



## FAIR TRADING COMMISSION

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**IN THE MATTER OF  
THE APPLICATION FOR A REVIEW OF THE DECISION  
OF THE FAIR TRADING COMMISSION  
DATED THE 14<sup>TH</sup> OF FEBRUARY, 2007**

**filed by**

**THE BARBADOS CONSUMER RESEARCH ORGANISATION**

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### **DECISION AND ORDER**

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**BEFORE:**

Sir Neville V. Nicholls  
Chairman

Professor Andrew Downes  
Commissioner

Mr. Gregory Hazzard  
Commissioner

**NO. 2 OF 2007**

## **PART ONE - BACKGROUND**

### **The Original Application**

1. Cable & Wireless (Barbados) Limited (C&W) submitted an application to the Fair Trading Commission “Commission” on August 5, 2003 seeking:
  - a) an adjustment to the domestic line rate for business and residential customers;
  - b) the introduction of flat rate charging plans and usage based rates for domestic calls made from fixed lines;
  - c) such further or other relief not inconsistent with the above as the Commission sees fit.
2. C&W in its application proposed revised rates for residential and business users of the domestic service. C&W stated that should the proposed domestic rates be approved, C&W intended to adjust international direct dialed (IDD) rates below the current maximum rates.
3. At the conclusion of the rate hearing, the Commission denied C&W's application and ordered that the existing rates for the domestic telephone service should prevail and that the Commission would hear the parties on costs at a date to be fixed.
4. Cable & Wireless (Barbados) Limited (C&W) applied for a Motion for Review that was dismissed by order dated July 20, 2004 and it was further ordered that the Commission would hear the parties on costs at a later date.
5. The Commission prepared and developed Draft Cost Assessment Guidelines (Guidelines) to ensure transparency in the Cost Assessment

process prior to convening a costs hearing. The Commission thereafter sought to engage in a public consultation process that invited comments and suggestions on the Guidelines that would guide the award of costs to intervenors.

6. In reviewing the written comments from the Office of the Public Counsel, The Barbados Light & Power Ltd., C&W, Mr. Alvin Cummins, Mr. David A. Commissiong on behalf of Mr. Alvin Thorpe and Mr. Malcolm Gibbs-Taitt on behalf of BARCRO both C&W and the Public Counsel questioned the legality of intervenors being awarded any such costs other than out-of-pocket expenses.
7. The Commission determined that a case should be stated pursuant to Section 41 of the Fair Trading Commission Act, CAP. 326B (Act) and Order 57 Rule 4 of the Rules of the Supreme Court for the opinion of the high court in an action interfiled (**The Public Counsel v. Fair Trading Commission**) and heard by the Honourable Mr. Justice Christopher Blackman. A decision was given in the matter on September 28, 2006 in which the court gave the opinion that only intervenors who were represented by Attorneys-at-Law were entitled to costs on a party and party basis, whereas intervenors who were not legally represented were entitled to out-of-pocket expenses only.
8. Pursuant to section 46 of the Fair Trading Commission Act, the Commission convened a hearing to determine how it would exercise its discretion in relation to an order for the costs of the 2003 rate adjustment application by C&W and the eligibility of persons participating therein to recover such costs. Applicants who were desirous of making claims were required to make written submissions which would be supplemented by oral submissions at the actual hearing. Written submissions should set out why the parties in question should be allowed to recover such costs in the

form of expenses or on a party and party basis where the intervenor was represented by legal counsel. Submissions should also cover who should bear those costs.

9. The costs hearing was fixed for February 14, 2007 and oral submissions were made by eight (8) intervenors and/or their representatives as well as legal counsel for C&W. The Commission heard oral arguments from Mr. Michael Carrington for Mr. Leroy McClean, Mr. Alvin Cummins, Mr. Hallam Hope for CARITEL, Mr. Olson Robertson, Mr. Malcolm Gibbs-Taitt for Barbados Consumer Research Organisation Inc. (BARCRO), Mr. Alvin Thorpe, Mr. Barry Carrington, Office of Public Counsel for the Council for the Disabled, Mr. Noel Smith and Mr. Patterson Cheltenham, Q.C. for Cable & Wireless (Barbados) Limited.

### **Original Decision**

10. The Commission issued its costs hearing decision on May 2, 2007 and decided and ordered that all parties should bear their own costs of the rate adjustment hearing including the costs of the costs hearing.

### **Filing of the Motion for Review**

11. Mr. Malcolm Gibbs-Taitt, on behalf of the Barbados Consumer Research Organisation Inc. (BARCRO) filed a NOTICE of Motion for Review pursuant to Section 36 of the Fair Trading Commission Act, CAP. 326B and Rule 53 of the Utilities Regulation (Procedural) Rules (Rules), S.I. 104 of 2003 on May 16, 2007.

12. Rule 53 of the Rules states, *inter alia*, that:

*"(1) the Commission may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation, misstatement, ambiguity, technical error or other similar error made in its decision or order.*

*(2) Any party to a proceeding may by motion request a review of a final decision or order."*

#### **Order requested by BARCRO**

13. The relief sought by BARCRO in its Notice of Motion for Review is that the Commission should, in whole or in part, vary or set aside its decision and additionally that all costs in the matter be borne by C&W.

