decision, which is the subject of the Motion,***

and the Motion must not be used as an opportunity to simply re-argue the applicant's case" (para 4.4)

13. The Applicant submits that the grounds raised below are identifiable, material and relevant and sufficient on a *prima facie* basis to meet the threshold test.

14. The Applicant further submits that the determination of the matters raised in this Notice of Motion and the supporting grounds raise questions of law and fact and important matters of principle which impact the correctness of the Decision and further, that a review based on these grounds could properly lead to a variation or rescission of the original Decision and that this Motion therefore meets the threshold test.

D. REQUEST FOR STAY – RULE 54(1) (b) AND RULE 56 OF THE URPR

15. Pursuant to Rule 54(1) (b) of the URPR the Applicant requests that the implementation of the Decision be immediately delayed and interim rates continue until the determination of this Motion by the Commission or such later time as the Commission may determine or direct.

16. Rule 56 of the URPR provides that upon receipt of a motion and a request for a stay of the implementation of the order or decision or any part pending the determination of the motion, the Commission may delay the implementation of the order or decision or any part, on such conditions as it considers appropriate. The Applicant submits that this Rule is distinguished from Rule 54(1) (b). While Rule 54 gives parties the right to request a stay/delay of a decision or order Rule 56 goes a step further and gives the Commission the authority to immediately grant such stay request in relation to the whole or any part of a decision or order while at the same time allowing the Commission to implement any conditions it may deem appropriate in the circumstances while the decision or order is stayed.

Grounds for Request of Stay

17. The URPR does not set out express criteria on which a stay would be granted after request by an applicant. Therefore, in the absence of clear criteria within the URPR that guide the Commission, the Applicant relies on established legal criteria ordinarily used by adjudicative bodies like the Commission[1] or Courts in determining whether a stay/delay of the decision should be granted.

18. In its Heat Rate decision dated September 10, 2018, the Commission stated the following in determining the issue of whether a stay should be granted to BLPC:

> *"The Commission is authorized by Section 36 of the Fair Trading Commission Act, Cap. 326B of the Laws of Barbados to review and vary or rescind any decision or order made by it, upon an application being made or on its own motion. In addition, Rule 56(1) of the URPR provides that the Commission may delay the implementation of its order or decision, on such conditions as it considers appropriate where a request for a stay is made.*
>
> *A delay in implementation of an order or decision is akin to a stay of a decision or an order in civil proceedings. Accordingly, in determining whether to permit the delay of implementation of its order or decision, the Commission should give consideration to matters similar to those a civil court would consider in an application for a stay.*
>
> *The Court in* ***AG Manitoba v Metropolitan Stores et al [1987] 1 SCR 110*** *held that a stay of proceedings and an interlocutory*

[1] Decision and Order on request to stay operation of TPL-007-2 EB-2018-0119 Independent Electricity System Operator / Hydro One Networks Inc. In this case the Ontario Energy Board considered section 36.2(6) Electricity Act 1998 the following criteria: the public interest, the merits of the application, the possibility of irreparable harm to any person, impact on consumers, the balance of convenience, the need to co-ordinate the implementation of the standard in Ontario with other jurisdictions, the need to co-ordinate the review of the standard in Ontario with regulatory bodies in other jurisdictions that have reviews, are reviewing or may review the standard and that have the authority to refer the standard back to the standards authority for further consideration, any other matter that may be prescribed by regulation.

injunction are remedies of the same nature and should be governed by the same principles. The case of ***American Cyanamid v Ethicon Ltd [1975] AC 396*** *laid down the following criteria to determine whether or not a stay should be granted:*

(i) *Whether there was a serious issue to be tried;*

(ii) *Whether the Applicant would suffer irreparable damage in the event that the stay is not granted; and*

(iii) *The balance of convenience which requires consideration of the public interest and other interested parties. This is ultimately a way to determine which party will suffer the greater harm from the grant or refusal of the stay.*

The Court in ***Hammond Studdard v Agrichem International Holdings Ltd [2001] EWCA Civ 1915*** *noted that the risk of injustice to either of the parties on the grant or refusal of a stay, and whether any irremediable harm could result to either party, were essential factors in making the determination. In the Jamaican case of* ***Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited*** *&* ***Another [2011] JMCA App 1,*** *Harris JA referred to* ***Linotype-Hall Finance Limited v Baker,*** *and opined that the courts have adopted a quite liberal approach, in that, they seek to impose the interests of justice as an essential factor in ordering or refusing a stay.*

The burden and the standard of proof lie on the Applicant who must prove its case on the balance of probabilities as provided by Section 131 of the Evidence Act.

19. The relevant considerations from American Cyanamid have been explored and refined over time. The local Court of Appeal has summarized those principles in **Toojays Limited v Westhaven Limited Civil Appeal No. 14 of 2008 ("Toojays")**. In Toojays Professor Justice Burgess JA held at para [32]:

"This summary of the American Cyanamid clearly proposes a two stage enquiry. The first is the initial threshold of serious question to be tried, and the second, consideration of where does the balance of justice (convenience) lie. It is worth emphasizing that consideration of adequacy of damages is not treated as a separate and distinct stage, but merely as a significant consideration in assessing the balance of convenience."

20. Thus, in the present circumstances the Applicant must establish;
    - A serious issue to be tried; and
    - That the balance of justice favours the grant of the interim relief sought.

    The arguments to support each criteria in support of the stay are set out below.

<u>Serious issue to be tried</u>

21. The Commission must be satisfied that there is a serious question to be tried, though the Applicant does not need to show a *prima facie* case. A "serious issue to be tried" means that the Applicant has, under the substantive claim, an arguable case; one which cannot be regarded as frivolous or vexatious (**Toojays Limited v Westhaven Limited Civil Appeal No. 14 of 2008**).

22. BLPC contends that there are serious issues to be tried particularly in relation to Sections 6 and 8 of the Decision and Order which concern the Commission's application of the principles in retroactive ratemaking and the treatment of the Self Insurance Fund ('SIF').

23. This Applicant submits that the matters as contained in paragraphs 23(i) to 23(v) of this Motion are serious issues to be tried:

    i) ***<u>The Commission acted in excess of its jurisdiction, and therefore ultra vires, by directing the Applicant to take certain actions regarding the SIF when it had no jurisdiction to do so and had previously acknowledged that it has no jurisdiction under its</u>***

<u>enabling legislation to oversee the SIF or to direct the Applicant to take action regarding it.</u>

This decision of the Commission in relation to the retroactive application of oversight over the SIF is an error of law and jurisdiction in that the Commission not only acted ultra vires but abused its discretion. These errors alone should cause the Commission to approach this matter cautiously and justify the stay/delay in the implementation of the decision or order while it further examines the Applicant's arguments for a review. Moreover, the Commission's decision is an error of fact on the findings of the evidence of the Applicant which was presented during the hearing. Additionally, the decision raises an important matter of principle in relation to regulatory certainty.

The Commission has no jurisdiction to oversee the operation of the SIF or the actions of its trustees regarding the assets held within the SIF. By letters dated April 19, 2016 and May 17, 2016 to the Commission, the Applicant proactively notified the Commission of its intended withdrawal and distribution of SIF funds to its shareholder. In response to this correspondence, the Commission then expressly confirmed that it has no jurisdiction in the matter of the SIF and specifically over the management of assets entrusted to the SIF in a letter to the Applicant dated May 19, 2016(attached at Appendix 'A'). It is well established law that a statutory entity must act within the four corners of its enabling legislation. Any actions outside of the general, specific or incidental powers of the Commission are *ultra vires* its powers and will be considered void *ab initio.*

The Applicant contends that neither the general nor specific powers granted to the Commission under the FTCA, URA, URPR or any of the other statutes it is legally empowered to administer, grant it the power to control the Applicant's operation of the SIF or to make the determinations and orders contained in the Decision purportedly compelling the Applicant to take certain actions in respect of the SIF and the creation of

a regulatory liability account in regard to withdrawals from the SIF. The Commission itself acknowledges at para. 225 of the Decision that "*the regulation of insurance entities is the purview of the Financial Services Commission*". It is thus the Financial Service Commission ("FSC") that has been granted power and jurisdiction over the SIF by Parliament. The FSC confirmed that it had no objection to a reduction in the funding level in the SIF by letter to the Applicant dated May 20, 2016. By now attempting to challenge actions which were sanctioned by the FSC six and a half years ago, the Commission is asserting a regulatory jurisdiction which has not been granted to it by Parliament. Should a Court approve the Applicant's position on appeal, those parts of the Decision related to the SIF would fail for illegality.

