
FAIR TRADING COMMISSION

BARBADOS

FTCUR/STYRER-2014-01

FAIR TRADING COMMISSION

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

AND IN THE MATTER of the Utilities Regulation Act, Cap. 282 of the Laws of Barbados;

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

AND IN THE MATTER of the Application by the Barbados Light & Power Company Limited for a Stay of the Decision of the Fair Trading Commission dated the 8th day of August, 2013.

BEFORE:

Sir Neville Nicholls
Mr. Gregory Hazzard
Mr. Andrew Brathwaite
Mr. Andrew Willoughby
Dr. Philmore Alleyne

Chairman
Commissioner
Commissioner
Commissioner
Commissioner

DECISION

APPLICATION FOR A STAY OF THE RENEWABLE ENERGY RIDER DECISION

1. The Barbados Light & Power Company Limited (hereinafter referred to as the Applicant) by a Notice of Motion dated and filed on the 3rd of December, 2013 applied for a review and variation of the Decision of the Fair Trading Commission (Commission) on the Renewable Energy Rider (RER) dated August 8th, 2013.
2. The Applicant has also sought an order staying the RER Decision until final determination of the Motion.
3. As it relates to the Application for a Stay of the RER Decision, the Applicant contended that the implementation of the RER Decision before the Motion for a review is heard will be detrimental to it.
4. The Applicant informed the Commission that it implemented the following aspects of the RER Decision:
 - a. Informing all prospective customers that the maximum allowable size of the unit is 1.5 times their average usage up to a maximum of 150kW; and
 - b. Discontinuing the implementation of the “buy all/sell all” option for prospective large customers and utilising only the Configuration 1 metering arrangement.

THE APPLICANT’S SUBMISSIONS ON THE STAY

5. The Applicant, in its submissions, expressed the view that the stay should be granted. It based its arguments on the fact that it could meet the legal criteria that are ordinarily used by tribunals, such as the Commission, in determining

whether a stay or delay of the decision should be granted. The Applicant submitted the following criteria that the Commission should consider when determining whether or not a stay should be granted:

- a. The Applicant's likelihood of success on the merits of the review;
- b. Irreparable harm to the Applicant if a stay is not granted, that is, that there is no adequate redress for the injury that may result;
- c. Absence of significant harm to other parties;
- d. Whether a stay or delay would serve the public interest, that is, that a stay would not adversely affect the public interest; and
- e. Any other criteria the Commission deems appropriate.

6. Additionally, the Applicant indicated that the following grounds/merits support the Motion and equally support the stay:

- a. Under the "sale of excess" billing arrangement, the Applicant will lose base revenue required to adequately cover the cost of serving RER customers.
- b. Customers on the Secondary Voltage Power (SVP) and Large Power (LP) tariffs will obtain reduced benefits under the "sale of excess" compared to the "buy all/sell all" billing arrangement;
- c. The Commission's determination to disallow the Alternate Meter Configuration 2 may result in a substantial increase in the installation cost to some RER customers;
- d. That allowing customers to install systems that would produce up to 1.5 times their total usage and up to a maximum size of 150kW was made on the basis that the Commission would accept the "buy all/sell all" billing arrangement to replace the "sale of excess" arrangement;

- e. The “sale of excess” billing arrangement will disadvantage the Applicant, its non-RER customers and the RER customers who are billed on the SVP and LP tariffs.

THE COMMISSION’S POSITION

Burden and Standard of Proof

7. 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 is analogous to civil proceedings in a court of law; therefore, both the burden and standard of proof in this instance would be the same as civil proceedings 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 the Applicant to prove that the stay should be granted.
8. 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.”
9. Therefore, in examining the submissions of the Applicant, the Commission will determine whether the Applicant discharged the burden and standard of proof and demonstrated on a balance of probabilities that the stay should be granted in accordance with the established legal principles.

Legislative Framework

10. The Commission is authorised by **Section 36** of the **Fair Trading Commission Act Cap. 326B** of the Laws of Barbados to review and vary or rescind any decision or order made by it, upon an application being made or on its own motion. In addition, **Rule 56(1)** of the **Utilities Regulation (Procedural) Rules 2003** made under the **Utilities Regulation Act Cap. 282** of the Laws of Barbados, states that the Commission may delay the implementation of its order or decision, on such conditions as it considers appropriate where a request for a stay is made.

Legal Principles

11. The Commission, as a regulatory body, is bound by law and must exercise its decision-making discretion in accordance with the relevant legal principles. Likewise, when making a determination on the stay, the Commission is similarly bound to utilise the legal principles that a court or tribunal alike ought to take into consideration when deciding whether or not to grant a stay.
12. In addition, the Commission utilised the legal criteria set out in *AG Manitoba V Metropolitan Stores et al* [1987] 1 SCR 110 and *American Cyanamid V Ethicon Ltd.* [1975] AC 396 to determine whether or not a stay should be granted.
13. In the *AG Manitoba* Case, it was determined that a stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same rules. Moreover, the *American Cyanamid Case* sets out the following legal criteria to determine whether or not a stay should be granted:
 - (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; and

- (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.

14. The Commission found that the criteria expressed in *AG Manitoba V Metropolitan Stores* and *the American Cyanamid Case* represent the legal principles to be used in determining the issue of the stay.
15. After examining the legal criteria on which the decision to issue a stay would be based and the submissions made by the Applicant, the Commission found that the Applicant satisfied two of the legal criteria as set out in the *American Cyanamid Case*. The criteria that the Applicant demonstrated were that there was a serious issue to be tried and that the balance of convenience was considered in favour of the public and other interested parties.
16. In this regard, the Commission determined that although the Applicant did not meet all of the criteria as set out in the *American Cyanamid Case* to support the granting of a stay, it considered the dicta of Lord Diplock in the said case. Lord Diplock stated that in the instance where there is doubt as to whether remedies in damages are adequate to compensate the respective parties for their loss, it would be prudent to preserve the status quo.
17. Therefore, the Commission in exercising its decision-making discretion considered the following reasons for preserving the status quo:
 - a. That the Applicant to date has not implemented the RER Decision in its totality. In this respect, the Commission recognises that if the RER Decision were to be implemented forthwith this may put new RER customers who are billed on the SVP and LP tariffs at a disadvantage.
 - b. A stay of the RER Decision would mean that the terms and conditions existing under the pilot as is determined in the

Commission's 2010 Approval of the RER Pilot Programme which was later amended by the Commission's letter dated July 27, 2011 would have to be applied to new RER customers of the Applicant.

18. **The Commission grants a stay of the implementation of its RER Decision of August 8, 2013 with effect from Friday, January 24, 2014 pending a determination of the Motion to review and vary the Decision of the Commission but subject to the following conditions:**
 - (a) That the terms and conditions existing prior to the RER Decision apply to new customers only; and**
 - (b) That existing RER customers continue under their present arrangements until the Commission determines the Applicant's Motion to review and vary the RER Decision.**

Dated this 24th day of January 2014

Signed by

.....

Neville V. Nicholls
Chairman

Signed by

.....

Gregory F. M. Hazzard
Commissioner

Signed by

.....

Andrew F. Brathwaite
Commissioner

Signed by

.....

Andrew W. Willoughby
Commissioner

Signed by

.....

Philmore A. Alleyne
Commissioner