FAIR TRADING COMMISSION

BARBADOS **NO. FTCUR/BLPCMTNRDEC 01/2023-20230307**

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 February 15, 2023 and numbered 01/2023.

AND IN THE MATTER of an Application by Barbados Light & Power Company Limited for a Review and Variation of the Commission's Decision issued on February 15, 2023.

BARBADOS LIGHT & POWER COMPANY LIMITED **APPLICANT**

INTERVENORS
Barbados Renewable Energy Association
Energy Division: The Ministry of Energy and Business Development
Mr. Kenneth Went
The Cooperative Society Ltd
Ms. Tricia Watson and Mr. David Simpson
Business Development Division: The Ministry of Energy and Business Development
The Barbados Association of Retired Persons

BEFORE:

Dr. Donley Carrington	Hearing Chairman
Ms. Ruan Martinez	Commissioner
Mr. John Griffith	Commissioner
Mr. Samuel Wallerson	Commissioner
Dr. Ankie Scott-Joseph	Commissioner

DECISION

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BACKGROUND

1. On October 4, 2021, the Barbados Light & Power Company Limited (the **Applicant**) made an Application for a Review of Electricity Rates, dated September 30, 2021 (the **Application**). The Fair Trading Commission (the **Commission**) gave its decision on the Application on February 15, 2023 (the **2023 Decision**). On March 7, 2023, the Applicant filed a Notice of Motion for Review and Variation of the Commission's 2023 Decision, supported by an affidavit of Mr. Roger Blackman, the Applicant's Managing Director (**Review & Variation Motion**).

2. The Review & Variation Motion raises questions of errors of law, errors of fact and important matters of principle. The errors of law the Commission is said to have committed were set out 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.*
>
> *(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.*
>
> *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.*
>
> *(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.*
>
> *(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]*

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

(vii) 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."

3. The Applicant contends that the Commission made the following errors of fact in its 2023 Decision:

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

(ii) The Commission failed to properly consider the evidence submitted by the Applicant concerning the 5MW Energy Storage Device (ESD)

(iii) The Commission failed to properly consider the evidence submitted by the Applicant at Schedules F of the Application concerning the Capital Structure."

4. The important principles of law raised by the Review & Variation Motion were defined as follows:

"(i) The Commission violated an important principle of regulatory ratemaking by engaging in retroactive ratemaking outside of legally established principles about when this is appropriate.

(ii) 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.

(iii) 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.

(iv) 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."

5. The Applicant contends that as a result of the errors which the Commission allegedly committed, it is entitled to 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."

Application for Stay

6. The orders sought by the Applicant in its Motion included an order to stay certain orders as contained in the 2023 Decision. The Commission determined that the said Application for a stay should be determined by written hearing. The Commission received the written submissions of the parties and rendered its decision on May 12, 2023 (the **Stay Decision**), and thereby stayed various orders made in the 2023 Decision.

Motion for Review

7. The Review & Variation Motion was heard in an oral hearing on August 28 - 29, 2023. Six intervenors participated in the oral hearing, namely: (i) Tricia Watson and David Simpson (Watson/Simpson Team), assisted by Ms. Jamila Eastmond; (ii) Mr. Kenneth Went (Mr. Went), assisted by Dr. Aly Elfar and Mr. Adlai Stevenson; (iii) Barbados Renewable Energy Association (BREA), represented by Mr. Robert Goodridge, (iv) Ministry of Energy, Small Business and Entrepreneurship (MESBE) – Business Division, represented by Public Counsel, (v) the Barbados Association of Retired Persons (BARP), represented by Public Counsel and Mr. Douglas Skeete; and (vi) the Barbados Sustainable Energy Cooperative (BSEC), represented by Lt Col (Ret'd) Trevor Browne, assisted by Mr. Halley Haynes. The Ministry of Energy and Business Development (MEBD) – Energy Division, another Intervenor, did not participate in the oral hearing. At the conclusion of that hearing, the Commission reserved its decision on the Review & Variation Motion, which it now gives.

THE ISSUES

8. Arising from the grounds of review recited in paragraphs 2, 3 and 4 above, the following issues arise:

Questions of Law

8.1 Whether the Applicant's Review & Variation Motion meets the threshold test required by rule 55(1) of the Utilities Regulation (Procedural) Rules, 2003 and the Utilities Regulation (Procedural) (Amendment) Rules, 2009 (**URPR**)? (**Issue 1: The Threshold Question**).

8.2 Whether the Commission acted in excess of (or without) jurisdiction by directing the Applicant to take certain decisions concerning the Applicant's Self Insurance Fund (**SIF**)? (**Issue 2: Commission's Jurisdiction over SIF**).

8.3 Whether it is lawful for the Applicant or the trustees of the SIF (the **Trustees**) to use money in the SIF to pay dividends to shareholders? (**Issue 3: Use of the SIF**). Important to this issue, is the factual question of the source of money deposited to the SIF.

8.4 Whether it was permissible for the Applicant to use money collected in rates from customers for deferred taxes to pay dividends to shareholders? (**Issue 4: Deferred Tax Liability**)

8.5 Whether the creation of a regulatory liability is "reasonably necessary" or "incidental" to the ratemaking power of the Commission? **(Issue 5: Use of Regulatory Liabilities**).

8.6 Whether the Commission engaged in retroactive ratemaking by its orders concerning the SIF, deferred income taxes and by selecting a test year and allegedly inappropriately using data from other years on a selective basis? (**Issue 6: Retroactive Ratemaking**).

Questions of fact and/or of mixed fact and law

8.7 Whether the Applicant had a legitimate expectation regarding the treatment of the $99.5 million withdrawal from the SIF and its recording of the deferred taxes, upon the 2019 income tax change, based on representations made by the Commission? (**Issue 7: Legitimate Expectation/Estoppel**)

8.8 Whether the Commission, in accepting the Applicant's choice of Test Year 2020 inappropriately used data from other years on a selected basis? (**Issue 8: Use of Test Year 2020)**

8.9 Whether the Commission failed to properly consider the evidence submitted by the Applicant concerning Accumulated Depreciation? (**Issue 9: Use of IFRS Depreciation Rates**)

8.10 Whether the Commission failed to properly consider the evidence submitted by the Applicant concerning the 5MW Energy Storage Devices (**ESD**)? (**Issue 10: Energy Storage Device**)

8.11 Whether the Commission failed to properly consider the evidence submitted by the Applicant at Schedules F of the Application

concerning the Capital Structures? (**Issue 11: Notional Capital Structure**).

9. At paragraph 64 of the Applicant's Review & Variation Motion, the Applicant raised a broad ground dealing with procedural fairness, natural justice and other questions. We address this ground as an additional issue at paragraph 230 hereof under the rubric of Procedural Fairness/Natural Justice. In addition, the Applicant has made broad assertions concerning the impact the Commission's orders are likely to have on its ability to provide a safe, adequate, efficient and reliable service and to raise capital. We address the allegations as an additional issue.

ISSUE 1: THE THRESHOLD QUESTION

10 A party seeking a review of a decision of the Commission must first meet the threshold test as provided for by Rule 55 of the URPR, which provides as follows:

> '*The Commission shall determine with a hearing, in respect of a motion brought under Rule 53 the threshold question of whether the matter should be reviewed or whether there is reason to believe the order should be rescinded or varied.*'

11. The Applicant submitted that its Review & Variation Motion met the threshold test required by rule 55(1) of the URPR. The Applicant referred the Commission to the decision of the Ontario Energy Board (**OEB**) in *Natural Gas Electricity Interface Review Decision*[1], and the decision of this Commission in *The Barbados Light & Power Company Limited Motion to Review and Vary the Decision of the Fair Trading Commission on the Application of the BL&P to Recover the Costs of the 5MW Energy Storage Device through the Fuel Clause* (**Costs Recovery Decision**). The Watson/Simpson Team also referred the Commission to the same decisions on the threshold question. The Watson/Simpson Team submitted that the Motion does not meet the threshold test. They observed that

[1] EB-2006-0322/0338/0340, May 22, 2007

the OEB recently amended its procedural rules, *inter alia*, to clarify the purpose of the threshold question. They quoted the OEB as stating that the purpose of the threshold test is for the OEB to assess each motion, without a hearing, at an early stage to determine whether it has a proper basis for proceeding to hear it on the merits.

12. The Commission, in the Costs Recovery Decision, set out the test to determine whether a motion for review met the threshold test for review. The Commission, citing the relevant provisions and noting the test, wrote thus:[2]

> *"The BL&P must first demonstrate, on a prima facie basis, the existence of the permissible grounds of review. Rule 54(1) of the Rules requires that every Notice of Motion must state the grounds on which the Commission should review a decision made in a utility regulation proceeding. Rule 54(1) states, inter alia, that: 'Every Notice of Motion made under rule 53(2), in addition to the requirement of rule 8 shall (a) Set out the grounds upon which the motion is made sufficient to justify a review or raise a question as to the correctness of the order or decision and the grounds may include…"*

13. The Commission further considered and explained the threshold test in the Costs Recovery Decision and the meaning of a *prima facie* case.[3] A *prima facie* standard of proof is relatively low. Further, it is essential that the Commission must have in mind the purpose of the threshold test. The threshold test has an overarching purpose of ensuring that only applications for review which, on their face, and without full investigation, appear to have a sound legal basis, should advance to a review on the merits. Or put differently, that serious rather than speculative grounds are investigated and reviewed.

14. The Commission is satisfied that the Applicant has met the threshold test. The Review & Variation Motion raises questions concerning important principles of ratemaking and regulatory law, including the Commission's jurisdiction to deal with the rate treatment of money withdrawn from the SIF for shareholder

[2] See paragraph 3.2 of the Costs Recovery Decision.

[3] See paragraphs 4.3 and 4.4 of the Costs Recovery Decision.

dividends, the interpretation of the SIF Regulations, retroactive ratemaking, amongst others. The Review & Variation Motion, without full investigation, raises a *prima facie* case for review.

ISSUE 2: COMMISSION'S JURISDICTION OVER SIF

The Applicant's Position

15. The Applicant contended that the Commission acted in excess of its jurisdiction, and therefore, ultra vires, by directing the Applicant to take various actions concerning the SIF when it had no jurisdiction to do so. The Applicant submitted that the Commission cannot act on decisions made by the Trustees concerning the SIF, such as withdrawal of monies from the SIF, or to require an actuarial study to determine the adequacy of the SIF to meet the risk for which it was established. The Applicant contended further that the Commission has no jurisdiction to oversee the operations of the SIF or the actions of its Trustees regarding assets held within the SIF. Even further, that the Financial Services Commission (the **FSC**) is the entity with jurisdiction over the SIF given by Parliament.

16. It is settled that a statutory body must act within the parameters of its enabling statute. Where the act or decision of the statutory body or decision-maker is outside of the lawful power or authority given by the enabling statute, it is invalid or unlawful and liable to be struck down by a court.

17. The Applicant acknowledged that the Commission has powers incidental to its specific and general powers, which it states, are given by section 19(3) of the Interpretation Act Cap. 1 and at common law. However, the Applicant contends that the incidental powers granted by section 19(3) of the Interpretation Act and at common law, do not extend to give the Commission jurisdiction over the SIF or authority to create a regulatory liability for withdrawals from the SIF.

Watson/Simpson Team's Position

18. The Watson/Simpson Team disagreed with the Applicant's contention that the Commission acted in excess of its jurisdiction in relation to the orders it made. They urged the Commission to reject the Applicant's argument. They submitted that sections 3(3)(a) and 20 of the Utilities Regulation Act Cap 282, (**URA**) and section 4 of the Fair Trading Commission Act, Cap 326B (**FTCA**) give the Commission jurisdiction to make the orders it did concerning the SIF. The Watson/Simpson Team stated that the orders made by the Commission concerning the SIF were made pursuant to section 3(3)(a) of the URA and section 4 of the FTCA.[4]

Public Counsel's Position

19. Public Counsel argued that section 10 of the URA, which provides that every rate made by the Commission shall be fair and reasonable, gives the Commission jurisdiction to treat to the withdrawal of funds from the SIF. He opined that the Commission can consider the removal of funds from the SIF under the purview of prudence.

BSEC's Position

20. Lt. Col. (Ret'd) Trevor Browne disputed the Applicant's contention that the Commission lacked jurisdiction to deal with the SIF. He observed that the SIF is a " … critical and fundamental component of the electricity infrastructure of Barbados." Lt. Col. (Ret'd) Trevor Browne considers that section 22 of the URA gives the Commission jurisdiction to deal with the SIF.

[4] BREA submitted a brief letter dated 30th March 2023, which stated, inter alia, that it considered the Applicant's motion and considered that the issues raised were serious. BREA expressed the desire that the Applicant would provide information on the impact of the Commission's 2023 Decision on the Applicant's current and future operations, its ability to cover adequately its costs and the cost of electricity to customers. The letter also raised unrelated concerns. In effect, BREA did not seek to address the many issues which arise on the Applicant's Review & Variation Motion.

Commission's Analysis

21. The Commission is of the view that in order to treat to the submissions of the Applicant it is necessary to consider the legislation which governs the functions of the Commission and the regulation of utilities in general.

22. The question of this Commission's jurisdiction was raised earlier in the Applicant's application for interim rate relief. In its decision given on September 16, 2022, (the **Interim Rate Decision**), the Commission considered the general approach to interpreting statutes as well as interpreting utility regulation statutes, which is relevant, and adopted here. In that decision, the Commission accepted the position stated by Green JA in *Reference Re Section 101 of the Public Utilities Act (Nfld)*[5] that the regulator's jurisdiction to deal with matters before it must be found either expressly or impliedly within the statutes conferring jurisdiction and governing the operation of the regulator. This applies here where the jurisdiction of the Commission to deal with the SIF[6] has been challenged.

23. In the Interim Rate Decision, the Commission examined the framework of the URA and the FTCA, which is also relevant and adopted in this case and on this issue. At paragraph 57 of the Interim Rate Decision, the Commission accepted that a "*technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation, as well as the power policy of the province and be consistent with generally accepted sound public utility practice*."

24. The Commission, in the Interim Rate Decision, examined the implied power of the Commission to grant interim rate relief where the Commission was not given any expressed power to do so. Although the decision was concerned with the power of the Commission to grant interim rate relief, the general

[5] (1998) 164 Nfld. & P.E.I.R 60 (Nfld. C.A)

[6] This is how the Applicant has framed the issue, not the Commission.

approach to implied powers stated in the Interim Rate Decision is relevant. In the Interim Rate Decision, the Commission accepted the statement of Greene JA in *Reference Re Section 101 of the Public Utilities Act* (Nfld):[7]

> "*In Reference Re Section 101 of the Public Utilities Act (Nfld.)21, the Court considered legislation governing utility regulation, albeit different legislation. Greene JA set out general principles when interpreting legislation governing utility regulation, which the Commission accepts are relevant to interpreting the FTCA and the URA as follows:*
>
> > *"1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;*
> >
> > *2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;*
> >
> > *3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;*
> >
> > *4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;*
> >
> > *5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.*"

25. The Commission, in concluding its review of the URA and the FTCA and the implied powers arising under the same, concluded at paragraph 60 of the Interim Rate Decision, as follows:

> "[60] ***Courts have interpreted legislation granting regulatory power broadly, conferring implied powers where the statutory language***

[7] See paragraph 58 of Interim Rate Decision.

> ***requires it.*** *Ultimately, whether the Commission has the power to grant interim rate relief will be dependent upon the meaning of the relevant words in the URA and FTCA."* [Emphasis supplied.]

26. In the 2023 Decision, the Commission revisited the framework of the URA and the FTCA, given the Applicant's submission that the Commission's jurisdiction is limited to making prospective decisions only. The Commission repeated that the URA and FTCA give it wide powers concerning setting rates to ensure that utility rates are always fair and reasonable to both the utility and customers.[8]

27. The Commission is required, by the URA and FTCA, to balance the interests of consumers and the utility. Indeed, section 3(3) of the URA expressly provides that the Commission shall protect the interest of consumers by ensuring that service providers supply to the public service that is safe, adequate, efficient and reasonable. To the extent that there is an obligation on the Commission to protect the interest of consumers by ensuring that the supply is safe, adequate and efficient, then the Commission must be concerned with the insurance of the service provider so that the supply may be adequate and efficient. Further, section 10(a) of the URA expressly provides that every rate made by the Commission shall be fair and reasonable. In addition, section 10(b) of the URA requires the Commission to take into account several considerations in determining the rate and the considerations include "such other matters as the Commission may consider appropriate". It is therefore appropriate that the Commission consider its obligation to protect the interest of consumers as mentioned in section 3(3) of the URA above.

28. The Commission must set a rate that is fair and reasonable to consumers and to the utility. It must ensure that the rate and standards of service provided are fair and reasonable to customers. A viable utility benefits the customers. The

[8] See paragraphs 185 to 188 of Interim Rate Decision.

utility must be given a reasonable opportunity to recover its costs and earn a fair return for its substantial investment. Any misbalance would likely cause injustice to one or the other party. If rates are excessively low, the utility is deprived of collecting reasonably incurred costs and rates would be confiscatory. It would result in an injustice to the utility, with knock-on negative effects, such as, for example, creating the risk that the utility cannot maintain its plant, or raise capital, amongst others. Similarly, customers should be charged based on the cost of services, that is the forecast prudently incurred cost required to operate, maintain, and invest in the utility system and to earn a fair return on its substantial investment. If the utility is allowed to recover more than its prudently incurred costs, that is, to over-collect revenue, then customers are likely to suffer an injustice. Balancing the interest of the utility and the customer is a core statutory function in utility regulation.