It also has to be recognized that there is no requirement in the SIF Regulations or in any other statute or regulation that the Applicant make contributions to the SIF or maintain any minimum balance or any level of insurance at all. The SIF was not established to require the Applicant to self-insure its T&D assets but to provide the Applicant with a mechanism that allowed it to do so under the Insurance Act. Ultimately, it is the Applicant's sole choice of how it elects to insure its assets. This may include some level of self-insurance of T&D assets, but that is not a legal requirement.

The Commission has found that the Applicant's contributions to the SIF were not voluntary. This is contrary to the findings of the Central Bank in its letter to the Applicant dated June 15, 2016 where it was stated as follows:

> *"(a) the Self Insurance fund (SIF) arose out of Hurricane Andrew impacting the Caribbean region and effectively eliminating the market for commercial insurance as it relates to electrical utility transmission and distribution facilities. The company with the concurrence of its shareholder starting setting aside cash funds in a separate*

bank account to assist Barbados Light & Power Company Limited (BL&P) in case of a hurricane impacting its transmission and distribution network.

(b) ***SIF is a voluntary initiative and not a government requirement****. Self-insurance legislation was passed, which permitted the company to establish the SIF under the management of Trustees."*

The Applicant submits that these findings amount to errors of law and fact.

At para. 199 of its Decision, the Commission states:

"Moreover, the decision in respect of the SIF was not prudent in that there is no evidence that an actuarial study guided the decision to make the withdrawal from the fund."

At para. 229 and 406, the Commission directs the Applicant to conduct actuarial studies in relation to the funding level of the SIF. The imposition of the actuarial requirement is a novel requirement that has never existed before in relation to the SIF. Such a requirement is not found in the SIF Regulations, a matter that was confirmed by the Financial Services Commission by way of its letter dated May 20, 2016 which states that the FSC has "*not found a requirement for documentary evidence to reduce the funding level in the self-insurance fund*."

Imposing such a requirement on a retrospective basis therefore not only violates the principle against retroactive ratemaking, but is unsupported by any law or regulation in Barbados or any evidence in the record.

The Applicant recognizes the incidental powers of the Commission which are ancillary to its specific and general powers of ratemaking, and which are guaranteed by statute at section 19(3) of the Interpretation

Act, Cap 1 of the Laws of Barbados and common law[2]. However, the Applicant contends that the incidental powers granted to the Commission at common law and under Section 19(3) of the Interpretation Act, Chapter 1 of the Laws of Barbados, similarly do not grant the Commission the power to make the pronouncements it has in the Decision regarding the SIF. Section 19(3) states:

> *'(3) Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that thing or are incidental to the doing thereof.'*

The Applicant contends that a requirement to create a regulatory liability account in relation to the SIF is not 'reasonably necessary' or 'incidental' to the ratemaking powers of the Commission. We refer the Commission to decision of the majority of the Supreme Court of Canada in **ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)**, 2006 SCC 4, [2006] 1 SCR 140 ("ATCO"), which dealt with a similar question, whether the regulator had jurisdiction to allocate to customers a portion of the profits of the sale of a gas utility's assets.

In **ATCO** the governing legislation required the utility to obtain regulatory approval if it wished to "sell, lease, mortgage or otherwise dispose of or encumber its property, franchises, privileges or rights, or any part of it or them" other than in the ordinary course of its business. A similar legislative grant of power to the Commission does not exist under the URA. After reviewing the statutory framework and the nature of property owned by a public utility, the majority of the Supreme Court of Canada held that even this approval authority did not confer jurisdiction on the regulator to allocate profits to customers from an asset sale to rectify

[2] See for example the dicta of Lord Selbourne, as follows: "whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires" (*Att-General v Great Eastern Railway Co (1880) 5 App.Cas 473 at 478*).

what it perceived as a historic over-compensation to the utility. Bastarache, J. writing for the majority at paras. 67-71 describes the regulator's lack of jurisdiction to attach ratemaking consequences onto the disposition by a utility of its property, which the Applicant submits is equally applicable to the instant case in relation to the SIF:

> *67. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.*
>
> ***68 Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted****. Through the rates, the customers pay an*

amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

69. In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. ***Absent any such interest, any taking such as ordered by the Board is confiscatory*** *. . . .*

Wittmann J.A., at the Court of Appeal, said it best when he stated:

Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to

non-depreciable assets when they have paid only for the use of those assets. [Emphasis added; para. 64.]

I fully adopt this conclusion. ***The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility****. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989), which relies on the same principle as was adopted in Market St. Ry. Co. v. Railroad Commission of State of California, 324 U.S. 548 (1945).*

70. Furthermore, one has to recognize that utilities are not Crown entities, fraternal societies or cooperatives, or

mutual companies, although they have a "public interest" aspect which is to supply the public with a necessary service (in the present case, the provision of natural gas). The capital invested is not provided by the public purse or by the customers; it is injected into the business by private parties who expect as large a return on the capital invested in the enterprise as they would receive if they were investing in other securities possessing equal features of attractiveness, stability and certainty (see Northwestern 1929, at p. 192). This prospect will necessarily include any gain or loss that is made if the company divests itself of some of its assets, i.e., land, buildings, etc

71 From my discussion above regarding the property interest, ***the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past****. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers.* ***There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation****.* ***It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates*** *(Northwestern 1979, at p. 691; Re Coseka Resources Ltd. and Saratoga Processing Co. (1981), 1981 ABCA 180 (CanLII), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; Re Dow Chemical Canada Inc. (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and*

> *the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).*

The Court in the **ATCO** case also considered whether the regulator may have possessed imputed jurisdiction as necessarily incidental to its discretionary power to approve or refuse to approve asset sales, and to attach conditions in any order approving such sales. In spite of these broad legislative powers (which again do not exist under the URA), the Supreme Court concluded the regulator did not have imputed or incidental jurisdiction to allocate proceeds from the sale of a utility's assets to customers:

> *77. Consequently, in order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something which is absent in this case (see* National Energy Board Act (Can.) (Re)*, 1986 CanLII 4033 (FCA), [1986] 3 F.C. 275 (C.A.)). In order to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets. In fact, it is not necessary for the Board in carrying out its mandate to order the utility to surrender the bulk of the proceeds from a sale of its property in order for that utility to obtain approval for a sale. The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for*

> *the future. This is not to say that the Board can never attach a condition to the approval of sale. For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system.*
>
> *78* ***In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale****;* ***to do so would completely disregard the economic rationale of rate setting****, as I explained earlier in these reasons.* ***Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs*** *(MacAvoy and Sidak, at p. 246). At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not contrary to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility.*

Those parts of the Decision which direct the Applicant to take certain actions related to the SIF must therefore fail for illegality, specifically that

the Commission had no jurisdiction to make the determinations and directions made in the Decision.

The question of the Commission's jurisdiction regarding the SIF is therefore a particularly serious matter to be tried.

ii) ***<u>The Commission provided no written reasons or insufficient reasons or other reasonable basis upon which to conclude that it considered or properly considered the evidence submitted by the Applicant on the matter of its prior referral of the withdrawal from the SIF to the Commission</u>.***

The Applicant contends that that part of the Decision concerning the SIF must also fail for irrationality in that the Commission improperly considered evidence regarding the movement of funds into and out of the SIF and failed to properly consider evidence proffered by the Applicant which demonstrated not only the Commission's confirmation of its lack of jurisdiction in the matter, but also that the Applicant had obtained the approval of the regulators who were legally and properly empowered to regulate the SIF and the Applicant's operation of same, and had approved the actions of which the Commission seems to disapprove, and on which its directions regarding the SIF appear to be based.

