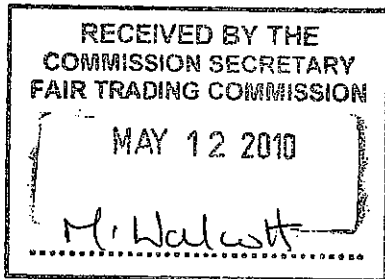


**SUBMISSIONS OF THE BARBADOS LIGHT & POWER COMPANY
LIMITED ON NOTICE OF MOTION FOR REVIEW FILED BY BARCRO**

BARBADOS

NO.02/09 BL&P - RADJ

THE 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;

IN THE MATTER of the Application by The Barbados Light & Power Company Limited for a Review of Electricity Rates pursuant to section 16 of the Utilities Regulation Act, Cap. 282 of the Laws of Barbados.

BARBADOS CONSUMERS RESEARCH ORGANISATION INC.

APPLICANT

A N D

THE BARBADOS LIGHT & POWER COMPANY LIMITED

RESPONDENT

INTRODUCTORY

1. On February 17, 2010 the Fair Trading Commission ("FTC" or "Commission") received Notices of Motions ("Motions") for a review of its Decision and Order dated January 25, 2010 ("Decision and Order") from the following intervenors:
 - (a) Barbados Consumers Research Organisation, Inc. (BARCRO)¹; and
 - (b) Barbados Association of Retired Persons (BARP)², filed by Public Counsel.

The Motions were for the review of the Commission's Decision and Order on an application by The Barbados Light & Power Company ("the Respondent") for a review of its existing electricity rates. BARCRO's Motion was supported by the unsigned Affidavits of Mr. Malcolm Gibbs-Taitt and Mr. Carl Ince, both

¹ Notice of Motion dated February 16, 2010.

² Notice of Motion dated February 17, 2010.

dated February 16, 2010 while BARP's Motion was filed without an Affidavit in support.

2. Rules 53 (2) and (6) of the Utilities Regulation (Procedural) Rules, 2003 ("the Rules") provide that "*any party to a proceeding may by motion request a review of a final decision or order*" and that "*a request to review shall be filed within 14 business days of the date of the decision or order*". The Motions were filed within 14 business days from the date the Decision and Order were delivered.
3. On February 17, 2010 the Respondent was served with copies of the Motions and draft Affidavits by the FTC and on February 18, 2010 it was served by Public Counsel with the Motion filed on behalf of BARP. Both Motions requested a stay of the implementation of the Decision and Order which was due to take effect on March 1, 2010. The Commission considered the applications for a stay and on February 26, 2010, ruled that both applications for a stay were denied.
4. By letter dated March 30, 2010, the FTC served the Respondent with an amended Notice of Motion filed by BARCRO on March 19, 2010³ together with a signed and sworn Affidavit of Mr. Malcolm Gibbs-Taitt dated March 18, 2010.
5. By letter dated April 14, 2010, the FTC advised the Respondent that the Motion that was filed on behalf of BARP by Public Counsel had been withdrawn.
6. The only Motion that remains before the Commission for its consideration is the Amended Notice of Motion filed by BARCRO. On April 21, 2010, the Respondent was served with BARCRO's written submissions. The Respondent hereby responds as follows:

³ Amended Notice of Motion dated March 18, 2010.

BARCRO's GROUNDS FOR REVIEW

7. BARCRO has submitted several grounds for review for the Commission's consideration, concerning the following:
 - a) The taking of consumer's circumstances into account, the timing of the Respondent's Application and the Increase in Rate Base.
 - b) Role of Public Counsel.
 - c) Standards of Service.
 - d) The shifting of 2.64 cents from the Base Energy rate to the Fuel Clause Adjustment.
 - e) Meter readings, Interim Billing and Meter costs.
 - f) Transcripts of the Proceedings.
 - g) Weight of Evidence.
 - h) Expert witnesses.
 - i) Value of Service.
 - j) Change in circumstances.
 - k) Commission's Consultants.
8. The unsigned and unsworn affidavits of Mr. Gibbs-Taitt and Mr. Ince are mere drafts and do not constitute evidence. The only affidavit that is properly before the Commission is the Affidavit of Mr. Gibbs-Taitt dated March 18, 2010. In his Affidavit, Mr. Gibbs-Taitt outlines the history of his career and concludes in paragraph 16 that he is *"unable to give an honest and fair analysis of the merits of the Application."* The Respondent submits that this statement casts grave doubts on the usefulness of this Affidavit. This will be examined further below. BARCRO did not file any other document in support of its Motion.
9. Before the Motion and the above mentioned issues are addressed, it is important to set out the legal framework that should guide the Commission's determination of this Motion.