#### **Written Hearing Review**

14. The Commission decided that (a) the determination of the preliminary issue of whether the matter should be reviewed and (b) the consideration of the review on the merits i.e. to assess whether the costs hearing decision should be varied or rescinded, would be by means of a written hearing pursuant to Rule 37 (1) of the Rules.

15. On May 30 and June 14, 2007 BARCRO filed written submissions with the Commission. These submissions were filed on all of the parties who participated in the costs hearing and they were given twenty-one (21) calendar days to respond to BARCRO's submissions. Legal Counsel for the Respondent (C&W) and the Public Counsel were the only two parties who filed written submissions in response to BARCRO's Motion for Review. Thereafter, BARCRO filed a written submission of reply on August 2, 2007.

## **Duty of Commission**

16. In hearings the Commission sits as an adjudicative panel and is required by legislation and principles of natural justice to make a determination based on the evidence put before it. By virtue of section 36 of the Act the Commission has jurisdiction on an application from a party or on its own motion to review, vary or rescind any decision given by it. The decision to allow a review is not taken lightly and in instances when the Commission allows a review it is prescribed by the Rules. The Commission's discretion to review and vary or rescind a decision or order is applied with a view to ensuring that there is consistency and predictability in the Commission's decision-making process.
17. A review is not a vehicle for applicants or intervenors to re-argue their submissions made at an earlier hearing simply because they do not agree with the decision. Under the Act, the authority of the Commission to allow a review is discretionary. An applicant must first demonstrate, on a *prima facie* basis, the existence of the permissible grounds of Review, this is referred to as the threshold question.
18. Rule 55 (1) of the Rules states that:

*"(1) 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."*
19. In accordance with Rule 55 (3) the Commission decided that it would combine the consideration of the threshold question and a review on the merits and would hold a consolidated hearing. As such, legal counsel for C&W and the Public Counsel in their written submissions addressed both

- (a) the threshold question and (b) the review on the merits to determine whether the decision should be varied or rescinded.
20. To discharge its first task vis-à-vis whether a review should be granted the Commission considered the Motion for Review and the complete written submissions and presentations received from all parties to the proceedings.
- The Threshold Question**
21. Unlike legal counsel for C&W and the Public Counsel, BARCRO did not specifically deal with the issue of the threshold question. However, in accordance with Rule 55 of the Rules, the Commission examined BARCRO's full written submissions when determining the threshold question of whether the decision of February 14, 2007 should be reviewed and to determine whether the decision and order should be varied or rescinded, thus a review on the merits.
22. BARCRO's written submissions contained the reasons why it believed that the decision should be reviewed, which are hereinafter examined in Parts three and four.
23. Legal Counsel for C&W and the Public Counsel in their submissions expounded on the issue of the threshold question. Both submitted that BARCRO is required to show on a *prima facie* basis that an error of law or fact exists by presenting specific examples or instances of error by reference to the evidence. It is their view that BARCRO has not presented to the Commission any facts which would support the existence of an error of fact or of law.
24. The Commission approached the threshold question by considering whether BARCRO has established on a *prima facie* basis that an error of fact

or law exists within the decision. The Commission considers that BARCRO must place before it specific references to aspects of its decision to demonstrate error of law or error of fact within the decision.

25. According to Black's Law Dictionary, a *prima facie* case is:
  - (a) the establishment of a legally required rebuttable presumption;
  - (b) a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favour.
26. The Commission in this hearing was in a unique position because of the utilisation of a written hearing and a consolidated process to have before it all the submissions that would have been presented to support a review on the merits. With this body of arguments before it, the Commission took the opportunity to examine the allegations of error and all the grounds submitted in support of the Motion for Review, to first determine whether BARCRO produced enough evidence to infer the existence of a ground for review.

## **PART TWO – STATUTORY GROUNDS FOR MOTION**

### **Onus of Proof**

27. Under Section 14 of the Utilities Regulation Act, CAP. 282 the onus rests on BARCRO to prove its case and this burden applies to this Motion for Review proceedings.

### **Evidence before the Commission**

28. Rule 54 (1) of the Rules states that BARCRO as the Applicant must comply with Rule 8 of the Rules and file an Affidavit setting out the relevant facts it relies on in support of its Motion. As such BARCRO has filed two Affidavits in this hearing dated May 30 and June 4, 2007 setting out the facts on which it relies in support of its Motion for Review.
29. Additionally, in its written submissions, BARCRO set out twenty-five (25) grounds on which it would rely in proving its Motion for Review.
30. Further, in its written submissions of reply filed on August 2, 2007 BARCRO requested leave to submit further evidence in support of its application for a review. This additional evidence was submitted on August 23, 2007.
31. Legal Counsel for C&W and the Public Counsel were both of the view that BARCRO did not present any evidence which met the statutory grounds for review. This was conveyed in their written submissions in response to BARCRO's Motion.

## **Grounds for Review permitted by the Rules**

32. Rule 54 of the Rules sets out specific grounds on which the Commission can review a decision made in a utility regulation proceeding.

