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COMMUNICATIONS REGULATORY COMMISSION
NEW JERSEY
H. Walcott

**WRITTEN SUBMISSIONS BY PUBLIC COUNSEL – OPENING REMARKS
BY CHAIRMAN OF THE COMMISSION**

In his opening remarks Sir Neville Nicholls, Chairman, at page 2 of the Transcripts for Day 1 said inter alia, "This pre-hearing work included hosting a procedural conference where all of the parties were briefed on the Commission's procedures and how the hearing and surrounding proceedings would be managed. There was also an extensive exchange of numerous interrogatories and requests for information and documents. Along with the Commission, the Intervenors asked the Applicant a series of questions and in turn the Applicant responded to all of the interrogatories and filed the information or documents being requested".

Public Counsel's Response to the Opening Statement by the Applicant's Counsel

At page 30 paragraph 1, I stated that even though the Applicant appeared to have established a prima facie case for consideration by the Commission, the Applicant had not urged that a failure by the Commission to grant the review in its favour would seriously affect the Applicant's ability to continue supplying quality service to its customers and the country as a whole. I also referred to the inappropriate timing of a rate review in favour of the Applicant given the global economic conditions and more particularly that Barbados' economy is in a serious recession.

What is the Evidence in respect of the Applicant's Application

The Applicant called six (6) witnesses, four (4) of whom are employees and two (2) being experts from overseas. The first witness Mr. Peter Williams, Managing Director, put the case for the Applicant since he had the authority to speak on policy matters. Mr. Williams himself an engineer, testified that in his opinion the Applicant had put forward a strong case and that he would not be please, (pages 179 -181 of the transcripts Day 2) if the Commission was minded to grant a rate of return less than what was applied for, although Mr. Williams subsequently stated that whatever

the Commission did, the Applicant would continue to serve its customers and the people of Barbados.

The second witness Mr. Hutson Best, the Applicant's Financial Controller and Mr. Mark King, the Chief Operating Officer and Engineer gave the evidence expected of them, which evidence was seriously challenged under cross-examination once the issue of depreciation had already been decided.

It is submitted that the evidence of the two expert witnesses called on behalf of the Applicant namely Mr. Robert Camfield and Mr. Michael O'Sheasy did not prove the case for the Applicant but rather their evidence damaged the Applicant's case in material particulars. The extensive and detailed cross-examination by most of the Intervenor but specially the cross-examination by Mr. Clyde Mascoll and Mr. John Campbell in addition to the cross-examination by the Commissioners.

Expert Witnesses

Generally speaking, it is beyond doubt that an expert cannot be told what to put in his report or what to say in evidence.

The Duties and Responsibilities of Expert Witnesses

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth and nothing but the truth without some qualification, that qualification should be stated in the report.

The Intervenors Failure to call Witnesses

The approach by the intervenors not to call witnesses was deliberate for the following reasons:-

1) **Utilities Regulations Act Cap. 282**

Section 14 states, "In any proceeding before the Commission involving an existing or proposed rate of a service provider, the burden of proof to show that the rate is fair and reasonable and in accordance with the principles established by the Commission, shall be upon the service provider".

2) **The Utilities Regulation (Procedural) Rules, 2003**

Rule 47 (1) states, "The Commission shall adjourn to consider its decision"

Rule 47 (2) states, "The decision of the Commission shall be based upon a consideration of the whole of the record of the material properly before the Commission".

- 3) The Fair Trading Commission (FTC) during the hearing had present three (3) Consultants in accordance with Section 12 (1) of the Fair Trading Commission Act Cap. 326B.

The consultants would have been able to advise the Commissioners on matters which required clarification on any issue raised through evidence in chief, cross-examination or re-examination.

The Interpretation Act, Cap. 1

The Long Title states, "An Act to make provision with respect to the operation, interpretation, citation and printing and recording of enactments, and for related purposes".

Under section 2, the definition section -

"enactment" means an Act or a statutory instrument or any provision in an Act or statutory instrument.

"instrument" includes a proclamation, order or warrant (other than an Order made or a warrant issued by a court) notice, scheme, rule, regulation or by-law

"statutory instrument" means an instrument made under an Act.

Section 3 (1) states, "Every provision of this Act shall extend and apply to every enactment whether passed or made before or after the 16th June 1966, unless a contrary intention appears in this Act or in the enactment".

