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# FAIR TRADING COMMISSION

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BARBADOS

FTCUR/STYDEC2018-01

## 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 13<sup>th</sup> day of April, 2018

**BEFORE:**

Mrs. Tammy Bryan

Ms. Jennivieve Maynard

Mr. Brian Francis

Ms. Ruan Martinez

Chairman

Commissioner

Commissioner

Commissioner

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DECISION

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**APPLICATION FOR A STAY OF ITEM (III) - IMPLEMENTATION OF HEAT RATE TARGETS - OF THE COMMISSION'S DECISION DATED APRIL 13, 2018:**

1. By Notice of Motion dated and filed on the 18<sup>th</sup> day of May, 2018 (hereinafter referred to as "the Motion"), Barbados Light & Power Company Limited (hereinafter referred to as "the Applicant") applied for a review and variation of item (iii) of the Decision of the Fair Trading Commission ("hereinafter referred to as "the Commission") dated April 13, 2018 on the Application to Recover the costs of the 5MW Energy Storage Device through the Fuel Clause Adjustment which provides:

*'The BL&P shall pursue a heat rate maintenance/improvement programme based on the following heat rate targets for each plant type and the individual unit in the case of the gas turbines:*

▪	Steam plant	-	15,370.20 BTU/kWh
▪	LSD1	-	9,067.28 BTU/kWh
▪	LSD2	-	7,980.52 BTU/kWh
▪	Gas Turbines		
❖	GT01	-	17,514.40 BTU/kWh
❖	GT02	-	15,209.60 BTU/kWh
❖	GT03	-	14,070.30 BTU/kWh
❖	GT04	-	13,007.80 BTU/kWh
❖	GT05	-	12,872.50 BTU/kWh
❖	GT06	-	12,861.30 BTU/kWh

*The heat rate targets shall be reviewed and amended annually or from time to time, as is warranted. The results of heat rate tests or plant/unit performance shall be signed by senior management of the BL&P or contracting party performing the tests, prior to its submission to the Commission. In the event that the BL&P's operations are impacted by perceived force majeure conditions, it shall be eligible to apply to the Commission for exemptions.*

*Such submissions shall detail the nature and cause of the event, resolution plan and future mitigation.'*

pursuant to Section 25 of the Utilities Regulation Act, Chapter 282 of the Laws of Barbados and Section 36 of the Fair Trading Commission Act, Chapter 326B of the Laws of Barbados.

2. The Applicant has also requested an order delaying the implementation of that part of the said item (iii) of the Decision which relates to the establishment of heat rate targets, until final determination of the Motion under Rule 56(1) of the Utilities Regulation Procedural Rules, 2003 (URPR).
3. The Applicant applied for and was granted an extension of time to file its Notice of Motion pursuant to Rule 7 of the URPR and subsequently, the Motion was filed on the 18<sup>th</sup> day of May, 2018 within the timelines contemplated by the extension.
4. Rule 54(1) of the URPR provides that every Notice of Motion made under Rule 53(2), in addition to the requirements of Rule 8, shall 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 shall request a delay in the implementation of the order or decision or any part pending the determination of the motion, if required.

APPLICANT'S SUBMISSIONS ON THE STAY:

5. The Applicant has relied on two grounds in support of its Motion to review and vary the Decision:-
  - i. Error of fact
  - ii. Important matter of principle

***Error of fact:***

The Applicant asserts that *“the Commission erred in fact when it misapplied the information which was provided by the Applicant in relation to determining suitable heat rate targets in its utilization of regression and trend line analysis to determine the ascribed heat rate targets. Neither the Applicant nor any other party to the consultation was given the opportunity by the Commission during the hearing consultation to respond to the appropriateness of this type of methodology being applied to set heat rate targets. Such error went to the core of the Commission’s Decision and has played a substantial role in the Decision outcome”*.

***Important matter of principle:***

The Applicant contends that *“the Commission’s Decision raises an important matter of principle as the heat rate maintenance/improvement programme, as presently construed causes the Applicant in the dispatch of its generation fleet to make decisions that require a trade-off between cost optimization that would benefit customers or meeting the Commission’s ascribed heat rate targets. If the Decision remains unchanged, this important principle will be further exacerbated when higher penetration of renewables are incorporated into the generation mix as planned in accordance with the National Energy Policy and the Applicant’s aligned 100/100 vision. With higher penetration of renewables, the average heat rates of the plants are anticipated to degrade due to lower dispatch loads in order to minimize overall system costs but with resulting penalties to the Applicant”*.

The Applicant further argues that *“the prescribed penalty or reward in a performance incentive mechanism must be such that it sufficiently incentivizes efficiency. However, the penalty as presently determined would present financial risk which could cause hardship to the Applicant on a month to*

*month basis which is not easily resolved due to the regulatory constraints of raising debt. At its extreme this could ultimately be to the detriment of customers”.*

*The Applicant further contends that “the establishment of heat rate targets in the way prescribed by the Commission presents substantial implications to the electricity supply system and warrants a more detailed consultation process especially in an environment where rapid transition to renewables is being encouraged. Heat rate targets have been applied in markets that have similar characteristics to Barbados, however, the methodology employed by the Commission to determine its targets is not consistent with the approach adopted in those markets that seek to incentivize a transition from fuel utilization to an investment in non-fuel assets”.*

6. The Applicant submits the following as grounds for the grant of an order delaying the implementation of the relevant section of the said item (iii) of the Decision or Stay:
  - 6.1 The Applicant believes that if the Commission’s Decision on the heat rate targets is implemented before the Motion is heard and determined, the Applicant would be exposed to unlimited financial exposure which could result in irreparable harm and may compromise the Applicant’s ability to deliver a reliable and affordable electricity supply to customers.
  - 6.2 The methodology used for calculating the targets departs significantly from the methodology and proposed targets initially presented by the Commission and discussed at length during the consultation process.