33. These are enumerated at Rule 54 as follows:

*"54 (1) 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:*
- i) error of law or jurisdiction;*
  - ii) error of fact;*
  - iii) a change of circumstances;*
  - iv) new facts that have arisen;*
  - v) facts that were not previously placed in evidence in the proceedings and could not have been discovered by reasonable diligence at the time;*
  - vi) an important matter of principle that has been raised by the order or decision."*

## **PART THREE – POSITION OF BARCRO**

34. BARCRO in its Notice of Motion for Review, relied on the following grounds:

- i) error of fact; and*
- ii) error of law*

## **ERROR OF FACT**

35. Where a decision made by a tribunal is based on a misinterpretation, misunderstanding or ignorance of an established and relevant fact or where a tribunal acts upon an incorrect basis of fact in making its decision, an aggrieved party is entitled to a review of the decision.
36. A reviewable error of fact must be a mistake or misunderstanding and must go to the root of the decision and must have played a substantial role in the outcome of that decision. The mistake must be logically connected and relevant to the core of the decision to sufficiently justify a request for review. An irrelevant factual mistake does not allow a party to a proceeding to successfully challenge every favourable decision made by the Commission.
37. The Commission, a statutory body, in the exercise of its functions may evaluate evidence and reach decisions and conclusions. The Court will not ordinarily interfere with this evaluation of evidence or conclusions of fact reached by a public body such as the Commission unless the Commission exercises its statutory powers on the basis of a mistaken view of the relevant fact. Neither will the Court interfere where there was no evidence available to the decision maker on which, properly directing himself as to the law, the body could reasonably have formed the view that:
  - i) A fact is found unsatisfactory by reason of some material inconsistency or inaccuracy.
  - ii) The Commission failed to take into account admitted or proven evidence or omitted to consider relevant matters.

38. Further, when a party alleges an error of fact, this error must occur in relation to a primary or central question which the tribunal has the power to decide conclusively by itself or a question of fact which goes to the merits of the case.

### **ERROR OF LAW**

39. When an Applicant can establish that the Commission has made a material error of law when making its decision, then a review and variation of the decision would be justified. An error of law occurs where a tribunal has an obligation or duty to take something into account or determine a question of law and either fails to consider it at all or makes some mistake when interpreting the law or determining the question.
40. In order for it to be determined that the Commission has erred in law the error must go to the root of the decision and must therefore affect the actual decision itself.
41. There is a general presumption that a public body, such as the Commission, has no authority, jurisdiction or power to commit an error of law, thus where a body errs in law in reaching a decision or making an order, the court has the jurisdiction to squash that decision or order.
42. Even in circumstances where the court finds that an error of law has been made the court may exercise its discretion not to quash the decision where in the opinion of the court it would not have materially affected the decision.
43. An error of law may occur where the Commission:
- i) misinterprets the statute, a legal document or a rule of common law;
  - ii) makes a decision on the basis of secondary legislation or any other

- act or order which is itself *ultra vires*;
- iii) fails to take relevant considerations into account;
  - iv) admits inadmissible evidence;
  - v) rejects admissible and relevant evidence;
  - vi) makes a decision on no evidence;
  - vii) fails to follow the proper procedure required by the law;
  - viii) fails to fulfil an express or implied duty to give reason;
  - ix) otherwise abuses its power;
44. BARCRO's arguments were set out in written submissions comprising fourteen (14) pages. The Commission finds that a great deal of repetition of argument has occurred and therefore sets out the arguments presented by BARCRO in summary form as follows:
- That the Commission in whole or part, varies or set aside its decision;
  - That all costs in this matter be borne;
  - That generally the Commission erred in fact and in law, in that it came to the wrong decision, when it misdirected itself as to the facts and ignored the relevant law;
  - That the Commission erred in fact, as a result of the delay between the date that it ordered on January 17, 2005 that the intervenors would be heard on cost and the actual costs hearing which was held on February 14, 2007;
  - That the Commission erred in fact and in law when it refused to consider all the parties to the matter as the Commission stated at the costs hearing that they would only hear submissions from intervenors who were not legally represented and entitled to out-of-pocket

expenses and not hear persons who were represented by an Attorney-at-Law;

- That the Commission erred in fact since the record states that there were seventeen (17) intervenors and at other times it states that there were eleven (11) intervenors;
- That the Commission erred in fact and law by seeking to apply the Costs Assessment Guidelines to the hearing even though the Guidelines came into effect after the rate hearing;
- That the Commission ought to have put a system in place to allow for costs to be paid to intervenors as they would an Attorney-at-Law; BARCRO argued that if this was done, the Commission would have the discretion to make an award of costs to the intervenors on this basis;
- That the decision made by the Commission in the costs hearing is contrary to the decision of the high court in the case stated before the Honourable Mr. Justice Christopher Blackman Suit No. 373 of 2006 to determine whether intervenors could be paid on a party and party basis, in the same manner as a lawyer;
- That the Commission erred in fact and in law at paragraph 27 of the costs hearing decision when the decision refused to acknowledge the cost claims of Mr. Alvin Thorpe as these relate to him having an Attorney-at-Law;
- That the Commission erred in fact and in law when it adopted the suggestions of the Public Counsel that a costs award cumulatively to

the intervenors may result in higher telephone rates that may place a heavy unnecessary burden on consumers;

