



THE FAIR TRADING COMMISSION

BARBADOS

FTCUR/BLPCMTNRVDEC 01/2023-20230307

THE 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 dated the 30th day of September, 2021 by the Barbados Light & Power Company Limited for A Review of Electricity Rates (the 'Application');

AND IN THE MATTER of the Decision of the Fair Trading Commission on the Application dated and issued 15th February 2023 and numbered 01/2023.

APPLICANT:

The Barbados Light & Power Company Limited

BEFORE

Dr. Donley Carrington
John Griffith
Ruan Martinez
Dr. Ankie Scott-Joseph
Samuel Wallerson

Deputy Chairman
Commissioner
Commissioner
Commissioner
Commissioner

DECISION

BACKGROUND

1. On 4th October 2021, the Barbados Light & Power Company Limited (the “**Applicant**”) made an Application for a Review of Electricity Rates, dated September 30, 2021 (“**Application**”). The Fair Trading Commission (the “**Commission**”) gave its decision on the Application on 15th February 2023 (“the **Decision**”). On 7th March 2023, the Applicant filed a Notice of Motion for Review and Variation of the Commission’s Decision (the “**Notice of Motion**”), supported by an affidavit of Mr. Roger Blackman, the Applicant’s Managing Director. One of the orders which the Applicant seeks in the Notice of Motion is for the Commission to delay the implementation of several of the orders of the Commission made in its Decision (hereafter referred to as the “request for a **Stay**”).
2. The orders which the Applicant has requested be stayed, as set out in the Notice of Motion are as follows, namely that the Applicant:
 - “(i) Declare a regulatory liability of \$99.5 million in connection with the SIF fund;¹
 - (ii) Declare a regulatory liability of \$9.5 million in connection with deferred tax liability;²
 - (iii) Revisit its accumulated depreciation expense;³
 - (iv) Use base revenue, customer count, usage and demand values from the period ended June 30th, 2022 for purposes of making an

¹ The Commission’s order provides: “405. In respect of the SIF, BLPC is directed to establish a record of \$99.5 million in a regulatory liability account. In the event of a catastrophic event that is eligible to be covered by the SIF, the BLPC is directed to first deploy the monies recorded in the regulatory liability account. BLPC is further directed to refund to customers the SIF amounts withdrawn that are not re-deposited into the SIF over a 30-year amortization period as a reduction to insurance expense that shall be shown as a separately identifiable amount for regulatory reporting purposes.

² The Commission’s order provides: “404. BLPC is directed to record fifty percent of its 2019 income tax gain as a regulatory liability and amortize the liability over a fifteen-year period.”

³ The Commission’s order provides: “399. BLPC is directed to establish a regulatory liability to recognize the difference between the accumulated depreciation recorded using the approved regulatory depreciation rates and the accumulated depreciation recorded based on the depreciation rates the BLPC used for its financial statements. The regulatory liability balance is to be updated as of the effective date of this Decision and shall be amortized over a fifteen-year period.”

adjustment to test year revenues and within the cost of service study;⁴

- (v) Use a financial capital structure of Equity 55% and Debt 45% for rate making purposes in the determination of the rate of return;⁵ and
- (vi) To modify the as filed test year expenses in the development of the revenue requirement in respect of utilizing the 2020 reported insurance expense of \$8,198,082.”⁶

(These orders are hereafter referred to as (the “**Challenged Orders**”).

3. The Commission issued a Procedural Directions order on March 16th, 2023 which invited approved intervenors in the Application to reply to the Applicant’s request for a stay. The intervenor team of Ms. Tricia Watson and Mr. David Simpson (the “**Simpson/Watson Team**”), Mr. Ricky Went, Barbados Renewable Energy Association (“**BREA**”) and the Barbados Sustainable Energy Cooperative Society Ltd (“**BSECSL**”) filed responses to the request for a stay.

⁴ The Commission’s order provides: “400. The Commission orders the use of base revenue, customer count, usage and demand values from the period ended June 30th, 2022 for purposes of making an adjustment to test year revenues and within the cost-of-service study.”

⁵ The Commission’s order provides: “407. The financial capital structure of Equity 65% and Debt 35% used by BLPC in the determination of its rate of return is denied. BLPC is granted a financial capital structure of Equity 55% and Debt 45% for ratemaking purposes in the determination of the rate of return.”

⁶ The Commission’s Order provides: “401. In the development of the revenue requirement, BLPC is directed to modify its as-filed test year expenses in respect of the following items: a. Utilize the 2020 reported insurance expense of \$8,198,082; b. Remove the \$252,000 of charitable donations and sponsorship; and c. Remove the affiliate expenses of Staff Secondments, Board Fees and Other.”