It is well established law that irrational decision-making constitutes an error of law that has the effect of negating the decision in question.

iii) ***<u>The Commission violated an important principle of regulatory ratemaking by engaging in retroactive ratemaking outside of legally established principles about when this is appropriate.</u>***

As regards its application of the principles of retroactive ratemaking, the authority of **Capital Power Corp. v. Alberta Utilities Commission** [2018] A.J. No. 1539 ("Capital") is a Canadian decision relied on by the Commission in support of its decision on retroactive ratemaking. However, this authority is distinguishable from the circumstances of the rate review because in that decision there was a finding that the loss line

charges were unlawful and in contravention of the Electric Utilities Act and this finding of unlawfulness was not challenged prior to the regulator granting relief. In the present circumstances, there has been no finding of unlawfulness under the Utilities Regulation Act Cap. 282 ("the URA"), the Fair Trading Commission Act Cap. 326B or the Insurance (Barbados Light and Power Company Limited) (Self-Insurance Fund) Regulations, 1998. Further, even though the Court in ***Capital*** accepts the exceptions to the rule against retroactivity are not closed, the Court here actually placed its decision within the established exceptions. The Commission has not similarly made any such attempt. Rather, it identifies policy without explaining the relevant policy which supports its position.

In Capital, all parties agreed that the rule making provisions in the Electric Utilities Act constituted a "negative disallowance scheme", in that the ISO rule took effect without prior Alberta Utilities Commission ("AUC") review or approval. In that case, the AUC found that it was unable to examine the justness or reasonableness of a line loss rule and line loss charges unless there was an ISO rule complaint, as occurred in that case. A negative disallowance scheme is a special situation that implies a power to act retrospectively because public utility regulators are empowered to disallow a charge which, in spite of already being in force and acted upon, had never been reviewed or approved in the first place.

However, there is no negative disallowance scheme in the present circumstances (a negative disallowance scheme is not possible in Barbados given section 11(2) of the URA precludes BLPC from charging rates other than those authorized by the Commission), nor do any of the other exceptions to the prohibition against retroactive ratemaking identified in Capital apply. There is no suggestion that any past rate, charge or tariff of the Applicant was unlawful or otherwise not in compliance with any applicable statutes.

iv) ***The Commission violated the important regulatory principle of regulatory certainty and consistency by making a ruling on the SIF in its Decision which was contrary to a written direction given to the Applicant on a previous occasion on the same matter and which apparent reversal of opinion undermines public confidence and that of the Applicant and other regulated entities in the stability of the Commission's decision making process and prejudices the Applicant.***

v) ***The Applicant had a reasonable and/ or legitimate expectation that the 99.5 million withdrawal from the SIF of which 15 million was paid to the Government of Barbados, would not be treated capriciously by the Commission based on the Commission's prior representation that the Applicant did not require its approval.***

The dicta of Cornelius J in **Harrison et al v Permanent Secretary Division of Energy & Telecommunications et al.** BB 2014 HC 51 provides the following overview of the general principles of Legitimate Expectation:

> *First of all, it is clear, that as mentioned above, the correct public authority must be identified. Secondly,* ***there must be cogent evidence as to what the public authority, whether by practice or promise committed itself to. The policy or promise must be clear, unambiguous and unqualified. Thirdly, the claimant must establish whether the authority has acted or proposes to act unlawfully in relation to that commitment****. Finally, the Court must decide what to do. In Chang v. Minister of Health TT 2009 HC 309, the Court citing R v. Northern London Borough Council, ex p Bibi [2001] E.W.C.A. Civ. 607 (per Schieman, L.J.*

recognised the last three issues as the three practical concerns arising in legitimate expectation cases.

The manner in which courts have tended to treat a claim to legitimate expectation has been succinctly stated in **Leacock (Pearson) v. Attorney General** per Simmons, C.J., cited with approval by the CCJ in **Joseph v. Boyce v. Attorney General of Barbados** (2006) 69 W.I.R. 104 at 118 as follows:

> *"In matters such as these (whether to give effect to substantive legitimate expectations) the Court must carry out a balancing exercise. The Court must weigh the competing interests of the individual, who has placed his legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The Court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority."*

Paragraph 228 of the Commission's rate review decision states that:

> "*For the reasons discussed above, the Commission will require $99.5 million SIF withdrawal to be made available by BLPC to be deployed consistent with the initial intent for the funds **and treated as a rate base deduction** (our emphasis) as the funds represent a source cost-free capital."*

The Applicant submits that it had a legitimate expectation based on written confirmations and approvals obtained from the Commission, the FSC, and the Central Bank of Barbados (CBB) that the Commission would not, six and a half years after the fact, re-write history and use an

unconnected ratemaking exercise to re-characterize the withdrawal of $99.5 million from the SIF as a regulatory liability. The Applicant openly notified the Commission, the FSC and the CBB of its intention to withdraw the SIF funds and distribute the proceeds (after $15M in tax was paid to the Government of Barbados) to its shareholder in 2016. At that time none of the regulators raised any objections to the Applicant's removal of the funds and the Commission determined that that it did not have jurisdiction in relation to the general administration of the SIF. In its letter dated May 19, 2016 the Commission stated *"The Commission confirms that the Barbados Light and Power Company Limited (BL&P) does not require approval from the Commission for the proposed changes to be made to the funding level of the BL&P Self Insurance Fund which was formally established under the Insurance Act of Barbados in 1998."* The Commission's representation was relied upon not only by the Applicant, but also by the CBB in its approval granted by letter dated June 15, 2016 to the Applicant.

The Commission through its February 15, 2023 Decision has not only retroactively gone back to erroneously reverse its position on this matter but has gone a step further and in its decision has justified the retroactive nature of its decision on the SIF by impugning that the Applicant's actions in relation to the removal of funds from the SIF were somehow improper, imprudent, or wrongful in spite of the Applicant having sought approval from the Commission for its plan six and a half years ago.

Alternatively, in the circumstances as highlighted above, the Commission is estopped from treating the SIF withdrawal as a rate base deduction. According to **Halsbury's Laws of England** Vol. 47 (2001) on Estoppel by Representation of Fact:

> *Estoppel by representation of fact arises where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so*

conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position to his detriment.

In **Lever Finance Ltd. V Westminster (City) London Borough Council [1971] 1 Q.B. 222 Lord Denning M.R.** as he then was in delivering his judgment stated that a public authority is bound by representations made by its officers as follows**:**

If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be. A good instance is the recent decision of this court in Wells v. Minister of Housing and Local Government [1967] 1 W.L.R. 1000. It was proved in that case that it was the practice of planning authorities, acting through their officers, to tell applicants whether or not planning permission was necessary. A letter was written by the council engineer telling the applicants that no permission was necessary. The applicants acted on it. It was held that the planning authority could not go back on it.

The Commission's decision to utilize the rate review process to retroactively and retrospectively reopen items that have been previously determined by the Commission and acted upon by the Applicant in reliance on such determination, in a contrary manner that is punitive to the Applicant, its investors and other stakeholders, has undermined the confidence of investors thereby affecting the Applicant's ability to raise capital to fund investment or maintain existing assets in such condition as to enable it to provide service to the public which is adequate efficient and reasonable[3], placing the Applicant in a worse position than prior to the rate filing. While the Applicant does not have a public credit rating, investors do consider its credit worthiness when deciding to invest.

[3] Duties of every service provider are set out under section 20 of the Utilities Regulation Act.

Investors (lenders and shareholders) have to be confident that there is stability and certainty before making investment decisions. This can be observed in many cases where regulators have made decisions which have had damaging impacts to the credit worthiness of utilities.

To promote efficient investment, it is standard to allow utility assets to earn a risk-adjusted cost of capital on the value of the rate base. This is a generally accepted policy for utility investments and indeed essential if regulated utilities are to have appropriate incentive structures. It is also recognized and accepted that final utility prices are determined by the product of the cost of capital and the approved rate base. In its Decision the Commission has sought, in its discretion, to apply a notional capital structure of 55% equity and 45% debt (even though the Applicant through its rate filing has demonstrated that it had not yet, after years of steady investment and payment of dividends, achieved the notional structure of 65% equity and 35% debt which the Commission approved since 2010.) This discretion in relation to the adjustment to the Applicant's capital structure when combined with the Commission's orders to reduce the value of the Applicant's asset base by rate base reductions caused by the retroactive claw back of the SIF (the most significant amount), amount to significant erosion of the value of BLPC's rate base and the ability of the Applicant to fully earn on used and useful investments.

24. In the circumstances, the Applicant submits that any arguments relative to excessive jurisdiction and the misapplication of law and facts raise serious issues to be tried in the present proceedings. Therefore, the above arguments form a sufficient basis to grant the stay sought by the Applicant.

Balance of justice

25. The balance of justice refers to the relative risk of harm to the Applicant if the stay is refused and the risk to the Applicant if it is granted.