- That the Commission erred in fact by failing to adopt the advice of legal counsel for C&W who argued that the Commission should have convened an issues conference which would have streamlined the operations of the hearing;
- That the Commission erred in fact by stating that the intervenors should have better utilised the Office of Public Counsel since Public Counsel himself made the decision not to assist intervenors as mandated by law;
- That the Commission erred in fact and in law at paragraphs 68 to 78 of the costs hearing decision by not accepting the point that during the 1982 Rate Hearing of the Barbados Light & Power Co. Ltd., that the objectors, Wendell A. McClean and Mr. Miles Rothwell were granted costs. This created a legal precedent. Moreover, the Court of Appeal in Suit No. 25 of 2003 ordered that costs in the sum of \$6,000.00 be paid by C&W to the intervenors including BARCRO. This further decision of the Court of Appeal extended the autonomy of awarding costs to objectors or intervenors long after the PUB had made the precedent in the 1982 rate hearing;
- That the Commission erred in fact and in law by failing to follow a purposeful interpretation of legislation by looking at much extraneous material that bears upon the background against which the legislation was enacted;
- That the Commission erred in fact, at paragraph 107 to 110 of the costs hearing decision since it ignored certain evidence of a written and

verbal kind as the records would show that some of the intervenors had legal and other professional assistance and yet the costs hearing dealt with parties entitled to out of pocket expenses only;

- That the Commission erred in fact at paragraph 109 (c) of the costs hearing decision when it stated that the rate adjustment application by C&W was not frivolous and vexatious even though it lacked sufficient evidence to substantiate a rate increase/change;
- That the Commission erred in fact, at paragraph 109 (d) of the costs hearing decision in suggesting that there was a paucity of argument as to the reasons why the Commission should exercise its discretion to award costs. BARCRO suggests that this argument goes against the praise that the Commission gave to intervenors at the end of the 2003 C&W rate hearing;
- That the Commission erred in fact and in law at paragraph 110 of the costs hearing decision because it did not speak to justice, equity or fair play;
- That the review proceedings are a re-hearing of the application and a revisiting of the evidence already presented and forms part of the existing record already before the Commission.

#### **PART FOUR – REASONS FOR DECISION**

##### **BARCRO's Grounds for a Review**

45. BARCRO argued in its written submissions that some twenty-five (25) instances exist that would show that the Commission “erred in law and/or fact” in various areas of the costs hearing decision. BARCRO cited an analysis

in relation to each type of error alleged and in many instances referred to some sections of previous transcripts and decisions of the Public Utilities Board (PUB) and the Commission.

46. However, in large part, BARCRO has failed throughout to identify specifically or otherwise any areas of evidence presented at the costs hearing and has also failed to demonstrate to the Commission where it fell into an error of law or an error of fact or possibly an error of mixed law and fact.
47. BARCRO left it up to the Commission to search the record and the references it gave to determine whether any evidence exists that would demonstrate a misinterpretation and that would show, in the mentioned situations, where an error of law and/or error of fact occurred. BARCRO in its Motion for Review and written submissions advances arguments in support of its requests for review. However, several of the grounds presented by BARCRO were unclear and contained repetition of submissions.
48. The Commission will now deal with these grounds seriatim. Where common or related issues are raised, for convenience and clarity, the Commission has sought to address them as a group.

#### **GROUND ADVANCED FOR THE MOTION FOR REVIEW**

##### **GROUND 1 AND 14**

49. BARCRO argued at Ground 1 that the Commission erred in fact by not using the opportunity given to it during the 2003 rate hearing when Mr. David Shorey, first witness for Cable & Wireless (Barbados) Limited was asked by Mr. Malcolm Gibbs-Taitt, intervenor, on behalf of BARCRO whether he had factored in the costs of intervenor funding into the proposed rates being sought.

50. BARCRO also argued later in its submissions at Ground 14 that another intervenor, Mr. Alvin Cummins also raised the point of intervenor funding and stated that in other jurisdictions it is customary to put certain procedures in place to accommodate this.
51. BARCRO has not identified the specific occurrence of an error of fact or law as alleged and merely repeats Mr. Alvin Cummins' submissions at Ground 14.
52. The Commission is of the view that these grounds are irrelevant to the issues that were before the Commission at the costs hearing. These grounds do not support BARCRO's case as to why a review of the costs hearing decision should be undertaken as they do not show or identify how the Commission erred in fact in making its decision to exercise its discretion not to award costs to parties.
53. Further, the issue being raised by BARCRO in relation to intervenor funding is one that would be within the purview of the policy makers to consider if they believe it necessary. No provisions in the present legislative framework of the Fair Trading Commission provide for intervenor funding. Neither is it the role or mandate of the Commission to develop this issue of intervenor funding. BARCRO's submissions on these grounds disregarded the totality of the evidence presented at the costs hearing.

**BARCRO has not established on a *prima facie* basis that grounds for review exist. The Commission therefore rejects these grounds for review.**

## **GROUND 2**

54. BARCRO argued that the Commission erred in fact and in law and it came to the wrong decision when it misdirected itself as to the facts and ignored the relevant law, the Administrative Justice Act, CAP. 109B (AJA).
55. The Commission is of the view that Ground 2 is also irrelevant to the issue that is presently before the Commission.
56. Again, BARCRO has failed to identify specifically the part in the decision where it believes the Commission has erred in fact and/or in law.
57. Ground 2, presently drafted is very wide and vague. It mentions the AJA, but BARCRO does not identify which provision of the AJA it believes that the Commission ignored, contravened or misrepresented in making its decision. Further, BARCRO does not state how it believes that the AJA is relevant to the outcome of the costs hearing decision.
58. In addition, the analysis outlined by BARCRO at this ground is very general and does not support the legal basis on which it is relying for claiming error of law and is for the most part, irrelevant to this exercise of a review.