Subsection (2) states, "The provisions of this Act shall apply to this Act as they apply to an enactment passed after 16th June, 1966, and references in this Act to an enactment so passed shall be construed accordingly".

Section 4 states, "Nothing in this Act shall be construed as excluding the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act".

Section 37 states, "In an enactment passed or made after the 16th June, 1966, the expression "shall" shall be construed as imperative and the expression "may" as permissive and empowering".

Other Relevant Legislation

The Evidence Act, Cap. 121

Section 2 "Court" means the court, tribunal, judge, magistrate, arbitrator, body or person before whom or which proceedings are held or taken.

"legal or administrative proceedings" means proceedings, however described

- a) In a court in Barbados or a court of a foreign country, or
- b) before a person or body, other than a court, authorized by law, including a law of a foreign country, or by consent of parties, to hear and receive evidence, and includes proceedings in a coroner's court and proceedings in a court martial".

“Probative Value” in relation to evidence, means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.”

Section 38 (1) states, “If a misleading question, or a question that is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive is put to a witness in cross-examination, the court may disallow the question or inform the witness that he need not answer the question.

2) For the purposes of subsection (1), the matters that the court shall take into account include any relevant condition or characteristic of the witness, including –

a) his age, personality and education; and

b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

Section 39 states, “A party may put a leading question to a witness in cross-examination but the court may disallow the question or direct the witness not to answer it”.

Section 44 (1) states, “The evidence that is relevant in proceedings is evidence that, if it were accepted, could rationally affect, whether directly or indirectly the assessment of the probability of the existence of a fact in issue in the proceedings.

2) In particular, evidence shall not be taken to be irrelevant by reason only that it relates to –

a) the credibility of a party or a witness;

- b) the admissibility of other evidence; or
- c) a failure to adduce evidence.

Section 45 states, "Evidence that is relevant in proceedings is, subject to this Act, admissible and shall be admissible, in the proceedings; and evidence that is not relevant in the proceedings is not so admissible".

The Utilities Regulation Procedural Rules 2003 (Supra)

Although Rule 42 is not inconsistent with the provisions of the Evidence Act in respect of cross-examination, the trier of fact must exercise such discretion justly and fairly.

What are the Issues the Commission should consider based on the Evidence before it

The issues as I see them –

- 1) Has the Applicant satisfied Section 14 of the Utilities Regulation Act, Cap. 282 as regards the burden of proof?
- 2) Is there substantial merit in the case for the Intervenors?

In respect of the first question, the Commission should give serious consideration to the fact that the Applicant knew it was applying for a rate review and had studies done by (experts) consultants at least three (3) years before the application was made. Put another way the Applicant had ample time to prepare for the rate review. The experts had visited Barbados and had several discussions with the Applicant in preparing for such rate review. The case for the Applicant appeared to be sound and conclusive until the Applicant's witnesses were cross-examined by the Intervenors and by the Commissioners. The evidence of the expert witnesses and the witnesses for the Applicant generally established only a prima facie case i.e.

“one in which the evidence is sufficient to support but not to compel a certain conclusion and does no more than furnish evidence to be considered and weighed but not necessarily to be accepted by the trier of the facts.”

The fact that the Commissioners asked several questions of the Applicant's witnesses and they requested additional information whether for the sake of clarity or to get substance from what was said is indicative that the Applicant did not present a crystal clear and compelling case to the Commission.

The request by Mr. Clyde Mascoll for the Applicant to revisit its application in light of his oral closing address should be considered by the Commission.

As regards question 2, there can be no doubt based on the evidence that the case for the intervenors has not only merit but substantial merit and if it were not so, I would have told them.

Timing of Review Hearing

In my opening address, I referred to the timing for a rate review not being appropriate at this time considering the global economic conditions and more particularly that Barbados' economy is in a serious recession.

What the hearing has done is to expose the Applicant as being financially healthy which has always been the case. The Applicant's retained earnings further confirm the point. A rate review in the Applicant's favour would be comparing the Applicant to the rich man referred to in the Bible at St. Luke Chapter 12 vs. 16 -19.