29. The Commission's obligation to the utility and customers does not cease on setting a rate. The Commission has monitoring obligations. Indeed, section 3 of the URA expressly provides that the Commission shall, inter alia, monitor rates charged for compliance. It monitors the utility for compliance with regulatory obligations and has the power to take enforcement action where the utility is not compliant. It also monitors to ensure the financial viability of the utility. In that regard, the Applicant files financial data with the Commission. It also monitors to ensure that the utility is not collecting more than it is authorised to collect. Further, the Commission is obligated to ensure that the rate is fair and reasonable "at all times". This Commission, in the Interim Rate Decision, at para 59, citing *Bell Canada v Canada Telecommunications Commission*[9] remarked:

> "*In deciding that the Commission could direct the one-time credit, in the absence of a specific power to do so, the Supreme Court of Canada observed as follows*:

[9] 12 1989] 1 S.C.R. 1722.

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

30. An important principle of utility regulation is that rate setting is cost-based. The utility should recover the costs of providing the service. In setting a reasonable rate, the Commission must decide on the costs recoverable by the Applicant. Amongst the expenses recoverable by the Applicant as part of its operating costs, is that for providing insurance coverage, whether by self-insurance or by a third-party insurer. The costs included in the rate for insurance (or for example, maintenance), as part of the utility's operating costs, are met by and are a burden to customers. Such operating costs, including the funding of the SIF are an integral part of the rate-setting exercise of ensuring that rates are fair and reasonable to both the customer and the Applicant.

31. The Commission does not manage the utility; it monitors only for compliance. The decisions of the utility have ratemaking consequences. For example, a utility may decide not to retire an asset, but to incur extraordinary repair and maintenance costs not anticipated and thus not given or allowed in the rate. If the Commission decides that the extraordinary repair and maintenance costs were prudently incurred and upon the consideration of other relevant facts, the costs may be capitalised and treated as a regulatory asset. The decision of the utility not to retire the asset but incur repair and maintenance costs above that given in the rate has regulatory consequences, that is, how the regulator will allow rate recovery of the extraordinary costs in future rates.

32. Notwithstanding the fact that the Commission does not manage the utility or the SIF, the decisions made by the Applicant or the Trustees of the SIF have regulatory consequences in that section 3(3) (a) of the URA charges the Commission with the responsibility of protecting the interest of consumers by

ensuring that service providers supply to the public service that is safe, adequate, efficient and reasonable. In this light, there can be no dispute that the purpose of the establishment of the SIF was to ensure that the supply of electricity was safe, adequate, efficient and reasonable, particularly in the event of a catastrophe. Accordingly, the decision made by the Applicant and Trustees of the SIF has regulatory consequences.

33. The Applicant has contended, at the Rate Hearing and at the hearing of this Review & Variation Motion, that it provided a service, for which the customers have paid and as such the Commission has no jurisdiction over the money it collected. The Commission is of the view that this contention is misconceived in that it ignores the fact that a regulated entity is subject to the regulatory principles as set out in the URA, particularly at sections 3 and 10 of the FTCA and regulatory principles which have been established as part of the regulatory compact between the Applicant and customers.

34. The Commission determines the revenue that the Applicant is entitled to collect from customers as part of its revenue requirement, which is made up of two distinct categories: (i) costs and expense and (ii) profit or rate of return. The point is made thus in *Southern Cal. Edison Co. v. Public Utilities Com:*[10]

> *"**(2)** A utility's rates are essentially the sum of **two distinct components**: its **operating expenses** and its **return on invested capital**. "The basic principle [of ratemaking] is to establish a rate which will permit the utility to **recover its cost and expenses** plus **a reasonable return on the value of property devoted to public use**." (Italics added.) (City and County of San Francisco v. Public Utilities Com. (1971) 6 Cal.3d 119, 129 [98 Cal.Rptr. 286 , 490 P.2d 798].) It is thus elementary regulatory law that the "return" — i.e., the profit — of the utility is calculated solely on the rate base — i.e., the capital contributed by its investors; **the utility is not entitled to earn an additional profit on its expenses, but only to "recover" them on a dollar-for-dollar basis as part of the rates.** A fortiori, the same principles apply to an increase in rates resulting from operation of a fuel cost adjustment clause: as its name indicates, the purpose of such a clause is to permit prompt rate adjustment to offset unusual changes in fuel costs, and no*

[10] 20 Cal. 3d 813, pg 818, 576 P.2d at 945.

portion of such a rate increase may lawfully represent a profit to the utility." [Emphasis Supplied]

35. Of the two distinct categories of revenue mentioned above, only one serves to provide financial benefit to those who provide capital to the utility, that is, the rate of return or the return on investment category. The shareholders are not the intended financial beneficiaries of the "operating expenses" category mentioned in *Southern Cal. Edison Co. v. Public Utilities Com*., of which insurance coverage costs, whether by self-insurance or by a third-party insurer, are a part. The utility is merely the custodian of the operating expenses. It is the device through which the operating expenses flow through to persons who are providing goods and services to the utility to enable it to provide the utility service it does to the ratepayers. Accordingly, the Commission is within its jurisdiction to enforce a regulatory consequence regarding the withdrawal of SIF monies for purposes profiting shareholders.

36. The Commission is of the view that the Applicant has incorrectly identified the issue as one concerning the Commission's jurisdiction over the SIF and has done so without paying due regard to sections 3 and 10 of the URA. The Commission is also of the view that the Applicant has further confused the issue of the Commission's jurisdiction over the SIF, by making references to advice given or statements made by the Central Bank of Barbados (the **CBB**) and the Financial Services Commission (the **FSC**). The evidence discloses that the Applicant unilaterally determined that a prudent reserve was USD $22 million for the SIF and did so without an actuarial study. At the time of making the decision the accumulated amount in the SIF was $141.5 million. The said decision resulted in an over-recovery or over-collection of funds for the SIF. Under such circumstances, the Commission has jurisdiction to determine the regulatory consequence of the over-collection of funds which were paid into the SIF, a segregated fund established to meet specified future expenses which protects ratepayers and the utility, alike, as part of its obligation to ensure that rates are always fair and reasonable.

37. Unlike the Applicant, the Commission defines the issues to be (i) whether the Commission has the power to deal with an over-collection of funding paid into a segregated fund, and (ii) whether a utility which is authorised to collect sums for insurance (or for another purpose, say maintenance) as part of its costs and expense in its rates be allowed to use the said funds to be distributed as profits to shareholders, that is, as part of the rate of return.

38. It should not be in dispute that the Commission has jurisdiction to treat to an extraordinary and unforeseeable over-collection in the same way it can to an extraordinary and unforeseeable increase in expense or an extraordinary and unforeseeable under-collection. In dealing with those extraordinary and unforeseeable increases or decreases in revenues or expenses, the Commission is ensuring that rates are fair and reasonable at all times. Further, the Commission is satisfied that a utility cannot use an over-collection of funding segregated for a specified future expense to pay dividends. Given the cost-based nature of rate-setting, rates paid by customers should be based on costs incurred by the utility for the provision of service to customers. The Applicant did not, as a matter of fact, incur costs for the provision of service related to the $99.5 million in self-insurance funds withdrawn.

ATCO Gas v Alberta

39. The Applicant referred extensively to ATCO *Gas & Pipelines Ltd v Alberta Energy and Utilities Board et al*[11] (**ATCO v Alberta**) in its written submissions and the Commission finds it's necessary to consider that decision and give its interpretation of the same. In that case, the Supreme Court of Canada was divided on whether the Board had jurisdiction to allocate the proceeds of gains from the sale of land and building no longer required in the supply of gas. A majority of the Court, four to three, held that the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's assets.

[11] [2006] 1 SCR 140.

40. The Commission is satisfied that *ATCO v Alberta* is meaningfully distinguishable from the circumstances regarding the withdrawal of SIF funds. A utility owns assets, such as buildings, plant, equipment, vehicles etc., which make up the rate base upon which the rate of return is calculated. These assets are acquired through the shareholders' equity or loan capital, not as allowable costs as part of the utility's operating expenses. For devoting the assets owned by the utility for the provision of service to customers, the utility recovers depreciation expense as part of the revenue requirement and return on equity or rate of return. This is often stated as the principle that the utility is allowed to charge and recover from ratepayers for the return "of" its capital (depreciation expense) and the return "on" its capital (rate of return). Generally, neither the recovery by the utility from ratepayers of the return "of" capital or the return "on" capital, gives the ratepayer a proprietary or any interest in the assets of the utility. The utility continues to own the assets. Even where the asset has been depreciated to zero, the utility owns the residual value of the asset, not the ratepayers.

41. The majority decision in *ATCO v Alberta* was influenced by the fact that the asset was that of the utility, and the proceeds from the sale of the utility's asset had nothing to do with ratemaking. On page 142, Bastarache, J., who delivered the majority decision for the Supreme Court, remarked:

> "*The interpretation of the AEUBA, the Public Utilities Board Act ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale* ***of assets of a utility****." ….. [*Emphasis supplied.*]*
>
> *An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular,* ***reveals that nowhere is there a mention of the authority for the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights.*** *Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to*

> *fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price – nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. 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****. 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* [54-69]."

42. In deciding on the distribution of the net gain from the sale of assets of a utility, the Supreme Court was not dealing with an over-collection of funding from customers for cost and expense recovered in rates as the Commission is dealing with here. Further, the SIF cannot be regarded as the asset of the Applicant in the same way that the land and buildings were regarded in *ATCO v Alberta.* The SIF was not an investment by the shareholders by which they were entitled to earn a return on. Nor can it be said that the Commission, in this case, is seeking to cancel the private rights of the Applicant. The Commission's decision regarding the rate treatment of SIF withdrawals in this case does not raise the question of whether ratepayers gain a proprietary interest in the assets of the utility. Rather, it deals with whether the utility has a standing to profit on the expenses funded by customers and whether the rate was fair or reasonable. Where customers pay, in the rates charged over years, an amount for self-insurance to be set aside for future costs to the utility, which the Applicant decides was not necessary, a question of the reasonableness and fairness of the rate charged arises. Accordingly, the Commission does not think that the issue in *ATCO v Alberta* is the same that faces this Commission in this case.

The Commission's Conclusion on Jurisdiction

43. The Commission has considered legislation which governs the functions of utility regulators in other jurisdictions and legislation which governs the regulation of utilities and note that such legislation is drafted in broad terms and is given broad and generous interpretation so long as it is consistent with the scheme of the legislation. In this light, the Commission is of the view that the provisions of the URA which set out the functions of the Commission should be given a broad and generous interpretation. Likewise, the URA which sets out the powers of the Commission to make fair and reasonable rates should be given a broad and generous interpretation.

44. The Commission is therefore of the view that the powers which have been expressly given to it by legislation should be given a broad and generous interpretation consistent with the scheme of the legislation. The Commission is also of the view that powers incidental to those expressed in the legislation should also be given broad and generous interpretation so long as it is consistent with the scheme of the legislation. The Commission is also of the view that it is entitled to determine the extent of its implied powers notwithstanding the fact that such a determination may be subject to review by the Courts.

45. A central principle of ratemaking is cost-based or cost-reflective rates. Cost reflective rates are important to the viability of the utility and ensuring that the customer is not undercharged or overcharged. Customers should pay for the provision of safe and reliable electric service, and if they do not, then it is unfair to the utility. Similarly, customers receive the benefits of utility service from the expenses included in the rates they pay. If customers do not get what they pay for, then they are overcharged, and the rate cannot be regarded as fair and reasonable to the customer. The Commission's responsibility is to seek to achieve cost-based rates and that the balance that flows from it, is achieved and maintained.

46. The Commission is of the view that the obligation imposed on it, or the power given to it by section 10 of the URA to fix rates which are fair and reasonable, which is a continuing obligation to ensure that rates are reasonable at all times, gives it jurisdiction to make rate determinations on the over-collection of funding for the SIF. The Commission also derives jurisdiction from (i) its functions under section 3(1) of the URA to monitor rates charged to ensure compliance, (ii) its further functions under section 3(3)(a) of protecting the interest of consumers by ensuring that service providers supply to the public, service that is safe, adequate, efficient and reasonable; and (iii) the general power given by section 4(5) of the FTCA to "do all that is necessary and expedient for the proper performance of its functions…." as set out in the FTCA and the URA.

ISSUE 3: USE OF THE SIF

47. The source of funding and the proper use of the assets of the SIF were major issues in this proceeding. The first issue is factual and the second, legal.[12]

The Applicant's Position

48. The Applicant, in its oral arguments before the Commission, strenuously argued that it is inappropriate and wrong to ignore the manner of the creation and funding of the SIF up to the year 2010 and that it was erroneous and wrong solely to make a determination based on what happened post-2010. The Applicant stated that nowhere in its 2023 Decision did the Commission address those matters. It said that the Commission, by solely trying to make a determination on the basis of ratepayers' contributions post-2010, erred and its decision is incorrect. The Applicant alleged that money was put into the SIF by the beneficiary under the SIF, namely the Applicant. Further, if the money had

[12] In matters concerning the SIF, parties have not always maintained a distinction between the actions, duties and responsibilities of the Trustees and those of the Applicant, (or rather lack thereof) of the Applicant, in relation to the SIF. However, for the avoidance of doubt, the Commission is mindful of the distinctions between the two.

not been put into the SIF, it would have been available to pay dividends. The Applicant noted that the amount paid out was almost to the dollar of the amount contributed by the Applicant, and the customers' contributions to the SIF, were left in the SIF with interest earned on the initial contributions.

49. In addition, the Applicant argued, at the oral hearing, that funds within the SIF are controlled by the legislative guidelines and relevant trust document, which the Commission agrees with. The Applicant's further argument was that funds once withdrawn from the SIF and transferred to the appropriate beneficiary stated in the trust deed, in this case the Applicant, are not subject to the purposes set out in the legislation. The effect of the Applicant's argument, taken to its logical conclusion, is that once the money from the SIF has been paid to the Applicant, the Applicant can use it for any purpose, as it is not then subject to the purpose set out in the SIF Regulations. Finally, the Applicant argued that the payment out of the SIF to the Applicant to pay dividends to the Applicant's shareholders is not in breach of trust, nor does it contravene any law. The SIF was not an asset on the Applicant's balance sheet.

The Watson/Simpson Team's Position

50. The Watson/Simpson Team stated that the issue of the SIF was addressed extensively in the Applicant's Application for Rate Review dated May 8, 2009. They quoted the Applicant as stating that the sum of $12,466,600 for Insurance Expense for 2008, as including the cost of general insurance and contribution to the SIF. They submitted that the amount of $7,656,272, which the Applicant sought for the SIF contribution in the 2009 Application, made up 61% of its total Insurance Expense.

Public Counsel's Position

51. On this issue, Public Counsel noted that the SIF Regulations provide that the SIF should be used for the specific purpose of reinstating the self-insured assets damaged by a catastrophe. We understand the conclusion of Public Counsel's

argument to be that any other use of the SIF would be unlawful. He stated that the intention of the SIF was to build resilience.

BSEC's Position

52. Lt. Col. (Ret'd) Trevor Browne argued that the Applicant contravened the SIF Regulations and that the Applicant's removal from the SIF was illegal. He argued that regulation 8 clearly specified that the SIF shall only be used for the reinstatement of expenses caused by a catastrophe. He observed that the Applicant proffered that regulation 8(2) authorised the use of money in the SIF to pay dividends on payment of taxes. He reasoned that because the law specified a particular consequence on the commission of a crime, it does not authorise the commission of the crime. He submitted that the Commission misappreciated the last point in its 2023 Decision. Finally, Lt. Col. (Ret'd) Trevor Browne stated that the Applicant's shareholders should be made to reinstate the money unlawfully removed from the SIF.

Source of Funds

53. The Commission acknowledges that the source of funding the SIF is an important issue to the Applicant in this Review & Variation Motion. The Commission reiterates that the burden is on the Applicant to establish, on a balance of probability, that the Applicant funded the SIF as alleged in this Review & Variation Motion. The Applicant's witnesses testified that all funds in the SIF were provided through equity contributions. The basis of this statement generally was that an allowance to fund the SIF was not included in rates before the 2010 decision and therefore must have been provided from equity sources. Beyond such bald statements, the Applicant produced no evidence to support this claim. This argument also ignores the higher rates paid by Barbadian ratepayers to the utility in anticipation of transfers into the trust since the last rate case.

54. The Commission rejects the contention that it ignored the source of funding the SIF when it made its decision. The SIF was the subject of intense investigation and argument at the hearing of the Application. The Applicant provided information concerning the SIF in response to a Request For Information From Intervenors at the hearing of the Application. The Commission reviewed hours of testimony and several documents related to the SIF when making its determination. Further, the Commission addressed the source of funding in its 2023 Decision, for example at paragraphs 221 and 222 of its 2023 Decision.

55. The Applicant's evidence in the 2009-2010 rate case, which was based on a 2008 test year, was that the payments to the SIF were an element of Insurance Expense when calculating the revenue requirement (See 2009 Memorandum on Income Statement, Schedule D, at Paragraph 24). The Applicant represented in the 2009-2010 rate case that annual revenues of $7,656,272 were needed to transfer to the SIF. As of 2008, the Applicant had a gross investment in Transmission and Distribution assets of $400,266,388. At the time, the SIF contained assets of $109,388,173, and an equity balance of $109,368,173, or equity equal to approximately 26% of covered plant.

