



FAIR TRADING COMMISSION

BARBADOS

No. 1 of 2012

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

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

AND IN THE MATTER of the Application by Digicel (Barbados) Limited for a Stay of the Decision of the Fair Trading Commission dated the 12th day of December 2011.

APPLICANT

Digicel (Barbados) Limited

BEFORE

Sir Neville Nicholls	- Chairman
Professor Andrew Downes	- Deputy Chairman
Mr. Gregory Hazzard	- Commissioner
Mr. Trevor Welch	- Commissioner

DECISION

THE APPLICATION FOR REVIEW AND STAY

1. Digicel (Barbados) Limited (hereinafter called the Applicant) by a Notice of Motion dated and filed on the 13th January, 2012 has applied to the Commission for a review of its decision on the Long Run Incremental Costs (LRIC) Guidelines dated 12 December, 2011. (LRIC Decision).
2. The Commission's LRIC Decision stated that following the publishing of the LRIC Guidelines, Cable & Wireless (Barbados) Limited was required to provide the Commission with proposed model specifications that were consistent with the said Guidelines. The Commission would then review the proposed model specifications and provide feedback to C&W on any required amendments. Subsequently they would then be required to develop the LRIC model based on these agreed model specifications.
3. However, the Applicant, being dissatisfied with the decision sought a review on a number of grounds.
4. Pursuant to the aforementioned review, the applicant further sought from the Commission (i) an order staying the Decision and Order of the Commission decision dated 12 December, 2011 and the LRIC process until final determination of all the matters raised in the aforementioned Notice of Motion or upon further determination of the matters raised as may be required, and (ii) an order restraining the Commission from taking any further action in relation to the Decision and Order and the LRIC process generally until final determination of this matter or upon further determination as may be required.
5. The Commission, after reviewing the Notice of Motion and supporting documentation, determined in a "Procedural Direction" dated February 13, 2012 that the issue of the stay would be dealt with as a preliminary matter. The Commission further stated that Digicel, Cable & Wireless

(Barbados) Limited (C&W) and CARITEL as parties to the consultation process were permitted to submit reasons either in support of or against the granting of a stay of the LRIC Guidelines Decisions and Order no later than February 24, 2012.

6. On the 24th February, 2012, the Commission received documents from C&W and Digicel which gave their reasons either against or in support of the granting of the stay. CARITEL did not submit any documents to the Commission regarding this issue.
7. The Commission thereafter sat to hear and determine the issue as to whether or not the stay ought to be granted. In so doing, they considered the arguments submitted by Digicel and C&W as well as the guiding legal principles which are utilised when seeking to determine whether or not a stay should be granted.

Synopsis of the Submissions

DIGICEL

8. Digicel expressed the view that the stay should be granted. They based their arguments on natural justice and procedural fairness. In support of this, Digicel first made allegations of a general nature and then further submissions under six main captions. Firstly, Digicel argued that a refusal of the Stay by the Commission would amount to a complete predetermination of this matter. The second argument made by Digicel is that all sides must be heard in relation to this issue Digicel argues that a refusal of the stay signifies that the legal principle of *audi deteram partem* is infringed. Also Digicel stated that there would be no prejudice to other parties with the exception of themselves and that there would be no delay to the underlying LRIC process if the stay was granted. Digicel also submitted that there was little merit in refusing the stay and proceeding substantively with a process based on fundamental principles under

review and on the other hand, seeking to conduct a review process of those principles. Finally, Digicel asserted that they had not been given the opportunity to address certain issues during the course of the consultation but rather this was the first time for them to be able to address them. Therefore, Digicel considered that this was a factor that militated in favour of the stay being granted.

C&W

9. C&W submitted that they were of the view that the stay should not be granted. Their main rationale for this submission was the fact that the Applicant in their view did not meet the legal criteria that was necessary to substantiate a stay as set out in the Commission's decision dated August 29, 2003 to an Application by Cable & Wireless (Barbados) Limited for a stay of the Decision of the Fair Trading Commission dated the 30th day of June 2003 and the 1st day of July, 2003 "Commission August 29, 2003 Decision".