26. When weighing up the balance of justice in this matter on deciding whether to grant the Applicant with a stay/delay in implementation of the Commission's decision, the Commission must be satisfied that the comparative mischief, hardship or the inconvenience which is likely to be caused to the Applicant by refusing to grant the stay/delay will be greater than that which is likely to be caused to opposing parties by granting it.

27. Hence, it is the duty of the Commission to consider the convenience of the Applicant as against the convenience of the Commission and the wider public as well as the intervenors in this matter. If the Commission believes that by refusing the stay/delay, greater or more inconvenience will be caused to the Applicant, it should grant the stay/delay. If the Commission finds that greater inconvenience will be caused to the opposing parties or intervenors, it should refuse the relief to the Applicant.

28. The Commission while granting or refusing to grant the stay should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compared with that it is likely to be caused to the other side if the injunction is granted.

29. ***In East Coast Drilling and Workover Services Limited v Petroleum Company of Trinidad and Tobago (2000) 58 WIR 351,*** *pp. 358E to J and 360C t per de la Bastide CJ, the Court emphasised that a balancing exercise must be undertaken. That exercise involves not only an assessment of the quantum of the risk involved in granting or refusing an injunction but also the severity of the consequences that will flow from either course.*

30. In ***Ansa McAl v Banks Holdings Limited & SLU*** BB 2016 CA the local Court of Appeal when assessing the balance of justice found that there is a logical order that should be followed. At paragraphs 136-137 of the judgment the Court of Appeal made the following observations:

> *"… Here, it is important to recall that, since this Court's decision in Williams v. CIBC Trust, the settled law is that the principles*

which should guide our courts in approaching the second limb of the American Cyanamid test are those stated by Sir John Pennycuick in Fellows & Sons v. Fisher [1975] 2 All ER 829 at 843. He said there of the balance of justice (convenience):

> *"(3) 'As to that' the court should first consider whether, if the plaintiff succeeds he would be adequately compensated by damages for the loss sustained* between the application and the trial, in which case no interlocutory injunction should normally be granted. (4) If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason on this ground to refuse an interlocutory injunction. (5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance, should otherwise be even, being preservation of the status quo. By the expression 'status quo' I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief. (6) Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence...."

[*137] In our judgment, it emerges very plainly from this statement of the law that there is a certain order in which factors relevant to deciding where the balance of justice lies should be taken into account by the court. We do not mean to be taken as suggesting, what was called in NCB v. Olint at para [21], a "box-ticking approach" "to the complexity of a decision as to whether or not to grant an interlocutory injunction". However, the order set out in Fellows & Sons v. Fisher flows logically from the intrinsic nature*

of the interlocutory injunction and is always followed in applying the American Cyanamid test.

26. The Applicant's submissions will follow the same approach in its analysis of the balance of justice.

Adequacy of damages

31. The standard question in relation to the grant of an injunction should now be is it just in all the circumstances that the claimant should be confined to his remedy in damages.

32. The law is clear that a significant question that the Commission is to ask itself is if the Applicant were to succeed in establishing its case, would the Applicant be adequately compensated by an award of damages for the loss it would have sustained if the Commission's Decision was implemented.

33. In ***Toojays Ltd v Westhaven Ltd*** civil appeal no. 14 of 2008, the Honourable Justice Burgess JA held at para [32]:

> "*This summary of the American Cyanamid clearly proposes a two stage enquiry. The first is the initial threshold of serious question to be tried, and the second, consideration of where does the balance of justice (convenience) lie. It is worth emphasizing that consideration of adequacy of damages is not treated as a separate and distinct stage, but merely as a **significant** consideration in assessing the balance of convenience."* [Emphasis added]

34. Damages are an inadequate remedy for BLPC and are not readily available to BLPC for actions/decisions/orders made by the Commission. The implementation of the Decision will cause BLPC irreparable harm to its business, goodwill reputation and operations as BLPC will be prohibited from meeting its statutory obligation to provide adequate service. The implementation of the Decision will further result in the erosion of debt and equity, disruption of investor confidence in the regulatory environment in

Barbados and significantly undervalue the Applicant's asset base. The Canadian authority of RJR Macdonald **Inc. v The Attorney General of Canada et al.** 1994 CanLII 117 (SCC) is instructive on the matter of irreparable harm in this context:

> *`Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.*

35. The Commission has erroneously contended that the Applicant acted imprudently when it removed the funds from the SIF (paragraph 199 of the Decision). By its Decision the Commission has effectively discredited in some degree the Applicant's more than 100-year reputation of being a financially responsible and upstanding corporate citizen and instead suggests some malfeasance in relation to the SIF.

36. The Applicant asserts that a reasonable person would reach a similar conclusion as it relates to the Commission's allegations of misconduct on the part of the Applicant. Evidence of this is that mere days following the Commission's decision and order on the matter, an intervenor in the matter, Lt Col.Trevor Browne, was quoted in an article dated February 16, 2023 in one of the island's leading newspapers as saying ***"Even when irrefutable evidence of BLPC's 'illegal' transfer of the Self-Insurance funds were presented to the commission, [its] decision, while detailing and admitting the 'illegal' action by the company, proposes to redress the situation by giving the BLPC 30 years to repay the money. This is a matter that probably should be referred to the DPP"***. Additionally, during a presentation at a Barbados Association of Professional Engineers' Forum on February 21, 2023, Lt. Col. Trevor Browne further stated that, "***The Self Insurance Fund, designed to respond to any national catastrophe, has been illegally de-capitalized by $100 million by the company."***

The credit quality of the utility industry is predicated on its regulatory stability and the consistency of the regulatory framework. This decision by the Commission to engage in retroactive ratemaking and exceed its jurisdiction will predictably undermine the regulatory construct in Barbados, materially weaken the regulatory jurisdiction's predictability and increase uncertainty for the utility, its investors, and other stakeholders, including its lenders.

37. As a result, the Decision will increase the cost of raising debt from the Applicant's lenders which will demand increased interest rates to account for the increased regulatory risk posed by retroactive ratemaking. Given the Commission's decision to reduce the proportion of equity in its notional capital structure, the Applicant will need to borrow additional funds to achieve a 45% debt level. As the Applicant borrows over a long term, the cost of this decision will be borne by the Applicant and ultimately its customers over the entire term of the financing. Once the interest rate is fixed in a debt issuance this cost cannot be recovered even if subsequently the Commission's Decision is reversed and lenders perceive the regulatory environment has improved, causing irreparable harm to the Applicant, or to the extent the Applicant's cost of debt is adjusted in a future rate proceeding, to its customers.

38. Moreover, the Decision potentially injures the reputation of the senior leaders and decision makers (i.e. human capital) within the Applicant's business that were entrusted to oversee the SIF. The impact of the Decision is particularly far reaching in a small society like Barbados.

39. The Applicant contends that the misstep by the Commission harms the Applicant's goodwill and reputation in the eyes of its key stakeholders and customers which cannot be remedied with damages and it is on this basis that damages are an inadequate remedy for the Applicant.

40. Such inadequacy is compounded by the fact that it is questionable whether the Commission could be made liable in damages in the event that BLPC's appeal is successful. In **Island Telephone Co (Re) (PEICA), [1987]** PEIJ No 114, 67 Nfld & PEIR 158, 7 ACWS (3d) 271 McQuaid JA, in dealing with an application

for a stay of proceedings with respect to an order issued by the Public Utilities Commission as follows:

> *With respect to the second test, irreparable harm, the Company argued, and I think with some merit, that compliance with the Commission's order touching the preparation of materials, would put it, the Company, to no inconsiderable expense which would be of no use should its appeal prove successful. Normally, this would be compensable in damages if such should be the case.* ***However, it is questionable whether the Commission could be made liable in damages in such an eventuality. Even if it could, since the Commission is exclusively funded by those industries over which it has jurisdiction, the end result would be that the Company would, in reality, be required to contribute to the payment of its own award for damages. It appears to me that there is something not quite equitable in such an arrangement****.*

41. In addition, there is no existing mechanism for the Applicant to recover its “damages” in rates. Should the Applicant be successful upon the determination of the review of the Decision there is no existing mechanism for it to recover the shortfall suffered from either the Commission or from customers.

42. Conversely, the Respondent and customers of the Applicant are extremely unlikely to suffer any harm if the stay is granted.

