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**

AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION

I **ROGER BLACKMAN**, of No. 12 Stepney, St. George, in this island, Managing Director of the Barbados Light & Power Company Limited, **MAKE OATH AND SAY** AS FOLLOWS:

1. I am the Managing Director of the Applicant, The Barbados Light & Power Company Limited, and as such am duly authorized to depose to the following facts and matters

in this Affidavit on behalf of the Applicant. The statement of facts set out herein are within my personal knowledge unless otherwise stated.

2. I make this Affidavit in support of the Applicant's Motion For Review And Variation of The Decision of The Fair Trading Commission issued on 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 and in satisfaction of the requirements of Rule 8(2) (b) of the Utilities Regulation (Procedural) Rules 2003 Of The Laws Of Barbados ('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. 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.

6. 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.
7. 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.
8. 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.
9. 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.
10. On May 8, 2020 the BLPC filed with the Commission an Application 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) ('Application').

11. The objective of the fuel hedging programme as articulated in the Application 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.

12. The Commission issued its Decision on the Applicant's Application ('Decision') on 21st October, 2021.

13. 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. The Decision included the following requirements:

> *"…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*;"

14. The aforementioned terms and conditions appear to change the nature, scope and purpose of the FCA and are inconsistent with the operation of the FCA as originally determined and maintained by the Commission.
15. 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.

MEETING THE THRESHOLD QUESTION (Rule 55 of the Rules)

16. 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.
17. 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 Review Decision')
18. In its Storage Device Review Decision, the Commission was persuaded by the following findings of the Ontario Energy Board ('Board') in its Decision on 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.'*

19. The Commission found as follows in the Storage Device Review 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)

20. The Applicant submits that the grounds raised below 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.

GROUNDS FOR THE APPLICATION (Rules 26 and 54 of the Rules)

21. 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.

22. 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.

23. 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

24. 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.

25. 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.

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

27. The reference to IPS in the context of hedging transactions is misleading and is more applicable to transactions related to investment funds and endowment.

28. 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. 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.

IMPORTANT MATTER OF PRINCIPLE

29. The Applicant believes and submits that 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 without full consideration being given to a substantive change to the purpose or function of the FCA.

30. 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.

31. 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."

32. 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 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. The BLPC does not believe the Decision should provide such an incentive.
33. 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.
34. 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.

35. 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.
36. 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.
37. 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.
38. 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.
39. 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.
40. 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.

SWORN TO by **ROGER BLACKMAN**)

this 10th day of November, 2021)

Before me:

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ATTORNEY-AT-LAW