

**APPLICATION FOR MOTION FOR REVIEW AND VARIATION**

**BARBADOS**

**FAIR TRADING COMMISSION**

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

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

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

**IN THE MATTER** of the Decision of the Fair Trading Commission dated the 21<sup>st</sup> 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**

**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 (3) AND RULE 54 OF THE UTILITIES REGULATION (PROCEDURAL) RULES 2003 OF THE LAWS OF BARBADOS**

**INTRODUCTION**

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’).
2. In particular, the Applicant requests a review and variation of paragraphs 5 and 138 of the Decision as they relate specifically to cost or benefit sharing of the gains, losses and costs of BLPC’s hedging programme and the reference to an investment policy statement. Specifically, the Applicant requests a review 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;”*

3. In Barbados, based on the current regulatory construct and in compliance with the Commission’s previous Decisions on the FCA, fuel costs are a direct pass through charge to customers. As such, implementing a fuel hedging programme where only 50% or a portion of hedging gains, losses and costs would be passed through to customers would appear to be inconsistent with the Commission’s regulatory position on the nature and purpose of the FCA and in effect force the Applicant to take speculative positions on fuel prices.
4. In relation to the Commission’s reference to BLPC being required to file an Investment Policy Statement (‘IPS’) with the Commission, described in items (d) and (e), BLPC is of the view that the title of “IPS” may be misleading as an IPS is more commonly applied in the context of an investment fund, endowment or investments of that nature. BLPC 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.
5. The Applicant maintains that the Commission’s determination that the results and costs associated with the said pilot fuel hedging programme shall be shared evenly (50/50) between the BLPC and the consumer is not appropriate. This decision would have the unintended consequence of incentivizing the BLPC towards making hedge purchases with the hope of profiting from intervening fuel price changes. Such action is counter to the objective of hedging which is to reduce the volatility of the fuel component of customers’ bills to extreme price increases.

6. This Application sets out;
  - (a) The statement of facts;
  - (b) Meeting the Threshold Question;
  - (c) The Grounds for the Application; and
  - (d) The Nature of the order being sought.
  
7. A date for the hearing of this Application will be fixed by the Commission.

**A. STATEMENT OF FACTS (Rule 26 of the Rules)**

8. 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.
  
9. The Applicant is a wholly owned subsidiary of Emera Caribbean Inc. (the 'holding company').
  
10. The Applicant is required to manage the grid to ensure the instantaneous supply of electricity meets constantly changing customer demand. The varying need for cooling, commercial & industrial uses, lighting and other end uses drives daily and seasonal patterns.
  
11. To satisfy the needs of the electric system, BLPC operates four (4) generating plants using a mix of technologies including steam turbines, diesel engines, gas turbines and solar PV to produce electricity. Electricity is transmitted from the generating stations at 69,000 volts and 24,000 volts and distributed over 3,000 kilometres of transmission and distribution lines facilitated by eighteen (18) substations dispersed across the island. BLPC, as at December 31, 2020 served

a total of 131,522 customers with a peak demand of 141MW and had an installed capacity of 256.1MW of generating plant. BLPC's installed capacity is supplemented by over 49MW of customer-owned solar PV capacity.

12. The steam and diesel units operate primarily on Heavy Fuel Oil and perform the baseload generation function of meeting the constant demand for electricity. Gas turbines, operating on Av Jet and diesel fuels are utilized as intermediate and peaking plant to meet periods of higher demand.
13. The BLPC purchases fuel under a contract with Barbados National Oil Company Limited (BNOCL), Sol (Barbados) Limited and Rubis West Indies Limited. The BNOCL is contracted to supply HFO, Sol supplies the BLPC with Av Jet and Rubis supplies the BLPC with diesel fuel.
14. The cost of fuel is recovered monthly from customers through the Fuel Clause Adjustment (FCA). The FCA was established by the Commission's forerunner, the Public Utilities Board (PUB) in 1965 to recover the cost of fuel purchased to generate electricity.
15. On May 8, 2020 the BLPC 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).
16. The objective of the fuel hedging programme is to provide BLPC's customers with the benefits of greater price stability, price certainty and a level of predictability in their electricity bill budget.

## **B. MEETING THE THRESHOLD QUESTION (Rule 55 of the Rules)**

17. In accordance with Rule 55 (1) of the Rules, the Commission must determine whether a Motion brought under Rule 53 has met the threshold test and thus should be reviewed or whether there is reason to believe the Order should be rescinded or varied.

18. The Applicant notes the Commission's Decision on The Barbados Light & Power Company Limited's Motion to Review and Vary the Decision of the Fair Trading Commission on the Application of the BL&P to Recover the Costs of the 5MW Energy Storage Device through the Fuel Clause Adjustment, Document No.: FTCUR/MTNDECESD/BL&P-2019-01 issued on April 23, 2019 ('Storage Device Decision')

19. In the Storage Device Decision the Commission was persuaded by the following findings of the Ontario Energy Board in the Motions to Review the Natural Gas Electricity Interface Review Decision, EB-2006- 0322/0338/0340, May 22, 2007, p. 18. The Board, whose procedural rules are almost identical to the URPR, found as follows regarding Motions to Review:

***'With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case. In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently. The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the***

***decision. In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.'***

20. The Commission found as follows in the Storage Device Decision:

***"in order for an applicant to meet the threshold test on filing a motion to review, it must demonstrate that the error which it alleges in the decision it wishes reviewed is identifiable, material and relevant to the decision which was made. Such an applicant must show, on a prima facie basis, that there is enough substance to the issues raised in their motion for review that a review based on those issues could lead to a variation or rescission of the original decision. It is insufficient for an applicant to demonstrate that it is dis-satisfied with the decision, which is the subject of the Motion, and the Motion must not be used as an opportunity to simply re-argue the applicant's case" (para 4.4)***

21. The Applicant submits that the grounds raised below set out in paragraphs 28.I and 28.II 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.