Burden and Standard of Proof

10. In order for the Commission to grant the stay which is being sought by the Applicant, the burden and the standard of proof required to be met under the law must be discharged. This matter which is being heard before the Commission is analogous to a civil proceeding in a court of law. Therefore, both the burden and standard of proof in this instance would be the same as for a civil proceeding in a Court of Law. The general rule in law is that the burden of proof in civil cases lies on the party who asserts an issue. Therefore the burden of proof in this instance would be on Digicel to prove that the stay should be granted.
11. As it relates to the standard of proof, *Section 131 of the Evidence Act* stipulates that:

“In a civil proceeding, the court shall find the case of a party proved if it is satisfied that the case has been proven on a balance of probability.”

12. Therefore, Digicel is required to demonstrate on a “balance of probabilities” that the stay should be granted in accordance with the established legal principles.

Legal Principles

13. It was decided in the Commission’s August 29, 2003 Decision that the appropriate legal criteria to be utilised when seeking to assess whether or not a stay should be granted are set out in *AG Manitoba V Metropolitan Stores et al [1987] 1 SCR 110* “*AG v Manitoba*” and the *American Cyanamid v Ethicon Ltd [1975] AC 396* “*The American Cyanamid Case*”.
14. The Commission should first consider:
- (i) Whether there was a serious issue to be tried;
 - (ii) Whether the Applicant would suffer irreparable damage in the event that the stay is not granted;
 - (iii) The balance of convenience which requires consideration of the public interest and other interested parties. This is ultimately a way to determine which party will suffer the greater harm from the grant or refusal of the stay.
15. However, Digicel appears to assert that the appropriate legal grounds, on which a decision for the grant or refusal of a stay is made, are the principles of natural justice and procedural fairness. These principles generally refer to the procedural precautions that are placed on decision making bodies.
16. While the Commission is cognisant of the fact that that it is generally bound by the principles of natural justice and procedural fairness, in this

instance, these rules do not represent the relevant legal principles on which the decision to grant or refuse a stay should be considered.

17. This view is supported by *AG Manitoba v Metropolitan Stores et al* [1987] 1 SCR 110 in which one of the main questions for the court's determination was:-

"what principles governed the exercise of a Superior Court Judge's discretionary power to grant a stay of proceedings until the constitutionality of impugned legislation has been determined".

18. The court in this case determined "*A stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same rules*".

19. The Commission as a regulatory body is bound by law and must exercise its decision making discretion in accordance with the relevant legal principles. Therefore, the Commission finds that the principles expressed in *AG v Manitoba* and *The American Cyanamid Case* represent the legal principles that a Court or tribunal alike ought to take into consideration when deciding whether or not to grant a stay.

20. The first issue assessed by the Commission was whether Digicel had established on a balance of probability that there were serious questions to be tried. According to *The American Cyanamid Case* and *AG v Manitoba*, in order to substantiate this point, an applicant is merely required to show that their case was not frivolous and vexatious.

21. After the Commission received the Notice of Motion and supporting Affidavits submitted on behalf of the Applicant, the Commission finds that the Application made by Digicel raises some points that are not frivolous or vexatious. The Commission finds therefore that Digicel has

met the criteria on a balance of probabilities for determining that there is a serious question to be tried.

22. Secondly, the Commission sought to determine whether or not the Applicant had established on a balance of probabilities that it would suffer irreparable harm if the stay is not granted. In order to satisfy this criterion, the Applicant must prove on a balance of probabilities that the alleged harm cannot be aptly compensated in damages. They must also show that the injury complained of must both be certain and great. It must be actual not theoretical. In *Wisconsin Gas Co v FER* 7585. 2d 699, 674 D.C. Cir 1985 USA, it was stated that the party requesting the stay must show that the injury complained of is of such imminence that there is a clear and present need for an equitable relief to prevent irreparable harm. The Learned Trial Judge held that *"The key word in this consideration is "irreparable". Mere injuries however substantial in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.*

23. Moreover, in the case of **Ashland Oil, Inc. v FTC** 409 F. Supreme Court. The Court held that *"Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin."*

24. As it relates to this issue, Digicel made several allegations. These allegations appear to suggest that they will experience harm or suffer prejudice. Primarily, they indicated that the failure of the Commission to grant the stay would not prejudice other parties except Digicel. They

further stated that refusing to implement the stay and proceeding with the substantive underlying LRIC process would in all circumstances pre-judge the review process in a manner adverse to Digicel. They further noted that a refusal of the stay signified that Digicel's right to be heard had been infringed.