56. In the 2010 Decision, the Commission approved the recovery of SIF Expense as a reasonable and prudent expense, relying on the Applicant's statements that the fund was a compelling and cost-effective way of protecting both customers and investors from risk. (See 2009 General Memorandum, Schedule A, at Paragraph 34). Over the period from 2010-2022, during which rates were in place, the approved amount would have resulted in an additional $91.9 million of transfers to the fund.

57. The Commission determined in its 2010 Decision that the funding of the SIF was necessary to ensure adequate financial capacity in the case of a disaster disrupting utility operations. While rates in place prior to 2010 did not include a component earmarked specifically for the SIF, the prior rates did include recoveries for estimated insurance costs. The SIF payments prior to the 2010

Decision were made instead of unaffordable or unattainable commercial insurance. While the SIF was voluntary from the perspective of being entered into freely by the utility, it was prudent in that it was needed to provide adequate coverage where commercial insurance was not reasonably attainable.

58. As discussed in the 2023 Decision, at paragraph 219, a utility's actual costs may differ to the initially estimated costs incorporated as part of a rate. Certain costs will increase (decrease) relative to the estimated costs used for ratemaking purposes. On this basis, it cannot be stated that cost increases associated with normal operating costs, like insurance, are funded by shareholders nor that cost decreases associated with normal operating costs belong to customers. Once rates are set, the utility has the option to file for new base rates, if it determines that present rates are inadequate for their return requirements.

59. The Commission finds that the Applicant did not establish, on a balance of probability, that all the funds in the SIF were provided by the Applicant's shareholders through equity injections to the Applicant. The Commission stands by its analysis and findings from paragraphs 219 to 227 of its 2023 Decision.

SIF Regulations

60. The Applicant argued that the SIF is governed by the Insurance (Barbados Light and Power Company Limited) (Self-Insurance Fund) Regulations, 1998 (as amended), (**SIF Regulations**) and the Trust Deed[13] which established the SIF. The Commission agrees with the said argument. However, the Trust Deed must be consistent with the empowering SIF Regulations. The Applicant referred to regulation 8(2) of SIF Regulations which states that where the SIF is

[13] It appears from the documents disclosed, that an early deed of trust is dated 31 December 1998. It appears also that that deed was amended and restated by an Amended and Restated Trust Deed dated 2nd July 2007. There is also the First Deed of Variation and Amendment to Trust Deed dated 9th June 2016. The reference to Trust Deed is a reference to the original trust deed as amended and restated and varied, that governs the SIF. In this case, the issue turns on the First Deed of Variation and Amendment to Trust Deed dated 9th June 2016.

used for any other purpose the money withdrawn shall be subject to taxes. The Applicant states that it withdrew the money and paid the relevant taxes and accordingly, it has complied with the SIF Regulations. The Applicant did not give the Commission the benefit of its interpretative process in arriving at the meaning of regulation 8(2) to permit the SIF to be used to pay dividends. Further, the Applicant, while referring to regulation 8(2) did not address the effect of regulation 8(1). At most, the Applicant seems to consider that the requirement to pay taxes implies that the SIF could be used to pay dividends. This raises a question of the interpretation of the SIF Regulations and in particular regulation 8.[14]

61. Regulation 3 of the SIF Regulations established the SIF. In addition to establishing the SIF, regulation 3 specified the purpose of the SIF, as follows: "*There is established a Fund for the* ***purpose of self-insuring the assets of the company*** *that are listed in the Schedule against damage and consequential loss as a result of a catastrophe*." [Emphasis supplied]. Regulation 4, provides that the SIF "shall be created by deed of trust and the trustees shall be such persons as the Supervisor of Insurance shall approve."

62. Regulation 5 provides for the monetary maximum amount to be collected to the SIF, namely the total replacement cost of the assets self-insured.[15] Regulation 5 is silent on how an amount in excess of the monetary limit is to be dealt with, that is, whether it must be withdrawn or not. Section 74 of the Trustees Act Cap. 250 of the Laws of Barbados provides for trustees to apply to the Court for the opinion, advice or direction of the Court on any question

[14] This Commission, in the Interim Rate Decision, considered the general principles of statutory interpretation, from paragraph 41 to 46.

[15] Regulation 5 provides as follows: "The monetary limit of the Fund shall be the total of the replacement cost of the assets which are being self-insured and the self-insured portion of the company's commercial insurance programme; or 10 per cent of the total assets of the company, where the replacement cost is not easily determined."

respecting the management or administration of trust property. Where there is doubt, it is prudent for trustees to seek and obtain the opinion of the Court.

63. The Applicant did not contend in this proceeding that the sum in the SIF had exceeded the maximum limit specified by regulation 5, and that it had to reduce the SIF to comply with regulation 5. Regulation 6 provides for the maximum amount that may be required to be paid into the SIF annually.

64. The Trustees of the SIF are prohibited, by regulation 7, from mortgaging or assigning the SIF. This provision ensures that the SIF is always available for its statutorily specified purpose.

65. Regulation 8, which the Applicant argues permits the use of the SIF to pay dividends, provides as follows:

> *"8(1) The Fund shall* ***only*** *be utilised by the company for the purpose of replacing or reinstating the self-insured assets which are damaged by catastrophe and reinstating the financial loss following such damage.* [Emphasis Supplied]
> 8(2) Where *the Fund is utilized for any other purpose any monies withdrawn shall be subject to corporation tax."*

66. Regulation 8(1) specifically limits the use to which the Trustees or the Applicant may use the SIF, that is, for replacing or reinstating the self-insured assets that are damaged by a catastrophe. Regulation 8 is clear and unambiguous. Regulation 8(1) severely curtails the purpose for which the SIF may be applied by the use of the word "only". "Only" is an everyday word, meaning solely or exclusively. There is nothing doubtful about regulation 8(1). Rather, it has a straightforward and plain meaning. Where the legal meaning of an enactment is plain, it must be given its plain meaning. The plain meaning conveys the intention of Parliament. The authors of *Bennion, Bailey and Norbury on Statutory Interpretation*[16] in paragraph [21.2], write that:

> *"[21.2] There is a presumption that every word in an enactment is to be given meaning. Given the presumption that the legislature does nothing in vain, the*

[16] Maintained on Lexis +.

court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded. This applies a fortiori to a longer passage, such as a subsection or section."

67. The clear meaning of regulation 8(1) is that the SIF is to be used only, that is, solely or exclusively, for the purpose of replacing or reinstating the self-insured assets which are damaged by a catastrophe and reinstating the financial loss following such damage. On the plain meaning of regulation 8(1), neither the Applicant nor the Trustees can use the SIF to pay dividends.

68. The Applicant interprets regulation 8(2) as permitting the Applicant to use money in the SIF for the payment of dividends, which is a purpose other than the single purpose specified in regulation 8(1). Regulation 8(2) does not specifically provide that the Trustees of the SIF or the Applicant could deploy the monies in the SIF for the payment of dividends to shareholders. If the SIF can be used as the Applicant contends, it must be implied from regulation 8(2). Such an implication would conflict with the clear language of regulation 8(1) and the purpose for establishing the SIF as stated in regulation 3.

69. At first glance, regulation 8(2) would seem to give rise to some difficulty. Other than the payment of dividends from the SIF, the Applicant did not give the circumstances where the money in the SIF could be used for a purpose other than specified in regulation 8(1). If regulation 8(2) is interpreted widely, to enable the Applicant or the Trustees to use the SIF to pay dividends (and for other purposes), then regulation 8(1) would be rendered wholly inoperative. The interpretation which the Applicant gives to regulation 8(2) means that a fund established for a specific purpose could be used to pay dividends and presumably for other purposes.

70. Regulations 8(1) and 8(2) must be interpreted harmoniously. It must be presumed that Parliament cannot give with one hand (in regulation 8(1)) and take it away with the other (in regulation 8(2)). In effect, Parliament cannot be

specific and clear, by regulation 8(1), that the SIF can only be used for replacing or reinstating the self-insured assets which are damaged by catastrophe and in the very next provision, permit the SIF to be used to pay dividends and other purposes. The High Court of Australia, in *Project Blue Sky v Australian Broadcasting Authority* (S41-1997), [1998] HCA 28, at paragraphs 70 and 71, states two of the important principles involved here. First, statutory provisions must be read harmoniously and every word must be given meaning. The High Court stated, thus:

> *"A legislative instrument must be construed on the prima facie basis that* ***its provisions are intended to give effect to harmonious goals [49]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions [50]****. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other"[51]. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*
>
> *Furthermore,* ***a court construing a statutory provision must strive to give meaning to every word of the provision [52]****. In The Commonwealth v Baume[53] Griffith CJ cited R v Berchet[54] to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".*

71. In addition, regulation 8(2) must be interpreted in context having regard to the stated purpose of the SIF. A court, and likewise this Commission, must consider the context, object and scheme of the legislation when interpreting the words of an enactment. Saunders PCCJ in *The Queen v Flowers*[17], citing *International Environments Limited v Commissioner of Income Tax*, succinctly stated the approach thus:

> *"When we interpret the words of a statute, we must examine the object and scheme of the enactment and the entire context in which the legislation is*

[17] [2020] CCJ 16 (AJ) BZ at para. [62]

> *situated. The surrounding context should be fully considered. That surrounding context must, in particular, include statutes or general laws that were enacted at different times, but which pertain to the same subject or object. They can assist us by shedding light on the meaning that must be given to the words of the statute we are interpreting. [The provisions of a statute] ought not therefore to be interpreted in isolation outside of the statutory framework….*"

See too Sir David Simmons, KA, in *Cable & Wireless (Barbados) Limited v Fair Trading Commission et al*, Civil Appeal No 25 of 2003, at para [53].

72. The Commission is of the view that regulation 8(2) was intended to deal with one specific situation, which is the dissolution or termination of the SIF. It is not unusual when creating a trust to provide for the likely scenario of the termination or dissolution of the trust. Regulation 8(1) operates during the life of the SIF and regulation 8(2) is intended to deal with the case where the SIF is dissolved or terminated.

73. If regulation 8(2) implicitly permits the SIF to be used for a purpose other than to replace or reinstate self-insured assets during the life of the SIF, as the Applicants seems to be arguing, then that other purpose must be incidental to or related to the only specified purpose. A related purpose would be, for example, to offset other insurance costs where the amount in the SIF exceeds the maximum collection under regulation 5. Paying dividends is unrelated to the purpose for which the SIF was established.

74. The Applicant, in its Further Reply to Responses of Intervenors, at paragraph 24.7, wrote concerning a determination made by the Commission in its 2023 Decision thus:

> "*At paragraph 122 of its Decision the Commission denied the Applicant's cost of insurance of $12,348,641 and determined that it was appropriate to utilize the expense of $8,198,082 on the basis that "SIF funds were established, in part, to cover the higher tier costs of insurance costs when it has SIF funds available in the trust …." The Applicant contends that the Insurance (Barbados Light and Power Company Limited) (Self-Insurance Fund) Regulations, 1998 (as amended) (SIF Regulations) do not allow the Applicant to utilize the SIF proceeds in this manner. Section 8(1) of the SIF Regulations stipulates that "…. The Fund shall only be utilized by the Company for the purpose of replacing or reinstating the self-insured assets which are damaged by*

catastrophe and reinstating the financial loss following such damage. ***The Applicant contends that paying commercial insurance premiums does not fall within the costs associated with "replacing or reinstating the self-insured assets which are damaged by catastrophe" or "reinstating financial loss following such damage" and as such the costs are not payable out of the SIF***." [Emphasis supplied.]

75. It follows from the Applicant's reasoning that paying dividends to the Applicant's shareholders from the SIF, to quote the Applicant, "*does not fall within the costs associated with "replacing or reinstating the self-insured assets which are damaged by catastrophe" or "reinstating financial loss following such damage" and as such the costs are not payable out of the SIF.*" The Applicant has not shown why it is prohibited and unlawful by regulation 8(1) from using the funds in the SIF to cover other insurance costs, but it is lawful and permissible by the same regulation 8(1) to use the funds in the SIF to pay dividends.

76. The Commission is fortified in its interpretation of regulation 8(1) because the money in the SIF withdrawn by the Applicant does not constitute capital invested by the Applicant's shareholders to which the Applicant is entitled to a return "of" capital or a return "on" capital to the shareholders. Nor were the funds withdrawn from the SIF to pay dividends an efficiency gain. It was no more and no less than an over-collection from customers for the SIF.

77. The interpretation that the Applicant contends for is not consistent with rate-making process and principles. The Commission repeats, for clarity, that rates are typically set to recover from customers (i) the utility's cost and expense, and (ii) a return to pay investors on their investment, normally referred to as a rate of return. A utility is not guaranteed the authorised rate of return. The utility is given a reasonable opportunity to earn a reasonable rate of return on its invested capital used in providing the service. If a utility is permitted to use a segregated fund set up to meet a specified future expense, such a segregated fund is not an investment of capital and the utility cannot increase the rate of return through the use of the segregated fund. To increase the rate of return through means other than the rate setting process, investment in plant, or

management-initiated cost reduction measures, would be contrary to sound utility regulation and create perverse incentives for the utility.

78. The plain interpretation that the Commission gives to regulation 8 is consistent with settled regulatory principles. The Commission is of the view that the Applicant's withdrawal of $99.5 million from the SIF for payment of dividends was contrary to the plain meaning of regulation 8(1) and thus unlawful.

79. Sir David Simmons, KA, in the said case of *Cable & Wireless (Barbados) Limited v Fair Trading Commission et al*, at paragraph [73], noted that in interpreting the legislation governing the Commission, the court and thus this Commission also, must have in mind public law notions of fairness thus:

> "[*73] That brings us to another point. In interpreting the legislation we must bear in mind that we should have apply public law notions of fairness. We must interpret the legislation to do fairness both to the company and the consuming public, both of whose interest are recognised in the purposes of the legislation viewed objectively and as a whole*."

The Commission is of the view that its interpretation given to regulation 8 is not only consistent with regulatory principles, and the context, scheme and purpose of the SIF Regulations, but is fair to the Applicant and the Applicant's customers.

Amended Trust Deed

80. The Applicant, in its document titled 'Request For Information From Intervenors at FTC Hearing September 27 – 29, 2022', in replying to the question: "Where is permission given for BLPC to pay the deductible from the SIF?" responded: "Please see attached "First Deed of Variation and Amendment" dated June 9, 2016 at Schedule 1." This seems to be a suggestion that the amended trust deed authorised the use of the SIF assets to pay dividends to the Applicant's shareholder. This, no doubt, requires us to examine the amended trust deed.

81. By a deed of variation and amendment dated June 9, 2016 (the "**Variation Trust Deed**"), the Applicant and the Trustees amended the trust deed governing the SIF, as provided in the schedule to the Variation Trust Deed, as follows:

> "*SCHEDULE 1 AMENDMENT TO PRINCIPAL DEED*
> *In accordance with Clause 2 of this First Deed of Amendment and Variation to Deed of Trust, the Principal Deed is amended as set forth hereunder.*
> *7A(1) In this Trust Deed, the term and expression "Minimum Value" means the amount as determined by the Trustees having reference to professional reports prepared with relevant actuarial and experience based information as to the required level of capital required for the Fund.*
>
> *7A(2) The Trustees at any time and in their sole and absolute discretion, shall be authorised to distribute to the Company, the amount by which the value in the Fund exceeds the Minimum Value (the "Surplus"), in such manner, as the Trustees determine; provided that no such payment or distribution shall be made where in the reasonable opinion of the Trustees, such payment or distribution (or part of such payment or distribution), such would:*
> *(a) cause the Fund to be less than a value which is at least at, or which exceeds the Minimum Value;*
> *(b) result in the Funds being less that the amount determined in accordance with established insurance financial principles as adequate or necessary to replace or reinstate the self-insured assets which are damaged by catastrophe and for reinstating financial loss in the event of such catastrophe;*
> *(c) be in contravention of any law relating to payment by the Trustees or the receipt of payments by the Company; or*
> *(d) impair the management of the Fund by the Trustees or otherwise result in the Fund being managed otherwise than in accordance with sound insurance principles."*

82. The Commission makes three observations regarding the Variation Trust Deed. First, any distribution by the Trustees to the Applicant is, by clause 7A(2)(c) of the Variation Trust Deed, subject to the proviso that the distribution is not "in contravention of any law relating to payment by the Trustees or the receipt of payments by the Company". The parties to the Variation Trust Deed recognised that any payment by the Trustees would be subject to any other law, irrespective of the Trustees' opinion concerning the lawfulness of the payment.

83. Secondly, the provisions of any trust deed governing the SIF must be consistent with the provisions, the general scheme and the purpose of the SIF Regulations. The trust deed (or any amendment thereto) governing the SIF cannot authorise the payment of any excess in the SIF contrary to regulation 8(1). The purpose

of the amendment is to permit the Trustees to pay excesses in the SIF to the Applicant. Once paid to the Applicant, the same could be paid to its shareholder(s). The amendment to the trust deed, is in our view, inconsistent with regulation 8(1), and legally ineffective in achieving the purpose sought.

