



FAIR TRADING COMMISSION

IN THE MATTER OF
THE APPLICATION FOR A REVIEW OF THE DECISION OF THE FAIR
TRADING COMMISSION DATED THE 20TH JULY 2004 NO.4 OF 2004

filed by

CABLE & WIRELESS (BARBADOS) LIMITED

DECISION AND ORDER

BEFORE:

Mrs. Vivian-Anne Gittens
Chairman

Professor Andrew Downes
Commissioner

Mr. Gregory Hazzard
Commissioner

IN THE MATTER OF

the Fair Trading Commission Act CAP. 326B

AND IN THE MATTER OF

the Utilities Regulation Act CAP. 282

AND IN THE MATTER OF

the Utilities Regulation (Procedural) Rules S.I. 2003 No. 104

BEFORE:

Mrs. Vivian-Anne Gittens
Chairman

Professor Andrew Downes
Commissioner

Mr. Gregory Hazzard
Commissioner

DATE: **January 17, 2005**

PART I - BACKGROUND

The Original Application

1. Cable & Wireless (Barbados) Ltd. "the Company" submitted an application to the Fair Trading Commission "Commission" on August 5, 2003 seeking:
 - (a) *an adjustment to the domestic line rate for business and residential customers;*
 - (b) *the introduction of flat rate charging plans and usage based rates for domestic calls made from fixed lines;*
 - (c) *such further or other relief not inconsistent with the above as the Commission sees fit.*

2. The Company in its application proposed revised rates for residential and business users of the domestic service. The Company stated that should the proposed domestic rates be approved, the Company intends to adjust international direct dialled (IDD) rates below the current maximum rates.

Original Decision

3. The Commission issued its decision on July 20, 2004 inter alia denying the Company's application for a rate adjustment and the introduction of usage based/flat rate plans for reasons fully set out in its decision.

Filing of the Motion for Review

4. The Company filed a Notice of Motion for Review pursuant to section 36 of the Fair Trading Commission Act CAP 326B and Rule 53 of the Utilities Regulation (Procedural) Rules, S.I. 104 of 2003 on August 5, 2004.

Order requested by the Company

5. The relief sought by the Company in its Motion for Review is the relief sought by the Company in its original application.

6. In addition, the Company now seeks from the Commission a rate adjustment in relation to domestic fixed to fixed voice and domestic fixed line access as will result in these rates moving towards cost that would allow the Company to make a reasonable rate of return on the capital employed in the provision of domestic fixed to fixed voice and domestic fixed line access. The Company has left it to the Commission to determine the final rate structure that would achieve this result be it that proposed by the Company or some other rate structure, including a flat rate as placed in evidence.

Written Hearing

7. The Commission decided that (a) the determination of the preliminary issue of whether the matter should be reviewed and (b) the consideration of the review on the merits i.e. to assess whether the decision should be varied or rescinded, would be by means of a written hearing pursuant to Rule 37 (1) of the Utilities Regulation (Procedural) Rules S.I. 2003 No. 104.
8. On October 12, 2004 the Company filed written submissions with the Commission. Intervenors having received late service of the Company's written submissions were granted until November 2, 2004 to file their submissions. The Company filed a written submission of reply on November 16, 2004.
9. The Commission granted leave to make brief oral presentations to persons who so requested. On December 2, 2004 the Commission heard oral summaries of their written submissions from the Company, Public Counsel – on behalf of the Barbados Council for the Disabled and Intervenors - Mr. Alvin Cummins, Barbados Consumer Research Organisation, CARITEL and Mr. Olson Robertson.

Consolidated Hearing

10. Rule 55 (1) of the Utilities Regulation (Procedural) Rules S.I. 2003 No. 104 states:

“(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.”

In accordance with Rule 55(3) the Commission decided that it would combine the

consideration of the threshold question and a review on the merits and would hold a consolidated hearing. In light of this the Company and some Intervenors in their written submissions addressed both (a) the threshold question and (b) the review on the merits to determine whether the decision should be varied or rescinded.

Intervenor Participation

11. The following Intervenors participated in the proceedings by filing written submissions and presented brief oral summaries in response to the Company's Notice of Motion for Review:

Public Counsel (on behalf of the Barbados Council for the Disabled)
Mr. Alvin Cummins
Barbados Consumer Research Organisation Inc. (BARCRO)
CARITEL
Mr. Olson Robertson
Mr. Alvin Thorpe

Duty of Commission

12. In Regulatory Rate Hearings the Commission sits as an adjudicative panel and is required by legislation and principles of natural justice to make a determination based on the evidence put before it. By virtue of section 36 of the Fair Trading Commission Act CAP. 326B the Commission has jurisdiction on application or on its own motion to review vary or rescind any decision given by it. The decision to allow review is not taken lightly and instances when it can review are prescribed by the statutory instrument. The Commission's discretion to review and vary or rescind a decision or order is applied with a view to ensuring there is consistency and predictability in the Commission's decision-making process.
13. 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. Under the Fair Trading Commission Act, the authority of the Commission to allow a review is discretionary. An applicant must first demonstrate, on a prima facie basis, the existence of the permissible grounds of Review, this is referred to as the threshold question.
14. To discharge its first task vis a vis whether a review should be granted the Commission considered the Motion for Review and the complete written submissions and presentations received from the Company and the Intervenors.

The Threshold Question

15. The Company invited the Commission to consider its full written submissions when determining the threshold question of whether the decision of July 20, 2004 should be reviewed and to determine whether the decision and order should be varied or rescinded – a review on the merits.

16. The Company cited Bell Canada case Telecom Decision CRTC 79-1 Ottawa, February 2, 1979 in support of its view that to meet the threshold for a review an applicant had to demonstrate on a prima facie basis, the existence of one or more of the grounds for review.

17. The Company further submitted that the Commission should also consider the approach set out in Order 53 of the English rules of the Supreme Court and the local equivalent where, for leave to bring an application before the court i.e. standing, an applicant needed only to establish that on a preliminary examination an arguable case exists.

