



FAIR TRADING COMMISSION

BARBADOS

NO. 0003/09

FAIR TRADING COMMISSION

IN THE MATTER of the Utilities Regulation Act, Cap. 282 and the Fair Trading Commission Act, Cap. 326B of the Laws of Barbados;

AND IN THE MATTER of an application by the Barbados Light & Power Company Limited for a review of electricity rates pursuant to Section 16 of the Utilities Regulation Act, Cap. 282 of the Laws of Barbados;

AND IN THE MATTER of an application for Costs by Intervenors pursuant to Section 46 of the Fair Trading Commission Act, Cap. 326B;

APPLICANTS

Barbados Small Business Association	(BSBA)
Barbados Association of Non-Governmental Organisations	(BANGO)
Barbados Association of Retired Persons	(BARP)

BEFORE:

Sir Neville Nicholls	Chairman
Mr. Andrew Brathwaite	Commissioner
Mr. Gregory Hazzard	Commissioner
Mr. Alfred Knight	Commissioner
Mr. Andrew Willoughby	Commissioner

DECISION

PART ONE - BACKGROUND

1. On May 8, 2009, the Barbados Light & Power Co. Ltd. (BL&P) filed an application with the Fair Trading Commission (Commission) for a review of its electricity rates pursuant to Section 16 of the Utilities Regulation Act, Cap. 282 (URA) of the laws of Barbados and Rule 60 of the Utilities Regulation (Procedural) Rules 2003 (the Rules).
2. In determining the review of the electricity rates, the Commission conducted a series of pre-hearing activities and convened a hearing from October 7, 2009 to October 23, 2009 in which parties to the proceedings participated.
3. Rule 64 of the Rules provides that persons may apply to be granted intervenor status in order to appear before the Commission in rate review hearings, such as the one referred to above.
4. Persons who are granted intervenor status are entitled to actively participate in hearings by cross-examining witnesses and making oral opening and closing statements. They are also entitled to participate in the pre-hearing activities by presenting evidence, filing interrogatories, making requests for information and appearing at whatever conferences the Commission convenes.
5. A number of persons were granted intervenor status and actively participated in the rate review proceedings. They were the Barbados Association of Non-Governmental Organisations (BANGO), the Barbados Association of Retired Persons (BARP), the Barbados Consumer Research Organisation Inc. (BARCRO), the Barbados Small Business Association (BSBA), Canbar Technical Services Ltd., Dr. Roland Clarke, Mr. Errol E. Niles, Attorney-at-Law, Mr. Douglas B. Trotman, Attorney-at-Law and Sentinel Group Caribbean Inc.

6. During the hearing the Commission issued Procedural Directions #3 on September 7, 2009 which advised that at the end of the rate application proceedings, any party to the rate application hearing is entitled to apply to the Commission for costs.

Filing of the Applications for Costs

7. Following the hearing, three (3) intervenors, namely BSBA, BARP and BANGO filed with the Commission applications for costs on November 2 and 3, 2009. These applications included claim forms which itemised the scope of work that was done by the intervenors' consultants. The Applicants submitted to the Commission their applications in accordance with the Fair Trading Commission Costs Assessment Guidelines 2007 (CAG).
8. Section 46 of the Fair Trading Commission Act Cap. 326B (FTCA) authorises the Commission to award costs arising out of Commission proceedings. Section 46 of the FTCA states, *inter alia*, that:-

"The costs of and incidental to any proceeding before the Commission shall be in the discretion of the Commission and may be fixed at a sum certain or may be taxed."

9. Sections 5 (1) of the FTCA and 6 (1) of the URA provide that a panel of Commissioners shall sit to hear and determine, *inter alia*, matters relating to utility regulation. This includes the issue of costs. The Commission, having received the applications for costs, decided that this matter should be disposed of by way of a written hearing pursuant to Rule 37 of the Rules.

Duty of the Commission

10. In keeping with Section 3.3 of the CAG the Commission must determine if the Applicants are eligible to apply for costs. Section 3.3 of the CAG states that a party in a Commission proceeding is eligible to apply for a cost award where

the party (a) primarily represents the direct interests of consumers or of rate payers in relation to the service provider or (b) is a person who is granted intervenor status by the Commission pursuant to the Rules.