**BARCRO has not identified the specific occurrence of an error of fact or law and has not established on a *prima facie* basis that a ground for review exist. The Commission therefore rejects this ground for review.**

### **GROUNDS 3, 4 AND 5**

59. Under these grounds, BARCRO contends that the Commission erred in fact by delaying the execution of the costs hearing.
60. These grounds as set out by BARCRO are similar and all refer to the decision of the Commission to hold the costs hearing proceedings at the allotted time on February 14, 2007. These are not errors of fact that went to the core or outcome of the Commission's costs hearing decision and therefore cannot be relied upon to support the Motion for Review. These grounds only identify that BARCRO is complaining about the delay of the Commission to conduct a costs hearing. It does not affect the Commission's decision to exercise its discretion not to award costs to the parties to the rate hearing or costs hearing.

**These grounds are also rejected by the Commission.**

### **GROUND 6**

61. BARCRO contends at this ground that the Commission erred in fact and in law when it issued a statement at the beginning of the costs hearing seeking to exclude intervenors that were represented by Attorneys-at-Law.
62. It is the Commission's view that the abovementioned statement and the costs hearing did not exclude intervenors who were represented by Attorneys-at-Law from applying for costs. The Commission's statement merely cautioned those intervenors who were not represented by Attorneys-at-Law that their submissions and any claims for costs should be limited to out-of-pocket expenses only. This was the Commission's way of reminding the parties to the costs hearing of the decision given by the

Honourable Justice Mr. Christopher Blackman in the case stated decision  
Suit No. 373 of 2006.

63. Throughout the exercise the Commission did not preclude any intervenor represented by Attorneys-at-Law from applying for costs.
64. An example of this is Mr. Michael Carrington on behalf of Mr. Leroy McClean who made an application to the Commission and claimed costs in his initial submissions prior to the costs hearing. The fact still remains that the Commission was not minded to exercise its discretion to award costs whether or not intervenors were represented by Attorneys-at-Law.
65. Finally, it must be noted that BARCRO also claims at this Ground that its organisation was represented by Senator Gregory Nicholls and Mr. Therold Fields, Attorneys-at-Law throughout the 2003 C&W rate hearing. The Commission finds that there is no evidence which shows that Senator Gregory Nicholls continued to represent BARCRO after the first procedural conference and into the rate hearing and that Mr. Therold Fields only appeared on behalf of BARCRO during the case stated and not at any time during the substantive rate hearing or costs hearing.

**The Commission is of the view that BARCRO has not established on a *prima facie* basis that an error of law or fact was made when the Commission directed parties to be guided by the decision given by the Honourable Mr. Justice Christopher Blackman in the case stated decision Suit No. 373 of 2006. The Commission therefore rejects this as a ground for review.**

## GROUND 7

66. BARCRO states that at paragraph 2 of the costs hearing decision that the Commission may have erred in fact since the record speaks to there being seventeen (17) intervenors and at other times it mentions there being eleven (11) intervenors. BARCRO argues that it would be better if the Commission had concentrated on those intervenors who were represented by Attorneys-at-Law and other professional personnel.
67. This ground misstates the Commission at paragraph 2 of its decision. At paragraph 2 of the decision, the Commission stated that twelve (12) intervenors were not represented by legal counsel.
68. In any event, no finding in the costs decision was made by the Commission on this fact. The number of intervenors not represented by legal counsel does not go to the root of the decision of the Commission to exercise its discretion not to award costs and would not change the outcome of the decision.

**This is a frivolous ground that does not properly support the Motion for Review and is therefore rejected by the Commission.**

## GROUNDS 8, 9 AND 10

69. In these grounds, BARCRO deals with the retroactivity of the Costs Assessment Guidelines. BARCRO argues that the Commission erred in fact and in law at paragraph 6 of the costs hearing decision when it failed to consider the laws of the high court. BARCRO also argues that no Guidelines were in place preceding the 2003 C&W rate hearing and this therefore means that the new regulations have no bearing on this costs hearing.

70. However, this issue was specifically addressed in the costs hearing decision whereby the Commission stated that the Cost Assessment Guidelines were developed to give transparency to the process and it was open to the Commission to apply the same principles that were set out in the Guidelines, even without developing and issuing the Guidelines.

**In Grounds 8, 9 and 10, no actual specific error of fact or law was identified. The Commission therefore rejects these grounds for review.**

#### **GROUND 11**

71. In Ground 11, no contention of an error of either fact or law was made by BARCRO. BARCRO states that the Commission at paragraph 10 of the costs hearing decision could only act *ultra vires* if it allowed for costs to be paid to intervenors in the same way as Attorneys-at-Law because of the legal meaning of costs.
72. In this ground, it must be noted that BARCRO is actually reinforcing a vital point that the Commission has made from inception, that is, if the Commission were to award costs to intervenors not represented by Counsel in the same way it would be acting *ultra vires*.
73. Secondly it is noted that on a review of the costs hearing decision Ground 11 has no actual bearing on paragraph 10 of the Decision as paragraph 10 merely sets out a portion of the background leading up to the case stated before the High Court.

