



FAIR TRADING COMMISSION

BARBADOS

FTC/URD/STYLRIC 2015-01

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 27th day of March 2015.

APPLICANT

Digicel (Barbados) Limited

BEFORE

Sir Neville Nicholls	- Chairman
Professor Andrew Downes	- Deputy Chairman
Ms. Herma Griffith-Ifill	- Commissioner
Mr. Errol Humphrey	- Commissioner
Ms. Monique Taitt	- Commissioner

DECISION

THE APPLICATION FOR REVIEW AND STAY

1. Digicel (Barbados) Limited (hereinafter called the “Applicant”) by way of a Notice of Motion filed on April 23, 2015 applied for a review and variation of the Decision of the Fair Trading Commission (hereinafter referred to as the Commission) on the Long Run Incremental Cost Interconnection Rates (LRIC) Decision (“the LRIC Decision”) dated March 27, 2015.
2. In the LRIC Decision, the Commission determined, among other things, that transitioning to the new LRIC interconnection rates will be effected using a glide path which would entail a larger reduction being done in the initial stage. An initial reduction of 60% of the difference between the existing RIO 2010 rate and the LRIC-based rates with effect from May 1, 2015. The remaining 40% reduction to move the rate to the final LRIC-based rates would be applied on April 1, 2016.
3. The Applicant being dissatisfied with the LRIC Decision, proposed in its Notice of Motion to vary the Commission’s LRIC Decision by extending the period of the glide path for the implementation of the new LRIC interconnection rates.
4. The Notice of Motion applied for the following Orders:
 - a. An Order that the Commission vary its decision and extend the glide path as referenced in the Decision.
 - b. An Order staying the Decision of the Commission and the LRIC process generally until final determination of all of the matters raised in this Notice of Motion or upon further determination of the matters raised as may be required.
5. The Applicant sought a review on a number of grounds. These grounds are specified below:
 - a. That the Commission failed to conduct the LRIC process in a transparent manner. That the costing exercise engaged in to date by the Commission in tandem with Cable & Wireless (Barbados) Limited (C&W) was prejudicial to the Applicant.
 - b. That the Commission failed to act in accordance with the rules of natural justice since it did not provide the Applicant with a reasonable time-frame to adjust to the new rates which subjected the Applicant to hardship and prejudice.
6. The Applicant contends that the implementation of the LRIC Decision before the review is heard will be detrimental to it. Consequently, the Applicant

sought an order staying the LRIC Decision of the Commission dated March 27, 2015 until final determination of the motion.

7. The issue concerning whether the Stay should be granted is a preliminary matter. As such the Commission analysed the submissions of C&W, Columbus International Inc. (FLOW) and CARITEL, being the parties to the consultation process, setting out the reasons for or against the granting of a Stay of the LRIC Decision.

SYNOPSIS OF THE SUBMISSIONS ON THE STAY

DIGICEL

8. The Applicant, in its Notice of Motion and the supporting Affidavit dated April 23, 2015 which was filed on behalf of the Applicant and its further submissions dated May 5, 2015, submits that its Application raises serious issues to be tried which cannot be considered to be frivolous or vexatious. In fact, the main issue raised by the Applicant concerns the time-frame over which the changes to termination rates are to be implemented. The Applicant claims that this is of considerable significance to its business and to the telecommunications industry as a whole in Barbados, as it can adversely impact the company's financial well-being in a very material way. The Applicant further claims that there are also serious questions regarding the process used by the Commission to make its decision which is neither frivolous nor vexatious.
9. The Applicant further submits that a refusal to grant a Stay would prejudice the Applicant and cause irreparable harm to its business. The Applicant states that a sudden and massive reduction in rates, whereby the entire rate reduction if implemented over the twelve month period, will have a massive impact on its budgeting and finances.
10. The Applicant claims that if a Stay is not granted that *"it will not be possible to reverse the effects of the implementation of the Decision should the outcome of the Commission's review require this. It is unlikely to be possible to reverse any adjustments in wholesale or retail rates once these are introduced to the market. The net effect of failing to grant a stay pending the determination of Digicel's Motion...and to implement the Decision will be to permanently alter the structure of the market in Barbados."* It further stated in its submissions of May 20, 2015 that *"the reductions in MTR [Mobile Termination Rates] will require a rebalancing of Tariffs across multiple retail and wholesale markets to ensure that there is adequate overall network cost recovery across the totality of operators' revenue streams.... This cannot be achieved overnight...Too precipitous a reduction in MTR does not afford the wider market time to respond in achieving this rebalancing."*