11. The Commission granted intervenor status to all of the Applicants to permit them to participate in the electricity rate review hearing (a Commission proceeding). As such, in keeping with Section 3.3 of the CAG, the Applicants were eligible to apply to the Commission for costs.
12. By virtue of Section 5 of the CAG, an Applicant claiming costs must also demonstrate to the Commission why a cost award ought to be made in its favour. This means that the Commission must determine if the persons applying for costs are entitled to recover such costs.
13. The Commission assessed the entitlement based on the Applicants' contribution during the rate review proceedings and the requirements of the CAG.
14. The award of costs arising out of a Commission proceeding is a matter that is within the sole discretion of the Commission.
15. The Commission's discretion in awarding costs must be exercised judiciously and in accordance with the law. The Commission's scope in awarding costs is defined in the judgment of the Honourable Mr. Justice Christopher Blackman in High Court *Suit No. 373 of 2006 - The Public Counsel v The Fair Trading Commission*. In this case stated brought pursuant to Section 41 of the FTCA, Justice Blackman set out in his decision the boundaries of the Commission's discretion in relation to awarding costs.
16. The learned trial Judge determined that the law does not permit the Commission to award an honorarium to intervenors that are unrepresented

by legal counsel in recognition of individual effort in preparing and presenting a case before the Commission. The law also does not permit intervenors to be awarded costs of preparing for and presenting the case before the Commission in the same way that costs for similar activity would be awarded to an Attorney-at-Law.

17. According to Justice Blackman if a person appears before the Commission and they are unrepresented by legal counsel, where the power to award costs exists, it is limited to an award of out-of-pocket expenses only. Out-of-pocket expenses include but are not limited to amounts paid to an expert or consultant. However, parties who are represented by an Attorney-at-Law are entitled to apply for costs for preparing and presenting the case to the Commission.
18. Two (2) of the Applicants, BARP and the BSBA, were represented by Public Counsel who is an Attorney-at-Law. BANGO was not represented by an Attorney-at-Law. BARP and the BSBA though represented by the Public Counsel cannot seek to recover legal costs. The role of Public Counsel under Section 9 of the URA is to assist consumers with preparing and presenting their cases. As such they are not entitled to claim legal costs for the work done by Public Counsel.
19. The BSBA, BARP and BANGO can only apply for out-of-pocket expenses, that is, reasonable disbursements such as travel, photocopying and proven consultation fees. In order for the Applicants to recover the funds that they are seeking, the Commission must be able to verify the Applicants' claims by examining all of the Applicants' receipts, travel claims and other documentation such as consultant reports and submissions which support the expenses being claimed. Parties may also rely on Affidavit evidence in support of a cost claim.

Burden of Proof

20. Pursuant to Section 3.2 of the CAG, the burden of establishing eligibility for a costs award is on the party who makes an application for a costs award.

Evidence before the Commission

21. In addition to the Applicants, the Commission invited the BL&P to be a party to the hearing as the costs applications arose out of proceedings which were triggered by the BL&P's rate review application, and the BL&P could be affected by the outcome of the cost assessment process. As such, on March 5, 2010, the applications were sent to the BL&P for their review.
22. Prior to commencement of the written hearing the Commission instructed the Applicants to submit further written submissions and documentation to support their claims. No further submissions were filed by the Applicants.
23. The BL&P was given an opportunity to respond to the applications and in its response dated May 31, 2010 addressed the individual applications and raised issues which it believed that the Commission should take into consideration when assessing costs.
24. After receipt of the BL&P's submissions the Applicants were invited to submit final written submissions or documents responding to the BL&P's submissions. None of the Applicants responded to the BL&P's submissions.
25. In determining this matter the Commission took into consideration the contribution made by each Applicant during the rate review proceedings, the costs applications of BSBA, BARP and BANGO and the submissions of the BL&P.

26. According to the CAG provision 10.4

“Recovery of costs for experts shall be limited to those experts who:

- (a) appeared before the Commission in the relevant proceedings; or*
- (b) whose written reports, legal opinions, and affidavits were tendered in evidence to the Commission; or*
- (c) whose reports, opinions or advice can be demonstrated to have assisted the Commission in the proceedings.”*

Interpreted in its strictest sense this means that the consultant or expert appears before the Commission to give evidence or to make submissions or that they provided useful advice for their client and that such advice or submissions would form a part of the evidence and enhance the Commission’s knowledge of the issues to be determined. The reason for this strict interpretation is that one of the purposes of retaining a consultant or an expert is to allow the parties to benefit (and by extension the Commission) from their special training, skill or experience in a particular subject.