43. Through its recent rate application to the Commission and via a rigorous hearing process to be granted interim rate relief the Applicant was able to provide the Commission with sufficient evidence to convince the Commission to grant interim rate relief this rate relief was granted on the basis of the Applicant refunding customers with interest at the rate of the approved return on equity if a final order justifying the rate adjustment in the manner applied for by the Applicant could not be substantiated.

44. The Commission determined that the issue to be decided in considering the Applicant's request for interim rate relief, was whether the Applicant will suffer financial distress in the absence of an interim rate increase. Paragraph 9 of the Commission's Procedural Direction 1 (PD1) in the Interim Rate Review hearing matter states the following:

> *"In an effort to expedite the process, the scope of this Written Hearing will primarily focus on the following issue – Specifically: Has BLPC provided sufficient evidence that it would experience financial distress in the absence of a temporary increase in rates over the next 4-6 months."*

45. Similarly, paragraph 8 of the Commission's Consultation Paper stated the following:

    "The rationale for setting interim rates is to mitigate the effects of regulatory lag (i.e., the period of time between the submission of an application and the time when the regulatory body makes a decision on the application) in circumstances where the utility is facing financial distress thereby impacting its ability to provide service that is safe, adequate, efficient and reasonable. The regulator must be satisfied that interim rate relief would avert financial distress."

46. The Applicant noted that neither the Consultation Paper nor the PD1 defined what was meant by 'financial distress'. The Applicant also highlighted that the legislation governing the rate making function does not set financial distress as the operative test or criterion upon which the FTC's ability to grant an interim rate is hinged. However, in light of the issue as framed by the Commission in PD1, the Applicant submitted facts to address the issue of 'financial distress' and support the grant of interim rate relief.

47. On September 16, 2022 the Commission granted the Applicant interim relief. Such interim relief would not have been granted if the Applicant had not met its burden to prove "financial distress" and in so doing achieve the award of interim relief in the manner that it did.

48. The Commission in that matter balanced the interest of the public with that of the Applicant and determined that the public's interest would not be harmed or worst off when compared to the potential harm and hardship that the Applicant was experiencing.

49. The situation as it relates to this matter is analogous as the Applicant seeks to convince the Commission that elements of its Decision and order warrant a second look on the basis that in the Decision and order the Commission has erred in its assessment of key matters for determination. As it relates specifically to the retroactive application of the SIF matter the Commission has erred so fundamentally so as to cause irreparable harm to the Applicant whereas no other party to the matter nor the public at large can claim such in relation to the Commission's decision.

50. As such, the Applicant is asking that while the Motion of Review and Stay of the implementation of the Commission's Decision and Order are being heard, that the interim rates as approved on September 16, 2022 are to continue to be billed until the final decision of the Motion to review. The Applicant is also requesting that the issue of refunds to customers, if any, be addressed in or after the decision on the Motion to Review has been made.

51. The request for a stay of the implementation of the Commission's Decision and Order presents minimal harm to customers because the request is made under the condition that should a refund to customers be warranted, the Applicant will reimburse with interest as stipulated by the Commission, any difference between the interim rates and the final decision of the Commission.

52. Since it has been established above that damages are unlikely to be an adequate remedy for BLPC but will conversely be an adequate remedy for the Commission or the public at large, it is evident that the balance of justice favours the Applicant.

53. In the interest of completeness, the Applicant will demonstrate below how the other ***Ansa*** factors also support the grant of the injunction.

Status Quo

54. The reasoning in *Fellows & Sons v Fisher* as adopted and applied in the ***Ansa*** decision provides that after the adequacy of damages is considered, the Court goes on to assess all other matters relevant to the balance of justice. An important factor in the balance, if it is otherwise even, is the preservation of the status quo. If on weighing competing possibilities or probabilities of the likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in the status quo, an injunction would be issued.

55. An order which requires a party to take some positive step may carry a greater risk of injustice if it turns out to have been wrongly made. It is therefore reasonable and in the interest of all parties that the status quo be preserved pending the hearing of the review.

56. The Decision of the Commission on the SIF alters the status quo which existed for more than six years when the decision was made by BLPC to transfer $99.5 million from the SIF to its sole shareholder, Emera. By its Decision the Commission requires BLPC to establish a record of the said sum of $99.5 million in a regulatory liability account and be treated as a rate base reduction.

57. Whether or not the decision on the SIF is correct is one of the issues for determination at the hearing of the substantive motion, and there is therefore a case to be argued on this issue which is likely to have some prospects of success for the Applicant and warrants the preservation of the status quo which existed for more than six years. It is therefore necessary for the stay to be granted so as to maintain the status quo.

58. In light of the foregoing the balance of justice leans in favour of maintaining the status quo, if this is disturbed prior to the review and or appeal, the possible effects on BLPC may not be adequately remedied with damages.

59. In conclusion, the stay of the Decision should be granted in favour of BLPC in light of the following:

    1. There is a serious question to be tried and BLPC has a good and arguable case against the decision
    2. The balance of justice favours the grant of the stay in favour of BLPC
    3. A stay is essential to the preservation the status quo
    4. Grave prejudice and potentially unquantifiable loss and damage will accrue to BLPC if the stay is not granted

In the circumstances the Applicant submits that the Commission adopt a procedure in which the Motion to Review is determined and the interim rates that are operative remain in place before any order or decision on final rates is made by the Commission.

E. GROUNDS FOR THE MOTION (RULE 54(1)(a) OF THE URPR)

60. Rule 54 (1) (a) of the URPR provides that every Notice of Motion made under Rule 53 (2), in addition to the requirements of Rule 8, shall set out the grounds upon which the motion is made, sufficient to justify a review or raise a question as to the correctness of the Order or Decision.

61. Rule 54 (1) (a) further provides that the grounds may include:

i. error of law or jurisdiction;
ii. error of fact;
iii. a change in circumstances;
iv. new facts that have arisen;
v. facts that were not previously placed in evidence in the proceedings and could not have been discovered by reasonable diligence at the time;

vi. an important matter of principle that has been raised by the Order or Decision.

62. For the purposes of this Motion, the Applicant seeks a review and variation of the Commission's Decision on the basis set out in Rule 54 (1) Ground (1) error of law or jurisdiction, Ground (ii), error of fact and Ground (vi), that is, an important matter of principle that has arisen by the Commission's Decision.

Error of Law - Rule 54 (1) (a)

63. An error of law arises where a Decision made by the Commission violates a principle of law, breaches natural justice or reflects that the Commission acted in excess of its jurisdiction under its enabling legislation.

64. The Applicant submits that the Commission erred in law in the Decision as follows:

(i) The Commission failed to discharge its statutory obligation enunciated under section 10 of the Utilities Regulation Act to set fair and reasonable rates through its inconsistent application of the adjustments relative to the test year.

Section 10 of the URA sets out the Commission's statutory duty to ensure that every rate is fair and reasonable. A critical aspect of determining fair and reasonable rates is to settle the test year that will be utilized in the determination of the rate. As the Commission rightfully indicates at paragraph 34 of its Order and Decision the determination of whether a test year is appropriate for setting rates is whether it is representative, after adjustments, of the period in which rates take effect.

To this end, the Commission in assessing adjustments to the test year, determined that energy usage in the test year was abnormal and a normalizing adjustment to test year revenues was necessary. In seeking to effect this change they ruled that the base revenue, customer count, usage and demand values from the period ended June 30, 2022 for the

purposes of determining the overall revenue increase, tariff revenue requirement of each rate class should be used.

The Commission itself positively quotes at paragraph 94 of the order, that the adjustments to the test year ensure an accurate measure of "costs incurred in conducting operations over a *twelve-month period (i.e. the test period cost of service) and to fix rates that will produce revenues to match the costs of that period*." Further, at paragraph 95 of the Decision and Order, the Commission identifies and indicates that normalization adjustments are "*made to revenues or expenses to offset for unusual operating events*".

Having decided to change the period over which BLPC was to adjust test year revenues, the Commission was obligated to ensure that it also looked at normalization of expenses to match the changes that were made. However, at paragraphs 117 to 126 which address the test year expenses, the Commission only applies itself to actual expenses claimed by BLPC prior to filing the application. At no point were the expenses adjusted to ensure that the same coordinated with the adjusted revenue and the inconsistent treatment of the adjustments does not produce a fair or reasonable result.