18. Public Counsel in his submissions considered that the Company had misconstrued the threshold question by seeking to rely on Order 53, as this Order establishes a procedure which relates to standing. He further submitted that the Company is required to show on a prima facie basis that an error of law or fact exists by presenting specific examples of error by reference to the evidence. It was his view that the Company had not presented to the Commission any facts which would support (a) the existence of an error in fact or in law or (b) that the decision raised an important principle.

19. The Commission does not agree with the Company that the rules relevant to Order 53 or those which seek to determine issues of standing or locus standi are applicable when one is determining the threshold question. Order 53 addresses a situation where a potential applicant seeks to establish standing. The Utilities Regulation (Procedural) Rules has its own rules with respect to standing. These are set out at Rule 53. By virtue of the Utilities Regulation (Procedural) Rules Rule 53(2) the Company already has locus standi to request a review.

20. The threshold question as set out at Rule 55(1) is a distinct and separate matter from that of locus standi. The Commission approached the threshold question by considering whether the Company had established on a prime facie basis that an error of fact or law existed or that the decision raised an important principle that contravenes or contradicts established regulatory principles.
21. According to Black's Law Dictionary, a prima facie case is:
- (a) the establishment of a legally required rebuttable 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.
22. The Commission in this hearing was in a unique position because of the utilisation of a written hearing and a consolidated process to have before it all the submissions that would have been presented to support a review on the merits. With this body of arguments before it the Commission took the opportunity to examine the allegations of error and all the grounds submitted in support of the Motion for review, to first determine whether the Company produced enough evidence to infer the existence of a ground for review.

PART II - STATUTORY GROUNDS FOR MOTION

Onus of Proof

23. Under section 14 of the Utilities Regulation Act the onus rests on the Company to prove its case and this burden applies to this Motion for Review proceedings.

Evidence before the Commission

24. The Company has not filed an affidavit in this hearing setting out the facts on which it relies in support of its Motion for Review. The Utilities Regulation (Procedural) Rules requires the filing of such an affidavit. Rule 54 (1) states that the Company must comply with Rule 8 and file an affidavit setting out the relevant facts it relies on in support of its Motion.

25. The Company filed a Notice of Motion for Review and Written Submissions. In its written submissions the Company simply stated it would rely on the evidence on the record of the original hearing.
26. In this Motion for Review the Company did not avail itself of the opportunity to place before the Commission any facts by way of affidavit. The Company has also not utilised the opportunity presented by this Review proceeding to place before the Commission any facts that were not previously placed in the evidence in the original hearing and which could not have been discovered by reasonable diligence at the time.
27. Further, while the Company initially stated it would request leave to submit further evidence in support of its application for a review the Company later withdrew this request.
28. The Intervenors were of the view that the Company did not present any evidence which met the statutory grounds for review. The Commission was therefore invited by the Intervenors to reject the motion in its entirety.

Grounds for Review permitted by Statute

29. Rule 54 of the Utilities Regulation (Procedural) Rules sets out specific grounds on which the Commission can review a decision made in a utility regulation proceeding. These are enumerated at Rule 54 as follows:

“54 (1) 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*"

PART III - POSITION OF THE COMPANY

30. The Company in its Notice of Motion for Review relied on the following grounds:

- (i) error of law;
- (ii) error of fact;
- (iii) an important matter of principle that has been raised by the order or decision.

31. The Company arguments were set out in written submissions comprising 169 pages. The Commission finds that a great deal of repetition of argument has occurred and therefore sets out the arguments presented by the Company, in summary form as follows:

- That contrary to the finding in the Decision the Commission had all the information (including but not limited to the revenues from the other services which used the domestic service) which the Commission needed in order to make a proper determination of the Company's application for rate adjustment for the two services namely domestic fixed to fixed voice and domestic fixed line access. Further that even if the Commission needed further information it should have requested the same.
- That the Commission had misconstrued the Company's original Application "Application" and had therefore erred in its finding that it had to consider other sources of revenue from services which used the domestic network.
- That by not allowing the Company an adjustment to its rates, the Commission erred and acted in breach of the Utilities Regulation Act in not allowing the Company to make a fair return on capital.
- That the Commission misinterpreted the Application in respect of which services were the subject of the Application and misinterpreted the Company's evidence and arguments with respect to the revenue requirement being greater than \$24.7 million.
- That the Commission erred in that it failed to have any or sufficient regard to the Company's cost allocation model called the EAM and wrongly concluded that the EAM "was not particularly useful in determining the Application and that the EAM co-mingles regulated and unregulated cost and revenue."

- That the Commission erred in its finding that it could not make a determination of the Application until it had information on the availability of financial contributions from the Universal Service Fund and Access Deficit Charges in that revenues from these sources did not exist in the Test Year and still do not exist and that this raises an important principle.
- That the Commission erred in law and fact in determining that the Company did not prove on a balance of probabilities that a rate adjustment was merited. Furthermore, this finding is contrary to the evidence before the Commission which states that the domestic services are provided in substantial deficit and that the relevant services are operated in deficit.
- That the Commission did have before it information on which it could have fixed other alternative rates and, misinterpreted its powers and duties under the Utilities Regulation Act which imposes a duty and gives the Commission the latitude to fix fair and reasonable rates.
- That the Commission ignored or failed to give weight to the MOU and Government Policy Objectives outlined in the Green Paper on Telecommunications Sector Policy.
- That the Commission misconstrued or ignored the evidence before it in relation to the proposed mechanism for customers to select a rate plan.
- That the evidence did not support the Commission's finding that an unacceptable degree of uncertainty plagued the model with respect to its ability to generate \$24.7 million.
- That consideration of customer equity is irrelevant to the proper determination of the proposed rate structure.
- That it was never the Company's case that the proposed rate structure was designed to alleviate congestion.
- That the Commission erred in finding the Company did not submit the terms and conditions relevant to the proposed rate structure and that this limited the Commission's full assessment of the effect of the implementation and application of the rates.
- That the Commission erred as it did not indicate to the Company that it was required to carry out a marginal cost study or sensitivity analysis. That such studies were not required by the Public Utilities Board or by any existing rule or principle.
- That the Commission breached the duty of fairness and principles of natural justice

in its failure to give adequate and sufficient reasons for its Decision.