THE ARGUMENTS

The Applicant

4. Mr. Blackman, in his affidavit dated March 7th, 2023, deposed as to the irreparable harm the Challenged Orders are likely to cause the Applicant if not stayed. He contended that the irreparable financial harm which the Applicant is likely to suffer cannot be remedied by any subsequent award of damages, even if the same were available. Mr. Blackman identified various ways in which the Applicant's financial position is likely to be adversely affected by the Challenged Orders.

5. Mr. Blackman stated that despite the Commission's implied acceptance that the Applicant was in a state of 'financial distress' prior to and at the time of the issue of the Decision, the Commission nevertheless made a determination which imperiled the Applicant's financial viability. He further stated that if the Applicant is forced to implement the Decision before the hearing and determination of the review, its rate base will be reduced below acceptable levels and it will realise marginal profitability until the final determination of the disputed matters. Mr. Blackman contended that in making the Challenged Orders, the Commission acted contrary to its role and function under section 3(2)(b) of the Utilities Regulation Act, Cap 282 of the Laws of Barbados.

6. Mr. Blackman also submitted that unless the Challenged Orders are stayed, the operating income and Return on Equity ("ROE") of the Applicant would continue to fall below accepted industry standards.

7. Mr. Blackman averred that the Commission's orders that the Applicant record (i) fifty per cent of its 2019 income tax gain as a regulatory liability and (ii) \$99.5 million in a regulatory liability account, "... will contribute to an undue reduction in its approved rate base, and ROE below acceptable levels and will compromise its ability to maintain its plant and equipment and make necessary

alterations and improvements to provide service to the public which is safe, adequate, efficient and reasonable as required by section 20 of the URA”.

8. Mr. Blackman also claimed that the Commission’s order, which requires the Applicant to use base revenue, customer count, usage and demand values from the period ended June 30th, 2022 for purposes of making an adjustment to test year revenues and within the cost-of-service study, while the Applicant has to maintain all other costs, expenses and other information from the 2020 test year, “ ... is likely to cause financial prejudice to BLPC in that it will be required to apply rates premised on unbalanced ratemaking, which does not appropriately account for updated Construction Work in Progress (CWIP), costs, expenses and other pertinent details from the period ended June 30th, 2022.” Accordingly, “CWIP and operating and maintenance expenses from 2022 which should properly be included in this calculation, would therefore be unjustly omitted.”
9. In addition to the above, Mr. Blackman alleged that the Applicant will suffer irreparable reputational harm and harm to its goodwill because the Commission’s Decision variously suggests that the Applicant “was untruthful, lacked transparency, provided incorrect or deliberately opaque information, included unsubstantiated costs in its Application, made errors in its calculations, sought to mislead the Commission, failed to implement Orders or directions made by the Commission in its 2010 Rate Review Decision, engaged in self-dealing or misappropriation of assets and other allegations”. He further alleged that these suggestions are unsupported by the evidence led during the oral hearing and in the Application and are likely to cause irreparable injury to the Applicant’s reputation and goodwill.
10. The Applicant, through Mr. Blackman, added that damages are not readily available for decisions or orders made by the Commission, and even if available, would be inadequate. It stated that the implementation of the

Decision will further result in the erosion of debt and equity, disruption of investor confidence in the regulatory environment in Barbados and significantly undervalue the Applicant's asset base.

11. The Applicant identified the legal principles to be applied on a request for a stay, and set out the reasons in support of the grant of a stay of the Challenged Orders. The Commission does not think it necessary to recite the Applicant's submissions on the principles which govern the grant or refusal of a stay, since they are not in dispute in this case, and are summarized below in this decision.

Watson/Simpson Team

12. The Watson/Simpson Team filed written submissions dated March 31st, 2023 opposing the request for a stay. The Watson/Simpson Team argued for a rigid application of the principles set out in *AG Manitoba v Metropolitan Stores et al*⁷ and the decision of this Commission in *Application by Cable & Wireless for Review of Decision on 30th June 2003 and 1st July 2003*. The Watson/Simpson Team argued that the Applicant has not adduced any evidence of damage or costs and has failed to demonstrate that it has suffered or is likely to suffer irreparable harm. The Watson/Simpson Team contended that the interim rate increase, which remains in place, protects the Applicant from any harm.
13. The Watson/ Simpson Team disagreed with the Applicant’s argument that the Commission impliedly accepted that the Applicant was experiencing “financial distress” by the grant of interim rate relief to the Applicant. The team suggested that the Commission refused to apply the “financial distress” test in deciding whether to grant or refuse interim rate relief.
14. The Watson/Simpson Team submitted that when considering the balance of convenience, the interest of the Applicant must be balanced against the interest of the intervenors and the public. They further submitted that the Commission must consider the irreparable harm that is likely to be done to one or the other party resulting from the grant or refusal of the request for the Stay. They reiterated that the burden is on the Applicant to prove irreparable harm. They argued that the public would be prejudiced by the continuation of the interim rate during the period of regulatory lag. They added that to stay the order in respect to the Self Insurance Fund would be against the public interest, and tantamount to the approval by the Commission of the Applicant’s breaches of the Utility Regulation Act and the SIF Regulations.⁸

⁷ [1987] 1SCR 110.