In the authority of **Davenport Water Co. v. Iowa State Commerce Com'n**, 190 N.W.2d 583 (Iowa 1971) the Supreme Court of Iowa quoted with approval the order of the Commission as follows:

> *"It is fundamental to a proper test year that costs (both investment and operating) and revenues match, i.e., that they be consistent with each other. Unless there is a matching of costs and revenues, the test year is not a proper one for fixing just and reasonable rates. The inclusion of costs without matching revenues will produce excessive rates. The inclusion of revenues, without the matching costs will deny the utility reasonable rates. The relationship between cost and revenues for the test period used and the validity of that relationship constitutes one of the*

most vital areas in the determination of just and reasonable rates…

If actual test year costs are adjusted to include costs associated with a higher level of revenues than prevailed in the test year, it is obvious that there is an improper matching of costs and revenues, unless the revenue level is also adjusted."

We are therefore of the view that it may be argued that the Commission has failed to discharge its statutory obligation enunciated under section 10 of the URA to set fair and reasonable rates through its inconsistent application of the adjustments relative to the test year.

(ii) The Commission acted in excess of its jurisdiction, and therefore ultra vires, by directing the Applicant to take certain actions regarding the SIF when it had no jurisdiction to do so and had previously acknowledged that it has no jurisdiction under its enabling legislation to oversee the SIF or to direct the Applicant to take action regarding it.

The Applicant repeats the submissions made at paragraph 23 (i) of this Motion.]

(iii) The Commission provided no written reasons or insufficient reasons or other reasonable basis upon which to conclude that it considered or properly considered the evidence submitted by the Applicant on the matter of its prior referral of the withdrawal from the SIF to the Commission.

The Applicant repeats the submissions made at paragraph 23 (ii) of this Motion.

(iv) **The Commission provided no written reasons or insufficient reasons or other reasonable basis upon which to conclude that it considered or properly considered the evidence submitted by the Applicant on the matter of its Accumulated Depreciation and its prior applications to the Commission for approval of depreciation rates between 2013 and 2022.**

The Applicant repeats the submissions made at paragraphs 67-75 of this Motion.

(v) **The Commission breached the Applicant's right to procedural fairness by alleging that the Applicant had not been transparent in its provision of evidence without stating what evidence provided by the Applicant was opaque or inconsistent or demonstrated material discrepancies and allowing the Applicant the opportunity to be heard on any such allegation. [paragraphs 68 and 69 of the Commission's Decision]**

It is a well-established principle of law that when a judge fails to give any or adequate reasons for his/her decision this amounts to an error of law. (**Clico International Life Insurance Limited v Octavius John et al**. Civ Appeal No. 6 of 2015 relying on Flannery v Halifax Estates Agencies Ltd [2000] 1 All ER 373**). The English Court of Appeal in Flannery v Halifax Estates Agencies Ltd** [2000] 1 All ER **373** succinctly pointed out that this duty to state reasons was a function of due process and, therefore, of justice.

(vi) **The Commission exceeded its jurisdiction, and therefore acted ultra vires, in its ruling on treatment of deferred tax liability.**

The Commission has no legal or regulatory ability to engage in the retroactive ratemaking evidenced within the Decision as it relates to deferred tax liability. The Commission's treatment of the tax benefit does

not fall within the recognized exceptions to retroactive ratemaking nor does it accord with the principles of fairness and reliability. The Commission cannot follow retroactive rate making in circumstances where it has now decided to treat those tax benefits differently.

The case of **Northland Utilities v Northwest Public Utilities 2010 NWTSC 92 (CanLII)Northland Utilities Case")** is instructive in this regard. In this case, the issue put before the court was whether the Board exceeded its jurisdiction when, as part of its rate-setting exercise for the period 2008-2010, it ordered the applicants to flow through to customer's money received as a result of a tax refund for operations in 2007. In allowing the appeal*, Vertes JSC stated:*

> *I agree with the Intervenors' counsel when he argues that the 2007 tax refunds cannot be considered as an "efficiency gain". They came about due to a change in federal tax policy as opposed to any efficiencies introduced by the utilities.* ***But, if it is a windfall then the solution is not to provide one to the 2008-2010 customer base. The solution is to concentrate on developing appropriate rates for the test years based on current knowledge. Any attempt to deal with the refunds received for 2007 within the context of the 2008-2010 rate application is, in my opinion, tantamount to retroactive ratemaking****. Calling it a "prospective adjustment" is merely doing indirectly what cannot be done directly. It is axiomatic that the courts will look to the substance of what is being done, and not merely the form, and strike down any attempt to do indirectly what a tribunal's enabling statute does not allow to be done directly.."*

The Commission breached the requirements of natural justice and procedural fairness by failing to follow mandatory procedural rules set out in its enabling legislation and the URPR, failing to act in a timely manner, causing inordinate delay in the hearing and determination of the Application and admitting late intervention without just cause resulting in prejudice to the Applicant including the determination of the Application on the basis of dated information.

viii) That the Applicant had a reasonable and/ or legitimate expectation that the 99.5 million withdrawal from the SIF would not be treated capriciously by the Commission based on the Commission's representation that the Applicant did not require its approval.

ix) That the Applicant had a reasonable and/ or legitimate expectation that its recording of deferred taxes as current year income for the year 2018 would not be treated capriciously by the Commission based on the Commissions representation to the Applicant that the same should be done.

Error of Fact - Rule 54 (1) (a) (ii)

65. An error of fact arises where a Decision made by the Commission is based on a misinterpretation, misunderstanding, misapplication or ignorance of an established and/or relevant fact or set of facts or where the Commission acts upon an incorrect basis of fact in making its Decision.

66. A reviewable error of fact must be a mistake or misunderstanding which goes to the root of the Decision and must have played a substantial role in the outcome of that Decision. The mistake must be logically connected and relevant to the core of the Decision to sufficiently justify a request for review.

67. The Applicant submits that the Commission committed the following errors of fact in the Decision:

(i) The Commission failed to properly consider the evidence submitted by the Applicant concerning Accumulated Depreciation.

68. In its decision dated Feb 15, 2023 the FTC ordered "BLPC is directed to establish a regulatory liability to recognize the difference between the accumulated depreciation recorded using the approved regulatory depreciation rates and the accumulated depreciation recorded based on the depreciation

rates the BLPC used for its financial statements. The regulatory liability balance is to be updated as of the effective date of this Decision and shall be amortized over a fifteen-year period." (P 399 of decision)

69. In this decision, the FTC, for the first time introduced the concept of and a framework for the use of regulatory assets and liabilities (P 25 of decision). This did not previously exist and the Commission is at variance with its established precedent by this decision. In addition, the Commission seeks to implement the framework retrospectively – in this instance from 2013 to 2022. This ruling by the Commission gives rise to a breach of its duty under the URA by denying the Applicant the opportunity to recover prudently incurred costs to serve customers and not allowing the Applicant to earn a reasonable return on its investment.

70. The approved regulatory depreciation rates referenced in the decision were approved in 2009 using balances from 31 December 2006 (https://www.ftc.gov.bb/library/2009-02-25_commission_order_depreciation_policy_bl&p.pdf). These rates reflected the cost to serve customers at that time based on assets in service, unrecovered amounts and the average remaining life at that time. As described during the rate hearing, these factors have understandably changed over the intervening 16 years since then. The assets in-service included in that decision have changed, the unrecovered amounts of those assets have changed and the average remaining life of those assets have also changed. As a result, using the 2009 depreciation rates does not give a true and fair view of either the cost to serve customers (depreciation expense) or actual recovery of initial investments over the period.

71. In its decision, the FTC also stated "129. In 1958, the NARUC provided the following definition of depreciation:

"Depreciation," as applied to depreciable utility plant, means the loss in service value not restored by current maintenance, incurred in connection with the consumption or prospective retirement of utility plant in the course of service from causes which are known to be in current operation and against which the

utility is not protected by insurance. Among the causes to be given consideration are wear and tear, decay, action of elements, inadequacy, obsolescence, changes in the art, changes in demand, and requirements of public authorities".

130. Further, the International Accounting Standards Number 16 - Property, Plant, and Equipment defines depreciation as "the systematic allocation of the depreciable amount of an asset over its useful life. The depreciation method must reflect the pattern in which the asset's future economic benefits are expected to be consumed by the entity".