- That the Commission excluded legitimate costs from the Company's revenue requirements without valid justification for exclusion namely deferred taxes and rate case expenses.
- That the Commission erred in law and in fact in considering the effect of CPE as an asset. CPE is irrelevant to the determination of rates and cost of service.
- That the Commission misunderstood or misapplied certain aspects of the law relating to the Revenue Apportionment Order and section 15 (3) of the Utilities Regulation Act.

PART IV - REASONS FOR DECISION

The Company's Grounds for a Review

32. The Company argued in its Written Submissions that some twenty-eight (28) instances exist that would show that the Commission "erred in law and/or fact" in various areas of its Decision; sometimes it cited law relating to each type of error and referred to sections of the evidence presented at the main hearing. However in large part the Company has failed throughout to identify specifically any areas of evidence and to demonstrate to the Commission where it fell into an error of law or an error of fact, or possibly an error of mixed law and fact.
33. The Company left it up to the Commission, to search the record and the references it gave, to determine whether the evidence exists that would demonstrate a misinterpretation and that would show, in the mentioned situations where an error of law or an error of fact occurred.
34. The Company in its Motion for Review and Written Submissions advances arguments in support of its request for review. Several of the grounds presented by the Company contained repetition of submissions. Where common or related issues are raised, for convenience and clarity the Commission has sought to address them as a group. The Commission will now deal with these grounds seriatim in the body of the Decision.

Grounds 1, 2, 4, 5, 13, 17, 22, 25 and 26 of the Motion for Review

- The Company argues that the Commission had all the information (including but not limited to the revenues from the other services which used the domestic service) which the Commission needed in order to make a proper determination of the Company's application for rate adjustment for the two services namely domestic fixed to fixed voice and domestic fixed line access. Further that even if the Commission needed further information it should have requested the same from the Company.
- Further that the Commission had misconstrued the Company's original Application and had therefore erred in its finding that it had to consider other sources of revenue from services which used the domestic network.
- That by not allowing the Company an adjustment to its rates, the Commission erred and acted in breach of the Utilities Regulation Act in not allowing the Company to make a fair return on capital.
- That the Commission misinterpreted the Application in respect of which services were the subject of the Application and misinterpreted the Company's evidence and arguments with respect to the revenue requirement being greater than \$24.7 million.

Nature of the Company's Application

35. In its application the Company requested that the Commission approve an adjustment to the line rental rate for business and residential customers. In order to do this the Commission as regulator must examine the revenue requirement of the domestic service as provided in the test year by the provider of the domestic service. Such is the proper remit of a regulator in a rate adjustment exercise and is the accepted approach.
36. Revenue requirement is the amount of revenue required by a utility to cover the sum of operating costs including debt service, depreciation, taxes and allowed return on rate base (\$ rate base x cost of capital). The revenue requirement is the total amount of money a utility is eligible to collect from customers through rates.
37. The revenue requirement provided in evidence was that for the domestic service. The Commission was specifically requested by the Company in the relevant part of its application to consider:

"An adjustment to the domestic line rate for business and residential customer;"

38. The Company then sought to have a fair return on its rate base. The rate base being an amount of investment in the domestic service. The Company argues in essence that the Commission should have disregarded this request and only seek to address the revenue requirements of the domestic fixed-to-fixed voice calling and domestic fixed line access.
39. The Company has at times invited the Commission to consider the domestic service and to assess its revenue and costs, yet at other times has requested that the Commission only consider the revenues and costs with respect to the domestic fixed line access and domestic fixed-to-fixed voice calling. This was the first time that the Company sought to introduce a new categorisation and sub-division of the existing line rental service.
40. The existing service is known as line rental for which a (\$28) charge applies. There are no regulated services known as domestic fixed line access and domestic fixed-to-fixed voice calling. The domestic fixed-to-fixed voice calling and domestic fixed line access are constituent parts of a line rental service which is one of a number of services provided under the category of domestic services.
41. The Company presented evidence as to the cost of domestic service and the revenue earned from the domestic service as a whole and sought to demonstrate to the Commission that there was a short fall in the global revenues [as set out in Memorandum of Financial Information with respect to \$199 million revenue requirement]. The application included domestic revenues of \$127 million which were over and above that which was ascribed to the sub-divided line rental service which the Company called (a) domestic fixed-to-fixed voice calling and (b) domestic fixed line access. In this Review as in the original hearing the Company continues to vacillate about the nature and scope of the application before the Commission. This resulted in an inconsistency of argument and requests.
42. The invitation to the Commission, as regulator, to only look at the two services presents a danger in itself given the amalgamation of the Company and the consolidation of the Company's statutory and other financial statements. The regulator's concerns include variations in accounting separation objectives, cross subsidies between regulated and non-regulated services as well as anti-competitive practices. The appearance of a deficit or surplus on a "service" is inextricably linked to the manner in which revenues are imputed and or allocated as well the manner in which costs are treated and reported.