84. And thirdly, the "Minimum Value" was to be determined with " … *reference to professional reports prepared with relevant* ***actuarial and experience based information*** …" [Emphasis supplied.] If clause 7A(1) required actuarial evidence to determine the Minimum Value, then, based on the evidence before the Commission, none was utilised in determining the Minimum Value.

85. The Commission is of the view that any payment pursuant to the Variation Trust Deed is subject to the SIF Regulations and in particular, to regulation 8. Further, the Variation Trust Deed cannot authorise a payment which is inconsistent with the SIF Regulations. If the effect of the Variation Trust Deed is to authorise a payment inconsistent with the SIF Regulations, then it is legally ineffective in doing so. The Commission is of the view that the use of the SIF's assets to pay dividends to the Applicant's shareholders contravenes regulation 8(1) and is thus unlawful.

Other Issues Concerning the SIF

86. If the Commission is correct that neither the Applicant nor the Trustees of the SIF can lawfully use the assets of the SIF to pay dividends, then many of the Applicant's challenges to the orders concerning the SIF made by the Commission in its 2023 Decision may be moot. Nevertheless, we consider the following arguments made by the Applicant concerning the SIF.

87. First, the Applicant has argued that the Commission has found, contrary to the findings of the CBB, that the Applicant's contributions to the SIF were not voluntary. The Applicant states that the Commission committed an error of law and fact in so concluding. The Applicant made the argument thus:

> *"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."*

88. As the utility provider, the Applicant has the responsibility to provide a safe, adequate, efficient and reasonable service under the URA. To provide safe and reliable service, assets must be in place. Further, risks to those assets must be managed in a prudent manner, whether through purchases of third-party commercial insurance or an alternative mechanism. Insurance coverage, whether third party or self-insurance, benefits both the ratepayers and the utility, as it ensures that, in the event of a loss, utility assets are replaced without the need for significant equity or debt contributions. Insurance coverage is therefore necessary that, in the event of a loss, utility assets can be replaced or repaired, downtime of service is minimised, and continuity and reliability of the system and service are achieved. Protecting a utility's assets by adequate and reliable insurance coverage in the event of a loss, is vital to the national security and health and safety of a nation. No regulator would allow a utility to operate without insurance coverage, whether third-party or adequate self-insurance.

89. While the Applicant may be the legal beneficiary of the SIF, the purpose of the SIF is to ensure the continuity of utility service. The Commission has the responsibility of ensuring that the utility provides reliable service. If the Commission lacks jurisdiction of the regulatory treatment of the SIF, the Commission would lack jurisdiction over whether the utility was operating in a prudent manner and the power and authority to ensure that the Applicant is providing a service that is safe, adequate, efficient and reasonable. The Commission, however, does not lack such jurisdiction.

90. Secondly, the Applicant contended that the Commission lacked jurisdiction to direct it to undertake an actuarial study. The Applicant stated that the

imposition of an actuarial study is novel, it violates the principle against retroactive ratemaking, and is unsupported by any law or regulation in Barbados or any evidence on the record. The Applicant, again while recognising the incidental powers of the Commission, contended that the incidental powers granted to the Commission at common law and under section 19(3) of the Interpretation Act, do not grant the Commission the power to make the pronouncements it has in the 2023 Decision regarding the SIF.

91. Further, the Applicant, in an effort to establish that the withdrawal from the SIF was reasonable, contended that the balance which remained in the fund after withdrawal was sufficient to meet the insurance needs for which the fund was established. To support that position, the Applicant relied upon a 2014 report from CaribRM, a member of CGM Gallagher Group and a subsequent study by ECI personnel. In the same vein, the Applicant also made reference to a subsequent study produced in 2018 that assessed the probability of losses exceeding $90 million ($45 million USD) at 1%. At the end of 2018, SIF funding stood at approximately $53 million.

92. Mr. Roger Blackman testified that no actuarial studies were done when the reduction in funding occurred. While no requirement existed, the Variation Trust Deed required the determination of the minimum amount of the funding required to be held to be based on professional reports with "relevant actuarial and experienced based information".

93. The Commission's prudency review of the Applicant's or the Trustees' decisions regarding the funding level of the SIF is identical to the prudency review that is given to investments in assets and expenses incurred by the utility in the rate proceeding. The application of the prudence review ensures that ratepayers are paying for utility assets or expenses that are reasonably incurred. In a market for a commodity service, such investments would be avoided to keep prices competitive and attract customers. Utility ratepayers

have no choice of provider and therefore the application of this judgement is placed on the regulator.

94. The test of prudency is no more than the regulator's standard for determining whether the utility has met its statutory and other obligations when the regulator is exercising oversight over the utility. Determining the prudency of the utility's decisions is part and parcel of the Commission's oversight responsibility over the utility imposed by the URA and the FTCA. Therefore, the Commission has the jurisdiction, and was entitled to conclude, on the evidence before it, that the Applicant's or the Trustees' reduction of the level of SIF for the purpose of shareholder profit was imprudent. The Commission is satisfied that, in addition to the foregoing power referred to in the preceding sentence, it can declare that the decision of the Applicant or the Trustees to change the level of the SIF, to be imprudent by reason of the duty or obligation or responsibility imposed on it to protect the interests of consumers by ensuring that service providers supply to the public service that is safe, adequate, efficient and reasonable. The Commission is also satisfied that it may direct the Applicant to carry out an actuarial study to be satisfied that the Applicant is able to provide a service that is safe, adequate, efficient and reliable and as part of its oversight obligations under the URA and FTCA.

95. As stated earlier, customers should be charged based on the prudently incurred cost required to operate, maintain, and invest in the utility system and to earn a fair return on its substantial investment. Such a judgment is exercised by the regulator. There is no doubt that a regulator may also determine, ex-post, that costs and expenses were imprudently incurred. The Commission does not accept, that its determination that the Applicant's or the Trustees' past reduction of the SIF for the purpose of shareholder profit was imprudent amounts to retroactive ratemaking.

ISSUE 4: DEFERRED TAX LIABILITY

96. The Applicant's liability for corporation taxes ("**income taxes**") is part of the revenue requirement and paid for by ratepayers through the rate charged to them for the electricity service. Charges for income taxes is not part of the rate of return which compensates shareholders for their investment in the utility. The corporate tax rates changed in 2019 from 35% to a sliding scale of 1% to 5.5%. The result was a substantial reduction in the Applicant's liability for income taxes, and a substantial over-collection of funding for income taxes from ratepayers. The Applicant, after settling its liability to the Barbados Revenue Authority, paid the over-collection of $19 million in dividends to its shareholders.

The Applicant's Position

97. The Applicant seeks an order that it is not required to retroactively record fifty percent of its 2019 income tax gain as a regulatory liability and amortise the liability over a fifteen-year period. The Applicant states, inter alia, that the Commission's order amounts to retroactive ratemaking.

Watson/Simpson Team's Position

98. The Watson/Simpson Team submitted that the Commission's 2023 Decision followed an accepted regulatory practice to allow a "flow-through" of tax benefits to ratepayers based on the "actual taxes" principle. Additionally, the Commission's 2010 Decision ruling in respect of accumulated deferred Investment Tax Credits and Manufacturers Tax Credits are consistent with the action in the recent 2023 Decision. They further submitted that the Commission's 2023 Decision does not amount to retroactive ratemaking given the Commission's April 2019 communication that stated the treatment of the tax gain would be determined in the rate hearing.

Mr. Ricky Went's Position

99. Mr. Went argued that it is appropriate to adjust the revenue requirement in respect of the income tax gain resulting from the tax change. He cited the return of such funds to Tampa ratepayers in a proceeding related to an affiliate of the Applicant's parent company, Emera Maine utility. Mr. Went suggested that an amortisation period of 5 years be used and not 15 years, based on the recommendation of Mr. Ralph Smith. He agreed with the Commission's view, expressed in the 2023 Decision, that the fact that the Commission did not previously rule on the rate treatment of income tax changes does not preclude it from making a decision based on the facts and findings available in a subsequent review.

BSEC

100. Lt. Col. (Ret'd) Trevor Browne submitted that the payment of deferred tax gains to the Applicant's shareholders was unjust. He suggested that the Commission varies its 2023 Decision to require 100% of " … the 2019 income tax gains be levied against the shareholder's share capital in BLPC …. to be applied with effect from 2019."

The Commission's Analysis

101. It is common that the timing of rate recovery for income taxes will occur in different periods from when the income taxes are actually paid to the taxing authority. Excess deferred tax balances arise when income tax rates are reduced, causing future tax liabilities to be reduced. Since the utility recovered income taxes in advance, there is an excess amount of taxes that were customer-funded that will not be payable to the taxing authority.

102. The Applicant considered the excess deferred taxes created through the 2019 income tax rate reduction as money available to shareholders and subsequently transferred the balance related to the reduction to shareholders in the form of dividends. By so treating the excess deferred taxes, the Applicant increased the profit earned by shareholders by $19 million. As discussed above, a utility's

shareholders have a right to the return "of" and a reasonable opportunity to make a return "on" their capital that they provide to the utility. The excess deferred income taxes were not funded by the Applicant or its shareholders. Nor were the deferred taxes a return "of" or a return "on" capital. A settled regulatory principle is that the utility is incentivised to increase its return through operational efficiency on the basis that it has some control over operational expenses and should benefit from keeping those costs low. The deferred tax gains to the Applicant are not attributable to the Applicant's management of the utility, that is, it is not an efficiency gain.

103. In effect, the deferred tax gains did not accrue to the Applicant by any of the accepted regulatory means or principles by which shareholders receive a return "on" its capital or a return "of" its capital. The intent for which the money was collected in rates is clear: the utility would have future tax expense due to timing differences. This future tax expense was recovered from ratepayers with the intent of paying future expenses as taxes, and are an expense included in revenue requirement and an expense and burden to ratepayers. If a change had not occurred in the tax rate, the amount would have been paid to the Barbados Revenue Authority eventually.

104. The Commission is satisfied that the payment of deferred taxes to the shareholders as dividends cannot be justified on regulatory principles. With the change in tax rates, the Applicant would have recovered revenues from customers to meet the forecast tax expense more than the Applicant's actual tax expense. Accordingly, the Applicant over-collected revenues from customers for the Applicant's forecast tax expense, and such over-collection has regulatory and rate-making consequences. The Commission has jurisdiction to treat to such an over-collection for reasons earlier given. The Commission does not accept, for reasons set out later, that its treatment of the Applicant's payment of deferred tax gains to shareholders as dividends as retroactive rate-making as contended by the Applicant.

Northland Utilities v Northwest Public Utilities

105. The Applicant urged the Commission to follow the decision in *Northland Utilities v Northwest Public Utilities* 2010 NWTSC 92 (***Northern Utilities* case**) where the regulator's order that a tax refund should be "flowed through" to customers was regarded as impermissible retroactive ratemaking. In that case, the refund was not an extraordinary gain. The Commission does not agree with the decision in *Northern Utilities* case if it suggests, or is authority that a regulator cannot deal with an unforeseeable and extraordinary increase or decrease in expenses or revenues. The decision in the *Northern Utilities* case seems confined to its facts. The dicta in *MCI Telecommunications Corp v Public Sev Comm'n of Utah*, and the cases referred to therein as extracted at paragraph 128 below in this decision, are decidedly preferred by this Commission as achieving a just result and a fair and reasonable rate at all times, in cases of unforeseeable and extraordinary increases or decreases in expenses or revenues.

ISSUE 5: USE OF REGULATORY LIABILITIES

106. The Applicant contends that the creation of a regulatory liability is not "reasonably necessary" or "incidental" to the ratemaking power of the Commission.

The Commission's Analysis

107. A "regulatory" asset or liability is no different from any other asset or liability allowed in rate base, as both represent an investment by a source of capital into the utility. A regulatory asset is a right of the utility to add an amount to determine the rate to be charged to customers in the future. On the other hand, a regulatory liability is an obligation on the utility to deduct an amount in determining the regulated rate to be charged in the future.

108. Regulatory assets and liabilities capture the economic effect of ratemaking decisions to reflect future ratemaking benefits or obligations of the utility. A

regulatory asset or regulatory liability on a stand-alone basis, is not retroactive ratemaking. It is simply an accounting mechanism to reflect the economic effects of ratemaking decisions.

109. Regulatory assets and liabilities are utilised in different ways in utility regulation. One such case is where there are differences between, on the one hand, the utility's **forecast** revenue and costs, and on the one hand, the utility's **actual** revenue and costs. In such a case, a regulatory asset or a regulatory liability may be utilised to deal with those variances. If for example, the utility experiences some unforeseeable expense, a regulatory asset may be created to permit the utility to recover the unforeseeable expense in **future rates**. The converse also applies. Where the utility collects, for example, an unforeseeable and extraordinary amount of revenue from ratepayers not forecast, a regulatory liability may be created to refund the gains to customers over time.

110. A regulatory liability may also be created to provide for a future anticipated cost.[18] This may arise when there is a potential for large, sudden, and financially damaging event from which the utility needs to be sheltered, or when a reserve of cash will be needed to fund the retirement of an asset. This represents a form of a regulatory liability and the utility has a duty to perform the services for which it has collected customer funds in advance.

111. The Applicant recognises this principle by including a reduction in rate base for the deferred tax liability within its Application. This is money that has been collected for customers for future tax expenses. During the time between collecting rates from customers and the date at which taxes are due, this balance

[18] See *Nova Scotia Power Inc. (Re),* [2023] N.S.U.R.B.D. No. 12, a Decision of the Nova Scotia Utility and Review Board Decisions, where, at para 218, the Board said: " 218 That said, there are regulatory tools available to the Board to mitigate the impact of rate increases. For example, the Board may defer the recovery of costs to a later period, or it may direct the creation of a regulatory asset to be amortized over an extended period rather than be recovered all at once. This is the premise underpinning the proposed Decarbonization Deferral Account in this proceeding. It would be a means of managing the significant costs expected to be incurred by electricity ratepayers to transition away from coal-fired electricity generation and have 80% of electricity in the province supplied by renewable energy by 2030 and towards the Province's net-zero GHG emissions target by 2050."

is available for other purposes, reducing the level of capital required from equity and debt stakeholders.

112. Regulatory assets and liabilities are usually amortised over a future time to incrementally (a) recover a specified prior cost, in the case of regulatory assets and (b) rebate to customers specified excesses previously recovered in rates, in the case of a regulatory liability. The amortisation period of regulatory assets can be used to manage rate shocks to customers, as appropriate. Similarly, the amortisation period of regulatory liabilities may be determined to avoid one-time sudden and large payments by the utility, when appropriate.

113. The Commission is satisfied that it has power to declare a regulatory asset or regulatory liability as part of its ratemaking power to ensure that rates are fair and reasonable at all times.

ISSUE 6: RETROACTIVE RATEMAKING

114. One of the Applicant's grounds of review is that the Commission violated an important principle of regulatory ratemaking by engaging in impermissible retroactive ratemaking. The ground of review challenges the Commission's decision requiring the Applicant to declare a regulatory liability of (i) $99.5 million, because that amount was withdrawn from the SIF and (ii) $9.5 million in connection with deferred tax liability. The Applicant also complained that 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.

115. The Applicant emphasised the need for regulatory certainty and consistency, which it alleged the Commission breached by engaging in retroactive ratemaking. The Applicant argued that certain of the Commission's orders concerning the SIF, the deferred taxes collected by the Applicant from ratepayers and the 5 MW Energy Storage Device (**ESD**) offend the principle of regulatory certainty. It stated that public policy dictates that companies should

be able to operate in an environment that is predictable. The Applicant described the Commission's alleged retroactive ratemaking as punitive to the Applicant, its investors and other stakeholders, and further alleged that it has undermined the confidence of the Applicant's investors. It submitted that the Applicant is in a worse position than prior to the rate hearing.

116. Further, the Applicant states that the Commission failed to explain why it arrived at its conclusion that it was not engaging in retroactive or impermissible retroactive ratemaking. The Commission disagrees. It is clear from the 2023 Decision that the Commission was treating the deferred tax liability and SIF gains as unforeseeable and unusual or extraordinary gains, to be dealt with as an exception to the general prohibition against retroactive ratemaking or as not offending the rule against retroactive ratemaking.

117. The Applicant criticised the Commission for relying on *Capital Power Corp. v Alberta Utilities Commission*[19] because there was a finding in that case that loss line charges were unlawful. However, continued the Applicant, there was no finding in this case that the use of SIF to pay dividends was unlawful under the URA, FTCA or the SIF Regulations. In the 2023 Decision, the Commission referred to *Capital Power Corp. v Alberta Utilities Commission* for the general principle concerning retroactive ratemaking, the exceptions to the general principle and the reasons why there is no blanket prohibition against retroactive ratemaking.[20] The Commission did not seek to draw any parallel between the factual and or legislative matrix in that case to the case at hand. The Commission solely referred to the general principles stated in *Capital Power Corp. v Alberta Utilities Commission.*

118. The Commission did not find, in the 2023 Decision, as the Applicant correctly states, that the use of SIF to pay dividends was unlawful under the URA, FTCA or the SIF Regulations. However, the Commission has reached the conclusion

[19] [2018] A.J. No 1539.

[20] See paras 191 to 194 of the 2023 Decision.

in this decision, that the use of SIF to pay dividends contravened regulation 8(1) of the SIF Regulations and is unlawful.

119. The Applicant also pointed out that it did not realise the authorised rate of return for several years. And in fact, except for the years 2013 and 2018, in the time since the last rate review, it did not achieve its 10% approved rate of return.

