BARBADOS No. 1 0f 2003

THE FAIR TRADING COMMISSION

IN THE MATTER of the Utilities Regulation Act 2000-30 of the Laws of Barbados

AND IN THE MATTER of the Application by Cable & Wireless BARTEL Limited for a represcription of the useful lives of the Assets and Plant in Service

CABLE & WIRELESS BARTEL LIMITED
APPLICANT

OLSON ROBERTSON
INTERVENOR

BEFORE

Mr. Justice Frank King	Chairman
Mrs. Vivian-Anne Gittens	Deputy Chairman
Mr. Floyd H. Phillips	Commissioner

APPEARANCE DATE: 2003 July 9

APPEARANCES

Mr. Alair Shepherd, Q.C. Legal Advisor to the Commission

Mr. Patterson Cheltenham, Q.C.
and Mr. B. Gale, Q.C. for the Applicant

Mr. Olson Robertson in person

REASONS FOR DECISION

1. On 25th October 2002, a panel of Fair Trading Commissioners delivered its Decision in the aforementioned matter and ordered as follows:

2. IT IS HEREBY ORDERED that the useful lives of the Applicant's Assets and Plant in Service to be applied to such assets for the income year 1999/2000 and thereafter is as follows:

Buildings – Account #212-1 – 70 years
Central Office – Account #221-1
CPUs – 7 years
Switching Network – 10 years
Trunk Peripheral Modules – 15 years
Line Peripheral Modules – 15 years
Software – 10 years
Fibre Optics Electronics – 15 years
Central Office Power Systems – 20 years
Station Apparatus -Account #231-1 - 11 years
Drop & Block Wiring – Account # 232-7 – 20 years
Large PABX – Account # 234-1 – 11 years
Aerial Cable – Account #242-1 20 years
Drop & Block Wiring - Account # 232-7 – 20 years.
Computer Equipment -Account # 261-2 – 6 years.
Motor Vehicles - Account # 264-1 – 5 years with a salvage value of 15%
Pole Lines – Account #241 – 20 years
Underground Cables – Account #242-2 – 30 years
Furniture & Office Equipment – Account # 261-1 – 8 years
Station Connection– Account # 232–1 – 5% rate
Work Equipment – Account #264-4 – 5 years

And it is further ordered

3. *(a) With respect to Account # 221-1 Central Office that the Applicant create and maintain seven (7) separate accounts that represent the following functional components of the Central Office:*

CPU
Switching Network
Line Peripheral Modules
Trunk Peripheral Modules
Software
Fibre Optic Electronics
Power Systems

4. *(b) That the Applicant provide a Depreciation Expense Reserve Imbalance Position as presented in Table 5-1 on page 118 of the 1998/99 Study, using the lives prescribed by this Decision. This Table, together with the necessary explanatory notes, must be submitted to the Commission within 45 days of the date of this Decision. On receipt of this information the Panel may, of its own motion, review this asset category."*

5. The Applicant filed a Motion requesting a Review of the following:

(a) Station Apparatus – Account No. 231-1 – with four grounds
(b) Aerial Cable – Account No. 242-1 – with five grounds
(c) The Rejection of Expert Evidence
(d) Buildings - Account No. 212-1 – with fourteen grounds
(e) Drop & Block Wiring – Account No. 232-7 – with two grounds

6. At paragraph 4 of page 8 the Applicant stated:

> *"The relief sought by the Applicant in this review is the relief sought by the Applicant in its Application filed on the 28th December 1999 and amended on the 22nd February 2000 together with all consequent orders and declarations."*

7. It seems, therefore, that the Applicant seeks a review of the entire Decision and Order of the 25th October 2002. The Motion is replete with allegations that the Panel erred in law and/or in fact in reaching its Decision, and in one case, at page 5, paragraph 2, that it had erred in law by breaching its statutory duty in a number of ways.

8. The Commission requested that this matter be disposed of by written submissions as provided for by the Procedural Rule 40.1 made under the Utilities Regulation Act 2000-30. The Applicant complied on 7th July 2003 in a 36 page document.