43. The Company argued that the Commission erred in fact and in law in its determination that “the full pool of applicable revenues from the domestic service had not been put before it in that such information was put before the Commission in evidence and/on the record.”
44. The Company has in this hearing failed to identify in the evidence the quantum of revenue the domestic service received from the other users of the domestic facilities.
45. International Revenues: In the original hearing the evidence was that in the financial statement for regulatory reporting for the year ended March 31, 2002, the Company declared revenue of \$184,264,000, which included an amount of \$56,691,000 in respect of international calls. The Company claimed this amount was a revenue transfer from CWBET on the basis of the revenue sharing arrangement. The Company states in Schedule 4 of the Application for rate adjustments that “the revenue transfer is not reflective of the underlying cost of domestic service provision and is not cost oriented and was not a commercially determined fee based on cost.”
46. The Company’s witness Mr. Paul Taylor, who designed the proposed tariff structure in his affidavit, included a Peat Marwick Study which states:
- “...The current revenue sharing agreement is not an appropriate mechanism for the transfer of the subsidy from the international operations to the domestic network. With respect to international calls BarTEL provides customers with access to the international network owned and operated by BET. Looked at another way, BET needs BarTel in order to gain access to the customers who make international calls. BarTel should be paid for providing this access. The revenue sharing approach however does not reflect the costs BarTel incurs in providing access to the local customer.”*
47. The Commission’s conclusion that - the revenues properly earned by the domestic service and due to it from the international service for the latter service’s use of the domestic service was not before it - remains unaltered.
48. **The Commission therefore rejects these as grounds for review. The Company’s submissions on these grounds disregarded the totality of the evidence presented at the**

original hearing on these issues. Further the Company does not identify the specific contravention of any important principle. The Company has not established on a prima facie basis that a ground for review exists.

49. Cellular Revenues: It was the Company's evidence as presented by its expert witness at the original hearing that revenues should go to the domestic service from the cellular service for the use of the domestic network. It was the evidence of the Company in response to interrogatory set 1 #3.3 that the \$4.8 million revenue received from CWCC was payment to CWBARTEL for a number of items which included line and equipment rental, management fees, lease circuit revenue, airtime and moneys for rental of space at Grazettes. This amount was not presented as the total revenue paid to the domestic service for use of its facilities.
50. Internet Revenues: The Company did not provide to the Commission an amount which represents the revenue the internet service pays for use of the domestic service facilities. The evidence provided by the Company's Financial Controller, Mr. Cochrane was that "the costs that are considered to relate to the provision of the internet service are costs of Bartel that have been charged out to Cable & Wireless BET and do indeed form revenue of Bartel."
51. Moreover, the Internet service was provided by a subsidiary of CWBET and the revenues would have been included in the CWBET Revenues and not in the CWBARTEL revenues. These revenues therefore would not have been in the amount of \$127 million which was revenue earned by the domestic service in the test year.
52. Interconnection Revenues: The Company in its evidence stated that persons interconnecting to the domestic network and using its facilities (PSTN) should be paying the domestic service for this use. At day 36 lines 1338 - 1352 of the transcript the Company's President, Mr. Austin states that revenue from interconnection would contribute to a reduction of the deficit.
53. The Commission remains of the view that it needed to ascertain the revenue from this source; such being relevant to the application before it for an increase in rates and a revision of the tariff structure.

54. The Company's arguments that the revenues were provided is contrary to the body of evidence presented and does not on a prima facie basis establish the existence of an error of law or fact or raise an important matter of principle. It is therefore rejected.

Burden of Proof

55. While the Commission sought to clarify the case as presented by the Company through interrogatories, questions to witness and data requests, the legislation clearly states at Utilities Regulation Act section 14 that the burden of proof shall be on the service provider.

56. The Commission is entitled to ask questions of the Company and it is entitled to ask the Company to produce further evidence to which the Company makes reference, or clearly relies on to establish its case. It is entitled to ask the Company to produce exhibits in support of this case. However, there must be a limit for the burden of proof always remains on the Company.

57. There is no duty on the Commission to think of or devise, every possible question or combination of questions to put to the Company, nor is there an inexhaustible duty to require the Company to produce exhibits. The record will show that the examination of witnesses by the Commission and its counsel was exhaustive, covering diverse technical and relevant areas. The Commission cannot be faulted for not putting questions or seeking presentation of the exhibits that the Company now seeks to determine was a breach of statutory or other duty. In the original hearing the Commission made requests for information due to the incomplete and inadequate nature of the responses and oftentimes responses were provided without relevant information.

58. The Commission is of the view that it is ultimately for the Company to determine the extent and nature of evidence it will lead. It is not the duty (statutory, by custom or otherwise) for the panel take over the Company's burden and prove its case for it.

59. These matters raised do not present on a prima facie basis a ground for review.

Proposal to recover \$24.7 million

60. In determining whether a deficit exists on the domestic service the revenue earned by and attributable to the domestic service must be fully accounted for and presented before one can ascertain the existence and magnitude of a deficit. The Commission finds that this submission does not raise a prima facie case of an error in fact or in law in the Commission's ascribing relevance to the other revenues that should be attributed to the domestic services.
61. In Schedule 6 of its Rate Application the Memorandum on Rate Structure submitted by Mr. Chris Carpenter stated at paragraph 90 " the proposal seeks to recover from the domestic calling and line access an amount of \$24.7 million in two phases..." Further paragraph 22 of the Memorandum of Financial Information attached to the Application noted that the revenue arising from the new domestic rates is \$24.7 million.
62. **The Commission therefore rejects this as a ground for review. The Commission finds that the Company has not established on a prima facie basis that an error of law or fact was made in the Commission's finding that "the Company stated that the new rate structure as proposed is intended to provide additional \$24.7 million to meet the revenue requirement of the domestic service."**

Grounds 3, 8, 9, 10, 13, 14 of the Motion for Review

- The Company argued that the Commission erred in that it failed to have any or sufficient regard to the Company's cost allocation model called the Enhanced Allocation Model (EAM) and wrongly concluded that (a) the EAM "was not particularly useful to the Commission in determining the subject matter in this Application" and that (b) the EAM "co-mingles regulated and unregulated cost and revenue."

The Company's Enhanced Allocation Model

63. The Company in its Motion for Review has argued that the revenues from users of the domestic facilities are contained in the EAM. The Company submitted that this EAM "the costing model used by the Company in support of its Application, was submitted to the Commission to assist the Commission in being able to separately identify the costs and revenues of the relevant services."