### **C. GROUNDS FOR THE APPLICATION (Rules 26 and 54 of the Rules)**

22. Rule 54 (1) 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.

23. Rule 54 (1) further provides that the grounds may include:

- i. error of law or jurisdiction;
- ii. error of fact;
- iii. a change in circumstances;
- iv. new facts that have arisen;
- v. facts that were not previously placed in evidence in the proceedings and could not have been discovered by reasonable diligence at the time;
- vi. an important matter of principle that has been raised by the Order or Decision.

24. For the purposes of this Application, 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.

#### ***Error of Fact***

25. An error of fact arises where a Decision made by the Commission is based on a misinterpretation, misunderstanding, misapplication or ignorance of an established and/or relevant fact or set of facts or where the Commission acts upon an incorrect basis of fact in making its Decision.

26. A reviewable error of fact must be a mistake or misunderstanding which goes to the root of the Decision and must have played a substantial role in the outcome of that Decision. The mistake must be logically connected and relevant to the core of the Decision to sufficiently justify a request for review.

#### ***Important Matter of Principle***

27. An important matter of principle that has been raised by the Order or Decision is relied on when seeking a review where the Applicant is of the view that the Commission failed to take into consideration an important principle that has arisen because of the Decision.

28. The Applicant submits the following grounds:

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

- a) The reference to IPS in the context of hedging transactions is misleading and is more applicable to transactions related to investment funds and endowment.
- b) 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 supports 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. 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 to 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.**

- a) 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.

- b) 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.”***

- c) The Applicant acknowledges that the prescribed decision to split the gains, losses and costs of the hedging programme (50/50) between BLPC and consumers would incentivize BLPC to undertake risky behaviour which would amount to speculation instead of hedging and detract from focusing on the objective of such a programme which is to stabilize the FCA component of customers’ bills.
- d) The BLPC does not believe the Decision should provide such an incentive.
- e) Hedging is a risk mitigation measure and should be distinguished from speculation, where the utility assumes, rather than transfers, price risk related to its fuel purchases in hopes that the future increases in prices are in its favor and result in hedge transaction profits.

- f) At its extreme, incentivizing the utility to engage in such speculative financial behaviour could ultimately be to the detriment of the overall well-being of the utility and by extension its customers. This is an important matter of principle, which has been raised by the Decision.
- g) Further, the Decision would undermine the integrity of the FCA to reflect all costs related to fuel purchases as some of those costs would now be either absorbed by the BLPC as expenses or revenues.
- h) The Applicant submits that the Decision to share the costs and results of the fuel hedging pilot between the utility and its customers will limit the programme from achieving its objectives and may result in unintended negative consequences for both the utility and its customers.
- i) The objectives of the fuel hedging programme were to reduce price volatility and limit the exposure of the fuel component of customers' bills to extreme price increases.
- j) Requiring only 50% of the results of hedging transactions to be reflected in the FCA would undermine the pilot's capability to demonstrate the ability of hedging to reduced fuel price volatility and exposure to extreme price increases.
- k) BLPC believes, that for hedging to be meaningful, it is necessary that an adequate amount of fuel volumes are hedged. Therefore, by limiting the pilot to a maximum of 40% of fuel purchases and further allowing only 50% of the hedging results to be reflected in the FCA, the Decision effectively restricts the pilot to a maximum of 20% of fuel volumes hedge transactions to be reflected in the FCA. At this low volume of transactions reflected in the FCA, it will be difficult for the pilot to demonstrate that the volatility reductions are worth the cost of the hedging programme.

- I) The implementation of a hedging pilot programme where some of the costs and hedging transactions are outside of the FCA mechanism would negate the objective of the pilot and would require the Applicant to take speculative positions on fuel prices.

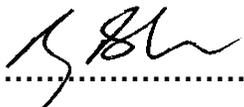
#### **D. NATURE OF THE ORDER BEING SOUGHT (Rule 26 of the Rules)**

1. Pursuant to Section 36 of the Fair Trading Commission Act Cap. 326B, and Rules 53 (2) of the Rules the Applicant seeks the following Orders that:
  - I. The Commission reviews and varies its October 18, 2021 Decision as it relates to items (c) and (g) of the Commission's decision and allow all costs and results associated with the pilot to be reflected in the FCA.
  - II. For the avoidance of doubt, the Commission's referenced IPS document intended for guiding the hedging programme be retitled the "Fuel Hedging Plan (FHP)".

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

2. 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.

**DATED THIS 10th DAY OF NOVEMBER, 2021**

SIGNED BY:  .....

**ROGER BLACKMAN**

**THE APPLICANT'S REPRESENTATIVE AND DULY AUTHORIZED OFFICER**

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