9. The purpose and value of written submissions are well established and will not be repeated here.

10. The written submissions were a repetition of the grounds put forward in the Motion for Review with explanatory material, references to case law, extracts from the evidence, and comment under various headings.

11. Under section 14 of the Utilities Regulation Act 2000-30 the onus rests on the Applicant to prove its case and this burden applies to these Review proceedings. The Applicant indeed stated on page 19 of its written submissions that:

"While the Applicant concedes that the onus of proof is on the Applicant in relation to its Application,…"

12. This Panel finds itself faced with a difficulty. The Applicant put forward in its Written Submissions, some 20 instances that it "erred in law and/or in fact" in various areas of its Decision, cited law relating to each type of error, indicating areas to which they would apply, but failed throughout to identify specifically any of the areas of its complaints as being an error of law, or an error of fact, or possibly an error of mixed law and fact.

13. The Applicant left it up to the Panel to search the record, its mind and the references it gave, to determine whether the mentioned situations were an error of law, or an error of fact, or, even an error of mixed law and fact.

14. Rule 50.1 of the Utilities Regulation Act 2000-30 Procedural Rules provides:

"Every Notice of Motion made under Rule 49.2 above, in addition to the requirements of Rule 8 shall:

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

(i) error of law or jurisdiction;
(ii) error of fact;"

15. The above rule seems to require that there be separate setting out of errors of law or jurisdictions, from errors of fact, and the Applicant has chosen not to follow this requirement.

16. It is incumbent on the Applicant to clearly identify and specify each and every instance as, this is an error of law, this an error of fact, this is an error of mixed law and fact, (of law and/or fact), and apply the law or facts to each, and not leave it up to the Panel to determine, unaided, which was which, if it erred, if it was an error of law, or an error of fact, or mixed law and fact. The Applicant must satisfy and convince the Panel that it has made specific errors in its Decision.

Station Apparatus – Account No. 231-1

17. Regarding Station Apparatus – Account #231-1 at page 4 of the Written Submissions the Applicant alleges:

> *(1) "Determination of the primary fact is not a matter of law but to make a decision unsupported by any evidence is an error of law". These cases of the Barbados High Court, were adopted by Justice King, in the case of* ***A Wendell McClean v the Barbados Telephone Company Limited No. 1038 of 1994*** *particularly at Pages 5 to 8 of that Judgment."*

18. As the above, it was incorrect to claim that the Commission relied on the finding of the Public Utilities Board that the asset category comprised of 28% telephone sets. No such reliance or importing was made by the Panel. This was merely a comment in support of its statement in paragraph 90 of its Decision *"it would have been helpful to the Panel if similar disaggregation was presented in the 1998/99 study."*

19. At page 5 No. 2 of the Notice of Motion the Applicant states:

(2) "The Commission erred in law by breaching its statutory duty to fix a fair and reasonable rate of depreciation for this account in failing or neglecting to request of the Applicant all of the necessary information for it to make a proper, just and reasonable determination of the Applicant's Application, namely, a disaggregation of telephone sets, exhibits of phones, evidence of costs, explanation of high defect and repair rate. The Applicant will, at the hearing, rely on the established practice of rate hearing applications for the adjudicating body to request all necessary information from the Applicant before making a determination as well as the Commission's own conduct in the hearing of the Applicant's Application of requesting further information (which was provided) in relation to financial information and other accounts including the building Account before making its final determination.

The Applicant will further contend that for the Commission to make adjudication without requesting of the Applicant the further information required by the Commission and giving the Applicant an opportunity to provide such information was unfair to the Applicant: an abuse of process and resulted in an unfair hearing."

20. The Applicant has claimed a breach of statutory duty in a number of failures by the Commission. The allegations are repeated in the written submissions. The Applicant failed in both cases to identify the statute or statutes which placed the relevant duties on the Panel. The Panel is conscious of its responsibilities and duties under the Utilities Regulation Act 2000-30 and the Fair Trading Commission Act 2000-31.