64. The Commission maintains its view that the EAM was not particularly useful to it in its determination of the application. There are in excess of one hundred (100) individual regulated services that comprise the domestic service. However, the EAM as presented to the Commission only contains twenty-eight (28) services, the categories and titles of which do not correspond in large part with the list of regulated services. It was not demonstrated to the Commission that the EAM captures or records costs and revenues for each regulated service that comprise the domestic service. The Commission therefore could not identify or ascertain the separate costs and revenues attributed to each regulated service that makes up the domestic service. Services such as Smart Choice or Comnet are not recognisable within the service profitability model referred to as the EAM.
65. Moreover, the Commission was not in a position to reconcile the information in the EAM with the figures submitted in the application document. The EAM provided no support to the Company's claims with respect to the revenue requirement of the domestic service i.e. the \$199 million. During the course of the original hearing the Commission expressed to the Company its concern that the figures in the EAM and the revenue requirement were not reconciling. On day 34 of the hearing the Chairman of the panel sought to ascertain whether the figures in the EAM were reconciled to the regulatory financial statement.
66. The Chairman of the panel (on day 34 line 91 -101) specifically requested that reconciliation be done by the Company to assist the panel in ascertaining the cost, revenues and rate base with respect to the regulated domestic service. The Commission as regulator was particularly interested in, and had to concern itself with the regulatory financial statements to see if these displayed a deficit after revenues and costs were appropriately allocated.
67. If the input data was deficient or the revenues and costs inappropriately apportioned among the 28 categories this would have a direct effect on the costs and revenues assigned to the sub-divided services presented by the Company i.e. line rental and its constituent parts including (a) fixed to fixed line access and (b) fixed to fixed voice calling. The Commission maintains that the cost of the domestic service is fully borne or ascribed to the domestic rate payers.

68. **The Commission therefore rejects as a ground for review that it erred in finding that the costs are borne by the domestic ratepayers as such has not been established on a prima facie basis.**
69. The failure to provide reconciled information to the Commission meant that the Commission could not check or verify the figures or the reports generated from information in the EAM against those presented in the regulatory financial accounts for the test year.
70. The amount of deficit recorded in the EAM which co-mingles costs and revenues of the services provided by the four former entities of C&W is significantly less than the over \$72 million which the Company claimed for the domestic service and which was provided by one entity CWBARTEL. The Commission finds that the numbers just do not reconcile. The EAM, as a consolidated document presents the costs and revenues of the four C&W entities together which includes the former CWBARTEL (domestic service) and CWBET (international service), and does not highlight the costs and revenues associated with regulated services.
71. In light of the above the Commission finds that it did not err in law or in fact when it found that it must consider all the relevant sources of revenue. Such sources have not been placed before the Commission for its consideration during the Review.
72. The Commission acknowledges that the Company's witness Mr. MacPherson attested to the robustness of the methodology of the EAM model, used by the Company primarily, to determine the profitability of its retail (not regulated) services. This witness did not test the nature or quality of the input data to the regulatory financial reports, as that was not his remit. Nor did he carry out any tests of the data. He stated he examined the methodology of the model.
73. The Company's submissions do not demonstrate on a prima facie basis or show that an error of law or fact was made or an important principle was contravened by the Commission. The Company's arguments amount to a dissatisfaction with the weight the Commission attributed to the evidence about the EAM. It is within the proper purview of the Commission to determine the weight it attaches to the evidence before it and this was done in the case of the EAM.

The Company's Cost Allocation Model

- The Company argued that the Commission erred in finding that the Company had refused to develop and put before it a cost allocation model.

74. The evidence of the Company's Vice President was that the Cost Allocation Model "CAM" to all intents and purposes was dropped from further development and replaced by the EAM (Transcripts page 2235 lines 2683 - 2691.) The CAM has different objectives. The primary objective of the EAM was to determine the profitability of its retail services.

75. **The Commission therefore does not see that an error is established on a prima facie basis in its conclusion that the CAM was not developed, and placed before it.**

Ground 6 of the Motion for Review

- The Company argued that the Commission erred in its finding that it could not make a determination of the Application until it had information on the availability of financial contributions from the Universal Service Fund and Access Deficit Charges in that revenues from these sources did not exist in the Test Year and still do not exist and that this raises an important principle.

Access Deficit Charge & Universal Service Fund

76. The Company has not identified any particular error in the Commission decision but has only stated that there was "substantial doubt as to the correctness of the Commission's determination" and that the Commission established a new principle in its Decision by finding that it was not in a position to determine rates without knowledge of the availability of the financial contributions from the two sources.

77. The Company argues that statements made by the Commission in a draft consultation paper should be considered in this Hearing. The draft Access Deficit Charge (ADC) consultation paper was not a part of the record/evidence of the original hearing or this Motion for Review proceeding and will therefore not be considered by the Commission.

78. While the Company now submits that the issue of the availability of funds from the Universal Service Fund was not relevant, the Company's evidence on the record contradicts this. The Company's President in his Affidavit stated that "existing and future services which are not cost oriented will be funded by universal service contribution from all service providers in Barbados on a non discriminatory basis." The

Company itself underscored the relevance of this issue to the determination of the original application by addressing this issue in its evidence at that hearing. This means that funds from this source would meet any deficit that exists on the domestic service which the Company argues is not cost-oriented. Moreover in the EAM the Company has inserted a figure under the heading Access Deficit. This may represent an estimate of the ADC.

- 79. The Commission therefore finds that on a prima facie basis the Company has not established a ground for review. This is because neither an error of law or fact has been established on a prima facie basis nor has it been established that the decision raises an important principle.**

Ground 16 of the Motion for Review

- The Company argued that the Commission erred in law and fact in determining that the Company did not prove on a balance of probabilities that a rate adjustment was merited. The Company further claims that this finding is contrary to the evidence which states that the domestic services are provided in substantial deficit and that relevant services are operated in deficit.