11. The Applicant added that, as it relates to the effect on the wholesale pricing, if the Application for the Review is successful, then this would result in a temporary increase in the level of MTR to move from a steeper to a shallower glide-path which would not be able to translate to the published pricing of terminating operators. This would mean therefore that due to the *“fixed terms in the agreements of transit operators would result in them having higher out payments to the terminating operators than they can recoup from the originating side.”* The Applicant further states that *“this effect is felt not just by the operators in proximity to terminating network [but] potentially at any point along the cascade accounting chain.”*
12. As it relates to the issue of the balance of convenience, the Applicant advanced that no party will be prejudiced in any way by a Stay being implemented. The Applicant further states that the process leading to the Commission’s Decision has been on-going for many years and that both telecommunications operators and consumers in Barbados currently enjoy the benefits of a highly competitive market. As a consequence, the Applicant is of the view that the granting of a Stay will *“not have the effect of prejudicing either the public interest or the interest of any other party”*.
13. The Applicant further sets out in its submissions of May 20, 2015 that should the *“Stay not be granted then retail market participants are faced with the decision of whether to reflect the lower rates in retail propositions in the short term. In order to avoid negative customer experience a prudent operator would not pass through the reductions but would maintain prices at a level that would protect them...”*.
14. Nevertheless the Applicant also adduced that should the Commission not agree that the Applicant had met the legal criteria above, that the balance of convenience requires that the status quo remains pending the outcome of this Notice of Motion for Review.

C&W and FLOW

15. C&W and FLOW (jointly referred to as C&W), in its letter dated May 15, 2015 in response to the submissions of the Applicant on the Stay, states that the criteria for the grant of a Stay were not met by the Applicant. C&W articulates that the LRIC Decision is consistent with the provisions of section 25(2)(e) of the Telecommunications Act CAP. 282B of the Laws of Barbados which stipulates that interconnection services shall be offered at charges that are cost-oriented.
16. The contention of C&W is that the Applicant did not satisfy the criteria of whether there is a serious issue to be tried. C&W purports that it is *“noteworthy that Digicel makes no attempt to argue that the rates preceding the Decision were cost-oriented, that the rates produced by the model are not, or that the Commission ought not to move to cost-oriented rates.”*

17. It further contends that the LRIC model and the rates derived from that model have been under consideration for three (3) years and that any reductions in interconnection rates ought not to be a surprise to the Applicant. C&W states that *“any impact on Digicel’s financing and budgeting should reasonably have been taken into account for some time....that a twelve month glide path is not the sudden and massive reduction in rates of which Digicel complains”*. Nevertheless, C&W adduces that the move to the LRIC Rates was specifically consulted upon by the Commission in the later stages of the consultation process and all parties including the Applicant were given an opportunity to respond. This in itself underscores the fact that the Commission gave due regard to the views of all parties prior to arriving at a decision.
18. In addition to the above, C&W’s submission on whether the Applicant would suffer irreparable damage in the event that the Stay is not granted was based on the ground that the damage or prejudice complained of by the Applicant relates to the requirement to move from charges far in excess of costs to charges in keeping with costs. In support of this position, C&W further argues that *“damages would be an adequate remedy in the circumstances as revenues garnered or lost over time with a varied glide path are perfectly quantifiable.”*
19. Lastly, C&W submits that the balance of convenience lies with allowing the first reduction towards compliance with the requirement for cost-orientation to ensure that existing rates more closely coincide with legislative requirements and would cause harm to the telecommunications industry legitimately entitled to implement rates in accordance with the Telecommunications Act.
20. On the issue of maintaining the status quo, C&W infers that it would be seriously prejudiced by the maintenance of the status quo and conversely that the reduction of the rates cannot be regarded as prejudicial to the Applicant since the previous rates are outside the mandate of the Telecommunications Act. Moreover, C&W asserts that in the absence of a challenge to the ultimate LRIC rate itself, the preservation of the status quo would be manifestly unfair.