THE COMMISSION'S DUTY

10. Pursuant to section 36 of the **Fair Trading Commission Act**, Cap. 326B of the Laws of Barbados,

"the Commission may on application or on its own motion review and vary or rescind any decision or order made by it and, where under this Act a hearing is required before any decision or order is made, such decision or order shall not be altered, suspended or revoked without a hearing".

11. The authority of the Commission to review its decision is discretionary and one which it does not take lightly. This has been so stated by the Commission in a previous decision where it opined that *"the decision to allow a review is not to be taken lightly and instances when it can review are prescribed by statutory instrument."*⁴

12. The reference to the prescription of the statutory instrument is a reference to the grounds for review which are provided for in rule 54 of the Rules. Rule 55 of the Rules sets out how the Motion should be determined. It provides:

"(1) The Commission shall determine with a hearing, in respect of a motion brought under rule 53 the threshold question of whether the matter should be reviewed or whether there is reason to believe the order should be rescinded or varied.

(2) Where the Commission finds that the matter should be reviewed or that there is reason to believe the order should be rescinded or varied, it may in its discretion, either dispose of the motion or issue procedural orders with respect to conducting the review on the merits.

(3) The Commission may adopt whatever procedures it deems to be just and expeditious in the individual circumstances of each motion including providing for the combining of the consideration of the threshold question and the review of the merits."

13. When examining a Motion for Review, the Commission has a duty to first consider the threshold question of whether the matter should be reviewed or

⁴ FTC Decision and Order dated January 17, 2005 in the matter of the Application for a Review of the Decision of the Fair Trading Commission dated the 20th July, 2004 filed by Cable & Wireless (Barbados) Limited, at para. 12, p. 3.

whether there is reason to believe the order should be rescinded or varied. In the instant case, the Commission has acted under rule 54(3) of the Rules and has combined the consideration of the threshold question and the review of the merits. In addition, the Commission has further determined that pursuant to rule 37 of the Rules, the Motion would be disposed of by way of a written hearing in the interest of expediting the matter in the most cost efficient way.

ISSUES

14. The main issues that arise for the Commission's consideration are:
 - (i) Whether the Motion should be reviewed or whether there is reason to believe that the order should be rescinded or varied ("the threshold question"); and
 - (ii) If the Motion should be reviewed, what should be the Commission's determination on the merits.

THE THRESHOLD QUESTION

15. The Commission has defined what is meant by "the threshold question" in a previous decision. According to the Commission:

*"an applicant must first demonstrate, on a **prima facie basis**, the existence of the permissible grounds for review, this is referred to as the threshold question".⁵ [emphasis ours]*

16. Therefore, in order for the Commission to determine the threshold question of whether the matter should be reviewed or whether there is reason to believe the order should be rescinded or varied, BARCRO must demonstrate on a prima facie basis, the existence of one or more grounds for review.
17. The Commission has accepted Black's Law Dictionary's definition of "prima facie case", defined as "(a) *the establishment of a legally required rebuttable*

⁵ Ibid, at para. 13

presumption; (b) a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favour".⁶

18. Rule 54(1)(a) of the Rules sets out the specific grounds on which the Commission can review a decision. It states:

"Every Notice of Motion for Review made under rule 53(2), in addition to the requirement of rule 8 shall:

- (a) 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 and the grounds may include*
 - (i) error of law or jurisdiction;*
 - (ii) error of fact;*
 - (iii) a change of 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".*

19. BARCRO has relied on the grounds of error of law, error of fact and a change in circumstances. The Respondent will now examine the grounds that have been put forward in the Motion.

(a) The taking of consumer's circumstances into account, the timing of the Respondent's Application and the Increase in Rate Base

20. BARCRO has argued that the Commission made an error of fact and law in not taking the circumstances of consumers into account, given the economic conditions that prevail worldwide. Further, it contends that the evidence did not support the payment of higher rates by customers and that the timing of the application was unreasonable for the consumers. BARCRO has also argued that the Respondent was prepared to accept a lower rate of return as

⁶ Ibid, at para. 21

evidenced in the Commission's Decision and Order and that the rate of return does not pass the test of fairness and reasonableness.