**The Commission therefore rejects this as a ground for review.**

## **GROUND 12**

74. BARCRO argues that the Commission at paragraphs 14 and 15 of the Costs hearing decision erred in fact and in law as the Commission's decision is contrary to the case stated opinion it sought but chose to ignore.
75. It is noted that BARCRO's Ground 12 has no bearing on paragraphs 14 and 15 of the costs hearing decision.
76. Nothing in the costs hearing decision turned on the facts as stated in paragraphs 14 and 15 of the costs decision which merely set out the fact that the case stated was heard before the Honourable Mr. Justice Blackman on May 10, 11 and 12, 2006. Further BARCRO does not state or show how the Commission acted contrary to the decision handed down by the Honourable Mr. Justice Blackman in the case stated Suit No. 373 of 2006.
77. In addition, it is the Commission's finding that BARCRO's analysis in relation to this ground which refers to Order 62 Rule 45 of the Rules of the Supreme Court is not relevant to this matter.

**The Commission therefore rejects this as a ground for review as it finds that this point is irrelevant to the issues raised in the costs hearing.**

## **GROUND 13**

78. BARCRO argued that the Commission erred in fact at paragraphs 16 and 29 of the costs hearing decision where Mr. Michael Carrington, Attorney-at-Law for Mr. Leroy McClean made the point that Mr. McClean is eligible for costs fit for one counsel as well as disbursements based on certain grounds.

79. This ground is vague and general, and does not assert how the Commission erred in fact.
80. The Commission finds that no error in fact has been demonstrated here. The Commission, at paragraphs 16 and 29, was merely summarising the submissions made by Mr. Michael Carrington on behalf of Mr. Leroy McClean.
81. Again, it must be noted that the Commission did not at any point indicate to Mr. Michael Carrington on behalf of Mr. Leroy McClean that he was not entitled to apply for costs for Mr. McClean. Further, Mr. Carrington, on behalf of Mr. Leroy McClean, withdrew his application for costs on his client's own initiative and with no intervention by the Commission.

**The Commission therefore rejects this as a ground for review as it believes that no error of fact has been identified here.**

#### **GROUND 15**

82. BARCRO alleges that the Commission erred in fact and in law at paragraph 27 of the costs hearing decision when the Commission refused to acknowledge the costs claims of Mr. Alvin Thorpe as they relate to his having an Attorney-at-Law.
83. At this ground, BARCRO makes reference to Mr. Thorpe's submissions to the Commission. Contrary to BARCRO's arguments, during the rate hearing, Mr. Thorpe did not identify that an Attorney-at-Law was acting on his behalf, nor did an Attorney-at-Law ever appear before the Commission on his behalf or submitted documents on his behalf. Further, the Commission determined that Mr. Alvin Thorpe did not put forward

any compelling arguments to the Commission at the costs hearing to show cause as to why he should be awarded costs.

84. This notwithstanding, the Commission was not minded to exercise its discretion to award costs to parties.

**The Commission rejects this as a ground for review.**

#### **GROUND 16**

85. BARCRO makes specific reference to paragraphs 28 and 58 of the decision and claims that the Commission erred in fact and in law regarding the position of the Public Counsel. At paragraphs 28 and 58, the Commission was merely summarising the Public Counsel's submissions.
86. The Commission simply restated the Public Counsel's submissions and did not single out any of his arguments as submitted, in making its findings in the costs hearing decision. Neither did the Commission rely on the Public Counsel's submission as a basis for exercising its discretion not to award costs.
87. Further, the Commission finds that BARCRO's analysis in relation to this ground which is intended to support Ground 16 is irrelevant to the issues of the costs hearing and this Motion for Review.

**The Commission therefore rejects this as a ground for review as it finds that it is irrelevant to the issues raised during the Costs Hearing and this Motion for Review.**

## **GROUND 17**

88. BARCRO claims that the Commission erred in fact and in law at paragraph 43 of the costs hearing decision by assuming that the costs hearing included those intervenors who were represented by Attorneys-at-Law, Accountants and Engineers.
89. It is re-emphasised that the Commission did not preclude any intervenor represented by an Attorney-at-Law from applying for legal costs, e.g. Mr. Michael Carrington on behalf of Mr. Leroy McClean.
90. The Commission finds that this ground also contradicts ground 6. The Commission finds that BARCRO could demonstrate no error in fact and was also unable to specifically show how the Commission misinterpreted or misapplied the law.

**As such, the Commission rejects this as a ground for review.**

## **GROUND 18**

91. BARCRO argues that the Commission erred in fact at paragraphs 59 to 67 of the costs hearing decision by ignoring the “good advice” of Mr. Patterson Cheltenham, Q.C. by not utilizing an issues conference during the 2003 C&W rate hearing. The Commission determines that mechanisms such as issues conferences and technical conferences are convened at the Commission’s discretion and are not mandatory during rate hearings.

92. Further the issues outlined in BARCRO's analysis in relation to this ground are again irrelevant to the nature of the costs hearing and do not support what the parties to the costs hearing were asked to provide.

**This ground does not support the Motion for Review and is therefore rejected by the Commission.**

#### **GROUND 19**

93. BARCRO complained that at paragraphs 68 - 78 of the costs hearing decision that the Commission rejected the point that during the 1982 rate hearing for the Barbados Light & Power Company Ltd., (BL&P), the Public Utilities Board (PUB), the predecessor of the Commission, awarded costs to the objectors. It is submitted that this ground is irrelevant to the Commission's exercise of discretion to award costs under section 46 of the Fair Trading Commission Act. The reason for this is that this point related to the 1982 rate hearing and was raised and well ventilated before the Honourable Mr. Justice Blackman in the case stated Suit No. 373 of 2006 and Mr. Justice Blackman addressed these arguments in his decision at paragraphs 19, 20 and 21.
94. Mr. Justice Blackman's findings were that costs from the 1982 BL&P rate hearing were paid only to the Attorneys-at-Law and not to any of the objectors (intervenors). Evidence of this was set out in days 17, 18 and 19 transcripts of the 1982 rate hearing.