25. C&W on the other hand appeared to suggest that if the Commission were to adopt its reasoning in the Commission's decision of August 29, 2003 the Applicant would not be allowed to succeed on this ground. In their view, this would occur because of the fact that Digicel had adduced no evidence of damage or cost. Consequently, they expressed that Digicel had failed to show they would suffer irreparable damage if the stay is not granted.
26. After examining the evidence adduced the Commission determines that the Applicant merely alleged that they will suffer harm. They have failed to substantiate that they will suffer irreparable harm. Further, the Commission's decision of August 29, 2003 stated that an Applicant ought to establish evidence of damage or cost in order to show that they would suffer irreparable harm. No evidence of damage or loss was provided. As previously stated, the burden of proof to show harm lies with the Applicant.
27. In assessing the balance of convenience, which is the final issue on which the decision to grant a stay is based, the Commission is ultimately seeking to determine which party will be more disadvantaged from the refusal or grant of the stay. The Commission therefore considered two main interests. These are the public interest as well as the interest of other parties.
28. Firstly, the Commission sought to determine whether or not the public interest requires that a stay is granted in these circumstances. In

examining this issue, the Commission adopted the reasoning in its August 2003 decision which was based on the reasoning in RJR MacDonald v AG of Canada [1994] 1 RCS 311 at 344 in which it was stated that “*in considering the balance of convenience, ... the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.*”

29. The Commission considered that the public interest is the key concern when examining the balance of convenience. After examining the evidence adduced by the Applicant the Commission finds that Digicel has failed to demonstrate that there will be any public interest benefits which will flow from the granting of the relief sought. Moreover, if the Commission grants the stay and then this matter is not resolved in a reasonable time; the potential benefits that may be reached from a possible change in interconnection rates would not be achieved.

30. Additionally, the Commission sought to determine whether the Applicant had shown that third parties would not be prejudiced by the granting of the stay. The Commission acknowledges Digicel’s submission that no other parties would be prejudiced if the stay is granted. However, the statutory mandate of the Commission is to ensure that the telecommunications market continues to be liberalised and the promotion of healthy competition must come into focus. The LRIC Guidelines would ultimately be used to build the LRIC Model which will provide service providers with a new basis on which to negotiate the interconnection tariffs. Therefore, staying this decision could mean that service providers who had indicated that the interconnection charges were too high may not be able to benefit from the possibility of lower rates if the process is delayed.

31. The Commission finds that the interest of these parties including Digicel would be better served by the implementation of the decision which would permit C&W to proceed to develop the specifications which will be used to develop the LRIC Model. This will ultimately be used to determine the interconnection rates.
32. The Commission notes Digicel's arguments that it appears counter intuitive to permit C&W to proceed to build the model while guidelines are being reviewed especially if the Commission exercised its discretion to change its decision. After examining this argument, the Commission determines that the general nature of guidelines is such that they naturally lend themselves to being flexible and amended if necessary. Moreover, we expect that a robust LRIC model will be created whereby changes in inputs or options could be easily accommodated. Consequently, the Commission did not consider that this argument could be sustained by Digicel.
33. The Commission therefore finds that the Applicant has failed to meet the balance of convenience test.
34. In these circumstances, the Application is refused and the stay is not granted.

Dated this 04th day of April 2012

Original Signed by

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Neville V. Nicholls
Chairman

Original Signed by

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Andrew S. Downes
Deputy Chairman

Original Signed by

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Gregory F.M. Hazzard
Commissioner

Original Signed by

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Trevor T. Welch
Commissioner