21. A Regulatory Panel is entitled to ask questions of the Applicant to test its case; it is entitled to ask the Applicant to produce further evidence to which it makes reference, or clearly relies to establish its case. It is entitled to ask the Applicant to produce exhibits in support of its case. However,

there must be a limit to this, for the burden of proof always remains on the Applicant. It is not the duty (statutory, by custom or otherwise) for the Panel to think up and to ask every possible question imaginable and to seek production of exhibits and thus take over the Applicant's burden and prove its case for it.

22. The Applicant has the resources to plan and present its case. It seems to us that it is well within the ability of the Applicant to have foreseen the need to lead evidence on the areas of which it complains that the Panel failed (a) to ask questions or (b) to request the production of exhibits or further information.

23. The statement at paragraph 93 of the Decision resulted after the hearing had closed and a study was being made of the evidence prior to writing a Decision. The Panel does not consider that any duty rested on it to have raised questions or sought exhibits at this stage, of the matters which the Applicant ought to have realised could assist its case, e.g., of the disaggregation which was an issue raised in the PUB 1993 Decision and which ought to have put any prudent Applicant on notice to inform the Panel that there was a change in the telephone ratio.

24. There is, we repeat, no duty on the Panel to think of or devise, every possible question or combination of questions to put to the Applicant, nor is there an inexhaustible duty to require the Applicant to produce exhibits. The record will show that the examination of witnesses by the Panel and its counsel was exhaustive, covering diverse technical and relevant areas. The Panel cannot be faulted for not putting questions or seeking presentation of the exhibits that the Applicant now seeks to determine was a breach of statutory or other duty.

25. At paragraph 5, page 19 of the Written Submissions the Applicant alleges at line 5:

> *"The Commission is under a statutory duty to fix fair and reasonable rates which will be to protect the interest of consumers as well as ensuring that service providers (the Applicant) will be able to finance its functions by earning a reasonable return on its capital. See sections 3(2) and 10 (1) of the Utilities Regulation Act 2000-30."*

26. Section 3(2) as is relevant reads:

> *"In establishing the principles referred to in sub-section 1(a) the Commission shall have regard to:*
>
> *(b) ensuring that an efficient service provider will be able to finance its functions by earning a reasonable return on capital.*

27. As to section 10 (1) in Part III of the Utilities Regulation Act 2000-30 dealing with Rates, Rate Making and Principles, it provides, <u>as seems relevant</u>:

> *10. (1) Every rate made by the Commission shall be*
> *(a) fair and reasonable; and*
> *(b) in accordance with the principles established by the Commission under this Act or set out in rules, orders or regulations and shall take into account…*

28. The Panel considered it acted properly in taking into account all its duties under the referenced legislation.

Aerial Cable – Account No. 242 – 1

29. At pages 60 -61 of the record the Applicant's witness, Mr. Layne, admitted that there was omission over the years to record the labour component of retirement in this account which if not recorded would give a much longer life than if this component had been recorded.

> "*The cable is retired but in many cases the labour is not retired so what has happened here in this particular cost centre is that we have under recorded the retirements of our cables and hence the historical analysis done by Dr. Elfar would have indicated a life which would be much longer than what should have been the case had we been accurately recording the retirements.*"

30. The retirements seemed substantial from the totality of the evidence, for aerial cable had been damaged by salt air, replacements by underground cable and replacements as a result of Government's civil works.

31. At page 301, however, Mr. Cochrane said that this omission would have no material effect.

32. The Panel repeats its finding that this contradiction weakened Mr. Layne's evidence.

33. Further, the Applicant contended at page 29, paragraph (b) of the Written Submissions that Dr. Elfar at pages 527 – 528 of the record had supported the view that recording the retiring labour expenses would have substantially lowered the life of this account. In fact, Dr. Elfar at these pages

dealt with the future of fibre cabling and wireless vis-à-vis copper cabling which should be around for the next 10 – 15 years.

34. Historically, high salt air penetration of splicing caused a short life of this account, but current practice of using gel packs around splicing had significantly eliminated this problem. It is therefore reasonable to expect that lives in this account have been prolonged.

35. Road improvements required replacements of cables, some less than five years old. This is an extraordinary factor, not depreciation, and ought not to be treated as such. The Applicant urged this as a material consideration, but the Panel does not agree.