Watson/Simpson Team's Position

120. The Watson/Simpson Team submitted that the Commission's 2023 Decision followed an accepted regulatory practice to allow a "flow-through" of tax benefits to ratepayers based on the "actual taxes" principle. Additionally, the Commission's 2010 Decision ruling in respect of accumulated deferred Investment Tax Credits and Manufacturers Tax Credits are consistent with the action in the recent 2023 Decision.

121. They argued that the Commission's 2023 Decision on deferred taxes does not result in retroactive ratemaking given the Commission's April 2019 communication that stated the treatment of the tax gain would be determined in the rate review. The Watson/Simpson Team cited Canadian regulatory orders that, they argue, conclude that the Commission's treatment of taxes is not retroactive but proper.

122. The Watson/Simpson Team referred to the decision in *MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah* in extenso in support of their submission that the Commission did not engage in retroactive ratemaking. They argued that the rule against retroactive ratemaking is flexible, not absolute. Citing the decision of the *Ontario Energy Board in Ontario Energy Board v Great Lakes Power Limited*,[21] the Watson/Simpson Team contended that " *.. credits going forward do not constitute retroactive rate-making. This is particularly the case where it reflects a one time fixed amount adjustment to an overpayment that the tribunal finds unjust*."

[21] [2006] RP-2005-0013

The Applicant's Reply

123. The Applicant disagreed with the Watson/Simpson Team that the Commission did not engage in impermissible retroactive ratemaking. It submitted that a regulated entity, having drawn the withdrawal from the SIF to the attention of the regulator, would reasonably expect the regulator to indicate whether the proposed action was likely to fall afoul of the legislation it administers. It denounced the approach of the Commission approving a transaction, tacitly or otherwise, only several years later to seek to reverse it.

124. The Applicant disagreed with the Watson/Simpson Team that the appropriate time to deal with the SIF withdrawal was at the next rate hearing. It argued that the Commission ought to have dealt with the issue before, as the Commission is charged with monitoring rates charged and carrying out periodic reviews of the rates and principles for rate setting. It contended that the Commission ought to have investigated the matter once it was aware of it and formed the view that it represented a deviation from any approved application of funds collected from customer rates.

Commission's Analysis

125. This Commission, in its 2023 Decision, from paragraphs 185 to 199, discussed extensively the question of retroactive ratemaking. The Commission reviewed the legislative framework of the URA and FTCA and concluded as follows:[22]

> "*The Commission is of the view, that it cannot be said, based on the framework of these enactments, that the Commission is limited to making prospective determinations only. The Commission thinks that any authority to make an order to have retroactive effect must necessarily flow from the broad powers to set rates under sections 3 and 10 of the URA and section 4 of the FTCA. Whether and under what circumstances the Commission may make an order to have retroactive effect will depend upon policy considerations and whether retrospective ratemaking is consistent, in the particular situation, with the aims and objectives of the URA and FTCA.*"

[22] See paragraph 188.

126. The Commission then reviewed decisions of courts in Canada and the United States of America concerning retroactive ratemaking. The Commission rejected the line of cases emanating from some courts in the United States which took the position that retroactive ratemaking is strictly prohibited. The Commission, at paragraph 198, concluded thus:

> "*The Commission is not persuaded that it should follow the line of cases which have sought to establish a strict prohibition against retroactive ratemaking as cited by BLPC. The Commission is of the view, that based on the framework of the URA and FTCA, the Commission is not limited to making prospective determinations only. Accordingly, whether and under what circumstances the Commission may make an order to have retroactive effect will depend upon policy considerations and whether retrospective ratemaking is consistent, in the particular situation, with the aims and objectives of the URA and FTCA. The Commission is persuaded to follow the body of case law emanating out of both Canada and the United States which establishes a general principle that ratemaking is prospective and that there is a general prohibition against retroactive ratemaking; however, that there are exceptions to the general prohibition against retroactive ratemaking. The broad principle against retroactive ratemaking will apply where it is necessary to "achieve sound utility regulation." The Commission accepts the recognised exceptions to the prohibition against retroactive ratemaking mentioned in the cases reviewed above, but also acknowledges the categories are not closed.*"

127. Ratemaking involves forecasting future costs and revenues. As Zimmerman J in *Utah Dept. of Bus. Reg. v. Public Service Commission*[23] states:

> "*In determining an appropriate rate, the PSC [regulator] considers the utility's historical income and cost data, as well as* ***predictions of future costs and revenues****, and arrives at a rate which is projected as being adequate to cover costs and give the utility's shareholders a fair return on equity…… This process places both the utility and the consumers at risk that the rate-making procedures have not accurately predicted costs and revenues……*"

128. The Commission is of the view that to the extent that there is a forecasting element in ratemaking, it is impossible to provide for every eventuality. Unforeseeable and extraordinary increases or decreases in revenues or expenses could affect one or the other party to the regulatory compact. As said

[23] 720 P.2d 420 (Utah 1986), at pg 420.

in *MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah,*[24] and is self-evident, it is impossible to make allowance for extraordinary and unforeseeable increases and decreases in revenues and expenses. Regulators have sought to deal with extraordinary increases and decreases in revenues and expenses in different ways. One way has been to treat extraordinary increases and decreases in expenses and revenues either as not a case of retroactive ratemaking or an exception to retroactive ratemaking. The extraordinary increase or decrease in expenses or revenues is dealt with at the next rate hearing, not by a retroactive adjustment to rates, but by some prospective or future corrective action, to arrive at a just and reasonable future rate. The following extract from *MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah* is lengthy but apposite.

> "*MCI and Tel-America acknowledge the general rule against retroactive rate making, but argue that the instant case falls within an exception that applies when an* ***unforeseeable event results in an extraordinary increase or decrease in expenses or revenues****.*
>
> ***A number of courts have recognized the exception for unforeseeable and extraordinary increases in a utility's expenses****. Increased expenses from natural disasters, such as extreme weather conditions, and other extraordinary events are the typical bases for the exception. See, e.g., Office of Consumer Advocate v. Iowa State Commerce Comm'n, 428 N.W.2d 302 , 306-07 (Iowa 1988) (one-time assessment for permanent storage of nuclear waste under Nuclear Waste Act of 1982 was extraordinary, unforeseeable expense); Narragansett Elec. Co. v. Burke, 415 A.2d 177 , 178-80 (R.I.1980) (extraordinary ice storm); In re Green Mountain Power Corp., 519 A.2d 595 , 597-99 (Vt.1986) (unscheduled shutdown of nuclear plant extraordinary expense); Wisconsin's Environmental Decade, Inc. v. Public Serv. Comm'n, 98 Wis.2d 682, 298 N.W.2d 205 , 212 (Ct.App. 1980) (severe ice storm); Re Kansas City Power & Light Co., 75 Pub.Util.Rep. 4th (PUR) 1, 38-41 (Mo.Pub.Serv.Comm.1986) (severe ice storm); Re Kansas City Power & Light Co., 55 Pub.Util.Rep. 4th (PUR) 468, 480-81 (Mo.Pub.Serv.Comm.1983) (power outage caused by interruption of water supply to boiler). In Green Mountain Power, the Vermont Supreme Court explained the rationale for the exception:*
>
> ***"If this treatment is not to be permitted, not only would there be a serious question as to whether the Company has been afforded a fair***

[24] 840 P.2d 765 1992 at pg 771.

opportunity to earn a reasonable rate of return*, it would also imply the need for an upward revision of the rate of return in all cases in the future. Such a revision, of course, would have to be based on a prediction of inherently unpredictable events the occurrence of extraordinary plant shutdowns."* ***The Board's conclusion was correct. Once it is clear that a particular cost is "extraordinary" and that it does not result from company mismanagement, or imperfect forecasts, treatment of such costs through appropriate amortization in future rate determinations does not constitute a "true-up" of past calculations,*** *because a truly extraordinary cost by definition would not be factored into the original rate….*

*"****The exception has been applied not only to unforeseeable and extraordinary increases in expenses, but also to unforeseeable and extraordinary decreases in expenses.*** *See, e.g., Re Narragansett Elec. Co., 57 Pub.Util.Rep. 4th (PUR) 549, 558 (R.I.Pub. Utils.Comm.1984) (excess earnings due to "unanticipated economic recovery and unforeseeable weather"); see also Chesapeake and Potomac Tel. Co. v. Public Serv. Comm'n, 514 A.2d 1159 , 1170 (D.C. 1986) (reimbursement of license contract payments previously paid to AT & T); Turpen v. Oklahoma Corp. Comm'n, 769 P.2d 1309 , 1332 (Okla.1988) (AT & T's reimbursement to subject utility was unexpected windfall).*

The extraordinary and unforeseeable nature of the expenses recognized under the exception differentiates them from expenses inaccurately estimated because of a misstep in the rate-making process, such as the inability to predict precisely, or from mismanagement**…..***"* [Emphasis Supplied]

129. It is not uncommon for regulators to use deferral accounts to deal with uncertain or volatile costs. They have been used to recover deficiencies and rebate excesses between forecast and actual costs. The Court of Appeal in *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*[25], explained thus:

> ***"63 The operation of deferral accounts is permissible under the existing regulatory scheme in this province regardless of whether it might be argued they incidentally have retrospective or retroactive effect. Deferral accounts are utilized in public utility regulation to deal with the effects of uncertain or volatile costs in a manner that ensures that rates are reasonable, not unjustly discriminatory and that the utility earns a just and reasonable return. They permit the recovery or rebate in a subsequent period of any deficiency or excess between forecast and actual costs.***

[25] [2012] N.J. No. 212

> ***Regulatory regimes generally permit the operation of deferral accounts.*** *See Bell Canada 2009 at paras. 54-55; ATCO Gas at paras. 33-44; City of Edmonton v. Northwestern Utilities Ltd., [1961] S.C.R. 392 at p. 406. It was properly acknowledged by all parties that the PUB Act authorizes the utilization of deferral accounts. See Stated Case at paras. 93-98.*
>
> ***64*** *In Bell Canada 2009 the use of deferral accounts to ensure that rates return to a utility the actual -- not forecast -- costs, was held to preclude a finding of retroactivity or retrospectivity:*
> *[63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective.* ***They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning.*** *These funds can properly be characterized as encumbered revenues, because the rates always remained subject to the deferral accounts mechanism established in the Price Caps Decision.* ***The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity.*** *Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (EPCOR Generation Inc. v. Energy and Utilities Board, 2003 ABCA 374, 346 A.R. 281, at para. 12, and Reference Re Section 101 of the Public Utilities Act (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).*
>
> *26*
>
> ***65 As stated, funds in a deferral account can properly be characterized as encumbered revenues*** *as the rates are subject to the deferral account mechanisms established by the regulatory authority."*
> [Emphasis supplied]

130. The Commission does not accept that requiring the Applicant to declare a regulatory liability for the amount deducted from the SIF and the deferred tax liability is engaging in retroactive ratemaking or impermissible retroactive ratemaking. Both gains from the change in the tax rate and the withdrawal from the SIF were unforeseeable at the time of the last rate hearing and are undoubtedly extraordinary gains to the Applicant. The Commission is not varying any final rate. Nor is the Commission seeking to remedy a deficiency in the rate through a later measure. The Commission is dealing with

[26] [2012] N.J No. 212, at paragraphs 63 to 65.

unforeseeable and extraordinary gains since the 2010 Decision. More so, the Commission deals with the gains prospectively, not retroactively.

131. In *Utah Dept. of Bus. Reg. v. Public Service Commission,* the utility, Utah Power Light, had set up an account referred to as an energy balancing account (EBA) to meet unstable fuel costs and other costs and revenue which the regulator felt was subject to rapid and unpredictable costs. Revenues from the EBA component of the consumer's utility bill were segregated and held in the EBA. The regulator allowed Utah Power Light to divert money accumulated in its EBA into the coffers of the utility to make up for an unexpected shortfall in general revenues by $40 million because of decreases in general consumer demand. Because of the shortfall, Utah Power Light's shareholders stood to receive a return of 13.25 per cent instead of the authorised return on equity of 16.3 per cent. The Department of Business challenged the decision of the regulator to allow the diversion of funds. The Court held that the diversion of funds from EBA to the coffers of the utility resulted in an adjustment of rates retroactively. In the Commission's view, the case is an authority that a utility cannot divert money in a segregated account encumbered for a specific purpose to make up for a shortfall in revenues in order to achieve the authorised rate of return. In that case, Zimmerman J., stated thus: [27]

> *"We conclude that the PSC exceeded its statutory authority here because its order* ***effectively allowed UP L to tap the EBA to make up for a general revenue shortfall, thus violating the proscription against retroactive rate making****.*
>
> *The PSC has broad authority to regulate a utility's business. U.C.A., 1953, § 54-4-1 (Repl.Vol. 6A, 1974, Supp. 1985). That authority, however, must be construed to harmonize with the general rules for rate making set by the legislature, to wit:* ***all rate making must be prospective in effect and rates may be fixed only in general rate proceedings****. U.C.A., 1953, § 54-4-4(1) and § 54-7-12(1)-(2) (Repl.Vol. 6A, 1974, Supp. 1985). It is true that the PSC has limited authority to permit interim rate changes which are necessary because of unexpected increases in certain specific types of costs; such authority is specifically given in the fuel cost pass-through legislation.* ***However, neither the pass-through legislation nor the Commission's***

[27] 720 P.2d 420 (Utah 1986) at pg 423 to 424

> ***general grant of regulatory authority permits a utility to have retroactive revenue adjustments in order to guarantee shareholders the rate of return initially anticipated.***
>
> *The PSC's reliance on the pass-through statute to justify its order is misplaced. Nothing in the passthrough statute allows the revenues which are specifically collected to cover anticipated fuel costs to be used the other hand, takes into account *424 to make up for general revenue shortfalls."*

132. Later, he added that: [28]

> "***We have previously held that a utility's attempt to use procedures established in the fuel cost pass-through statute to recover specific nonfuel-related expenses is invalid****. See Utah Department of Business Regulation, 614 P.2d at 1248-49. The decision in this case extends that holding to prohibit the use of the pass-through statute to enable a utility to recover revenue shortfalls resulting from errors in forecasting or calculating an appropriate general rate. The pass-through statute has not modified the risk relationship that exists between a utility and its customers by reason of the requirement of prospective rate making.* ***The utility cannot use the energy cost pass-through procedure to shift to ratepayers the risk of misprojecting nonenergy components of the general rate****. Our holding is consistent with those of other courts that have considered fuel cost adjustment statutes and have determined that such statutes cannot be used to guarantee that a utility will actually earn its authorized rate of return****. See, e.g., Southern California Edison Co., 576 P.2d at 945.*

133. Justice Zimmerman concluded that: "*The bar on retroactive rate making has no exception for missteps made in the rate-making process. Corrective action can be taken,* ***but it must be prospective only***."[29] [Emphasis Supplied.] The orders which the Commission made requiring the Applicant to declare a regulatory liability are prospective only. The Applicant's action, as described by Zimmerman J, has the effect of a retroactive revenue adjustment to guarantee the shareholder the rate of return initially approved or anticipated. See too the case of *Southern Cal Edison Co. v Public Utilities Com*[30] which further supports the proposition

[28] Ibid. pg 424.

[29] Ibid. 424.

[30] 20 Cal 3d 813 (Cal 1978), 144 Cal Rptr 905.

that a regulator treating prospectively with an extraordinary and unforeseeable over-collection is not impermissible ratemaking.[31]

134. The Commission does not accept that it engaged in impermissible retroactive ratemaking by requiring the Applicant to declare a regulatory liability in relation to the $99.5 million withdrawn from the SIF and the $9.5 million in connection with deferred tax liability. These fall within the recognised exceptions to retroactive ratemaking identified in *MCI Telecommunications Corp. v. Pub. Serv. Comm'n of Utah.* The Commission's orders were prospective and not retroactive.

Applicant's Failure to Realise Authorise RoR

135. As indicated above, the Applicant complained that it did not realise the authorised rate of return for several years. However, failure to achieve the authorised rate of return cannot justify the use of the assets of the SIF to pay dividends.

136. The effective regulation of a utility depends on aligning the incentives of profit motivated equity shareholders with the behavior the regulator wants to encourage, resulting in the concept that the equity return on investment is the element of the revenue requirement that is, the "at risk" element when overall recovery is being assessed. The utility is, in regulatory terms, given a "reasonable chance" to earn a return that appropriately compensates shareholder for the use of their capital. The utility is not guaranteed the authorized rate of return. For example, customer usage of electricity may be

[31] In *Southern Cal Edison Co. v Public Utilities Com,* there were substantial over-collections from the operation of a fuel adjustment clause, which was designed to allow Edison to recover its increased fossil fuel costs in an expedited manner. Edison collected $408 million from the fuel adjustment clause but it spent only $262.2 million, leaving the company with $145.8 million more than needed. Edison's reported earnings per share were $4.10 for 1974 as compared with $2.70 for the previous year. The commission ordered the utilities to amortize, by 36 months of billings credit to its customers, the substantial over-collections generated by the fuel adjustment clause. Edison contended that because the funds in issue were lawfully collected pursuant to a rate structure found by the commission to be just and reasonable at the time, the order to return them constituted illegal retroactive ratemaking. Edison also argued that the funds could not be isolated from its overall revenues. The Supreme Court of California concluded that Edison's contentions were without merit and did not constitute retroactive ratemaking.

higher or lower than forecast. Utility management, appointed by and responsible to the shareholders of the utility, must work within the utility framework to ensure an appropriate recovery for those shareholders.