21. It is submitted that the issues of the economic conditions and timing of the Respondent's application are adequately dealt with by the Decision of the Commission. At paragraphs 240 and 242 of the Decision, the Commission considered the issues of timing and economic conditions and concluded that it was aware of the challenges being faced by Barbados at this time. The Commission also held that "it is equally aware that, especially at these times, it is important that Barbados maintains a stable and reliable electricity service". As the Respondent has previously submitted, the cost of operating and maintaining the utility plant has continued to increase and in addition, the Respondent has to make substantial investments to continue to provide such a service. It is clear from the evidence and the judgment that the Commission did not fail to take into account the issues of economic conditions and timing of the application.
22. It is further submitted that the Commission adequately took the circumstances of consumers into account and that the rate of return was fair and reasonable. The Commission considered the issues of the consumers' interest and the concept of fairness and reasonableness as is shown at paragraphs 13 – 15 of the Decision. The Commission opined that fairness and reasonableness relates to "the balance between the interest of the consumers and the interest of the utility company" as set out in section 3 of the **Utilities Regulation Act**, Cap. 282 of the Laws of Barbados ("URA"). The Respondent submits that the Decision of the Commission achieves this balance.
23. Using what it terms as "arithmetic conclusions", BARCRO contends that the Decision was not fair and reasonable. It is submitted that BARCRO has misinterpreted the application of certain key principles and as such has arrived at inaccurate conclusions. In paragraph 6 of its submissions, BARCRO states that the Respondent had requested that "the Rate Base be moved from 6.07% to 10.48%". This is inaccurate. As the Commission is aware, the Respondent had shown that the actual Rate of Return for the Test Year was 6.07% and that it was seeking a Rate of Return on Rate Base of 10.48%. In addition, the Respondent submits that the Commission took the correct principles into account in determining the Rate of Return. The

Commission considered and applied the decision of Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia⁷ in which the US Supreme Court stated *"The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."* These principles were upheld in the case of Federal Power Commission v. Hope Natural Gas Company.⁸

24. The Respondent presented evidence of a "Study of the Cost of Capital and Rate of Return Recommendation"⁹ which was undertaken by a team of independent consultants led by Mr. Robert Camfield, an appointed expert, to establish the basis of its proposed Rate of Return. This Study remains uncontradicted. BARCRO has not presented an iota of evidence to contradict the Rate of Return that was approved by the Commission and therefore, its contention that the Rate of Return is not fair or reasonable fails to establish a prima facie case for the Commission to review its Decision and Order.

25. BARCRO has also sought to argue that the Customer Charge and Demand Charge for the tariff groups were not fair and reasonable. It is submitted that BARCRO has not put forward any evidence to substantiate how these charges are not fair or reasonable. The Respondent on the other hand has explained its rate design objectives and how these charges and the rates in general were arrived at based on a cost of service study prepared and presented by the independent consultant and appointed expert, Mr. Michael O'Sheasy.¹⁰ The Respondent also presented evidence of how a marginal cost analysis was undertaken to assess the impact on the rate design at certain pricing points. BARCRO has criticized the "lack of uniformity" in the three tiered structure for the basic energy charge. What BARCRO fails to mention however, is that the Respondent explained that one of the primary reasons for this "lack of uniformity" was to lessen the impact upon low-usage customers which paradoxically was one of BARCRO's criticisms by alleging that the Respondent failed to account for the impact on customers. BARCRO

⁷ 262 U.S. 679 (1923)

⁸ 320 U.S. 591 (1942)

⁹ See Affidavit of Robert Camfield, pages 503-716 *Application* (Volume 3).

¹⁰ See Affidavit of Michael O'Sheasy, pages 717-788 *Application* (Volume 3).

challenged the fact that the tier ratios between Domestic and General Service were not identical. What BARCRO failed to mention is that the cost to serve these two rate groups is different as are their circumstances such that there is no requirement to offer identical tier ratios across these two disparate rate groups. BARCRO has suggested ways in which the Base Energy charge may be revised but there is no evidential basis for these suggestions.

26. Overall, it is submitted that BARCRO has not disproved the Respondent's evidence that was presented during the hearing. In the circumstances, the Respondent submits that BARCRO has not established on a prima facie basis that these grounds for review exist.

(b) the Role of Public Counsel

27. BARCRO has submitted that the Commission erred in law and fact when it failed to acknowledge that Public Counsel was an intervenor. This is an inaccurate statement. Public Counsel at all times assisted other intervenors and was not an intervenor himself. In the circumstances, it is submitted that this ground does not present a prima facie basis for a review.