The Submissions of the BL&P

27. The BL&P has done its own assessment of the cost claims. A review of the BL&P’s response to the costs applications shows that generally they have no objection to bearing the costs being claimed but believed claims could have been more substantiated.

PART TWO - THE APPLICATIONS

Barbados Small Business Association

28. The BSBA was represented by Public Counsel and Ms. Lynette Holder during the hearing. The BSBA retained Mr. Clyde Mascoll as a consultant. The BSBA’s cost application seeks the reimbursement of fees for their consultant Mr. Clyde Mascoll.

29. A review of Mr. Mascoll's Curriculum Vitae (CV) shows that he has many years experience as an economist, lecturer at the University of the West Indies and as a Minister of State in the Ministry of Finance. The Commission considered that Mr. Mascoll also showed aptitude in the way he handled various complex issues which arose throughout the hearing.
30. Mr. Mascoll showed knowledge of the application and most of the issues contained therein. There was evidence that he had spent time reviewing the application and advising the BSBA. The BSBA has satisfactorily demonstrated that Mr. Mascoll is knowledgeable in his field of work and acted as a Consultant on their behalf. Mr. Mascoll submitted in his claim form fees for the time spent preparing evidence and preparing for hearing. However, the BSBA did not lead any evidence in the matter and based on legal principles set out by Justice Blackman in *SCS No. 373 of 2006 - The Public Counsel v The Fair Trading Commission* cannot seek to recover these costs being claimed. It is against this that an interrogatory was sent to the BSBA by the Commission on August 12, 2010 to seek clarification on this issue. The BSBA in its response to the Commission dated September 03, 2010 stated that "*the claim for 'preparing evidence' does refer to our review and analysis of the 'evidence' presented by the applicant to inform a resultant presentation.*" The Commission is satisfied that based on this explanation, the BSBA may claim for this activity. Section 4.1 (e) of the CAG states that:-

"In determining whether an applicant is eligible for a costs award and without prejudice to the generality of section 2.1 hereof the Commission may consider whether the applicant in the course of the Commission proceedings:

(e) contributed to a better understanding by the Commission of one or more of the issues addressed by the party"

31. However, in relation to the BSBA's claim for preparation and presentation of the case, the BSBA will be unable to recover for this as it runs contrary to Justice Blackman's decision as only Attorneys-at-Law can recover such amounts.
32. **Based on the BSBA's overall contribution to the hearing, the Commission determines that the BSBA is eligible to recover most of the amount claimed for its consultant's expenses.**
33. **The Commission awards the sum of \$33,100.00 to the BSBA.**

Barbados Association of Retired Persons

34. BARP's claim for costs relates to the recovery of out-of-pocket expenses/disbursements only as BARP was at all times represented by Public Counsel. Apart from Public Counsel BARP was also represented by Mr. John Campbell, Mr. Lionel Moe and Mr. Jailal Jebod Singh, three BARP members. These three members were also retained by BARP as consultants.
35. BARP explained that it set up a committee to deal with the issues contained in the BL&P application and its committee primarily consisted of Mr. Jailal Jebod Singh, Mr. John Campbell and Mr. Lionel Moe. BARP was also assisted by the Public Counsel, an Electrical Engineer, an Economist, a Telecommunications Expert and an Accountant. However, BARP has limited its Application to the three named above and is seeking to recover professional fees for each of them.
36. Two of the three, namely Mr. Campbell and Mr. Moe, are retired Chartered Accountants. A review of Mr. Campbell's CV shows that Mr. Campbell has experience, apart from the BL&P rate review hearing, with regulatory matters as he lists in his Record of Achievements that he supported legal counsel of the Public Utilities Board in an appeal to the High Court. This, along with his

summary of professional background, qualifies him to be a Consultant with financial and accounting knowledge within the meaning prescribed in the CAG.