131. Depreciation is the process of recovering the initial investment in tangible capital assets in a systematic fashion over the useful service life of the plant, recognizing that utility plant is typically a group of investments. Depreciation cannot be calculated with precision, but to ensure that the analysis is as accurate as is reasonably possible, it requires the knowledge and informed judgment of an expert trained in the field of utility depreciation. The judgment pertains to the estimation of the future surviving life of plant as indicated by past patterns of retirements, industry trends, and corporate investment plans."

72. As described in the decision and order, BLPC prepares financial statements in accordance with International Financial Reporting Standards (IFRS) which do not currently permit the financial reporting of regulatory assets and liabilities (P 27). In compliance with IFRS and as described in the summary of significant accounting policies (bates stamp 000055 of the application) "…depreciation on other [than land and work in progress] property plant and equipment is calculated by the straight line method using rates required to allocate the cost of the assets less salvage over their estimated service lives…" International Accounting Standards Number 16 - Property, Plant, and Equipment further requires at paragraphs 50 and 51

"**Depreciable amount and depreciation period**

50. The depreciable amount of an asset shall be allocated on a systematic basis over its useful life.

51. The residual value and the useful life of an asset shall be reviewed at least at each financial year end and, if expectations differ from previous estimates, the change(s) shall be accounted

for as a change in an accounting estimate [Refer: IAS 8 paragraphs 36-40] in accordance with IAS 8 Accounting Policies, Changes in Accounting Estimates and Errors."

73. The guidance above suggests quite clearly that using IFRS as a basis for determining accumulated depreciation will result in a true and fair view of the accumulated depreciation (cost to serve customers and amount of plant value recovered from customers) than the rates determined over 16 years ago using factors that have changed significantly. Moreover, arbitrarily applying the 2009 approved rates to determine the amount of accumulated depreciation to be deducted from the plant in service to calculate rate base results in a potential regulatory asset rather than the expected regulatory liability when compared to the accumulated depreciation calculated using the appropriate IFRS congruent rates, as the 2009 rates did not contemplate assets that were brought into service over the period 2009 to 2022.

74. Lastly, in the decision, the FTC states at paragraph 91 – "As it relates to BLPC's depreciation differences that have emerged since 2013, the Commission finds that the final difference between the two (2) accumulated depreciation amounts should be recognized as a regulatory liability, included in rate base, and returned to ratepayers. The period of the amortization of this liability is not mandated by any particular principle, but a fifteen (15) year amortization approximately aligns with the weighted average remaining life of BLPC's plant. Therefore, the Commission determines that this regulatory liability shall be refunded using a fifteen (15) year amortization."

75. This can only be reasonably viewed as factually inaccurate as the amount of depreciation recovered from rate payers using the existing tariff over the period 2010 to Sep 2022 was less than the depreciation expense actually incurred by the utility. In fact, the amount estimated as a reasonable expense and thus recovered from rate payers from 2010 to Sep 2022 was $469.9M (37M annually per 2010 tariff decision for 12.6 years), and the amount of the depreciation expense actually incurred was $557.9M. As a result, it can only reasonably concluded, that there was a shortfall of depreciation expense contributed by

customers and recovered by the utility over the period in the amount of $89M and as such the conclusion that an amount should be refunded to customers is flawed and damaging to the utility.

76. During the Rate Hearing the BLPC resubmitted all of its depreciation applications which the Commission failed to review as evidence in relation to the accumulated depreciation.

77. **<u>The Commission failed to properly consider the evidence submitted by the Applicant concerning the 5MW Energy Storage Device (”ESD”)</u>**

78. In its decision and order dated April 13, 2018 the Commission determined that the costs associated the Applicant’s 5MW energy storage device (ESD) were reasonable and its use would facilitate the realization of Barbados’ clean energy vision in its April 13, 2018 order.

79. The Commission stated that:

> *“The Commission acknowledges that energy storage deployment will become a central focus for the BL&P in transitioning its existing grid infrastructure to better cater to the issues of efficient energy dispatch, grid resilience, reliability and management. The Commission recognises the commitment of the Applicant to the national clean energy vision.*
>
> *Given the myriad benefits to be derived from the inclusion of an ESD in the grid generation matrix, it is anticipated, that all stakeholders - customers, the utility and the environment (reduced emissions) - stand to benefit from its utilisation. Therefore, the Commission considers that the investment is justified.”*

80. The main issue in the ESD Application, was whether the Fuel Clause Adjustment (FCA) is an appropriate mechanism for the recovery of the ESD's cost. The Commission, having reviewed the submissions from intervenors, the current status of RE penetration, along with its projections and expected impact on the grid, the BNEP, energy storage

and its own research approved recovery of the ESD via the FCA for a period of three (3) years, commencing on September 1st, 2018. The Commission further determined that a review was necessary to assess the continued appropriateness and applicability of the FCA as a recovery mechanism. The Commission determined that:

> *"Recovery of the ESD's costs is approved for a period of three (3) years, commencing from September 1, 2018. Six (6) months prior to the expiration date, a review shall be conducted to assess the continued appropriateness and applicability of the recovery mechanism.*
>
> *All financial inputs of the FCA related to the recovery of ESD costs shall be audited by a representative of the Commission to ensure its value is correctly determined."*

81. The Applicant anticipated the commencement of a review by the Commission at some point during 2021 and after the September 1, 2021 date had passed, the Applicant wrote to the Commission to query and remind the Commission of its obligation commence the review. Further to its April 13, 2018 decision, no review of the battery as determined by the Commission was ever held.

82. In its rate review application, BLPC sought the Commission's approval to include the undepreciated portion of the 5MW ESD capital investment and operating costs in Rate Base. The undepreciated ESD cost was $11.6 million as at December 31, 2020.

83. In its Application, the Applicant shared the following with the Commission
Paragraph 52 – Rate Application
Memo on Rate Base – paragraph 4
Memorandum on Capital Expansion

    Paragraphs 47 – 52

84. In BLPC's responses (dated July 15, 2022) to Barbados Renewable Energy Association (BREA) interrogatories dated June 30, 2022, BLPC provided further evidence to the Commission.

85. Apart from BREA's interrogatories, Commissioner John Griffith on Day 11 of the Hearing engaged with the Applicant's witness Rohan Seale on the 5MW ESD. In that exchange the Commission focused on the losses of the battery and the fuel arbitrage and savings but did not sufficiently enquire about the battery's other uses and benefits as outlined by the Applicant in its Application.

86. The Commission determined in its decision dated February 15, 2023 that:

> *"BLPC has not demonstrated that the current ESD is economical over the life of the facility, nor does it provide ratepayers an acceptable fuel cost reduction as compared to the capital investment. Prior to purchasing additional energy storage, BLPC shall submit a full economic cost benefit analysis for the new energy storage, which demonstrates that it provides an acceptable economic benefit to ratepayers, to the Commission for approval."*

87. The Commission further determined that:

> *"BLPC's request to recover the undepreciated portion of the 5MW energy storage device and operating expense in base rates is denied."*

88. The Applicant contends the Commission's determination in relation to the Applicant's 5MW ESD is an error of fact. The Applicant further contends that the Commission made an incorrect finding in relation to the 5MW ESD and believes that this matter should be reviewed and the Commission's decision in relation to the battery varied. The Applicant believes that this issue was not sufficiently canvassed during the rate review hearing but even on the basis of the information that was available to the Commission, the Commission erred in that it gave insufficient or no weight to the claims by the Applicant on its battery and in so doing reached an incorrect conclusion.

89. The Commission in reaching its decision focused solely on and gave predominant weight to the initial business case of the Applicant's battery providing fuel savings and ignored the evidence from the Applicant that demonstrated that the initial business case has evolved and now more than

four (4) years hence the battery provides more than just fuel savings but is an integral part of the Applicant's operations in that it also provides frequency regulation, peak shaving, solar firming, other ancillary benefits that stabilize the grid and enhance reliability for customers. Moreover, the Commission ignored the ambitious nature of the BNEP for electricity production in Barbados to be 100% reliant on RE sources by 2030 and the IRRP which strongly supports and requires the installation of large increments of batteries.

90. It should be emphasized that while the commission acknowledges the primary application of the 5 MW BESS project which was predicated on fuel savings it fails to recognize that the BESS can and has provided multiple benefits for customers and as such has created further value. In addition to the primary use case identified the BESS can be deployed to provide other ancillary services including higher penetration and integration of variable RE sources, avoid curtailment whilst allowing the 100% RE target to be achieved over time. These benefits cannot be ignored given the exponential growth in distributed solar PV with its high intermittency.

