

BARBADOS

FAIR TRADING COMMISSION

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 Fair Trading Commission Act, Cap 326B of the Laws of Barbados; and

AND IN THE MATTER of the Decision of the Fair Trading Commission issued on the 21st day of October, 2021 on the Barbados Light & Power Company Limited's Application for Approval to Implement a Fuel Hedging Programme and to Apply the Results and Costs of Hedging to the Calculation of the Fuel Clause Adjustment

THE BARBADOS LIGHT & POWER COMPANY LIMITED

APPLICANT

NOTICE OF MOTION FOR REVIEW AND VARIATION OF THE DECISION OF THE FAIR TRADING COMMISSION DATED OCTOBER 21, 2021 ON THE BARBADOS LIGHT & POWER COMPANY LIMITED'S APPLICATION FOR APPROVAL TO IMPLEMENT A FUEL HEDGING PROGRAMME AND TO APPLY THE RESULTS AND COSTS OF HEDGING TO THE CALCULATION OF THE FUEL CLAUSE ADJUSTMENT PURSUANT TO SECTION 36 OF THE FAIR TRADING COMMISSION ACT, CAP 326B, AND RULES 53 (2) AND RULE 54 OF THE UTILITIES REGULATION (PROCEDURAL) RULES 2003 OF THE LAWS OF BARBADOS

1. Pursuant to Rule 53 (2) of the Utilities Regulation (Procedural) Rules 2003 of the Laws of Barbados (“the Rules”) the Barbados Light & Power Company Limited (hereinafter ‘Applicant’ or ‘BLPC’) hereby applies to the Fair Trading Commission (‘Commission’) for a review and variation of its Decision on the Barbados Light & Power Company Limited’s Application for Approval to Implement a Fuel Hedging Programme and to Apply the Results and Costs of Hedging to the Calculation of the Fuel Clause Adjustment, document #FTC/UR/DECBL&P/2021-02 issued on October 21, 2021 (‘Decision’).

A. DECISION OR ORDER SOUGHT (RULE 8(2) (a) OF THE RULES)

2. The Applicant respectfully requests that the Commission exercise its power under section 36 of the Fair Trading Commission Act to make the following Orders, which the Applicant now applies for:

- (i) AN ORDER varying the Decision as it relates specifically to cost or benefit sharing of the gains, losses and costs of BLPC’s hedging programme set out in paragraphs 5 and 138 of the Decision to allow all costs and results associated with the pilot to be reflected in the FCA. Specifically, the Applicant requests a variation of that part of the Decision which states:

“...c. The Results and costs associated with the said pilot fuel hedging programme shall be shared evenly (50/50) between the BL&P and the consumer;

d. The IPS and all strategies employed therein, including hedging, shall require the prior written approval of the Commission;

e. Any amendments to the IPS shall require the prior written approval of the Commission;

...g. The cost of hedging shall include costs borne by the Commission in the management/establishment of the fuel hedging

programme by the BL&P. These costs will be passed to the BL&P, 50% of which will be passed through the FCA;”

- (ii) AN ORDER amending the references in the Decision to an Investment Policy Statement, intended to guide the hedging programme, to reflect a “Fuel Hedging Plan (FHP)” or other suitable name which properly reflects its purpose and intent;
- (iii) AN ORDER that this Motion and the matters raised herein satisfies the threshold question as provided for by Rule 55(1) of the Rules;
- (iv) SUCH FURTHER and other Orders as the Commission may deem appropriate in hearing and disposing of this matter.

B. STATEMENT OF FACTS (Rule 26 of the Rules)

3. The Applicant is a vertically integrated electric utility company which was established on May 6, 1955 and incorporated on December 30, 1986 under the **Companies Act**, Cap 308 of the Laws of Barbados and has its registered office at Garrison Hill, St. Michael, Barbados. Pursuant to the Electric Light & Power Order, No. 3, set out in the Third Schedule of the **Electric Light and Power Act**, Cap 278 of the Laws of Barbados, the BLPC was granted the right to supply energy for all public and private purposes for a period of forty-two years from August 1, 1986.
4. The Applicant is a wholly owned subsidiary of Emera Caribbean Inc. (the ‘holding company’).
5. On May 8, 2020 the Applicant filed an application with the Commission for approval to implement a fuel hedging programme and to incorporate the full gains and losses from the hedging programme, along with any other administrative costs associated with the programme, in the calculation of the monthly Fuel Clause Adjustment (FCA).

6. The objective of the fuel hedging programme was to provide BLPC's customers with the benefits of greater price stability, price certainty and a level of predictability in their electricity bill budget.
7. In its Decision the Commission permitted the implementation of a Fuel Hedging Programme on a Pilot Basis in accordance with certain terms and conditions, including those more particularly described at paragraphs 5 and 138 of the Decision.
8. The Applicant submits that the Commission erred in fact in the Decision and that the Decision raised certain important matters of principle within the meaning of Rule 54(1)(a) of the Rules, which justify its review and variation by the Commission in exercise of its powers under section 36 of the FTCA. The errors of fact and the important matters of principle are more particularly described in the Affidavit of Mr. Roger Blackman, Managing Director of the Applicant, submitted in support of this Motion.