Request for Transcripts

It cannot be denied that the Intervenors were disadvantaged from start to finish and in more ways than one. My request for transcripts to be circulated in accordance with the statutory provision can be justified by examining the transcripts of Day 1 page 28 lines 677 – 682 relative to the opening statement of Sir Henry Forde and the transcripts of Day 12 page 1095 paragraph 3 relative to the objection by Mr. Ramon Alleyne one of Applicant's counsel as to whether or not Sir Henry Forde used a particular statement regarding the witness Mr. Stephen Worme on the rate of return. Another example showing how the Intervenors were disadvantaged relates to Mr. Alleyne's repeated comments that a particular witness of the Applicant was not the appropriate one to answer certain questions and that the witness who should have been asked had already testified and that the question was not asked of him at that time.

It is submitted that a question can only be asked when it is formulated in the mind and not before. This point is fortified when one looks at the Commission's own (Procedural) Rules regarding the number of days the hearing should have taken and the commencement times etc. So even with the best intentions things do not always fall into place as we usually hope for. Put another way, we do not always get it right first time and sometimes at all.

The Legal Submission raised by Public Counsel re. the Statutory Provision of the Availability of Transcripts

The submission raised dealt with the interpretation of a statutory provision. The Commission did not invite counsel for the Applicant to respond before ruling on the point. It is my view that although the Commissioners comprised two attorneys-at-law including the Chairman, the other side should have been invited to respond to the submission even if the ruling was unchanged. The Transcripts will show that certain comments were struck from the record, but if still considered in the decision one will never know.

The Role of Public Counsel

The Public Counsel being a creature of statute was requested by two named intervenors namely, the Barbados Association of Retired Persons (BARP) and the Barbados Small Business Association (BSBA) to represent them at the hearing but as regards rate review hearings the Public Counsel has other clientele and the Public Counsel himself is a user of electricity and therefore a rate payer.

In the highest traditions of the legal profession whether as a Public Prosecutor or as Public Counsel I owe it to the intervenors to ensure that they are given a fair hearing. Time being of the essence cannot be substituted for what is fair and just.

Reasons why the Applicant's Request should be Refused

- 1) The evidence shows that the Applicant is a monopoly with very healthy retained earnings. In addition the Applicant will always be the owner of its plant and machinery.

- 2) Since all losses are passed on by the Applicant to the consumers and the rest of the country, the Applicant suffers no burdens and it enjoys all the benefits.
- 3) The Managing Director of the Applicant has testified that a failure by the Commission to grant the requested rate of return would not cause the Applicant to “cripple” or stop producing quality service to the people of Barbados.
- 4) Most importantly the evidence given by the Applicant’s witnesses the experts (consultants) did not build the case for the Applicant. The extensive cross-examination by the intervenors and the Commissioners in my opinion, means that the experts did not properly perform their duties and responsibilities referred to in this submission.

Other Factors to be Considered

Even before the hearing commenced the views of the public varied relative to whether the Applicant should be granted the required rate of return, a lesser rate of return or any rate increase at all.

Commissioners presiding over the hearing will also have their respective views but personal opinions must be divorced from what they are required by law to do, that is, do justice to the hearing by carefully examining the evidence in respect of the issues which constitute the “pith and substance” of the application and the merit of the intervenors’ case.

Having on record what transpired during the hearing, it would not be in the parties interest to have this matter re-heard by the same or another panel of Commissioners since it is know that the many costs are passed on. In addition any legal issues bearing directly on the hearing would have to be addressed before the main hearing. The transcripts from this hearing would have to become part of the intervenors documents for comparative purposes.

Conclusion

On the evidence before the Commission it is my submission that there is substantial merit in the case for the intervenors. It should follow that if the Commission finds substantial merit, it means that the Applicant has not satisfied Section 14 of the Utilities Regulation Act, (Supra). The more merit the Commission finds for the Intervenor, the more the case for the Applicant is not established and even if the Commission is minded to grant a rate review in the Applicant's favour, it should not be even near to what the Applicant is requesting since the case for the Applicant is not an "open and shut" one.

I wish to thank all of the Intervenor for such meaningful participation and also to thank the staff of the Fair Trading Commission for bearing with us when we sought leave of the Commission to file documents after the scheduled dates.

ELI EDWARDS
PUBLIC COUNSEL (AG.)
November 11, 2009