36. It is noteworthy that, at page 68 of the transcripts, Mr. Layne admitted that the future needs alone could not justify a move to a 17 years life for this asset.

37. After due consideration of the Applicant's contentions, the Panel finds no cause to change its Decision on this account.

Expert Evidence

38. The role of an expert was dealt with at paragraphs 11-16 of the Decision of 25th October 2002.

39. The Applicant cites other authorities at pages 31, 33, 34 of its written submissions.

40. Although the Panel accepts these authorities, as well as its own, it remains of the view that expert evidence is to furnish the Court or Tribunal

with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Tribunal to form its own independent judgment. The primary reason for maintaining that experts give opinion evidence and do not decide cases is to ensure that the functions of the Tribunal are not usurped by the witnesses.

41. The purpose of depreciation is to allow amortization of the cost of the asset over the estimated life in which that asset is used and useful in the public service. In the final analysis this must be the judgment of the Tribunal on the totality of the evidence and not that of the expert.

42. In its decision of 25 October 2002, the Panel set out the principles which guided it in setting the assets lives.

43. In his affidavit of 15 November 2001, and at the hearing, Dr. Elfar introduced a method of double weighting which, in the Panel's view, and in Dr. Elfar's explanations, would result in an earlier depreciation life for some assets and a longer life for others than if the method previously used and presented to the Public Utilities Board in its 1993 Decision.

44. He said at pages 386 – 387 of the Record

> *"….But if you weigh it with the money. Then of course the big one, which is the Windsor Lodge, will pull the average, the average remaining life is 6.5 years, for example – I didn't do the mathematics, I'm just giving you an example – instead of using a simple average and say well, yes I give the Company permission that on average the money will be recovered over 9.6 years."*

45. The Panel agrees that old rates are not sacrosanct or immutable to remain current forever to bring hardship and deprivation to public utilities, (Husbands in the 1986 Appeal at pages 6 – 7). It is clear from that Decision that a utility should use the provisions of the Act to secure change.

46. If the Applicant herein now proposes to adopt this method, new to Barbados, it ought first to have sought a change by order of the Public Utilities Board or Fair Trading Commission. No such application has been made. However, this latter aspect apart, Dr. Elfar's methodology was set out in paragraphs 19, 55 – 60 of the 2002 Decision. It is a convoluted approach. Dr. Elfar claimed it is not new, that it had been used by a number of utilities over years and he had taught it in his courses. He did not assist the Panel with its genesis or the names of any of the utilities which used it or of the legislators/regulators which has approved its use.

47. Dr. Elfar claimed that NARUC, the National Association of Regulatory Utility Commissioners had approved his approach, at pages 560 - 561 of the record, page 37 of its handbook "Public Utilities Depreciation Practices (Exhibit 23)". Similarly RL Hodges in "Technology Forecasts for Local Exchange Switching Equipment" at page 37 of that work (Exhibit 25). A study of those Exhibits, 23 and 25, respectively, do support Dr. Elfar in his claim. They both speak of weighting as a depreciation tool, but neither deal with double weighting as put forward by Dr. Elfar.

48. Furthermore, Dr. Elfar in answer to Deputy Chairman, Mrs. Gittens, admitted that double weighting achieved the recovery of money more quickly than being the simple method, see extract at paragraph 44 hereof, that is, in the example he gave to 6.9 years rather than 9.6 years.

49. In the light of all this, and the quality of Dr. Elfar's evidence under examination, the Panel was of the view that his evidence on his methodology could not be accepted.

50. Furthermore, Dr. Elfar, in his affidavit and in his evidence opined that the Panel ought to consider that buildings comprised of more than bricks and mortar, for example, air conditioning, lifts, power systems, cabling and other fixtures and fittings, and these should be taken into account on setting the building life at 50 years.

51. The Intervenor also noted in his response to submissions by Counsel for the Applicant that:

> *"I am prepared to concede Sir, that there is only one expert called. But Sir his evidence must not be swallowed lock stock and barrel without the careful appraisal of it by the Commission.*
> *Your duty is to evaluate the evidence and decide whether you will accept all or any part of his evidence"*

52. The Panel was equally situated like Dr. Elfar in being presented with the same base evidence. The Panel is duty bound to exercise its judgement. This judgement cannot be substituted by that of the expert who proposes a model for capital recovery which hinges on assumptions he made from the same base evidence. In these circumstances the Panel considers it dealt fairly with the expert evidence and maintains its Decision.