C. MEETING THE THRESHOLD QUESTION (Rule 55 of the Rules)

9. The Applicant respectfully submits that the threshold question of whether the matter should be reviewed or whether there is reason to believe the Decision and Order should be rescinded or varied, has been met in that:
 - (i) The grounds and matters raised in this Notice of Motion and the supporting Affidavit raise questions of errors of fact and law and important matters of principle impacting the correctness of the Decision.
10. The Applicant submits that the grounds set out below in this Motion are sufficient on a *prima facie* basis to meet the threshold question and further, that a review based on those issues could properly lead to a variation or rescission of the original Decision and that its Application therefore meets the threshold test.

D. GROUND FOR THE APPLICATION (Rules 26 and 54 of the Rules)

11. For the purposes of this Motion, the Applicant seeks a review and variation of the Commission's Decision on the basis set out in Rule 54 (1), Ground (ii), error of fact, and Ground (vi), that is, an important matter of principle that has arisen by the Commission's Decision of October 18, 2021.

12. The Applicant makes this Motion on the following grounds:

I. The Applicant asserts that the Commission erred in fact in its reference to an IPS document

- (i) The reference to IPS in the context of hedging transactions is misleading and is more applicable to transactions related to investment funds and endowment.
- (ii) The BLPC submits that an IPS is more commonly applied in the context of an investment fund, endowment or investments of that nature and not typically referenced in hedging programmes. BLPC acknowledges that it is not opposed to the actual contents that the Commission has directed be placed within the document, but is of the view that it is a misnomer to refer to the document as an IPS and that this may lead to a lack of clarity or specificity in meeting these terms and conditions if the FHP is implemented.
- (iii) It is BLPC's view that the document guiding the hedging programme may be more appropriately titled the "Fuel Hedging Plan (FHP)" which would include BLPC's "Guiding Principles and Objectives" of the hedge it wishes to embark on. Such error does not in our view go the core of the Commission's Decision but the reference to an IPS document ought to be corrected for the avoidance of doubt and changed to more appropriately reflect a FHP.

II. The Decision raises an important matter of principle in that it changes the regulatory position and understanding of the purpose and scope of the FCA and forces the Applicant to take speculative positions on fuel prices.

- (i) The principle on which the FCA exists is the full recovery of fuel and associated costs by the Applicant. The Applicant makes no profit or loss on the acquisition of fuel at present and this cost is passed on wholesale to customers via the FCA. Associated costs related to the acquisition of fuel, such as storage costs, are also passed on. The Decision now appears to seek to change this basic principle by introducing a speculative, profit-making element to the fuel charge, which distorts the nature and function of the FCA.
- (ii) Fuel costs are currently a direct pass-through to customers with no opportunity for the BLPC to profit from the purchase transactions. By allowing the BLPC to share in the gains and losses of the programme, the Decision, incentivizes the BLPC to enter into hedges with the objective of securing a profit from the fluctuation of fuel prices. The Commission, on page 22 of its Consultation Paper dated November 9, 2020, indicated the following:

“Speculation

The aim of speculation is to try to make a profit from the change in price of a commodity, even if the investor has no physical risk. This however, is not the goal of hedging which is focused on the reduction of risk or volatility associated in the commodity’s change in price. In evaluating the outcome of the hedge therefore, one must consider the net effect of the gain or loss on the physical position plus the gain or loss on the hedging tool.”

- (iii) The Commission's Decision appears to be in direct contradiction to its expressed understanding of the purpose of hedging as contained in its consultation paper and is inconsistent with the purpose and function of the FCA.

E. PERSONS AFFECTED BY THE APPLICATION (Rule 26 of the Rules)

- 13. Pursuant to Rule 26 (4) the Applicant advises that it is impractical to set out all the names and addresses of each customer affected by the Application because they are too numerous. However, the persons affected can generally be described as the customer base of the Applicant. These customers are affected because they are the ones to whom the Applicant supplies service.

F. DATE OF HEARING OF MOTION (Rule 8(2) (d) of the Rules)

- 14. A date for the hearing of this Motion will be fixed by the Commission.

G. SUPPORTING AFFIDAVIT (Rule 8(2) (b) of the Rules)

- 15. The Affidavit of Roger Blackman, Managing Director of the Applicant, is submitted in support of this Motion.

DATED THIS 10th DAY OF NOVEMBER, 2021



SIGNED BY:

ADRIAN CARTER

THE APPLICANT'S REPRESENTATIVE AND DULY AUTHORIZED OFFICER

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