91. The Applicant contends that the Commission's decision if left unvaried would not only result in the Applicant's inability to recover the full cost of an asset that customers are benefitting from but failure to allow the Applicant to recover the full cost would effectively result in the taking of the Applicant's property without the opportunity for just and fair recovery thus in violation with section 3 of the URA and established regulatory principles. Additionally, the Commission's decision has far more wide reaching effects in that it is misaligned with the BNEP and the need for batteries to provide grid stability services to the electricity network.

92. On the matter of fair and reasonable recovery of used and useful utility property, in Bluefield, 262 U.S. the Court adopted the rule of Smyth v. Ames and enumerated three (3) factors to be considered in estimating fair value of utility property: (1) the original cost of construction (2) the present cost of construction and (3) other matters including but not limited to, the expense of permanent improvements, the property's probable earning capacity, and the monies

required to meet operating expenses.[4] Once the "value of utility property used and useful in the public interest" was determined, the Commission was charged with the task of fixing a "reasonable return" on that value.

93. Further, in Power Comm'n v. Hope Natural Gas[5] years later the court went a step further and determined whether a rate order is lawful is to be judicially determined based on whether the total impact of the order is just and reasonable. The court said in 320 US at page 602, 64 S.Ct at page 2288: *"It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end".*

94. The Applicant contends that the Commission's order in relation to its 5MW ESD is unjust and unreasonable and woefully misaligned with Government policy which calls for the immediate deployment of high penetration of batteries.

95. The Applicant's 5MW ESD is used and useful, is in keeping with its obligations to provide a safe and reliable electricity service (that is, without the battery the electricity service could be significantly less reliable) and thus the battery properly belongs in rate base. By not allowing the ESD to be recovered fully deprives the Applicant of which it is lawfully entitled.

96. **The Commission failed to properly consider the evidence submitted by the Applicant at Schedules F of the Application concerning the Capital Structure**

97. In the decision, the commission ordered "The financial capital structure of Equity 65% and Debt 35% used by BLPC in the determination of its rate of return is denied. BLPC is granted a financial capital structure of Equity 55% and Debt 45% for **ratemaking purposes** (our emphasis) in the determination of the rate of return." (P 407 of the decision). This has the effect of reducing the return on rate base, and the resulting revenue requirement.

[4] Smyth v. Ames 169 U.S. 466, 546-548 (1898) Bluefield, 262 U.S. 679, 691 91923) excerpts taken from the Supreme Law of Utility Rate Hikes The *Hope* and *Bluefield* Decisions by James A. Chance
[5] 320 U.S 591, 627, 64S. Ct 281, 88 L. Ed. 333

98. Over time, reducing equity participation from 65% to 55% may be achievable, but this needs to be done in a structured manner to test whether this can be achieved, given the restricted capital market and options for raising debt in Barbados. This will require a dividend to be paid to the shareholder which will be refinanced with debt, requiring approval from the Commission which this Decision presumably supports. Until this is achieved, this will have the effect of causing the equity investor in the utility to earn a cost of debt rather than cost of equity, which at existing equity levels can cost equity investors as much as 7.5M annually. In the 2010 decision, the commission allowed the use of a notional capital structure of 65% equity and 35% debt even though the utility was closer to 80% equity and 20% debt. During the 2022 rate hearing, evidence was supplied by the applicant that showed the applicant was not able to achieve the notional structure over the 11 year period. The notional structure of 65% equity and 35% requested in this application was also supported by expert testimony of Dr. Bente Villadsen (expert witness) who also highlighted the limited access to capital. To use a structure of Equity 55% and Debt 45% for ratemaking purposes without a clear path to achieve such a structure raises an important matter of principle which is damaging to the utility and the equity investor because it will result in depriving the utility from earning on its actual equity.

Important Matter of Principle - Rule 54 (1) (a) (vi)

99. An important matter of principle that has been raised by the Order or Decision is relied on when seeking a review where the Applicant is of the view that the Commission failed to take into consideration or has violated an important regulatory principle within the Decision.

100. The Applicant submits the following specific grounds under this general category:

101. **The Commission violated an important principle of regulatory ratemaking by engaging in retroactive ratemaking outside of legally established principles about when this is appropriate.**

The Applicant repeats the submissions made at paragraph 23 (iii) of this Motion.

102. **The Commission violated an important regulatory principle by selecting a test year (2020) and then inappropriately using data from other years on a selective basis.**

The Applicant repeats the submissions made at paragraph 64 (i) of this Motion.

103. **The Commission violated the important regulatory principle of regulatory certainty and consistency by making a ruling on the SIF in its Decision which was contrary to a written direction given to the Applicant on a previous occasion on the same matter and which apparent reversal of opinion undermines public confidence and that of the Applicant and other regulated entities in the stability of the Commission's decision making process and prejudices the Applicant.**

104. **The Commission violated the important regulatory principle of regulatory certainty and consistency by making a ruling on deferred taxes in its Decision which was contrary to direction given to the Applicant on a previous occasion on the same matter and which apparent reversal of opinion undermines public confidence and that of the Applicant and other regulated entities in the stability of the Commission's decision making process and prejudices the Applicant.**

F. PERSONS AFFECTED BY THE APPLICATION (Rule 26 of THE URPR)

105.

Pursuant to Rule 26 (4) the Applicant advises that it is impractical to set out all the names and addresses of the persons affected by this Motion because they are too numerous. However, the persons affected can generally be described as the customer base of the Applicant, the Intervenors in this matter and the Applicant. These customers are affected because they are the ones to whom the Applicant supplies service.

G. SUPPORTING AFFIDAVIT (Rule 8(2) (b) OF THE URPR)

106.

The Affidavit dated 06 March, 2023, of Roger Blackman, Managing Director of the Applicant, is attached hereto and submitted in support of this Motion.

H. ORAL OR OTHER EVIDENCE SOUGHT TO BE PRESENTED (Rule 8(2)(a) of the URPR

107.

The Applicant intends to present:

(i) legal submissions prepared by its Attorneys-at-Law,

(ii) The Decision and Order and any Order of the Commission which may amend or replace it,

(iii) The transcript of the hearing of the Application which led to the Decision;

(iv) The Applicant's letters to the Commission dated April 19, 2016 and May 17, 2016;

(v) The Commission's letters to the Applicant dated May 19, 2016;

(vi) the Application and such further and other documentary evidence as the Applicant's counsel may advise and the Commission may permit.

DATED THIS 07TH DAY OF MARCH, 2023

SIGNED BY: ....

ROGER BLACKMAN

THE APPLICANT'S REPRESENTATIVE AND DULY AUTHORIZED OFFICER

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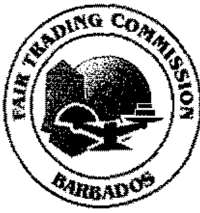
Ms. Tricia Watson and Mr. David Simpson
Business Development Division: The Ministry of Energy and Business Development
The Barbados Association of Retired Persons

APPENDIX -A



FAIR TRADING COMMISSION

No: 4/12/17

In replying, the above number and date of this letter should be quoted.
All correspondence should be addressed to the Chief Executive Officer.

Date: 2016/05/19

BY HAND & EMAIL

Mrs. Kim Griffith-Tang How
Director of Customer Solutions
The Barbados Light & Power Company Limited
P. O. Box 142
Garrison Hill
ST. MICHAEL

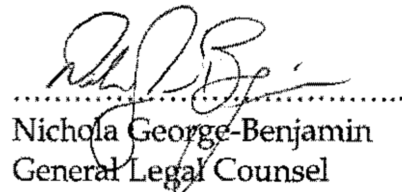
Dear Mrs. Griffith-Tang How,

Re: The Barbados Light & Power Self Insurance Fund

The Fair Trading Commission (the Commission) refers to your letters dated April 19, 2016 and May 17, 2016 with respect to the captioned.

The Commission confirms that the Barbados Light and Power Company Limited (BL&P) does not require approval from the Commission for the proposed changes to be made to the funding level of the BL&P Self Insurance Fund which was formally established under the Insurance Act of Barbados in 1998.

Yours faithfully,



Nichola George-Benjamin
General Legal Counsel

:cmj

Cc: Mrs. Sandra Sealy, Chief Executive Officer, Fair Trading Commission

Good Hope, Green Hill, St. Michael BB12003, Barbados, W.I.
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