⁸ Insurance (Barbados Light and Power Company Limited) (Self-Insurance Fund) Regulations, 1998.

15. The Watson/Simpson Team also challenged the Applicant's complaint that the Commission damaged its reputation by statements made in the Decision. They argued that the complaint is outside of the jurisdiction of the Commission.

Barbados Renewable Energy Association (BREA)

16. BREA, in its letter dated March 30th, 2023, supported the Applicant's request for the stay of the Challenged Orders, on the basis that the Notice of Motion raised important issues. BREA's letter also sought information and raised issues which are not germane to the present application.

Barbados Sustainable Energy Cooperative Society Ltd (BSECSL)

17. The BSECSL, in its letter of March 30th, 2023, stated that the Notice of Motion should be denied, but did not advance any relevant arguments for the position taken. The arguments made in the letter did not address the request for the stay.

Mr. Kenneth Went

18. Mr. Went's letter of March 25th, 2023 set out the "pros and cons" of granting a stay. He observed, inter alia, that during the period of the stay, the interim rate will continue and thus the Applicant will be protected. He thought that the stay should be given to promote due process and he did not rule out the possibility of an error being made by the Commission, given the voluminous nature of the documents in the proceedings before the Commission. He felt the balance favoured granting the stay, since "the stakes are high" and the review would provide the opportunity for an "optimal outcome."

THE LAW

19. Rule 54(1)(b) of the Utilities Regulation (Procedural) Rules 2003 (the "URPR") provides that an applicant for a review of a decision of the Commission may request the Commission to delay the implementation of its order or decision

pending the determination of the motion for review.⁹ The URPR do not set out the matters to be considered on a request for a stay of an order or decision of the Commission. However, it is evident that rule 56(1) of the URPR gives the Commission broad discretionary powers to stay its orders and decisions where it is just to do so. Rule 56(1) of the URPR provides as follows:

“Upon receipt of a motion under this Part and a request for a stay 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 condition as it considers appropriate.”

20. This Commission, in its earlier heat rate decision dated September 10th, 2018, determined that:

“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] 1SCR 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

⁹ Rule 54.(1) provides: “Every Notice of Motion made under rule 53(2), in addition to the requirements of rule 8 shall (a) (b) request a delay in the implementation of the order or decision or any part pending the determination of the motion is requested.”

- (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 irreparable 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.”

- 21. The Applicant and the Watson/Simpson Team agree that the above-mentioned principles are to be applied on an application for a stay. The Watson/Simpson Team argued for a strict application of the principles, particularly in relation to satisfying the requirement for irreparable damages. However, the Commission notes that the principles set out in *American Cyanamid v Ethicon Ltd*¹⁰, and the cases following it on interim injunctions, are guidelines only. They are not to be applied rigidly, but flexibly. The Commission must maintain the broad discretionary powers given to it by Rule 54(1)(b) of the URPR to stay its orders or decisions whenever it is just to do so. In each case, the Commission must assess whether granting or refusing a stay is more likely to produce a just result. The objective of the Commission is to take the course, (that is, to stay or not to

¹⁰ [1975] AC 396

stay its orders or decisions) which carries the least risk of injustice to the applicant, on the one hand or to the public or other relevant parties on the other hand.

22. The Court of Appeal of Barbados, in *Rupert DeLisle Worrell v. Minister of Finance*¹¹ observed that adequacy of damages may not be relevant in every case when considering the balance of justice in a case involving public law. The Commission agrees with the Applicant that in applications for a stay before the Commission, similarly, adequacy of damages may not always be a relevant factor.
23. It emerges from *Toojays v Westhaven*¹², that there are different approaches to the question of adequacy of damages. One approach focuses on whether damages are adequate and legally recoverable and the other considers whether it is just in all the circumstances of the case to confine the applicant to its remedy in damages. Even if damages were an adequate remedy in this case, as in quantifiable and recoverable, the Commission thinks it would be unjust to leave the Applicant to any remedy in damages.
24. The Commission restates what has been said in many decided cases before, that when considering the balance of convenience, or more appropriately, the balance of justice, the matters which may be taken into account are innumerable.¹³ Finally, the Commission is mindful that each case is to be decided on its own facts and that it is not its function, on a request for a stay, to find facts on disputed matters.