137. The utility management, with their for-profit motive, is responsible for making a rate application with the regulator when it deems the return it is earning is too low. The regulator cannot be blamed if shareholders failed to recognise that a rate increase was needed to earn what they consider as a reasonable return on capital. Once rates are set, the utility's management and shareholders are those that determine if the rates are adequate for their return requirements.

138. The general rules of ratemaking, as discussed earlier in this decision, do not permit the Applicant to use revenues charged and collected for self-insurance (part of the utility's operating costs) to be diverted to pay dividends because the Applicant did not realise its authorised rate of return every year.

ISSUE 7: LEGITIMATE EXPECTATION/ESTOPPEL

The Applicant's Position

139. At Ground (v), the Applicant complained that it:

> *" .. 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."*[32]

140. Under that ground, the Applicant argued that:

> *"… it had a legitimate expectation based on written confirmations and approvals obtained from the Commission, the FSC, and the 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-characterise 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*

[32] The ground did not state approval to do what.

the Commission determined that it did not have jurisdiction in relation to the general administration of the SIF."

141. Elsewhere, the Applicant contended that:

> *"By letters dated April 19th 2016 and May 17th 2016 to the Commission, the Applicant proactively notified the Commission of its intended withdrawal and distribution of SIF Funds to its shareholders. In response to this correspondence, the Commission expressly confirmed that it has no jurisdiction in the matter of the SIF and specifically over the management of assets entrusted to the SIF ….."*

142. The Applicant referred the Commission to the cases of *Harrison et al v Permanent Secretary Division of Energy & Telecommunications et al*[33], a decision of Cornelius J; *Pearson Leacock v The Attorney General*[34] and *Joseph v Boyce v Attorney General of Barbados*,[35] as setting out the general principles applicable to legitimate expectation,[36] which the Commission is in agreement with.

Watson/Simpson Team's Position

143. The Watson/Simpson Team argued that the Applicant's expectation is not legitimate, but unlawful. They referred the Commission to Professor Eddie Ventose, in his text, *Commonwealth Caribbean Administrative Law*, pages 199 to 200, for the proposition that courts do not give effect to an expectation that is unlawful.

Applicant's Response

144. The Applicant agreed that legitimate expectation would not arise where a statute makes an action unlawful, also relying on Professor Eddie Ventose. The

[33] BB 2014 HC 51

[34] (2005) 68 WIR181, a decision of then Chief Justice, Sir David Simmons, KA.

[35] CCJ Appeal No 2 of 2005, a decision of the Caribbean Court of Justice.

[36] The Commission accepts the pithy statement of Cornelius J on the principles of legitimate expectation in *Harrison et al v Permanent Secretary, Division of Energy and Telecommunications* et al.

Applicant argued that there was no statutory provision to indicate that it was unlawful to rely on the statement of the Commission that it had no jurisdiction.

Commission's Jurisdiction – Principles of Public Law, Equitable Principles

145. The Applicant proceeded on the basis that the Commission has jurisdiction to grant relief based on grounds for judicial review in public law (legitimate expectation) and on equitable principles (estoppel). The Commission is a creature of statute with limited jurisdiction. The Commission has no inherent jurisdiction.[37] Rule 54 of the URPR seems to give an indication of the Commission's power on a motion to review. That rule appears to limit the Commission's jurisdiction to reviewing "question(s) as to the correctness of the order or decision" of the Commission based on the grounds set out in rule 54(1)(a). Legitimate expectation is a ground for judicial review, whether such review proceeds under the common law or pursuant to the provisions of the Administrative Justice Act Cap. 109 B of the Laws of Barbados. Judicial review is a process whereby courts exercise a supervisory jurisdiction over decisions made by the executive pursuant to legislation. Judicial review is not the same as the review which is the subject matter of this proceeding.

146. The Commission would not wish to make a definitive statement of law on an issue not argued before it. However, the Commission considers it important to note that issues can arise concerning the jurisdiction of bodies such as this to decide motions for review before it, based on equitable principles or on public law grounds. That notwithstanding, the Commission proposes to address the Applicant's arguments based on legitimate expectation and estoppel, since they have been argued before it without objection.

[37] Nova Scotia Power Inc.(Re) (2023) NSURB No.12para 32.

Legitimate Expectation – Legal Principles

147. A claim for relief based on legitimate expectation may arise in different situations. The Supreme Court (then House of Lords), in the case of *Council of Civil Service Unions v Minister for the Civil Service*[38] identified two instances likely to give rise to a legitimate expectation: (a) an assurance from a decision-maker, or (b) the past enjoyment of some benefit or advantage or regular practice. The Applicant's case is based on a promise or representation giving rise to a claimed legitimate expectation. The Commission has found useful, the learning in the oft-cited case in this region, of *Francis Paponette v Others v The Attorney General of Trinidad and Tobago*.[39] That case similarly dealt with the situation where it was alleged that a promise or representation gave rise to a legitimate expectation. At paragraph 28, the Privy Council noted:

> *"**[28]** In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord Hoffmann in R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61 at [60], [2008] 4 All ER 1055:*
>
> > *'It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is "clear, unambiguous and devoid of relevant qualification": see Bingham LJ in R v Board of Inland Revenue Comrs, ex p MFK Underwriting Agents Ltd [1990] 1 All ER 91. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called "the macro-political field": see R v Secretary of State for Education and Employment, ex p Begbie [2000] 1 WLR 1115.'*
>
> ***"[30]** As regards whether the representations were "clear, unambiguous and devoid of relevant qualification", the Board refers to what Dyson LJ said when giving the judgment of the Court of Appeal in R (on the application of Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] EWCA Civ 473, [2003] QB 1397: the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made."*
>
> *Not only will a court frustrate the legitimate expectation of a person in an appropriate case, but there are also limits to legitimate expectations. A court is*

[38] [1985] A.C. 374.

[39] *[2011] 3 WLR 219.* The decision of the Judicial Committee of the Privy Council (**Privy Council**) on an appeal from the Court of Appeal of Trinidad & Tobago.

unlikely to give effect to a legitimate expectation where it would require a public body to act contrary to the provisions of an enactment

148. The Privy Council recognised that there are cases where the Court is entitled to frustrate legitimate expectations in the public interest thus:

> *"[34] The more difficult question is whether the government was entitled to frustrate the legitimate expectation that had been created by its representations.* ***In recent years, there has been considerable case law in England and Wales in relation to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation.*** *Some of it was referred to by Warner JA in her judgment. The leading case is R v North and East Devon Health Authority, ex p Coughlan [2000] 3 All ER 850. Lord Woolf MR, giving the judgment of the Court of Appeal, said (at [57]):*
>
> > *'Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.' (Lord Woolf MR's emphasis.)"*

149. In that case, the Privy Council dealt with the burden of proof as follows:

> *"[37] The initial burden lies on an applicant to prove the legitimacy of his expectation.* ***This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation.*** *It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest. [*Emphasis Supplied*]*
>
> *[38] If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in R (on the application of Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363 at [68]:*
>
> > *'The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that*

any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.'

"It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified."

150. Not only will a court frustrate the legitimate expectation of a person in an appropriate case, but there are also limits to legitimate expectations. A court is unlikely to give effect to a legitimate expectation where it would require a public body to act contrary to the provisions of an enactment.[40]

151. In *R (Bibi) v Newham London Borough Council*[41] Schiemann LJ saw three questions arising in legitimate expectation cases:

> *"The first question is to what has the public authority, whether by practice or by promise; committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the Court should do."*

The Commission's Analysis

152. The Applicant, in its letter dated April 19, 2016 to the Commission, provided information on the SIF, including the studies undertaken, the balance in the SIF, amounts paid out, and the Applicant's plans to reduce the level of funds in the SIF. The letter informed the Commission that: "Based on the results of the study, BL&P management believes that the SIF has a balance which substantially exceeds the projected future requirements." The letter informed the Commission that if approved by the Trustees, the excess SIF funds will be returned to BL&P. The letter did not ask for the Commission's approval for the payment out from the SIF to the Applicant and neither did the letter request the Commission to render a rate determination.

[40] R v Department for Education and Employment exp. Begbie [2000] 1 WLR 1115, 1125D. The Applicant and the Watson/Simpson Team made a similar argument relying on Prof. Eddie Ventose- see paras. 141 and 142 above.

[41] [2001] EWCA Civ 607, at para. 19

153. In its second letter dated May 17, 2016 to the Commission, the Applicant was specific that it wished a letter confirming that approval was not required from the Commission for ".. changes to be made to the funding level of the Self Insurance Fund."

154. It is important that the Commission's response, which is alleged to have given rise to a legitimate expectation, be set out in full. It was as follows:

> "*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*." [Emphasis supplied]

155. The authorities are explicit that a claim such as this can only be based on a promise or representation which is clear, unambiguous and devoid of any relevant qualification. One of the alleged representations relied upon is that " … the Commission expressly confirmed that it has no jurisdiction in the matter of the SIF and specifically over the management of assets entrusted to the SIF."

156. The Commission's letter did not state that the Commission had no jurisdiction in relation to the SIF or the general administration of the SIF. Nor can the Commission's letter be interpreted to have that meaning. The Commission's letter was specific and limited to stating that the Applicant "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." Further, and importantly, the Commission's letter did not state that the proposed changes to be made to the funding level of the SIF would not attract any ratemaking consequences. And most certainly, the Commission's letter did not approve or confirm that the excess (as determined by the Applicant) could be lawfully paid to the Applicant's shareholders.

157. The Applicant, at para 15 of Further Reply To Responses of Intervenors, wrote:

> "*The Intervenor Team is to be reminded that the Applicant specifically sought the Commission's approval* ***of its actions regarding the SIF*** *and the Commission in writing, expressed and impliedly approved the transaction."* [Emphasis supplied]

The Applicant's claim is broad, and we think, a mischaracterisation of the Commission's letter dated May 19, 2016 to the Applicant.

158. The Applicant's other legitimate expectation, expressed in its grounds, is that 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****."* [Emphasis supplied].

This complaint seems to be that the Applicant had a legitimate expectation to procedural fairness. The Commission accepts that it has a duty to act fairly.[42] Procedural fairness, in this case, as the Commission understands it, would mean that, if the Commission proposes to act contrary to the legitimate expectation that it allegedly created, then the Commission must give notice, and consult and or afford the Applicant an opportunity to make representations on the matter before acting inconsistent with the legitimate expectation it induced.

159. If the Commission is correct in its understanding of that ground of review, then the Commission acted with procedural fairness, before frustrating the alleged legitimate expectation (which is denied). At the Issues Conference held on July 4, 2022, one of the issues for the Rate Hearing was Clawback Accountability, which included the Applicant's withdrawal of money from the SIF and its use of the same to pay dividends. The Applicant had notice that the Commission would be dealing with the issue at the rate hearing. It was a hotly and

[42] See *Halsbury's Laws of England*, Volume 61A (2023), from paras 26 to 48 where the authors discussed various aspects of the duty to act fairly and natural justice.

extensively debated issue at the rate hearing. The Applicant addressed the issue during the hearing by way of a witness, namely, Dr. Philip Hansel. Further, the Applicant addressed the matter in its written and oral submissions to the Commission.

160. In effect, the Applicant was (i) given notice of the issues (deferred income taxes and the transfer from the SIF to pay dividends), (ii) given an oral hearing and permitted to make both oral and written representations, (iii) at the oral hearing, to call witnesses, tender evidence and to cross-examine witnesses and (iv) afforded the opportunity to and was represented by legal counsel. At the conclusion of the hearing, the Commission gave reasons for its decision. The Commission did act with procedural fairness before deciding on the Applicant's use of the over-collection withdrawn from the SIF, and the windfall from deferred income taxes collected because of the change in the tax rate.

161. The Applicant also argued that:

> *"… it had a legitimate expectation based on written confirmations and approval obtained from the Commission, the FSC, and the 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****…"* [Emphasis supplied.]

The Commission's letter cannot reasonably give rise to the Applicant's expectation. The rate hearing following the Applicant's withdrawal from the SIF was an appropriate time to address that issue. The Applicant can decide when to apply for a rate review. Again, the Commission's letter did not state that the Applicant's withdrawal from the SIF would not have ratemaking consequences. Nor did the letter say that the Commission would not consider the ratemaking consequences of the withdrawal.

162. The Applicant also argued that its legitimate expectation is " *..based on written confirmations and approvals obtained from the Commission, the FSC and the Central Bank of Barbados…*" In effect, the Applicant relies not only on the Commission's letter but also the confirmations and approvals of other entities as inducing its

expectation, which would bind the discretion or power of the Commission to make regulatory decisions concerning the withdrawal of the over-collection from the SIF. The Applicant did not cite any authority to support the argument that it was entitled to rely on a promise or representation or confirmation or approval by some other body to ground the legitimate expectation alleged.

163. The general rule is that an applicant must prove that the promise or representation is made by the authority or someone with the actual or ostensible authority to make the promise or representation on the authority's behalf. The authors (The Rt. Hon Lord Woolf, former Chief Justice of UK et al) of *De Smith's Judicial Review*, sixth edition, write (para 12:032):

> *"A legitimate expectation must be induced by the conduct of the decision-maker.* ***The representation by a different person or authority will therefore not found the expectation****. Thus representations by the police will not create a legitimate expectation about actions of the prison services."* [Emphasis Supplied].

164. However, there are cases where the promise or representation of one government authority was held to bind another. The general, and in the Commission's view, correct position seems to be that expressed by the authors of *De Smith's Judicial Review*. In *R v Secretary of State for the Home Department Ex P Mapere*[43], Justice Sullivan accepted the argument that *"it is wrong in principle for courts to rule that a decision-maker's discretion should be limited by an assurance given by another person."*

165. The Applicant also argued legitimate expectation concerning the deferred income tax liability gain. It contended that it had a reasonable and or legitimate expectation that its recording of deferred taxes as current year income for the 2018 would not be treated capriciously by the Commission based on the Commission's representations to the Applicant that the same would not be done. Here again, it is important to examine the correspondence passing between the Applicant and the Commission.

[43] [2001] Imm A R 89 at [36], accessed on Bailii.org

166. The Applicant, in its letter dated December 31, 2018, informed the Commission that the deferred tax liability gain of approximately $19 million resulting from the change in tax rate would be recognised in Q4, 2018. The letter further informed the Commission of the Applicant's intention to defer and amortise the gain to make up for any shortfall in the authorised rate of return until based rates are reset. The Commission responded by letter dated April 3, 2019 indicating that it did not agree with the Applicant's proposal to defer and amortise the gain. It stated further:

> "*a) BL&P is required to confirm the final amount of the said gain to the Commission by May 10, 2019;*
> *b) The amount so determined is to be held in a regulatory account;*
> *c) The amount is to be taken into account during the upcoming rate review through an adjustment to the Revenue Requirement.*
> *It is considered that this approach is a more efficient means of facilitating the return of these gains to the consumer*."

167. The Commission does not agree that it reversed itself on or acted contrary to any previous representation made by the Commission to the Applicant. The Commission was clear that the gain was to be held in a regulatory account, to be taken into account in the contemplated rate review application and returned to customers. The Commission does not agree that the letter dated April 3, 2019 gave rise to the legitimate expectation alleged by the Applicant.

168. Even if the Commission frustrated the legitimate expectations of the Applicant, which is denied, then it was justified in doing so in the public interest. An important principle is the statutory requirement that rates should be fair and reasonable to the utility and to customers. Embedded in that principle is that rates should be based on cost to customers and that costs and revenues should match. In this case, there was an extraordinary difference between the actual costs of contributions to SIF and the revenue collected from customers for the SIF. This resulted in a higher than required rate to the customers. Further, if the Applicant is allowed to deploy funds, collected in rates from customers, and segregated in the SIF to cover specified future losses, to pay dividends to

shareholders, customers are paying for a forecast expense which was not incurred and the shareholders benefit in a way that the rate was not designed to facilitate. Utilities bear losses and enjoy gains that depend upon their own managerial efficiency. The gains from the over-collection of revenues for the SIF and the change in the income tax rate, did not arise from the Applicant's managerial efficiency. Frustrating the alleged legitimate expectation of the Applicant would be justified to give effect to the basic principle of fairness and reasonableness in ratemaking and the avoidance of unreasonable discrimination. In addition, any alleged legitimate expectation which the Applicant has must yield to regulation 8(1).

Estoppel

169. The Applicant relied on estoppel as an alternative to legitimate expectation. The Applicant contended that in the circumstances, the Commission is estopped from treating the SIF withdrawal as a rate-based deduction. The Applicant was specific in identifying the particular estoppel it was relying on, namely, estoppel by representation of fact. The Applicant cited an extract from *Halsbury's Laws of England*,[44] as setting out the relevant principles.

170. The Commission does not think that the estoppel argument is sustainable for three reasons. First, estoppel is a private law construct and there is doubt as to whether estoppel applies in public law.[45] Secondly, estoppel and the legitimate expectation arguments are usually similar or substantially the same[46]. Thirdly, since the legitimate expectation and estoppel arguments are

[44] Estoppel (Volume 47 (2021)) 1. Nature, Classification and Principles of Estoppel, para 308

[45] The authors of *Halsbury's Laws of England Estoppel* (Volume 47 (2021)) 1. Nature, Classification and Principles of Estoppel, para 313 observed:

[46] See Michael Fordham, *Judicial Review Handbook*, 5 edition, para 40.25, under the rubric, "Relationship between estoppel and legitimate expectation"

essentially the same, estoppel will usually suffer the same fate as the legitimate expectation argument. That applies in this case.