(c) Standards of Service

28. BARCRO has submitted that the Commission made an error of fact and law when at the Issues Conference it ordered that service standards be removed from the hearing. BARCRO bases this argument on section 17(1) of the URA and Rule 63 of the Rules. Section 17(1) enables a service provider to make an application for a change in service standards and sets out what should be contained in such an application. These provisions do not prevent the Commission from considering the issue of service standards outside of the context of a hearing of an application for a review of electricity rates.
29. Rule 63(1) provides that "*where a service provider makes an application for a rate review, proposed service standards must be presented as part of that request*". It is submitted that the Respondent complied with this requirement. It is surprising that BARCRO would seek to rely on this provision since it is submitted that the Respondent presented a "Memorandum on Service Standards" as part of its application and therefore complied with the rule.

30. Rule 63(4) and (5) of the Rules provide that *"the proposed service standards may be considered in the hearing"* and *"in its ruling, the Commission may set minimum service standards"*. However, rule 4 of the Rules provide that ***"the Commission may issue procedural directions, which shall govern the conduct of proceedings before the Commission and shall prevail over any provision of these Rules that is inconsistent with those directions."*** (emphasis ours) The Commission directed in Procedural Directions No 2. dated September 23, 2009 that the issue of service standards was being addressed outside of the hearing. Therefore, the Respondent submits that if the Commission did not strictly comply with rules 63 (4) and (5), which is denied, the Commission is entitled under rule 4 to vary the Rules. The Commission had a separate hearing on the issue of service standards and issued its Decision on February 24, 2010.
31. In the circumstances, the Respondent submits that BARCRO has not established on a prima facie basis that these grounds for review exist.

(d) The shifting of 2.64 cents from the Base Energy rate to the Fuel Clause Adjustment

32. BARCRO has submitted that the Commission made an error of fact in agreeing to shift the 2.64 cents per kWh of fuel cost from the Base Energy rate to the Fuel Clause Adjustment (FCA), since "it made no proper arrangement to make sure that consumers do not face an unfair burden and that proper adjustments are ordered so as to ensure efficiencies, transparency and accountability". It is submitted that the Applicant has misinterpreted the shifting of the 2.64 cents from the Base Energy rate to the FCA. The shifting of the 2.64 cents does not place any extra burden on the customers and in fact improves efficiency and transparency. As the Commission stated in paragraph 198 of its Decision, "having all fuel cost collected through one mechanism, the FCA, will provide customers with more transparency on the cost of electricity service and will be less confusing than having a portion of fuel costs in the base energy charge and the rest in the FCA".
33. In the circumstances, the Respondent submits that the Commission should also reject this as a ground for review since BARCRO has failed to establish

on a prima facie basis that an error of fact was made in the Commission's ruling.

(e) Meter readings, Interim Billing and Meter costs

34. BARCRO has contended that the Commission made an error of fact in (i) failing to make sure that consumers will see an effective measure put in place to justify that meter readings, whether actual or interim will reflect a true position and (ii) by not correcting the way interim billing is conducted. BARCRO did not lead any evidence at the hearing to show that meter readings were inaccurate or to show why interim billing should be corrected. It is submitted that there are no errors of fact concerning meter readings and interim billing and as such no prima facie case has been made out on the basis of these grounds.
35. On the matter of meter costs, BARCRO contends that the Commission made an error of fact "since it accepted the time meters are kept on customers' properties before any change or testing is exacted". During the hearing, the Respondent's witness Mr. King gave evidence on the average age of meters and the maintenance programme employed by the Respondent. No evidence was led to refute the evidence of the Respondent. In the circumstances, BARCRO has not made a prima facie case that this ground for review exists.

(f) Transcripts of the Proceedings

36. BARCRO contends that the Commission made an error of fact and law in failing to deliver the transcript of evidence within two (2) business days since this deprived it of the opportunity to properly make oral submissions, notwithstanding being allowed to put written submissions at a later time.
37. Rule 44 of the Rules provide:

"The Commission may make provisions for oral argument to be made by the parties immediately following the close of evidence although written argument may be filed at that time instead of oral argument if directed to do so by the Commission."

38. Rule 44 provides the Commission with the power to dispense with oral hearings. Although the parties did not have all the transcripts before the presentation of their oral arguments, they were given the opportunity to address the Commission and BARCRO did address the Commission. Further, the Commission gave BARCRO and the other intervenors a further opportunity to present written arguments, at which time BARCRO would have had all of the transcripts. It is submitted that the intervenors were not prejudiced by any delay in receiving all the transcripts. BARCRO not only had an opportunity to make representations in writing but the requirements of fairness were met. No injustice was caused.¹¹ In the circumstances, it is submitted that BARCRO has not made out a prima facie case for a review on this ground.