37. Likewise, Mr. Moe in his CV has also shown that he is an accounting Consultant with accounting and financial experience and knowledge. The Commission is of the view that this financial skill set was one which was necessary in analysing and assessing the BL&P's application. Throughout the hearing, Mr. Moe unlike Mr. Campbell had an observatory role and did not make any submissions or assist with cross-examination of the witnesses. In his invoice, which itemises the services he gave to BARP, Mr. Moe has claimed for reviewing the application, attending meetings, preparing for cross-examination and interrogatories.
38. The Commission acknowledges that in respect of the claims concerning Mr. Moe and Mr. Campbell these two individuals may be considered to be Consultants in keeping with the CAG.
39. However, notwithstanding the fact that Mr. Campbell and Mr. Moe have been accepted as consultants by the Commission, BARP's intervention in the areas of finance and accounting did not enhance the Commission's knowledge of the issues for determination. At times BARP's representatives misunderstood some of the issues to be determined and appeared unprepared. As such, the Commission finds that the level of costs claimed does not reflect the contribution made by BARP. Therefore the Commission adjusted Mr. Campbell's claim to \$2687.50 and Mr. Moe's to \$761.25. Section 4.1 (e) of the CAG states that:-

"In determining whether an applicant is eligible for a costs award and without prejudice to the generality of section 2.1 hereof the Commission may consider whether the Applicant in the course of the Commission proceedings

(e) contributed to a better understanding by the Commission of one or more of the issues addressed by the party”

40. Mr. Jebodhsingh’s CV indicates that he is a consultant in the area of Administration and Leadership. He assisted with managing BARP’s intervention during the hearing of the BL&P’s application. He has been the Chairman of BARP’s Consumer Protection Committee since 2006 and was involved in a number of consumer related matters.
41. Based on Mr. Jebodhsingh’s invoice he billed BARP for his role as an administrator, organiser and manager of meetings involving the collaborating and coordinating of other intervenors to avoid duplication in presenting issues before the Commission. The principles to be observed in determining costs eligibility included under the CAG makes allowance for parties that made reasonable efforts to co-operate with other parties in order to reduce the duplication of evidence and questions on cross- examination. Further, parties that made reasonable efforts to combine their intervention with that of similarly interested parties are acknowledged under the CAG. However, throughout the hearing there was still much duplication in the submissions of the intervenors and generally there did not appear to be much cohesion among them.
42. The Commission has determined that the services performed by Mr. Jebodhsingh are not of a nature that would justify an award of costs by the Commission and therefore this claim will not be allowed. As such, BARP will not be permitted therefore to recover fees claimed for Mr. Jebodhsingh.
43. **Based on the above, the sums claimed by BARP have been adjusted by the Commission and BARP will be permitted to recover the sum of \$3,448.75 for the consultancy fees claimed. BARP will also be permitted to recover all**

of its expenses in the sum of \$1,203.20 for travelling and photocopying relating to the hearing.

Barbados Association of Non-Governmental Organisations

44. BANGO is seeking to recover the costs of three consultants, Mr. Douglas Skeete, Mr. Chris Halsall and Mr. Roosevelt King.
45. Mr. Skeete has an extensive background as a Chartered Accountant and has a long standing career in the financial services sector. Based on Mr. Skeete's CV he is a Consultant as intended by the Commission's CAG. Further, a review of BANGO's costs claim indicates that he claimed in the following categories: - preparing interrogatories, reviewing files, preparing for hearing, preparing arguments and attendance at hearing. In his cross-examination he demonstrated an understanding in the areas related to finance and accounting. The Commission was impressed by his directness in cross-examination which used time efficiently during the hearing and he brought clarity to several issues. Section 4.1 (e) of the CAG states that:-

"In determining whether an applicant is eligible for a costs award and without prejudice to the generality of section 2.1 hereof the Commission may consider whether the Applicant in the course of the Commission proceedings

(e) contributed to a better understanding by the Commission of one or more of the issues addressed by the party"

46. The amounts claimed are reasonable and in keeping with the interrogatories, submissions and level of participation by Mr. Skeete. However, BANGO's claim for Mr. Skeete was adjusted, as a portion of it was claimed for preparation of the case and is contrary to Justice Blackman's decision. The Commission determines that BANGO will be allowed to recover \$7,000.00 of Mr. Skeete's expenses.