**In keeping with the case stated decision, the Commission therefore rejects this argument from BARCRO as a ground for review.**

## **GROUND 20**

95. BARCRO alleged that the Commission erred in fact by not disclosing the itemised amount of all costs that have been awarded to each of the parties in the public hearing. The Commission finds that this ground is vague and unclear.
96. Further, the Commission determines that this ground is wholly irrelevant to the issue which the Commission had to determine at the costs hearing.

**Ground 20 is therefore rejected by the Commission as a ground for review.**

## **GROUND 21**

97. BARCRO alleged that the Commission erred in fact at paragraph 107 to 110 of the costs hearing decision since it ignored certain evidence of a written or verbal kind.
98. The Commission finds that like Ground 6, this ground is not only repetitive but is also vague and does not identify what is the evidence, written or oral, that the Commission ignored. This ground lack specifics. It is assumed however, based on the analysis in relation to this ground that BARCRO is referring to the same issues as outlined in ground 6, that is, that the Commission at the costs hearing sought to exclude those intervenors represented by an Attorney-at-Law. It is contended therefore that the same arguments as stated earlier and set out in relation to Ground 6 apply here as well.

**The Commission rejects this as a ground for review as it does not identify on a prima facie basis where the Commission erred in fact.**

## **GROUND 22**

99. BARCRO argued that the Commission chose to elaborate at paragraph 109 (b) of the costs hearing decision about the utilisation of Public Counsel and claimed that this is an error of fact since Public Counsel himself made the decision not to assist intervenors as mandated by law. BARCRO in its ground specifically referred to an email dated October 17, 2003 from the Public Counsel to intervenors during the rate hearing. The Commission finds after reviewing this evidence of the email that the Public Counsel did not completely divorce himself from the intervenors.
100. The Commission finds that the email did not show that Public Counsel would not assist but rather that he indicated that "*I will be available on a limited basis to assist those of you who need my help*".
101. The Commission therefore remains of the view that the Office of Public Counsel was not properly utilised as a mechanism for streamlining challenges to the rate adjustment application and saving costs.

**As such, the Commission rejects this as a ground for review.**

## **GROUND 23**

102. BARCRO claimed that the Commission erred in fact at paragraph 109 (c) of the costs hearing decision since at no time did BARCRO hear or regard the application of C&W as frivolous and vexatious.
103. The Commission finds that this ground has no merit. BARCRO has not challenged the Commission's assessment of C&W's application and appears to concede the point that the Commission made in its costs decision. The Commission, at paragraph 109 (c), was merely stating that

Cable & Wireless (Barbados) Limited had no choice under the present legislative framework but to come and make an application for a rate review and as such the application by Cable & Wireless (Barbados) Limited was justifiable and was not frivolous and vexatious.

**The Commission finds that this in itself is not an error of fact and/or law and as such rejects this as a ground for review.**

#### **GROUND 24**

104. BARCRO argues that the Commission erred in fact at paragraph 109 (d) of the costs hearing decision by suggesting that there was a paucity of argument by intervenors.
105. It is settled law that "he who asserts must prove". As such, the Commission determines that the onus is on BARCRO to show or prove specifically what arguments were put forward by parties and contained in the submissions of the parties to the costs hearing that the Commission failed to consider.
106. BARCRO in its analysis in relation to this ground referred to the transcripts from the 2003 rate hearing which in the Commission's view are immaterial to the issues in this Motion for Review. BARCRO would need to show where it believes that strong submissions were made by the various parties to the Commission to support that the Commission should exercise its discretion and award costs to parties. No evidence of this was put forward to support Ground 24.

**As such the Commission rejects this as a ground for review.**

## **GROUND 25**

107. BARCRO claimed that the Commission erred in fact and in law at paragraph 110 of the costs hearing decision since the decision does not speak to justice, equity or fairplay.
108. The Commission finds that this ground is vague and unclear. The analysis supporting it sheds no further light on the issue. Is BARCRO proposing that the Commission should have been more equitable in making its decision? The Commission is a creature of statute and its action must conform with the legislative framework it was established under and has been given to administer. As such, the Commission does not have the power to exercise equitable jurisdiction in much the same way as a court would. The Commission is mindful of this also in its decision making function.

**The Commission rejects this ground as unclear and irrelevant to the Motion for Review.**

## **Scope and Extent of a Review**

109. The Commission has also addressed briefly the scope and extent of a review and why a review is not the same as a re-hearing or an appeal. It is important for the Commission to address this issue in its decision also as it was discussed by BARCRO on page 16, paragraph 8.3 of its written submissions dated June 4, 2007.