Conclusion on Legitimate Expectation Estoppel

171. As stated before, questions can arise concerning the Commission's jurisdiction to determine the Applicant's Review & Variation Motion, or any issue therein, based on equitable principles or to grant relief based on traditional grounds of judicial review in public law. That notwithstanding, the Commission is of the view that the Applicant has not established a factual basis for either legitimate expectation or estoppel by representation of fact.

ISSUE 8: USE OF TEST YEAR 2020

The Applicant's Position

172. One of the Applicant's grounds of review is that 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. Accordingly, the Applicant has requested that the test year is updated to 2022 in its entirety, including non-depreciation expenses and Construction Work in Progress (CWIP). It has also asked that the cost of insurance utilised in the development of the revenue requirement be as filed, $12,348,641.

173. The Applicant argued that since the Commission made adjustments to the test year revenue (requirement to use base revenue, customer count, usage and demand values for the twelve-month period through June 2022 to determine the overall revenue increase and in the cost-of-service study), it is obligated to examine the normalisation of expenses to match the changes made. However, the expenses were not adjusted to coordinate with the adjusted revenues. The Applicant referred the Commission to the decision in *Davenport Water Co. v*

Iowa State Commerce Com'n[47] for the proposition, as quoted by the Applicant, that:

> *"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…… 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."*

Watson/Simpson Team's Position

174. The Watson/Simpson Team stated that the 2020 Test Year is inappropriate. They stated that it was a position they have always held, as they put it, from the beginning. They submitted that 2020 was not a typical operating year, but an aberration. They stated that they do not have any argument with the Applicant that if the Commission makes changes to sales and revenues, then changes are also to be made to expenses. The Watson/Simpson Team contended that the Applicant should be required to use 2022 as the Test Year as its audited financial statements for 2022 should be available.

Mr. Went's Position

175. Mr. Went suggested several reductions in costs be made to the revenue requirement to recognise changes in costs which occurred between 2020 and the hearing, all of which were included in his closing statements. Mr. Went supported the inclusion of any "inadvertently" omitted costs in the revenue requirement calculation.

The Commission's Analysis

176. The Applicant returns over the 2011-2019 period were constant and relatively close to their stated return. Due to the nature of the Applicant's business, it was able to make a return on its investment even in 2020 and 2021, a time when other businesses in Barbados were suffering from mandatory closures and

[47] 190 N.W. 2d 583 (Iowa 1971).

orders to stay at home due to "COVID-19". These Governmental orders caused a significant drop in usage and electric demand. Despite the drop in revenue, the Applicant elected to use 2020 as the basis of its rate application without adjustment.

177. In its order, the Commission determined that the use of a 2020 test year was reasonable, given the limitations on the Applicant. However, it also determined that use of 2020 billing determinants would be inappropriate because use of the depressed usage figures would result in the Applicant over-recovering its approved revenue requirement as usage and demand increased. Furthermore, the Commission found that allocation of costs based on 2020 usage and demand would result in distortions in the cost-of-service study due to relative differences in the impact of COVID-19 on customer classes.

178. The Commission ordered an adjustment to normalise the amount of usage in the year to address these deficiencies. This adjustment was based on June 30, 2022 information. The Commission ruled the use of June 30, 2022 customer and usage information appropriate and reasonable as:

i. It would incorporate long-term changes in demand resulting from the impacts of COVID-19.
ii. It would account for the Applicant's various statements on the lack of growth occurring in Barbados.
iii. As the year ending June 30, 2022 still included periods impacted by COVID-19, the Applicant would see the benefit of any subsequent growth in usage, which would serve to offset cost increases that may have occurred since the end of the test year.

179. The Applicant argued that it was inappropriate for an adjustment to be made to usage and number of customers without recognising associated costs, and the result was unbalanced ratemaking. As a remedy, the Applicant requested the use of 2022 Construction Work in Progress (CWIP) and operations and

maintenance expenses should be included in the calculation of the revenue requirement.

180. Under questioning from the Commission, the Company stated that "*the issue for the Applicant is the input costs that were not assessed in these sections such as lubricant, and other input costs that would have faced inflationary pressures.*" The Applicant is responsible for proposing and supporting appropriate adjustments to the test year with its application, which are then evaluated by the Commission and Intervenors, along with the test year expenses, to determine if they are reasonable for purposes of including in rates.

181. The Applicant adjusted for various operational expenses that would not occur until after the end of the test year, or in some cases, not until 2022.

182. The Applicant has proposed that all expenses be updated to reflect costs as of June, 2022. This adjustment would be unreasonable and antithetical to good regulatory practice as the Commission has not had the chance to review in detail or question the Applicant on the expense through June 2022 and determine if such costs were reasonable for provision of utility service and of a reoccurring nature. The review would require a new application with an updated test year.

183. Further, the expenses proposed to be adopted by the applicant include costs that would require adjustments, such as for the rental generation the Applicant removed from the application and has testified is no longer being incurred[48] ($5,708,146 for the year ended 6/30/22), uncollectible expenses, insurance expenses, and various affiliate expenses disallowed by the Commission.

[48] See Transcript Day 6 at Lines 995-977, Day 8 at Lines 53-57, and Application at page 733.

Insurance Expense

184. The Applicant has asked that the figure of $12,348,641 be utilised in the revenue requirement. At paragraph 122 of the 2023 Decision, the Commission wrote as follows:

> *"The cost of insurance included by BLPC in the application was $12,348,641, an adjustment of $4,150,559 over the amount incurred in 2020. BLPC explained that it based its requests on estimates that were available at the time of the filing. However, the Commission does not find the evidence supporting the increase sought by BLPC to be adequate. As a result, the Commission determines that it is appropriate to utilise the 2020 reported insurance expense of $8,198,082."*

It is clear that the Commission did not allow the increased amount of $4,150,559 for Insurance Expense, because of the lack of evidence to support the increase. The Commission's position remains the same, namely that the Applicant did not produce the evidence to support the increase in Insurance Expense.

185. The Applicant has criticised the Commission for a statement it made which followed its disallowance of the claim for an increase in the Insurance Expense above the 2020 Test Year actual insurance expense. The Commission wrote:

> "*In addition, the Commission is of the view that SIF funds were established, in part, to cover the higher tier costs of insurance and that BLPC should not incur excessive insurance costs when it has SIF funds available in the trust.*"

186. The Applicant has argued that the SIF cannot be used to pay commercial insurance premiums as they do not "…. *fall within the costs associated with "replacing or reinstating the self-insured assets which are damaged by catastrophe" or "reinstating financial loss following such damage" and as such the costs are not payable out of the SIF*." The Commission agrees with the Applicant's argument but reiterates that its decision to disallow the claim for $4,150,559 was based on a lack of evidence supporting the increase in Insurance Expense.

ISSUE 9: USE OF IFRS DEPRECIATION RATES

The Applicant's Position

187. The Applicant's complaint is that the Commission failed to consider or properly consider 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. One of the orders the Applicant seeks is that the Commission should no longer require it to 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 IFRS depreciation rates the Applicant used for its financial statements.

188. The Applicant noted that the 2023 Decision is the first time the concept of regulatory assets/liabilities has been introduced and such items are not permitted by IFRS accounting standards.

189. The Applicant further argued that the Commission's framework is being implemented retroactively which does not provide the Applicant with the opportunity to recover prudently incurred costs or earn a reasonable rate of return. It submitted that the use of the IFRS accounting based depreciation rates results in a true and fair view of accumulated depreciation. Further, that the 2009 deprecation rates do not give a true and fair view of the cost to serve customers (depreciation expense) or actually recover the Applicant's initial investments over the period.

190. The Applicant added that the use of the 2009 depreciation rates to calculate the difference between the regulatory accumulated depreciation and the IFRS recorded accumulated depreciation is inappropriate as the 2009 rates did not contemplate plant in service changes over the period 2009 to 2022.

191. The Applicant asserted that paragraph 91 of the 2023 Decision is factually inaccurate. Paragraph 91 of the 2023 Decision describes the difference between the regulatory and IFRS based on accumulated depreciation which results in a regulatory liability because the regulatory accumulated depreciation value is larger.

192. The Applicant calculated that based on the depreciation expense recovered from rate payers using the existing tariff over the period 2010 to 2022 that it recovered $469.9 million from rate payers. However, the depreciation expense actually incurred was $557.9 million over the period. Thus, the Applicant alleges, there was a shortfall of $89 million unrecovered from rate payers.

Watson/Simpson Team's Position

193. The Watson/Simpson Team submitted that an adjustment of $70.2 million to reduce rate base is needed rather than the $32 million as set out in the 2023 Decision. The Watson/Simpson Team characterised this as the true regulatory plant-in-service.

194 They referred to 2009 Depreciation Decision (Feb. 25, 2009) which they stated required the Commission's approval to change depreciation rates for regulatory purposes. The Watson/Simpson Team stated that the Applicant did not have approval to use different regulatory rates which led to the disconnect between the regulatory accumulated depreciation and the accumulated depreciation balance that formed part of the Applicant's revenue requirement.

The Commission's Analysis

195. In the 2009 depreciation proceeding, the Commission addressed the Applicant's request for convergence of regulatory and financial reporting depreciation rates. For example, the Applicant in its 2009 depreciation submissions asked for "convergence" of depreciation rates used for financial report (e.g., IFRS) and regulatory depreciation rates. This convergence was stated by the Applicant to "*eliminate the need to keep separate records of assets and asset lives*". However, this reasoning was not accepted by the Commission.

196. In this case, the Applicant has made similar statements that the use of the IFRS rates would "align" financial and regulatory reporting. The Applicant and its witness on depreciation, stated that it hoped to "*adjust the annual filing that goes*

with the FTC to align with IFRS statements"[49]; the Applicant further stated that the rates approved in 2009 were "*not really appropriate*"[50], and that it would like to maintain alignment of financial statement and regulatory depreciation.

197. Further, in the Applicant's March 3, 2023 Motion to review, the Applicant, after providing a summary of IFRS depreciation, states that "*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…*"

198 The Commission wishes to restate that financial accounting for IFRS purposes does not control rate decisions of the Commission. The Commission previously stated this principle clearly in the context of depreciation rates. At paragraph 93 of its February 25, 2009 Depreciation Decision the Commission stated:

> "*For the avoidance of doubt and in response to the Applicant's statements and the Intervenor's concerns arising with regard to this issue, the Commission advises that:*
> i. *The approval of depreciation rates proposed by the Applicant does not remove the authority from the Commission to set rates.*
> ii. *The capital balances and depreciation rates determined in this Hearing will be factors in the Applicant's calculation of revenue requirement in a rate review.*
> iii. *At all times the Applicant will be required to apply to the Commission if it requires a change in depreciation rates for regulatory reporting.*
> *iv. While the Applicant may at a later date choose to use different depreciation rates for its financial reporting, the depreciation rates to be used for regulatory reporting will be as determined in this Decision unless there is Commission approval of the change*."

199. In that case, the Commission also stated at paragraph 86 thus: "*As the Regulator the Commission's main objective with regards to determining an appropriate depreciation policy and associated depreciation rates is to align the recovery of invested capital with the asset's useful life.*"

200. Depreciation, which in the economic context represents the cost of aging and wear on assets, serves additional purposes in regulatory ratemaking. When a

[49] Hearing Day 7 at Lines 814-816.

[50] Hearing Day 7 at Lines 846-848.

utility makes an investment in an asset, this investment is capitalised. The money provided by debt and equity sources is frozen in that asset. A return is provided on the net balance of the asset to compensate the finance sources for the use of their money. The investment on which the return is earned is reduced over time through the mechanism of depreciation expense, the accumulated amount thereof is capitalised as a contra asset. From a regulatory perspective, this depreciation expense is equivalent to the return of capital to debt and equity interests – Depreciation is not a cash expense, yet it provides a related flow of cash through rates to the utility.

201. Depreciation expense and accumulated depreciation balances are fundamental to the determination of whether a utility is getting a return "of" and a return "on" its investment. When a regulator sets rates, it includes a certain level of return of capital to investors. As it is not part of the return on investment, it is a cash flow that is assumed to be satisfactorily recovered as long as the utility is making a profit.

202. The Applicant asserted that the rates approved by the Commission in the 2009 Depreciation Decision do 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*". As the Applicant states in paragraph 72 of the motion, IFRS depreciation requires "*The residual value and the useful life of the asset shall be reviewed at least each financial year and, if expectations differ from previous estimates, the change(s) shall be accounted for…*"

203. IFRS depreciation rates incorporate differences in residual value and useful life that are regularly reviewed and adjusted, and therefore the associated accumulated depreciation balances also incorporate these differences. Accordingly, they are not appropriate for achieving the regulatory goal of measuring the return of invested capital from ratepayers to the utility, regardless of whether depreciation recognised under IFRS is more or less accurate for financial reporting purposes. Accounting under IFRS is not based

upon sound ratemaking practices and must be evaluated to ensure the IFRS accounting outcomes do not produce perverse ratemaking outcomes.

204. The Applicant's request to use IFRS rates for calculation of rate base and depreciation expense would lower the accumulated depreciation reserve against that which would occur if the regulatory rates set in the last case were used. In essence, the Applicant is asking the Commission to deem that less capital has been returned than that which was included when rates were set, and a post-hoc revision of depreciation rates that the Commission was clear in the 2009 Depreciation Decision should be used for regulatory purposes.

205. The Applicant proposes an increase in its net investment used for calculation of rate base on the basis of rates that have been used for financial reporting. If this is allowed then it will result in an over-collection in rates at the expense of ratepayers. The Commission has ordered a regulatory liability to ensure that the correct amount of capital is returned to investors and the correct net investment is utilised in calculating the revenue requirement.

206. This regulatory liability ensures the integrity of the equity and debt contribution balances, or in other words, results in the same net investment amount that would have occurred if the Applicant had not change the depreciation rates. The Commission allowed the creation of the regulatory liability to make the process of tracking plant values more efficient as requested by the Applicant in the application. The alternative treatment is not a removal of the regulatory liability, but instead a reversion of rate base to that which was previously used for regulatory reporting purposes. Under either scenario, the effect on the overall revenue requirement is equal.

207. For avoidance of doubt and in response to Applicant's statements regarding the benefits of aligning IFRS and regulatory depreciation rates, the Commission wishes to emphasise that:

i. The approval of depreciation rates does not give permission for the Applicant to make future changes in regulatory balances or reported depreciation expense as a result of changing financial reporting depreciation rates without the Commission approval of the rates.

ii. The Commission expects the depreciation rates determined in this case to be used for reporting the Applicant's rate base and net income until a change in depreciation rates and expense is approved by the Commission.

iii. IFRS requirements do not control ratemaking decisions of the Commission, including for depreciation. As noted in the February 25, 2009 decision on depreciation: "As the Regulator, the Commission's main objective with regards to determining an appropriate depreciation policy and associated depreciation rates is to align the recovery of invested capital with the asset's useful life." IFRS rates would not achieve that objective.

ISSUE 10: ENERGY STORAGE DEVICE

Applicant's Position

208. The Applicant stated that the Commission failed to properly consider the evidence submitted by the Applicant concerning the ESD. The Applicant argued that the Commission focused solely on the initial business case that the ESD would provide fuel savings and that the Commission ignored evidence that it provides other services which have evolved over the 4 years the ESD has been in service.

209. The Applicant contended that in addition to fuel savings, the ESD is an integral part of its operations in that it provides frequency regulation, peak shaving, solar firming and ancillary benefits that stabilise the grid and enhance reliability for customers (Motion at P 89). These ancillary services provided by the ESD help support higher penetration and integration of variable renewable

energy sources and these benefits cannot be ignored given the exponential growth in distributed solar PV with its high intermittency.

210. The Applicant further argued that the Commission's 2023 Decision is misaligned with Barbados National Energy Policy (**BNEP**) and the Government's policy on renewable energy. It added that the Decision will not allow the Applicant to recover its full cost and that this effectively results in the taking of the Applicant's property without the opportunity for just and fair recovery.

211. The Applicant stated that the undepreciated ESD value was $11.6 million as of December 31, 2020, and has asked that the undepreciated portion of the 5MW energy storage device and operating expense is recovered in base rates.

Mr. Went's Position

212. Mr. Went submitted that the Applicant failed to provide evidence that the benefits of recovery of ESD costs through the Fuel Clause Adjustment no longer apply. Further, that the Applicant did not provide any evidence that the ESD costs would not be adequately recovered through the Fuel Clause Adjustment. He submitted that the $11.6 million of ESD costs should be removed from rate base and the associated depreciation expense should also be removed from the revenue requirement.

The Commission's Analysis

213. In the 2023 Decision, the Commission determined that the costs related to the ESD will continue to be recovered through the Fuel Clause Adjustment. The Applicant had requested that the ESD undepreciated plant in service and operating expenses be recovered in base rates.