- 6.3 The Commission utilized trend line and regression analysis in its Decision as the methodology to determine the heat rate targets without giving the parties to the consultation an opportunity to interrogate this methodology as to its reasonableness.
- 6.4 The trend line and regression analysis methodology as applied by the Commission to determine the heat rate targets departs from the methodology commonly used in the industry for determining such targets. The Applicant has been unable to identify other jurisdictions where this methodology is utilized to determine heat rate targets. The Applicant has however observed precedent internationally for using historical averages – the only methodology presented by the Commission during the consultation process – as the basis for setting heat rate targets.
- 6.5 There is little clarity in the Decision as to how the regression analysis and the trend line was utilized to determine the targets. Regression analysis is a commonly used statistical technique for estimating the relationship among variables, rather than for determining targets.
- 6.5.1 Regression analysis is very sensitive to outliers and therefore would not be the most appropriate methodology for determining targets for heat rate performance especially among peaking plants where heat rate outliers are commonly driven by instantaneous response to system demands placed on the plants.
- 6.6 An effective incentive mechanism should provide a reasonable opportunity to achieve the targets. There exists a low probability of the Applicant achieving the targets given its historical heat rate performances especially the targets related to the Gas Turbines.

- 6.6.1 Heat rate targets should adequately and realistically reflect the available generating plant's technical capabilities and system constraints.
- 6.6.2 The Commission's approach to the heat rate maintenance /improvement program would incentivize the Applicant to substitute lower heat/higher fuel cost generation units for higher heat rate/lower fuel cost generation units in an effort to achieve the targets. Compliance with the targets would require the Applicant to increase its gas turbines share of system load, resulting in higher overall fuel cost to customers.
- 6.6.3 The Applicant does not consider the targets presented in the Decision to be reasonable, because given its current least cost dispatch methodology, the Decision would penalize the Applicant for facilitating higher penetration of renewables and expose the Applicant to considerable financial risks given the targets marked deviation from the current heat rate performance of the plants.
- 6.7 The pursuit of heat rate targets in isolation does not allow for cost optimization given the different plant and fuel types. Simply put, heat rate optimization will in many instances drive higher fuel costs to customers.
- 6.8 The decision not to implement a cap on the financial exposure presents a significant risk to the Applicant and its customers. The Applicant supports this contention with Exhibit "RS3" of the Affidavit of Mr. Rohan Seale.

6.8.1 The absence of a limit on the level of financial exposure can determine the financial viability of the Applicant given the magnitude of fuel cost relative to its other expenses and normal operating cash flows. This is further exacerbated by the volatility of market fuel prices and possible heat rate degradation caused by factors outside of the control of the Applicant such as fuel quality and supplier delays.

6.8.2 Subjecting the Applicant to unlimited financial exposure could affect the Applicant's ability to provide a sustained, safe, affordable and reliable service to customers.

#### **THE COMMISSION'S POSITION ON THE STAY:**

7. The Commission is authorized 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 URPR provides 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.
8. A delay in implementation of an order or decision is akin to a stay of a decision or an order in civil proceedings. Accordingly, in determining whether to permit the delay of implementation of its order or decision, the Commission should give consideration to matters similar to those a civil court would consider in an application for a stay.
9. The Court in **AG Manitoba v Metropolitan Stores et al [1987] 1 SCR 110** held that a stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same principles. The case of **American Cyanamid v Ethicon Ltd [1975] AC 396** laid down the following 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.

10. The Court in **Hammond Studdard v Agrichem International Holdings Ltd [2001] EWCA Civ 1915** noted that the risk of injustice to either of the parties on the grant or refusal of a stay, and whether any irremediable harm could result to either party, were essential factors in making the determination. In the Jamaican case of **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited & Another [2011] JMCA App 1**, Harris JA referred to **Linotype-Hall Finance Limited v Baker**, and opined that the courts have adopted a quite liberal approach, in that, they seek to impose the interests of justice as an essential factor in ordering or refusing a stay.
11. The burden and the standard of proof lie on the Applicant who must prove its case on the balance of probabilities as provided by Section 131 of the Evidence Act.
12. The Commission finds that there is a serious issue to be tried, that being whether the process and methodology used by the Commission to develop the heat rate targets were appropriate. The Commission also acknowledges that there is a possibility that the Applicant may face unlimited financial exposure, if the Commission finds on review that the Applicant cannot currently meet some of the targets established by the Commission based on its historical data. Furthermore, in the Commission's view, it is unlikely that customers would be prejudiced, if the decision on the heat rate targets is delayed until final hearing and determination of the Motion.

DECISION:

13. The Commission grants the stay of the implementation of that part of item (iii) of its April 13, 2018 Decision related to the establishment of heat rate targets, until after the Motion is heard and determined.
  
14. The Commission will commence the review of its April 13, 2018 Decision on the Barbados Light & Power Company Limited's Application to recover the costs of the 5MW Energy Storage Device (ESD) through the Fuel Clause Adjustment.

**Dated this 10th day of September 2018**

*Original signed by*

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Mrs. Tammy Bryan  
Chairman

*Original signed by*

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Ms. Jennivieve Maynard  
Commissioner

*Original signed by*

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Mr. Brian Francis  
Commissioner

*Original signed by*

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Ms. Ruan Martinez  
Commissioner