¹¹ Civil Appeal No 8 of 2017

¹² [2012] 2 LRC 65, paragraphs [54] to [61]

¹³ *American Cyanamid v Ethicon Ltd* [1975] AC 396, 408.

COMMISSION'S ANALYSIS

25. The Simpson/Watson Team was the only intervenor who addressed the legal principles upon which a stay is granted or refused. They agreed with the Applicant that the request for a stay raised serious issues to be tried. Therefore, the Commission need not address this any further.

26. The Commission does not agree with the submission of the Watson/Simpson Team that the public will be prejudiced or is likely to be prejudiced by the continuation of the interim order. The Commission's order granting interim rate relief to the Applicant was specific that: "... should these interim rates be found excessive after the full rate review, the Applicant shall refund its customers the difference between these rates and the final approved rates, with an interest rate equivalent to the return on equity to be approved in the substantive rate review."

27. The Commission does not agree with the Applicant that the grant of interim rate relief was based on any implied acceptance of "financial distress", which impacted the Applicant's ability to provide a service that is safe, adequate, efficient and reasonable. The Applicant's argument seems at odds with its earlier position. The Applicant, on the application for interim rate relief, very forcefully argued that "financial distress" was not the test for granting interim rate relief and strenuously urged the Commission not to apply it. This Commission, in its Interim Rate Decision, stated that the level of scrutiny on an application for interim rate relief is not the same as on an application for a final rate increase and that interim rate relief is granted on evidence insufficient for making a final rate increase order. The Commission further stated that interim rate relief is "granted to relieve the applicant from the deleterious effects caused by the length of the proceedings." The Commission, in The Barbados Light & Power Company Limited Application for Interim Rate Relief Decision and Order, September 16, 2022, at paragraph 67 set out the circumstances where

interim rate relief may be granted. In the circumstances, it cannot reasonably be argued that the grant of interim rate relief is an implied acceptance by the Commission that the Applicant was experiencing “financial distress” before or at the time interim rate relief was granted.

28. The Commission is entitled to take into account the nature of the Challenged Orders in deciding wherein lies the balance of justice. The financial or monetary nature of the Challenged Orders is without doubt. If the orders for the Applicant to establish regulatory liabilities of (i) \$99.5 m in connection with the SIF Fund and (ii) \$9.5 m in connection with the deferred tax liability are not stayed, they will result in an increase in the Applicant’s regulatory expense, even though the sums are to be amortized over thirty (30) years and fifteen (15) years respectively.
29. The Applicant has also requested a stay for the following orders:
 - (i) The use of base revenue, customer count, usage and demand values from the period ended June 30th, 2022 for the purposes of making an adjustment to test year revenues and within the cost of service study, requires the Applicant to adjust test year;
 - (ii) The financial capital structure of: equity 55% and debt 45% for rate making purposes in the determination of the rate of return; and
 - (iii) The Commission’s order “to modify the filed test year expenses in the development of the revenue requirement in respect of utilizing the 2020 reported insurance expense of \$8,198,082”.
30. The Commission is of the view that the balance of justice favours granting the stay, where several of the Challenged Orders are likely to impact the final rate which is to be implemented across the various customer classes. Staying the Challenged Orders would avoid disruption to rates, and would be fair to both

the Applicant and the public. The Commission is satisfied that stability and certainty of rates within the short term would be of benefit to both the Applicant and the public, in ordering their affairs. The Commission is further satisfied that the public is reasonably adequately protected by the terms on which the interim rate relief was granted and will continue until final determination where a stay is granted. The public is protected since the Applicant will be required to refund its customers with interest if the interim rates granted are found to be excessive when final rates are determined.

31. In exercising its discretion, the Commission also considered the significant sums involved and the relative novelty in this jurisdiction of some of the issues raised on the application to vary the Decision.

32. Accordingly, the Commission is satisfied that it is just to stay the Challenged Orders. The Commission's decision to stay the Challenged Orders is not to be interpreted as an implied admission of "financial distress" or a finding of fact that the Challenged Orders have or will have the financial consequences which the Applicant states they will.

ORDERS

33. The orders of the Commission are as follows:

- (a) The orders at paragraphs 400, 401, 404, 405 and 407 of the Decision are hereby stayed until the determination of the Applicant's Notice of Motion for Review and Variation of the Commission's Decision made on February 15th, 2023 or until further order of the Commission, and
- (b) The interim rates granted by the order of the Commission made on September 16th, 2022 are to continue until the final determination of the Applicant's Application or until further order of the Commission.

Dated this 12th day of May, 2023

Original signed by

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Donley Carrington
Deputy Chairman

Original signed by

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John Griffith
Commissioner

Original signed by

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Ruan Martinez
Commissioner

Original signed by

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Ankie Scott-Joseph
Commissioner

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Samuel Wallerson
Commissioner