CARITEL

21. CARITEL in its letter dated May 9, 2015 expressed its support of a Stay of execution on the related LRIC Decision as it may *“have the potential for Rate Shock on Digicel and consequently undermine competition and its attendant benefits to consumers.”*
22. Consequently, CARITEL is of the view that the LRIC Decision did not provide adequate reasoning and analysis for the glide path approach adopted, hence the belief that the *“consuming public could possibly be at risk if the Decision is implemented and there is a financially deleterious effect on Digicel and a deleterious impact on quality of service and infrastructure roll-out should the Applicant (Digicel) have a sound case to present.”*

ANALYSIS

Jurisdiction

23. The Commission, upon an application being made by a party in a Motion to Review, has jurisdiction to grant a Stay on the implementation of its Decision as it considers appropriate.
24. According to **Rule 56(1) of the Utilities Regulation (Procedural) Rules, 2003 S.I. 2003 No. 104**, *“upon receipt of a motion under this Part and a request for a stay of the implementation of the order or decision or any part pending the determination of the motion, the Commission may delay the implementation of the order or decision or any part, on such conditions as it considers appropriate.”*

Burden and Standard of Proof

25. 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 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.
26. As it relates to the standard of proof, **Section 131 of the Evidence Act CAP. 121** 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.”
27. Therefore, the Applicant is required to demonstrate on a balance of probabilities that the Stay should be granted in accordance with the established legal principles.

Legal Principles for determining whether or not the Stay should be granted

28. Before the Commission can grant a Stay of its Decision, the Applicant is required to set out 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.
29. 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 legal principles that a Court or tribunal alike ought to take into consideration when deciding whether or not to grant a Stay.

30. Generally, the criteria that the Commission uses when determining whether or not a Stay should be granted, are derived from AG Manitoba v Metropolitan Stores et al [1987] 1 SCR 110 and American Cyanamid Co. v Ethicon Ltd. [1975] AC 396.
31. In the former 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 be satisfied by the Applicant:
- a. Whether there was a serious issue to be tried;
 - b. Whether the Applicant would suffer irreparable damage in the event that the Stay is not granted; and
 - c. 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.
32. In examining the first criterion to be assessed, the Commission must seek to determine whether the Applicant has established on a balance of probability that there are serious questions to be tried. According to the *American Cyanamid Case* and *AG Manitoba Case*, in order to substantiate this point, an applicant is merely required to show that its case was not frivolous or vexatious.
33. The Applicant submits that its Motion is neither frivolous nor vexatious. It was further argues that the matters set out in its Motion are of very considerable significance to its business and to the telecommunications industry as a whole in Barbados and have the potential to adversely impact on its financial well-being in a very material way. Here the Applicant contends that there are serious questions regarding the process by which the Decision in this matter was made and the time-frame over which the charges to termination rates are to be implemented pursuant to the Decision.
34. The Commission gave consideration to the Applicant's statement made in its Affidavit dated 23rd April 2015 at paragraph 11 "*...the Applicant and C&W have been physically interconnected since 2004...it is beyond argument that the Applicant is a party with a clear and direct interest in any procedure or process which impacts or potentially impacts on the terms and conditions of its interconnection relationship with C&W. This is particularly the case in terms of interconnection rates and any process which has the potential to affect interconnection rates. As such, the terms of the Decision potentially have a direct and significant impact on the Applicant's commercial activities*".
35. The Commission recognises that according to the *American Cyanamid Case* in an Application for a Stay the Applicant is merely required to prove that its

claim is not vexatious or frivolous. There is no requirement for the Applicant to prove the merits of its case or that there is a strong prima facie case to be heard. Rather, the Applicant is required to demonstrate that an issue exists as it relates to the negative impact the glide-path, as set out by the LRIC Decision, will have on its financial stability. The Applicant is also allowed to assert whether the Commission upheld the principles of natural justice and due process when making its decision.