Page 16, paragraph 8.3, states inter alia that:

*"Therefore review proceedings are a re-hearing of the application and the revisiting of evidence already presented and forms part of the existing record already before the Commission."*

110. A re-hearing can be defined as a second or subsequent hearing of a case. It is usually held because of some fundamental error or omission that occurred in the first/original hearing. It often involves a complete re-opening of proceedings, where parties are given the opportunity to re-submit evidence and re-argue their case.
111. The latitude of allowing applicants to adduce new/fresh evidence, make representations that were not previously made and recall witnesses to give oral testimony is often permitted by a Commission or tribunal at a re-hearing. New or fresh evidence is accepted where it appears that the evidence is credible and will have an important influence on the result of the proceedings.
112. A re-hearing is also generally convened where there has been some fundamental defect in the initial trial that can only be corrected by having a hearing "de nova" (a new hearing). A tribunal/Commission may also consider the re-hearing of a matter where it is not satisfied with the extent of the evidence and facts presented in the first hearing.
113. Jurisdiction to re-hear must generally be specifically given by the adjudicative body's enabling legislation. There are no provisions within its legislation or procedural rules which give the Commission power to re-hear a matter.

114. In the case of appeals, the over-riding distinction between an appeal and a review is that an appeal is a proceeding instituted to have a previous decision reviewed by a higher court, whereas with a review the request is made to the same tribunal or Commission. The court hearing the appeal can substitute its decision for that of the tribunal or Commission or may direct that the tribunal or Commission review its own decision.
115. The distinction between a review by a Commission and an appeal is also recognized by the Fair Trading Commission Act.

Section 37 (1) of the Fair Trading Commission Act states:

*"An appeal shall lie on a question of law to a judge of the high court from a decision or order of the Commission."*

116. This means that there is only one ground on which a Commission decision can be appealed, i.e. on a question of law. The grounds for an appeal are therefore extremely restricted. Draftsmen of the legislation perhaps anticipated that applicants would attempt to abuse the appeal process if additional grounds for appeal were allowed. It should be noted that appellate courts are reluctant to disregard the decision of the tribunal which has more expertise and experience in this area.
117. The Commission finds that BARCRO was incorrect when it stated that review proceedings are a rehearing of the application and revising of evidence already presented.

## PART FIVE – THE COMMISSION’S RULING

118. The Motion for Review has twenty-five (25) grounds or “reasons for review”, however, the Commission finds that many of the reasons are redundant and unclear, while others can be categorized as being no more than complaints by BARCRO. Much of BARCRO’s written submissions attempts to reassert its arguments as presented at the 2003 C&W rate hearing and the costs hearing. These arguments of BARCRO were fully considered by the Commission in reaching its previous decisions.
119. The Commission is of the view that the Motion and the arguments as presented do not support a review on a *prima facie* basis, nevertheless, having the full submissions before it the Commission sought to give full consideration to them.
120. The Commission generally considers the existence of alleged errors being raised by the decision to be unsubstantiated on a *prima facie* basis for the following reasons which are summarised below:
- Alleged errors of fact and/or law were not adequately demonstrated or specified by reference to evidence to allow them to be assessed by the Commission.
  - Allegations of error were not substantiated by the evidence on the record of the original hearing.
  - The arguments were already previously fully canvassed during the original hearing and were considered by the Commission in reaching its decision.

- The burden of proof throughout was on BARCRO. It is not the responsibility of the Commission to request or search the record for evidence to support this Motion *ad infinitum*.
- Arguments presented by BARCRO were inconsistent and seemingly contradictory with respect to the nature and extent of its application.
- BARCRO's grounds or arguments did not constitute errors of fact or law.

**For the reasons expressed in this decision, the Commission therefore finds that BARCRO has not demonstrated that errors of fact or law exist on a *prima facie* basis. Accordingly the Motion for Review is denied.**

DATED this \_\_\_\_\_ day of October, 2007

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Sir Neville Nicholls, K.A.  
Chairman of Panel

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Gregory Hazzard  
Commissioner

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Professor Andrew Downes  
Commissioner

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## **PART SIX - COMMISSION'S ORDER**

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**BARBADOS**

**No. 2 of 2007**

### **THE FAIR TRADING COMMISSION**

**IN THE MATTER** of the Fair Trading Commission Act, 326B and the Utilities Regulation Act, CAP. 282

**AND IN THE MATTER** of an Application for Costs by Intervenors pursuant to Section 46 of the Fair Trading Commission Act, CAP. 326B

**AND IN THE MATTER** of an Application for a Review filed by the Barbados Consumer Research Organisation (BARCRO) dated February 14, 2007 of the Decision of the Fair Trading Commission pursuant to Section 36 of the Fair Trading Commission Act, CAP. 326B

The Barbados Consumer Research Organisation Inc. (BARCRO)  
**APPLICANT**

Cable & Wireless (Barbados) Limited  
Office of Public Counsel  
**RESPONDENT**

### **BEFORE**

Sir Neville V. Nicholls  
Professor Andrew Downes  
Mr. Gregory Hazzard

Chairman  
Commissioner  
Commissioner

Upon reading the Notice of Motion for Review filed by the Applicant; and

Upon reading the written submission filed by the Applicant on the Motion for Review; and

Upon reading the responses of Counsel for Cable & Wireless (Barbados) Limited and Public Counsel; and

Upon reading the response of the Applicant.

**IT IS HEREBY ORDERED** that the Motion for Review of the decision of the Fair Trading Commission dated February 14, 2007 be dismissed.

Dated this        day of October, 2007

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**Sir Neville V. Nicholls**  
Chairman

.....  
**Professor Andrew Downes**  
Commissioner

.....  
**Mr. Gregory Hazzard**  
Commissioner