Balance of Probabilities Test

- 80.** The Commission did not find that there was a deficit in the provision of the domestic service (see paragraph 130 of Decision) because it was not in a position to ascertain critical revenues. The full revenues earned by domestic services must be ascertained before one can determine whether the domestic service is operating in deficit or meeting its costs. The Financial Controller and the Vice President, Regulatory Finance in speaking of the deficit claimed relied on the EAM. The Commission has rejected the EAM as the nature and quality of the input figures were not tested even by the witness Mr. MacPherson and did not tally with regulatory financial statements. They were conspicuous lacunas in the evidence.
- 81.** Throughout this Review the Company while seeking to have the Commission rebalance rates sought to draw the Commission's attention to only two categories of services and ignored other services that appear to be provided in excess of costs, that is with significantly high profit margins. The Commission's mandate was to ascertain (a) whether the Company had enough revenue to meet the revenue requirements of the domestic service to allow the Company a fair rate of return on rate base, (b) whether a rate adjustment was needed from line rental to meet the foregoing and (c) to consider for approval the tariff structure proposed.

82. The Company has not indicated the important principle that the Commission failed to consider by its Decision.

83. The Commission remains of the view that until the Company properly attributes revenue to domestic services that it earns by allowing others to use its facilities, that the Company has not proven its case that a rate adjustment is needed on a balance of probabilities.

84. The Commission finds that this submission does not establish on a prima facie basis the existence of any of the statutory criteria for review.

Grounds 17, 21, 22, 23, 24, 25 of the Motion for Review

- The Company argued that the Commission did have before it information on which it could have fixed other alternative rates and, misinterpreted its powers and duties under the Utilities Regulation Act which imposes a duty and gives the Commission the latitude to fix fair and reasonable rates.

Alternative Rate Structures

85. While the Company's witness Mr. Taylor, at pages 1646 -1648 of the Transcript and in particular at lines 1040 – 1048 outlines the various options he examined in designing the rate structure he highlighted the difficulties and problems with each option and summarily dismissed them as viable options. The Commission therefore could not consider these comments as proposals of alternate tariff structures put before it for its consideration.

86. Moreover the Company's Chief Executive Officer on day 35 lines 2526 - 2554 of the Transcript further outlined the shortcomings of a \$36 flat rate as he stated that it would result in consumer inequity, unfairness and low users subsidizing heavy users of the service.

87. The Commission is of view that evidence presented at the original hearing with respect to a viable alternative rate structure was not sufficient to allow it to ascertain inter alia:

- (a) the level of revenues the Company would have been able to attain from alternative rate structures to meet the cost of providing the domestic service;
- (b) the fairness and the reasonableness of the rate derived from each alternative structure; and
- (c) the ease of implementation.

88. The submission by the Company that evidence of an alternative tariff structure was presented to the Commission, does not present a full and accurate picture of the nature and extent of the evidence at that hearing.

89. **Further the Company did not identify the important principle raised by the Commission. In this proceeding there is no evidence before the Commission on these issues and the Commission rejects the submission as a ground for review.**

Government Policy

- The Company claims that the Commission ignored or failed to give weight to the Memorandum of Understanding (MOU) and Government Policy Objectives outlined in the Green Paper on Telecommunications Sector Policy.

90. In the original hearing the Commission took into consideration all existing Government policy that it is legally bound to consider as a statutorily established regulatory body

91. **The Commission is of the view that this submission does not present a ground for review as it does not establish on a prima facie basis that the Commission fell into error of law or fact or raised an important matter of principle that contravenes established regulatory and other principles. .**

Locked into plans

- The Company claims that the Commission misconstrued or ignored the evidence before it in relation to the proposed mechanism for customers to select a rate plan.

92. The Commission notes that the Company in paragraph 21.2 of the Motion to Review states that "...to the extent that 30 days' notice is required to change plans, the Company concedes that the customer would be locked into a particular plan for a period of time".

93. The Commission therefore sees no possible error in it stating that the customer is locked to that plan for a period of time and therefore rejects this as a ground for review.

Uncertainty of recovery of \$24.7 million

- The Company claims that the evidence did not support the Commission's finding that an unacceptable degree of uncertainty plagued the model with respect to its ability to generate \$24.7 million.

94. The revenue collected by the Company from the proposed revised tariff structure is dependent on the extent of the movement of all customers to plans based on their usage. If all persons moved to the lower plan then the Company would receive less than the \$24.7 million in revenue it sought.

95. The regulator must have a sense of how the elasticities in demand would affect revenue when there is a change in prices. Furthermore revenue generated from any rate structure is sensitive to the extent of movement from one plan to the next.

96. The Commission remains of the view that information generated from a sensitivity analysis and marginal cost study would allow a Company and regulator to determine the efficacy, affordability and appropriateness of a revision to an existing tariff structure. The reasons are set out in the sections entitled *Sensitivity analysis and marginal cost study*.

97. The Commission also remains of the view that it is not possible to reasonably predict whether significantly more or less than the stated \$24.7 million would be generated. As the Company did not present any significant evidence or analysis to demonstrate the behaviour of its proposed rate structure with changes in customer demand, an unacceptable degree of uncertainty surrounds the revenue that would be generated.

98. The Commission finds that the Company has not established on a prima facie basis that a ground for review exists.

Customer Equity

- The Company claims that the Commission's consideration of customer equity amounted to an error in law or fact as the issue of consumer equity is irrelevant to the proper determination of the proposed rate structure.