36. **In view of the above, the Commission determined that on a balance of probabilities that the Applicant's claim is neither frivolous nor vexatious and thus satisfies the requirement for a serious issue to be tried.**
37. The Commission then sought to determine the second criterion of whether the Applicant would suffer irreparable damage in the event that 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 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"*.
38. The Applicant contends that *"...a sudden and massive reduction in rates, whereby the entire rate reduction required by the Commission's Decision must be implemented in a 12 month period, is highly prejudicial and will be very damaging to Digicel's business and will have a massive impact on Digicel's finances and budgeting. Further, it will not be possible to reverse the effects of the implantation of the Decision should the outcome of the Commission's review require this. It is unlikely to be possible to reverse any adjustments in wholesale or retail rates once these are introduced to the market"*.
39. On examining the submissions of the Applicant on this criterion, the Commission was unable to obtain from the Applicant sufficient information to demonstrate that the irreversible impact of adjusting the rates cannot be remedied with damages. Further, the Commission considered the fact that the Applicant only provided a theoretical analysis of how it will be affected but has not supported such contention with actual evidence as required in the *Wisconsin Gas Co Case*.
40. **In this regard the Commission has determined that the Applicant has not on a balance of probabilities sufficiently satisfied the criterion that it would suffer irreparable damage in the event that the Stay is not granted.**

41. The final criterion to be assessed by the Commission relates to whether a balance of convenience exists. The Commission must give consideration to the public interest and other interested parties to determine which of the two parties will suffer the greater harm from the grant or refusal to grant a Stay.
42. In assessing this criterion, the Commission essentially has to determine which party will be more disadvantaged or suffer greater harm from the refusal or grant of the Stay. In **RJR MacDonald v AG of Canada [1994] 1 RCS 311** 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"*.
43. The Applicant submits that no party will be prejudiced in any way by a Stay being implemented by the Commission pending the determination of the Applicant's Motion. In this regard, the Applicant states that the process leading to the Commission's Decision has been ongoing for many years and that both telecommunications operators and consumers in Barbados currently enjoy the benefits of a highly competitive market.
44. The Commission took into consideration the arguments adduced by C&W and CARITEL. In C&W submissions the Company states that C&W mobile customers will be adversely affected due to the delay in receiving reduced rates. CARITEL, nevertheless submits that the consuming public could possibly be at risk if the Decision causes a financially deleterious effect on the Applicant.
45. With this in mind, the Commission noted that there may be a greater negative impact on the Applicant and its consumers if the Stay is not granted which can create an adverse impact on the public in the long run. This impact will arise in view of the fact that wholesale rates would initially decrease upon implementation of the LRIC Decision then increase if the Commission decides to extend the glide path in favour of the Applicant as it relates to the Motion for Review. Such an impact can lead to some financial instability for the Applicant which may also extend to its customers.
46. **In view of the above, the Commission determined that the balance of convenience test was satisfied by the Applicant on a balance of probabilities.**
47. Consequently the Commission, having determined that the Applicant did not meet all the criteria as set out in the *American Cyanamid Case*, has nevertheless given consideration to the dicta of Lord Diplock in that case. Lord Diplock further stated that *"it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises...Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he*

has not previously found it necessary to undertake...I would reiterate that in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases...".

48. In light of the dicta of Lord Diplock, it is evident that the Commission has the authority to exercise its discretion to grant a Stay although all the legal criteria were not met once it is determined to be prudent to preserve the status quo.
49. Therefore, the Commission considered the fact that the LRIC Decision was implemented on May 1, 2015 which meant that both the Applicant and C&W would have only commenced a new course of rate structure for one month before the Commission's determination of the Stay. The Commission also noted that a Decision on the Stay could not be made before May 1, 2015, in light of the process that had to be followed by the Commission, namely, allowing the parties an opportunity to be heard in that submissions on the reasons for granting or refusing to grant a Stay had to be made by the Applicant, C&W and CARITEL. The last set of submissions was received by the Commission on May 20, 2015. The Commission also considered the submissions of C&W and CARITEL to determine any possible injuries which would be caused as a result of granting the Stay. The Commission did not receive evidence from C&W or CARITEL proving immediate or actual damages that it will suffer if the Stay is implemented. The estimated loss provided by C&W was not deemed actual or immediate.
50. As a consequence the Commission is of the view that a Stay on the implementation of the LRIC Decision pending the final determination of the Motion to Review and Vary the LRIC Decision as filed by the Applicant is prudent in this instance.
51. **In these circumstances, the Commission grants a Stay on the implementation of the LRIC Decision with effect from JUNE 15, 2015 pending the determination of the Motion to Review and Vary the LRIC Decision as filed by the Applicant.**

Dated this 3rd day of June 2015

Original Signed by

Original Signed by

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Neville V. Nicholls

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Andrew S. Downes

Chairman

Deputy Chairman

Original Signed by

Original Signed by

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Herma Griffith-Ifill
Commissioner

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Errol Humphrey
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