(g) Weight of the Evidence

39. BARCRO contends that the Commission made an error of fact in arriving at its Decision and Order that was "against the weight of the evidence presented". It is submitted that the Respondent presented overwhelming evidence at the hearing in support of its application. In arriving at its Decision, the Commission heard and accepted the evidence of the six (6) witnesses, including two (2) experts, called on behalf of the Respondent. These witnesses were subjected to extensive and incisive questioning by Intervenor and Commissioners. The Commission also accepted into evidence six (6) Affidavits, eleven (11) Memoranda, twelve (12) sets of Responses to Interrogatories, three (3) expert reports, and over fifty (50) documents including relevant legal, accounting and regulatory cases, precedents and studies. This constituted a sufficiency of reliable evidence to satisfy the burden of proof required by section 14 of the URA.
40. In the circumstances, the Respondent submits that BARCRO has not made out a prima facie case for review on this ground.

¹¹ *R v. Panel on Takeovers and Mergers ex. P. Guinness Plc* [1990] 1 QB 146

(h) Expert witnesses

41. BARCRO has submitted that the Commission made an error of fact and law when it failed at the Issues Conference to give BARCRO leave to bring a witness who is a qualified economist. The Respondent submits that this contention is unsubstantiated. Pursuant to paragraph 17 of the Procedural Order No. 1 dated August 11, 2009 on the Procedural Conference, an intervenor who wished to rebut the Respondent's expert evidence or to introduce expert evidence of their own was obliged to do so by submitting an Affidavit by August 31, 2009. The Respondent is not aware of any such Affidavit filed on behalf of BACRO. In the circumstances it is submitted that this too is a baseless ground for review.

(i) Value of Service

42. BARCRO contends that the Commission made an error of fact in "allowing for different costing for meter reading and few related matters which is suggested as Cost of Service with little or no regard for to Value of Service." Mr. O'Sheasy gave evidence that the value of service principle was not factored into a cost of service study and that as it pertains to rate design, prices are not based on the value of service principle in a regulated utility environment. The Commission accepted this evidence. BARCRO has not offered any evidence in rebuttal and so it is submitted that BARCRO has not established a prima facie case for review.

(i) Change in circumstances

43. BARCRO has alleged that the Respondent has purchased three (3) generators but has only put one (1) into service and that this is an issue to be addressed. The evidence before the Commission clearly contradicts this contention, which is unfounded. The Respondent submits that this allegation is not admissible on a review since it is not evidence and does not amount to a change in circumstances. This allegation therefore does not provide a prima facie ground for review.

(k) The Commission's Consultants

44. BARCRO contends that at no time during the hearing was it afforded an opportunity to question the Commission's consultants and that this amounts to an error of law. The Respondent does not recall BARCRO or any other party to the proceedings asking for permission at any time to question the Commission's consultants. In any event, pursuant to rule 61(2) of the Rules, the Commission may engage persons having the professional, technical or other knowledge to assist the staff in summarizing the issues and providing a preliminary assessment of the reasonableness of the case presented by the service provider. In the circumstances, it is submitted that BARCRO has not established a prima face case for review.

(l) Other grounds

45. The Respondent submits that no prima facie case has been made out on the other grounds that have been put forward by BARCRO. These grounds are of no merit.

REVIEW ON THE MERITS

46. This Motion should be denied. BARCRO has failed to establish a prima facie case for review. BARCRO has not specifically identified any areas of evidence or demonstrated to the Commission where it fell into error of law or fact. BARCRO's affidavit is inadequate and fails to provide any evidence in support of its Motion for review. In the circumstances, the Respondent contends that the threshold has not been met to justify a review.

CONCLUDING REMARKS

47. The Commission has previously stated that – "a review is not a vehicle for applicants or intervenors to reargue their submissions made at an earlier hearing simply because they do not agree with the decision".¹² The Respondent submits that the Motion by BARCRO was a further effort on its

¹² Supra n. 4 at para. 13.

part to reargue its case. In the circumstances, it is submitted that this Motion be denied.

DATED MAY 12, 2010

PREPARED ON BEHALF OF THE RESPONDENT BY:

H. de la Forde

SIR HENRY FORDE, Q.C.

AND

CLARKE GITTENS FARMER

PER:

[Signature]
RAMON O. ALLEYNE

[Signature]
NICOLA A. BERRY