99. The Commission has the statutory responsibility to consider consumers' welfare and to ensure that there is no undue discrimination in the rates vis a vis classes of consumers. The Commission is of the view that customers who buy the same volume of calls should pay the same amount otherwise inequity would result. The evidence of the Company at the original hearing underscored the relevance of this issue in the evaluation of the appropriateness of a tariff structure. The Commission was also invited by the Company to assess the rate plan with respect to its ability to produce consumer equity. At page 8 paragraph 26 of Mr. Taylor's affidavit evidence he, on behalf of the Company, stated "The Applicant also considered moving to a purely metered regime. The Green Paper notes, at p. 74, that "consumers should be given the opportunity to pay only for what they use, thereby ensuring a situation of equity and fairness among consumers with respect to their use of the service."

100. Further, the Company's Chief Executive Officer in giving evidence on day 35 lines 2526 - 2554 of the transcript noted a shortcoming of a \$36 flat rate option was that it would result in consumer inequity.

101. It has not been established that on a prima facie basis that the Commission has erred in taking this factor into consideration and therefore this ground for review is rejected.

Return on Capital

- That by not allowing the Company an adjustment to its rates, the Commission erred and acted in breach of the Utilities Regulation Act in not allowing the Company to make a fair return on capital.

102. The Company argued that the Commission's failure to fix rates did not allow the Commission a reasonable return on capital in respect of the two services (a) domestic fixed to fixed voice calling and (b) domestic fixed to fixed line access.

103. The Commission remains of the view that the statutory reference to earning a reasonable return on capital must be determined by examining the revenue requirement for the provision of the domestic service by CWBARTEL not by examining specific individual services provided by the domestic service provider.

104. The Company has not established on a prima facie basis that the Commission has erred and this ground for review is rejected.

Congestion

- The Company claims that it was never the Company's case that the proposed rate structure was designed to alleviate congestion.

105. The Company's witness presented evidence on the issue of congestion. The Company's engineer in Schedule 5 of the Memorandum on Network discussed extensively the current congestion problem and attributed part of this to the flat rate system. In addition when asked whether the move to a usage based pricing would resolve the congestion problem, the witness responded that it would.

106. The Company has presented the recurring congestion problem and its attendant escalating costs, as a major challenge. A change in rate structure may significantly dampen (or increase) network operating and capital costs, which would in turn affect the rates. The Commission remains of the view that the impact of the proposed rates on the Company's network congestion problems is relevant and that the Commission did not err in fact or law in finding that the proposed rate structure was designed to alleviate congestion and rejects this as a ground for review. Additionally, the Commission is of the view that this ground did not raise an important principle.

107. **The Commission therefore finds that on a prima facie basis this ground has not been established.**

Terms and Conditions

- The Company claims that the Commission erred in finding the Company did not submit the terms and conditions relevant to proposed rate structure and that this limited the Commission's full assessment of the effect of the implementation and application of the rates.

108. The Commission considers that each rate structure should have terms and conditions. The new rate structure is significantly different to the current rate structure and the Company admits at paragraph 25.1 of the Motion for Review ...“that the terms and conditions would vary significantly if the new proposed rate structure was approved...” The Commission is of the view that terms and conditions to the new rate structure are relevant and should have been submitted by the Company.

109. The Commission therefore finds that on a prima facie basis this ground has not been established.

Grounds 19, 20, 27 of the Motion for Review

Sensitivity analysis and marginal cost study

- The Company claims that the Commission erred as it did not indicate to the Company that it was required to carry out a marginal cost study or sensitivity analysis and that such studies were not required by the Public Utilities Board or by any existing rule or principle.
- The Company argues that the Commission breached the duty of fairness and principles of natural justice in its failure to give adequate and sufficient reasons for its Decision.

110. The Company must do more than merely state that a duty is breached. It must demonstrate on a prima facie basis that an error has occurred which would be reviewed by the Commission. The Commission provided extensive reasons in its fifty-four (54) page Decision. The Company’s submissions in this regard provide no basis for review.

111. The evidence presented in Mr. Taylor’s affidavit in paragraph 27 stated “The Applicant is mindful of the sensitivities and perception about usage based prices for telephone service. Furthermore, while consumers in Barbados are already accustomed to pay for services such as electricity, water and mobile telephone services on a metered basis, some consumers have been openly opposed to the introduction of usage based charges for the domestic phone service. These sensitivities, however, have to be weighted against the concerns to keep rates for basic telephone service affordable for residential customers”.

112. The issue of the sensitivity analysis was relevant and warranted the Commission's consideration.
113. The Company requested that the Commission approve (a) a revision of the tariff structure and (b) authorise the introduction of a flat rate/usage based charging scheme. In revising a tariff charging scheme, the Commission is duty bound to ensure that it produces fair and reasonable rates. Therefore the question of affordability of the new rates generated by the revised tariff structure becomes germane and has to be considered. The Company on day 23 at lines 1266 to 1301 of the transcript itself raised the issue of affordability as one of the considerations in the design of a rate structure.
114. This case is therefore distinguishable from previous rate cases in that the application before the Commission was twofold, for a charge in rate and a change in tariff structure. This was not the case in the previous applications before the Public Utilities Board.
115. In the absence of other information to verify the appropriateness of the new tariff, the Commission would have found valuable the Company's presentation of a marginal cost study or sensitivity analysis.
116. The information list at Rule 60 of the Utilities Regulation Act Procedural Rules does not envisage or relate to a revision in a tariff structure merely to an application for an adjustment in rates and even being so applicable was not exhaustive. While there was no legal obligation, the burden of proof was on the Company. The Company must submit the evidence that would support its case. The Commission therefore finds that on a prima facie basis the Commission has not established any ground for review.

Ground 11, 15 of the Motion for Review

- The Company argues that the Commission excluded legitimate costs from the Company's revenue requirements without valid justification for exclusion namely deferred taxes and rate case expenses.