Buildings Account No. 212-1

53. The Applicant complains that the Panel failed to take into account renovations, up-grading etc., but these are but normal requirements of buildings ownership. There was no evidence that the main real estate,

Windsor Lodge, will even in the short or long term be retired as totally inappropriate for telecommunications usage and staff comfort. Roofs, floors, partitions, windows were mentioned in sub-paragraph 4 of paragraph 13 on page 14 of the written submissions but these are but normal facets of a building without which the building is but a shell of mere bricks and mortar. They are all so integral that they cannot be isolated and treated differently.

54. When dealing with Windsor Lodge, on examination by the Deputy Chairman, it was clear to the Panel that Windsor Lodge's main buildings were under immediate discussion. The citing of destruction of two hotels was being examined. Mr. Devonish did say with emphasis "yes" to the question "*…are the Cable & Wireless buildings for which you are saying there is no alternative use, are the circumstances the same?"* At that time the existence of two old buildings were not an issue. Comparison was being made to Hilton Hotel and Sandy Lane Hotel. The Panel reiterates that it is inappropriate to compare a five star hotel to buildings used and useful in the public service for the supply of a utility.

55. The Panel noted that the Applicant took a conscious management decision with respect to the main buildings at Windsor Lodge to enter into a sale lease-back buy-back arrangement. The implications for depreciation on buy-back were clear.

56. The Panel is concerned that Dr. Elfar's enthusiasm to recover capital seems contrary to the established purpose of depreciation in a regulatory context.

57. We now address remote buildings. These are small buildings housing equipment, about 20 or so across Barbados. The evidence is that equipment is becoming smaller as time goes by, but that the remotes will be in use for years to come and that none have been retired over the years.

58. There is a claim that the remotes cannot be put to any other telecommunications use, and it is doubtful if anyone would buy them because of size and land area. As long as they continue to be used and useful in the public service, they will continue to be depreciated.

59. Having considered the submissions made by the Applicant, the Panel does not consider that it acted improperly. We hold that the life of buildings remain at 70 years.

Drop and Block Wiring – Account No. 232-7

60. With respect to the Drop and Block Wiring – Account No. 232-7 in paragraph 2 of the Notice of Motion the Applicant states that the Panel

> *"ignored the evidence it presented as to the significant increase in –*
>
> - *new cable project;*
> - *the environment impact on drop and block wiring;*
> - *and a number of other factors.*

61. The Panel noted that the actuarial analysis in the 1998/99 Depreciation Study did not provide any useful historical indication of the life of Drop & Block Wiring. The reason the Applicant gave for this was that there was little recorded retirements. At Page 93 of the record Mr. Layne states:

> *"In material life drop wire is not individually recorded in the asset register. It is a low cost item and extremely difficult to track retirement of drop wire …"*

62. The Panel examined the issues/factors and therefore did not ignore what was presented.

Relief

63. At page 36, paragraph 1 the Applicant seeks this relief:

> "*The net effect of this submission is that the Commission should revisit its approach to every asset category and make all necessary and consequential adjustments to the individual accounts consistent with the "pith and substance" of the Applicant's submission contained in Counsel's address giving appropriate weight to the evidence of the only expert witness, Dr. Elfar".*

64. It seems to us that this submission is without foundation as no complaint was raised in respect of asset categories outside of the five mentioned. The Panel will therefore not disturb its Order as it relates to the remaining asset categories.

Reasons for denying the Application to lead oral evidence at review

65. At page 5 paragraph 4 of the Application to Review at 2(b)1 the Applicant states:

> *"Had the Commission made enquiry of the Applicant it would have been informed that telephone sets comprised 87% of this Account."*

Further, paragraph 3 of Item 2 of page 5 (already extracted at page 5 hereof) indicates an intention to seek leave at the review hearing to provide information in respect of disaggregation. It seems clear that the Applicant intended making two applications for presentation of additional evidence.