214. The Applicant does not point to any evidence in the case, which demonstrates that the Fuel Clause Adjustment is an inadequate cost recovery mechanism or that the current recovery mechanism will not allow for adequate recovery of

costs. Furthermore, in response to questioning by the Commission during the hearing of the motion, the Applicant acknowledged that recovery of costs is not precluded under the current rate recovery mechanism[51] , the mechanism through which the Applicant initially sought such recovery. Therefore, the Commission finds the Applicant's contention to be unfounded.

215. The Commission rejects the argument that it ignored evidence that the ESD provides benefits beyond fuel-savings and includes other ancillary benefits. The Commission reviewed the evidence on the record and determined the Applicant provided little evidence, beyond brief statements, which substantiate the basis for ancillary benefits to the ratepayers of the ESD. The Applicant did not adequately support and demonstrate that such benefits were being realised.

216. Further, the Applicant stated that the ESD issue was not sufficiently canvassed during the rate review hearing. The Commission is of the view that the Applicant has the responsibility for supporting its base rate Application and all components therein. The Applicant has the obligation to put forward the evidence for the Commission to review and consider.

217. The Commission also rejects the contention that its 2023 Decision is out of alignment with the BNEP. In response to questioning by the Commission during the hearing as to how the current recovery mechanism, is contrary to the BNEP, the Applicant clarified and broadened its contention that the Commission "*called into question the prudence of the ESD*" and "*that there is a need to assess any type of investment going forward where the Commission says you need to provide us reports and further information to allow us to do certain analysis*." A core part of the Commission's statutory obligations and responsibilities is to "protect the interests of consumers by ensuring that service providers supply to the public service that is safe, adequate, efficient and reasonable." (URA section 3(3)(a)). To fulfill that obligation the Commission must, in part, review

[51] See Motion Hearing Day 2, Transcript 385-387 and 401-405

the prudency and reasonableness of the Applicant's fixed assets. Indeed, this is a fundamental aspect inherent in the regulation of utilities.

218. It must be noted that on July 11, 2017, the Applicant applied to the Commission for (i) the recovery of the costs associated with the commissioning of a 5 MW ESD in proportion to the fuel savings benefits it delivers; and (ii) the recovery of the costs of the ESD through the Fuel Clause Adjustment. Approval for the recovery of costs through the Fuel Clause Adjustment was granted on April 13, 2018; thus, a mechanism for such recovery has already been established and recovery has commenced. Moreover, as part of the May 31, 2023 Decision regarding the Applicant's Application to Establish a Clean Energy Transition Rider as a Cost Recovery Mechanism, the Commission made clear that the prudency of capital investment and costs would form part of its determinations under the rider and that evidence will be required as part of the rider Application [52]. As noted by the Commission in that order, the rider may help facilitate timely cost recovery of investments that is deemed necessary to support the energy transition underway in Barbados[53].

ISSUE 11: NOTIONAL CAPITAL STRUCTURE

The Applicant's Position

219. The Applicant contended that the Commission failed to properly consider the evidence submitted by it at Schedule F of the Application concerning the Capital Structure. The Applicant's motion seeks an order that a financial capital structure of equity 65% and debt 35% be used for rate making purposes in the determination of the rate of return.

220. The Applicant argued that the use of an equity 55% and debt 45% for ratemaking purposes without a clear path to achieving an actual capital

[52] See paras. 6.2.2 and 7.1 of the May 31, 2023 Decision

[53] See para. 6.1.1 of the May 31, 2023 Decision

structure that aligns with the ratemaking capital structure, raises an important matter of principle, as such a situation deprives the utility from earning on its actual equity.

221. The Applicant stated that an actual capital structure with 55% equity may be achievable but that it needs to be done in a structured manner to test whether it can be achieved due to the restricted capital market and the options for raising debt. It noted that over an 11-year period it was not able to achieve the 65% equity and 35% debt notional capital structure that the Commission approved in the 2010 Decision, despite years of steady investment and payment of dividends. The Applicant observed that Dr. Villadsen supported the notional equity amount of 65% and highlighted limited access to capital.

222. The Applicant contended that as a result of the difference between the existing actual equity level and the ratemaking equity level determined in the 2023 Decision, it can cost equity investors as much as $7.5 million each year, because they will be earning at the cost of debt rather than cost of equity in respect of the different equity amounts. Additionally, the Applicant argued that, combined with the other elements of the Decision that reduce rate base, the (notional) capital structure further erodes its ability to fully earn on used and useful investments.

Mr. Went's Position

223. Mr. Went supported the Commission's decision to utilise a capital structure of 55% equity and 45% debt for ratemaking purposes. He pointed to several factors, which are generally in keeping with the basis of the Commission's decision.

224. He noted that at the time of the 2010 Decision, the Applicant's proposal for a 65% equity ratio and 35% debt ratio was in line with the Caribbean region's average capital structure. If the Applicant maintained a similar approach in

this present application, the Applicant would have proposed a 55% equity ratio. Further that the gap between the Applicant's actual capital structure at the time of the 2010 Decision and the capital structure adopted in that decision for ratemaking purposes is similar to the gap based on current data of approximately 15%.

225. He observed that it is anticipated that the Applicant will be raising significant funds to support its capital expansion programme, and the regulatory capital structure, with a lower equity level may provide it with more flexibility to use loan financing. He stated that securing additional loans will result in the Applicant not having to pursue its inexplicable dividend practice of paying inordinate dividends on the premise of bringing its capital structure closer to the notional capital structure.

226. Lastly, Mr. Went observed that the Applicant seems to be of the view that it must reduce its capital structure to align with the notional capital structure used for ratemaking purposes. Mr. Went recommended that the Commission makes it abundantly clear in its forthcoming decision and order that this is not required, if only for the avoidance of doubt.

Commission's Analysis

227. In the February 2023 Decision, the Commission granted a notional financial capital structure of equity 55% and debt 45% for ratemaking purposes in the determination of the rate of return. In its Application, the Applicant requested a notional financial capital structure of equity 65% and debt 35%. As noted at paragraph 235 of the 2023 Decision, the Applicant's actual equity ratio was 71%.

228. This matter of principle has been previously addressed by the Commission in its 2010 Decision. In the earlier 2010 Decision, the Commission determined it was appropriate to utilise a notional financial capital structure for ratemaking purposes that was less than the Applicant's actual capital structure at the time. In making the determination of the appropriate cost of capital in that case, the

Commission took care to stress that "it is important to make a distinction between the notional and the target capital structure… [as] the 35/65 mix is not a target that has to be reached at a particular point in time."[54] Indeed, the decision mentioned that this point of clarification was made by the Applicant's witness Mr. Peter Williams. Therefore, to reiterate, the notional capital structure is not a target for the Applicant to reach, as the Applicant claims or infers in paragraph 98 of the Review & Variation Motion.

229. An assessment of the appropriate capital structure to use when determining the rate of return must be undertaken by the Commission to fulfill its duty of arriving at fair and reasonable rates. The Applicant's actual capital structure is at the discretion and responsibility of its management and board and the Commission's regulatory options cannot be constrained by decisions made by the Applicant. Moreover, the Commission's options are not similarly confined to the Applicant's proposed notional capital structure set out in its Application, which provided for a lower notional equity ratio as compared to the Applicant's actual equity ratio. The use of a notional capital structure for ratemaking purposes is an important tool in the regulatory toolbox. The Commission determined, based on its reasoned judgement and analysis as comprehensively discussed in the 2023 Decision, that a rate of return of 7.47%, inclusive of a notional financial capital structure of equity 55% and debt 45%, was fair and reasonable.

PROCEDURAL FAIRNESS/NATURAL JUSTICE

230. One of the Applicant's grounds for review, identified as an error of law, was that:

> "*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*

[54] 2010 Decision at P 101.

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."

231. The ground raises several questions for the Commission, including: (i) natural justice, (ii) procedural fairness, (iii) failure to follow mandatory procedural rules, not only in the URPR but also in the Commission's enabling legislation, (iv) unspecified delay, (v) delay in determining the Application and (vi) admitting late intervention without just cause leading to prejudice. However, no argument followed this ground in the Review & Variation Motion. The rules of natural justice which the Commission allegedly breached were not identified. The way the Commission failed to accord the Applicant procedural fairness was not discussed in the Review & Variation Motion. The Applicant did not state the "mandatory procedural rules" set out in enabling legislation and the URPR which the Commission failed to follow. The facts to support the multiple questions raised in the ground were not set out in the Review & Variation Motion, and therefore, no factual basis to support this ground.

232. The Applicant's Review & Variation Motion took the approach of specifying the ground of review, with the arguments following it, or identifying where in the Review & Variation Motion the arguments are located. This ground did not take that approach. It should be clear from the Review & Variation Motion, what the factors, either of law or facts, or both, which are relied upon to support the ground. This ground, which was not numbered, stood on its own, without the facts and law supporting it, and without identifying where arguments in support of it were located.

233. The Commission reiterates that it accorded the Applicant procedural fairness as discussed above. There are no facts to support the allegation that the Commission breached any of the principles of natural justice. The particulars of delay and person(s) responsible for the delay are absent from the Review &

Variation Motion and affidavit in support. And no evidence is before the Commission of any alleged prejudice suffered by the Applicant.

234. For these reasons, the Commission rejects this ground as unsupported.

ALLEDGED ADVERSE IMPACT

235. The Applicant has made a number of assertions concerning the effect the Commission's 2023 Decision will likely have on its ability to provide a safe and reliable service. It has said, amongst others, that the Commission's 2023 Decision is likely to compromise its ability to maintain its plant and equipment and to raise capital to fund investment or maintain existing assets in such condition to provide service to the public which is adequate, efficient and reasonable. These are serious charges, which indict the Commission with breaching or ignoring its principal responsibilities when setting a rate in this proceeding.

236. The URA and FTCA impose a number of obligations on the Commission. These include the obligation to set rates which are fair and reasonable to both the utility and the customer. In setting rates, the Commission must take into account the matters set out in section 10(b) of the URA, which include the rate of return on the rate base. In establishing principles, the Commission must ensure that an efficient service provider will be able to finance its functions by earning a reasonable return on capital. We have said earlier in this decision that a viable utility benefits the customers. Indeed, the Board in *Nova Scotia Power Inc. (Re)*[55], puts it thus, which we adopt, substituting Nova Scotians for Barbadians and NSPI for the Applicant: "[18] It is in the interests of all Nova Scotians to ensure that NSPI continues to be a stable and financially sound company. **This is a reality which the Board must consider when determining what, if any, rate increase is warranted**." [Emphasis supplied.]

[55] [2023] NSURBD No 12

237. The Commission also has the responsibility of protecting the interest of ratepayers by ensuring that service providers supply to the public service that is safe, adequate, efficient and reasonable. We have said in this decision and before, that the Commission must balance the interest of the utility and consumers. The Board in *Nova Scotia Power Inc. (Re)*[56], puts it thus: "*One of the regulator's tasks is to balance the need for the Utility to recover its reasonable and prudent costs with the need to ensure that ratepayers are charged fair and reasonable rates*."

238. The Commission takes its responsibilities seriously.

239. The Barbados Renewable Energy Association (**BREA**), in its letter dated March 30, 2023, asked the Applicant to provide relevant information of the impact of the Commission's 2023 Decision on it thus: "*At the proposed Hearing, we would also like the Applicant to provide information on the impacts on its current and future operations, its ability to adequately recover its costs, the cost of electricity to consumers and/or any further arguments associated with the following parts of the Commission's Decision…*" We have not been provided with evidence of the negative impacts of our decision on the Applicant's ability to provide a service which is safe and reliable. The Applicant's general allegations regarding its perceived negative impact of our 2023 Decision on the Applicant, without demonstrating the same, is not helpful to the Commission in addressing its concerns.

240. Earlier in this decision we cited *Southern Cal. Edision v Public Utilities Com* as stating that: "*A utility's rates are essentially the sum of two distinct components: its operating expenses and its return on invested capital*." Concerning the first component, the Applicant requested total operating expenses (exclusive of taxes, fuel cost, and depreciation) in its Application of $102,502,237. The Commission approved $96,838,799 in expenses in its final order. Amongst the amount disallowed was $4,150,559 for an increase above 2020 Test Year

[56] Ibid

insurance expense. In effect, the Applicant has been allowed the operating expenses it sought in large measure, with very modest adjustment, outside of the Commission's rejection of the unsupported claim for an increase in insurance expense. The Commission's order allows the Applicant to recover its reasonable and prudent forecast operational expenses.

241. Therefore, the Commission does not expect to see a decrease in service quality due to unavailability of capital. If rates are inadequate to cover maintenance expenses, the utility has the opportunity to demonstrate that it is not recovering a sufficient return and request an adjustment to rates.

242. Moreso, the Commission has operational and financial oversight of the Applicant. While it is the Applicant's responsibility to apply for a rate increase if it deems the rate inadequate to collect sufficient revenue to meet its operating expenses, section 16 of the URA also permits the Commission to initiate a rate review. The Commission, in exercising its oversight of the Applicant, would not permit a situation where the Applicant is not collecting sufficient revenue to meet its operating expenses. In such a situation, if necessary, the Commission itself would initiate a rate review under section 16 of the URA. The Commission would take such a step because a viable utility benefits all Barbadians.

243. All in all, the Commission rejects the argument that its decision jeopardises the Applicant's ability to provide a safe and reliable service. The Applicant has not shown that the Commission has disallowed requested costs and expenses which would affect the Applicant's ability to provide a safe and reliable service.

244. Of the second component, return "of" capital (depreciation expense) and return "on" capital (rate of return or profit), the Applicant has asked the Commission to review its decision on depreciation and capital structure as addressed in this decision. The Commission will not always accept the submissions of the

Applicant or the intervenors. But it does not follow that our rejection of the Applicant's ground will compromise its ability to raise capital.

245. There are also the contentious issues of the unforeseeable and extraordinary gains, which the Applicant decided to pay to its shareholder as dividends. Our decision on these issues have gone against the Applicant. Where we have decided against the Applicant in this proceeding, the Commission has set out its reason for doing so at length, and where relevant, setting out the regulatory principles which have guided this Commission.

246. This Commission is mindful of the overall impact of its orders on the Applicant and has determined its decisions are fair and reasonable and which provide for the Applicant's ability to provide a safe and reliable service

DISPOSAL

247. For the reasons given above, the Commission concludes as follows:

(i) The Commission is satisfied that the Applicant's Review & Variation Motion met the threshold test required by rule 55(1) of the URPR.

(ii) The Commission did not act in excess of or without jurisdiction by directing the Applicant to take certain decisions concerning the SIF. The Commission is satisfied that, in addition to other powers specified in this decision, the obligation imposed on it, or the power given to it by section 10 of the URA to fix rates which are fair and reasonable, gives it jurisdiction to treat to the over-collection of funding for the SIF.

(iii) The Commission finds that on a true construction of regulation 8, it is unlawful for the Applicant or the trustees of the SIF to use money in the SIF to pay dividends to shareholders. The Commission found as a fact, or as a question of mixed fact and law, that the Applicant did not establish itself as the source of the funds which were used to build up the SIF.

(iv) The Commission is of the view that it was impermissible for the Applicant to use money collected in rates from customers for deferred tax liabilities to pay dividends to shareholders.

(v) The Commission is satisfied that the creation of a regulatory liability is "reasonably necessary" or "incidental" to the ratemaking power of the Commission. The Commission is satisfied that it has power to declare a regulatory asset or regulatory liability as part of its rating making power to ensure that rates are fair and reasonable at all times.

(vi) The Commission rejects the argument that it engaged in impermissible retroactive ratemaking by its orders concerning the SIF, deferred income taxes and by selecting a test year and allegedly inappropriately using data from other years on a selective basis or otherwise. The orders made by the Commission do not amount to retroactive ratemaking or they are exceptions to the rule against retroactive ratemaking. In the case of deferred income taxes and the withdrawal from the SIF, the Commission is dealing with unforeseeable and extraordinary over-collections of revenue, which are recognised exceptions to the rule against retroactive ratemaking or are not regarded as retroactive ratemaking.

(vii) The Commission similarly rejects the Applicant's claims for legitimate expectation and or estoppel arising out of alleged representations made by the Commission to the Applicant concerning the SIF and the over-collection for deferred income tax liability.

(viii) The Commission further rejects the Applicant's grounds that the Commission failed to consider or to properly consider the evidence submitted by the Applicant concerning Accumulated Depreciation, the ESD and Schedule F of the Application concerning the Capital Structure.

(ix) The Applicant's request to recover the undepreciated portion of the 5 MW ESD and operating expense in the base rates is denied. The costs related to the ESD will continue to be recovered through the Fuel Clause Adjustment.

(x) The Commission will now formally review the Applicant's Compliance Filing, require amendment as is necessary and thereafter issue the Final Order outlining rates.

ORDER

248. For the reasons given in this decision, the Applicant's Review & Variation Motion is dismissed. The Order of the Commission made on May 12, 2023, at paragraph 33(a) of its Stay Decision, staying specified orders of the Commission's 2023 Decision, is hereby lifted.

249. Interim Rates are to continue to be billed through to the date to be determine in the Final Order. The issue of refunds, if any, will be addressed in the Final Order.

Dated this 20th day of November, 2023

Original signed by
……..
Dr. Donley Carrington
Hearing Chairman

Original signed by
……...
Mr. John Griffith
Commissioner

Original signed by
…….
Ms. Ruan Martinez
Commissioner

Original signed by
…….
Mr. Samuel Wallerson
Commissioner

Original signed by
…….
Dr. Ankie Scott-Joseph
Commissioner