47. BANGO's claim for costs also included Mr. Chris Halsall whose CV shows that he has over 25 years experience in the Information Communications Technology industry and is a Technology Advisor and Software Developer. During the hearing Mr. Halsall cross-examined witnesses on behalf of BANGO. Mr. Halsall's questioning throughout the hearing focused solely on the issue of the proper compensation due to pole rental.
48. This issue of the rental of the poles and the revenue received from such was not a core issue in determining the rate review matter. It was not germane to the issues which the Commission had to determine and after a while it became repetitive. A review of the transcripts shows that Mr. Halsall was warned on several occasions by the Commission for pursuing this line of argument which resulted in time wastage. In accordance with Section 4.1 (a), (f) and (g) of the CAG:-

"In determining whether an applicant is eligible for a costs award and without prejudice to the generality of section 2.1 hereof the Commission may consider whether the applicant in the course of the Commission proceeding:

- (a) asked questions on cross examination which were unduly repetitive of questions already asked by other parties;*
- (f) addressed issues in his written or oral evidence, in questions on cross examination or in argument which were not relevant to the issues determined by the Commission in the proceedings;*
- (g) engaged in any other conduct that tended to lengthen unnecessarily the duration of the proceedings;"*

Furthermore, BANGO was not able to properly demonstrate that Mr. Halsall had technical knowledge or experience in the relevant areas that were core to the rate hearing. The Commission does not accept Mr. Halsall as a consultant for the purpose of the rate review proceedings and as intended by the CAG.

In light of the above, the Commission is of the view that Mr. Halsall's claim of \$17,500.00 cannot be justified. The Commission determines that BANGO will not recover the expenses claimed by Mr. Halsall.

49. A review of Mr. Roosevelt King's CV shows that he was trained as a Meteorologist but is currently a consumer advocate and activist. Mr. King is a veteran in terms of appearing at and participating in Commission proceedings, like the rate review hearing on behalf of BANGO. For example, Mr. King played a major role as an intervenor in the Depreciation Hearing which was held in January 2009. Moreover, he took the lead role in objecting to the BL&P's confidentiality claim and he actively participated in the confidentiality hearing. BANGO asserts that Mr. King was responsible for preparing the opening and closing remarks on behalf of BANGO at the hearing and assisted with preparing interrogatories. BANGO's contribution, made through Mr. King, did not enhance the Commission's knowledge of the issues for determination. In accordance with Section 4.1 (e) of the CAG

"In determining whether an applicant is eligible for a costs award and without prejudice to the generality of section 2.1 hereof the Commission may consider whether the applicant in the course of the Commission proceeding:

(e) contributed to a better understanding by the Commission of one or more of the issues addressed by the party;

However more significantly, although BANGO has submitted that Mr. King is a consultant for BANGO, the Commission is aware that as he is an officer for BANGO and as such, he cannot qualify as a consultant for that organisation. The Commission will not ordinarily entertain claims made for out-of-pocket expenses paid to an officer or employee of an intervenor. In the Commission's view, this practice would violate the spirit of Section 46 of the FTCA and the Cost Assessment Guidelines, and would be open to abuse. Accordingly, the

Commission denies the claim for reimbursement of consultancy fees paid to Mr. King.

50. **Based on the above, BANGO will be permitted to recover the sum of \$7,000.00 and BANGO will also be permitted to recover the sum of \$1,035.00 which represents BANGO's expenses for travelling and photocopying relating to the hearing on the days on which its consultants attended.**

Determination

51. **The Commission orders that the costs awarded herein shall be borne by the BL&P. The BL&P is to submit the sum of \$45,786.95 to the Commission to be disbursed to the parties.**
52. A summary of the costs table is provided in the Schedule.

SCHEDULE

INTERVENOR	COSTS REIMBURSED
BSBA	\$33,100.00
BARP	\$4,651.95
BANGO	\$8,035.00
<u>TOTAL</u>	<u>\$45,786.95</u>

Dated this 17th day of November 2010

Original Signed by

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Neville V. Nicholls
Chairman

Original Signed by

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Gregory F.M. Hazzard
Commissioner

Original Signed by

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Andrew F. Brathwaite
Commissioner

Original Signed by

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Alfred W. Knight
Commissioner

Original Signed by

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Andrew W. Willoughby
Commissioner