66. It is clear from page 4 under Station Apparatus, Account # 231-1 and page 5 paragraph 3 of item 2 of the Motion to Review, (and similarly under the same account at page 18 and paragraph 2 at page 19 of the Written Submissions), that the Applicant intended to apply at the review hearing for leave to lead/provide evidence in respect of:

(a) disaggregation, and

(b) the nature and quality of current telephone sets

67. This would pertain to paragraphs 90 and 93 of the Panels Decision.

68. Procedural Rule 8 made under the Utilities Regulation Act 2000-30 provides how applications of the above nature should be made. It provides:

> ***8. Notice of Motion***
>
> *8.1 Any matter which arises during a proceeding and which requires a decision or order of the Commission shall be brought before the Commission by Notice of Motion.*
>
> *8.2 A Notice of Motion shall be in writing and shall:*
>
> *(a) contain the decision or order sought, the grounds upon which the motion is made, and an indication of any oral or other evidence sought to be presented;*
>
> *(b) be accompanied by a supporting affidavit setting out a clear and concise statement of the facts;*

(c) *be accompanied by any documents that may support the motion; and*

(d) *indicate that a date for the hearing of the motion will be fixed by the Commission.*

8.3 *The party bringing the motion shall file a Notice of Motion and serve it on all parties to the proceeding within 2 business days of the date of filing.*

8.4 *If the Commission decides the motion will be heard, the Commission shall issue a Notice of Hearing of Motion to all parties to the proceeding at least 2 days before the motion is scheduled to be heard.*

8.5 *A person who wishes to respond to the Notice of Motion, or to reply to a response, may file and serve, at least 5 business days before the motion is scheduled to be heard, a written response or reply, an indication of any oral evidence sought to be presented, and any document which may support the response or reply.*

8.6 *In hearing a motion the Commission may permit oral or other evidence in addition to the supporting documents accompanying the notice, response or reply.*

8.7 *Despite this Rule, the Commission may permit an oral motion to be made at an oral hearing and it shall be disposed of in accordance with such procedures as the Commission may order.*

69. The Applicant failed to comply with every provision which places an obligation on it. Reference to an Application in its Application to Review does not comply with the Rule. In particular there is no Affidavit of the facts, no service on the Intervenor or supporting documents or exhibits.

70. In our opinion Rule 8.7 does not assist the Applicant as the hearing of the Application to review was not an oral hearing but one in which the limitations of a written hearing applied.

71. Furthermore, in **R. v Banks [1961] 1 WRL 1484** (See Phipson on at Evidence 15th Edition 2000 at 292) the following principles were laid down for admitting evidence at an appeal, or Review

(1) It must be evidence which was not available at the trial

(2) It must be relevant to the issues

(3) It must be credible evidence in the sense that it is well capable of belief

72. It is noteworthy too that there must be a reasonable explanation for failure to adduce the evidence at trial (represcription hearing) and it would be expected to find this in the supporting Affidavit.

73. The question arose, could the evidence sought to be admitted fall into the category of evidence not available at the hearing? The Panel thought not, for the Applicant was always in full possession of it at all times.

Secondly, relevance should have been dealt with in the Affidavit of support. Thirdly, the Intervenor is an important statutory person in these proceedings: entitled to service of all proceedings and he would have been denied service and the opportunity to respond.

74. In our opinion the failure to comply with Rule 8 was fatal to the Application and the principles in **R v Banks** could be considered as supportive of that position.

75. In these circumstances the Panel dismissed the Application to introduce additional evidence.

Reasons for Dismissal of Motion for Review

76. The Application is dismissed for the following reasons

a. Failure to identify specifically the errors of law and the errors of fact, and
b. The reasons given under the accounts identified for review

Costs

77. The Applicant sought costs to be amortised and, if necessary, to have an opportunity to be heard.

78. The Panel desires to hear the Applicant on this matter at a date to be agreed.

Dated this 7th day of November 2003

.....	.....
Justice Frank King	Mrs. Vivian-Anne Gittens
Chairman	Deputy Chairman

.....

Mr. Floyd H. Philips

Commissioner