Deferred Taxes

117. The Commission is of the view that there must be a distinction between a request for information and acceptance of specific information. While the Commission acknowledges that this information was specifically requested, the Commission indicated at the onset of the Hearing (Day 9, lines 81-85) that “For the avoidance of any doubt the Commission would like to make it abundantly clear that the Company must establish the Company’s entitlement for deferred taxes as a legitimate and reasonable cost of service for this Application.”
118. In addition the Utilities Regulation (Procedural) Rules are designed to cater to a variety of utilities namely; water, telecommunications, gas, sewage and electricity. The Commission must take the specifics of the particular utility into consideration when determining which items the utilities have proven are applicable as relevant costs incurred in the provision of the service.
119. The evidence did not support the inclusion of deferred tax as legitimate expense and accordingly the Commission did not then proceed to analyze or examine the amount presented by the Company. The Commission is of the view that it is not an accepted regulatory principle that deferred taxes are automatically included in the cost of service of a utility.
- 120. No additional evidence has been presented at this hearing and the Commission finds that on a prima facie basis that a ground for review has not been established.**

Rate Case Expenses

121. The Commission has a duty to ensure that rate case expenses were fair and reasonably incurred in the provision of the domestic service. Although requested by the Commission, the Company did not present any supporting invoices or other information on the details of the expenses.

122. A breakdown of the rate case expenses was specifically requested by the Commission on day 5 lines 1021 - 1026 and was promised by Mr. Shorey at line 1048 - 1057. However, his supplementary affidavit at paragraph 13 and 14 provided no breakdown, merely a cumulative figure together with a historical recitation of the rate case allowances applied for rate cases from 1972 through 1998.

123. The Commission is of the view that it did not ignore important regulatory principles by denying the Company any rate case expenses.

124. In this review hearing the Company has not presented any evidence or sought to identify for the benefit of the Commission where in the evidence the information which shows the Commission fell into error lies. The Commission is therefore left with no alternative but to reject this ground as it was not provided with sufficient evidence to justify on a prima facie basis that an error occurred in law or in fact.

Ground 12 of the Motion for Review

- The Company argues that the Commission erred in law and in fact in considering the effect of CPE, and that CPE is irrelevant to the determination of the application.

Customer Premises Equipment (CPE)

125. The evidence of the Company's witness Mr. David Shorey was that the CPE was included in the rate base. In his evidence he noted that CPE was deregulated in October 2003 (day 4 pages 135 -136). The deregulation of CPE meant that the Company would no longer be receiving regulated revenue from the rental of CPE or incurring regulated costs related to its provision of CPE. This removal of CPE from the regulatory services would affect the revenue requirement of the domestic service.

126. **While the Company has expressed its dissatisfaction with this Commission's finding it has not raised or established even on a prima facie basis that the Commission's finding amounted to an error of fact or law or that it raised an important matter of principle.**

Ground 7 & 18 of the Motion for Review

- The Company argues that the Commission misunderstood or misapplied certain aspects of the law relating to the Revenue Apportionment Order and section 15 (3) of the Utilities Regulation Act.

Revenue Apportionment Order

127. There are a number of carriers providing and expected to provide national or local telecommunications services and or international and external telecommunications. The terms cannot at present be uniquely attributed to C&W (Barbados) Ltd.

128. The revenue apportionment order was established in a monopoly telecommunications environment where Cable & Wireless was the only provider of national and external telecommunications. The Telecommunications Act section 114 (3) specifically provides that if the Barbados Revenue Apportionment Order 1989 is inconsistent with the Act it will not survive.

129. With the amalgamation of the companies, CWBET and CWBARTEL, the continuation of the revenue apportionment order would amount to the Company being ordered to make a paper transfer from one cost centre to another within a single Company, and being directed to carry out a mere accounting reporting function vis a vis revenue.

130. **Having considered all of the relevant legislation and the regulatory environment in Barbados, the Commission considered that its interpretation as stated in the Decision is correct. The Commission rejects this matter as a ground for review as it has not been shown on a prima facie basis that the Commission has erred in its finding in law or fact or that it can be considered that the Commission established an important matter of principle.**

Section 15(3) - Ability of a second rate review within a year

131. If the original hearing had resulted in the Commission setting rates which were to be effective for a fixed period then section 15(3) would not permit a review.

132. The Commission acknowledges there would be no contravention of the legislation if rates were not set to apply for a specific period. However having rejected the proposed tariff structure because of other shortcomings the Commission is of the view that this misstatement was not material to its decision and would not cause it to vary its decision.

PART V - THE COMMISSION'S RULING

133. The Motion for Review has 28 grounds or 'reasons for review' however, the Commission finds that many of the reasons are redundant, while others can be categorised as being no more than complaints or requests. Much of the Company's written submission attempts to reassert its arguments presented at the original hearing, which were fully considered by the Commission in reaching its decision.

134. The Commission is of the view that the Motion as presented and the arguments do not even support a review on a prima facie basis, nevertheless having the full submissions before it the Commission sought to give full consideration to them.

135. The Commission generally considered the existence of an alleged error or the important principle being raised by the decision to be unsubstantiated on a prima facie basis for the following reasons which are summarised below:

- Alleged errors were not adequately demonstrated or specified by reference to evidence to allow them to be assessed by the Commission.
- Allegations of error were not substantiated by the evidence on the record of the original hearing.
- The arguments were previously fully canvassed during the original hearing and were considered by the Commission in reaching its decision.
- The burden of proof throughout was on the Company. It is not the responsibility of the Commission to request additional information ad infinitum.
- Specific data elements critical to the application requested by the Commission were not provided and were deemed relevant by the Commission.
- Arguments presented were inconsistent and seemingly contradictory with respect to the nature and extent of its application.

136. For the reasons expressed in this decision the Commission therefore finds that the Company has not demonstrated that errors of fact or law exist or that the decision raises important principles even on a prima facie basis. The sole error which was acknowledged by the Commission was not significant enough to merit a variation or rescission of the decision. Accordingly the Motion for review is denied.

DATED this 17th day of January 2005

Original signed by
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Mrs. Vivian-Anne Gittens
Chairman of Panel

Original signed by
.....
Professor Andrew Downes
Commissioner

Original signed by
.....
Mr. Gregory Hazzard
Commissioner