

ST. LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 of 1985

BETWEEN:

CABLE & WIRELESS (WEST INDIES) LTD - Appellants

and

PUBLIC UTILITIES COMMISSION - Respondents

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Mr. L.A. Williams for the Appellants
Mr. Henry Giraudy for the Respondents

1986: May 13;
Oct. 21, 22.

JUDGMENT

MOE, J.A.

This is an appeal by Cable and Wireless (West Indies) Ltd., hereafter referred to as the Company) from a decision rendered on the 23rd November, 1985, by the Public Utilities Commission (hereafter called the Commission) in respect of a claim made by the Company for an increase in certain national telephone charges in St. Lucia. When the appeal came on for hearing on the 13th May, 1986, Mr. Giraudy appeared on behalf of the Commission and asked for an adjournment which was granted until this sitting of the Court in October 1986. On the appeal coming on for hearing on the 21st October 1986 Mr. Giraudy sought to raise a preliminary objection notice of which was filed in the Registry but was not served on the Company or its Counsel. The Court referred to Order 64 Rule 10 of the Rules of the Supreme Court 1970 and ruled that the preliminary objection was not properly before the Court and in the circumstances the Court could not entertain it. Mr. Giraudy also made it clear that he would not be arguing the body of the appeal. The preliminary objection having failed, he sought and was granted leave to withdraw from any further participation in the proceedings.

The Company operates the telephone system in St. Lucia by virtue of section 3 of the Public Telephone Ordinance No. 23 of 1966. It made a claim pursuant to section 24(1) of the Public Utilities Commission Act, No. 12 of 1973 for an increase in the local rates payable for its services in St. Lucia as distinct from international rates. There were complaints

/and objections....

and objections against the increase claimed and the Commission held a hearing.

The Company at the hearing of the claim presented evidence from three persons. Mr. Ian Boatman, General Manager of the Company's operations here in St. Lucia, explained how the Company assumed responsibility for the national telephone system, that the Company expanded and developed the system, that further development of the telephone system is being carried out; that capital will have to be raised to continue the development and he gave reasons why a particular rate of return on the capital investment was necessary. Mr. Crowhurst, the Company's regional telecommunications tariffs manager showed how the rates proposed would give the required rate of return and Mr. Bartor, the Company's regional management accountant, explained the audited accounts of the Company. The audited accounts showed the Balance Sheet of the Company with respect to its operations in St. Lucia as at 31st March 1985 and a statement of source and application of funds for the year ended 31st March, 1985. There were also notes to the accounts in which were stated the accounting policies, the fixed assets, operating expenses and future capital expenditure of the Company here in St. Lucia.

The Company's presentation was subjected to long and detailed scrutiny by one objector. The Commission appears to have accepted a submission by Counsel for the objector, the Consumers Protection Committee of the St. Lucia Teachers Union, that the Commission should make a determination based on the operations of the Company as revealed by the audited accounts of the Company as a whole and then consider the position of St. Lucia as revealed by the totality of the evidence and these accounts..... That at the very least the operations of the St. Lucia branch of the Company must be compared with the overall picture of the Company to enable the Commission to determine whether the Company is presently enjoying a fair return on capital. The Commission regarded this submission as a substantial point not without considerable merit.

Accordingly the Commission appears to have accepted the position as set out in that part of its decision appearing at page 22 of the record that - "In order to determine whether the Commission should award an increase in rates it is vitally important that the Commission look at the legal personality of the Company and the totality of the accounts to see whether in the overall consideration of the accounts the Company is already making a sufficiently substantial profit in its overall regional operations over and above what it is in fact asking the Commission to award. That would enable the Commission to decide whether it should

/make.....

make any award at all having regard to the profitability of the concern, or accede to the application for increases. Before the Commission can decide such a question the overall accounts should be produced.....including the accounts for international telephone calls notwithstanding that the Commission had no power to grant increases in international telephone rates.

Counsel for the Company strenuously resisted the above contentions. He pointed out that the Company has with the Government of St. Lucia a twenty year agreement under which it is working the telephone system in St. Lucia. The Company owns in St. Lucia, fixed assets and other plant which are exclusively used and useful for the provision of the telephone system. The application before the Commission relates only to the local rates for provision of services under that system and it was in respect of those operations that the Company had presented accounts for the purposes of the determination of the application. He submitted that on such an application the Company had to present a set of accounts to permit the Commission to determine (a) a rate base and (b) a rate of return. The accounts put in evidence represent the financial operations of the Telephone System in St. Lucia. The Company's only duty was and is to produce accounts in respect of the operations of the St. Lucia Telephone System, such accounts to reflect the necessary data on which the Commission as a Regulatory Body could consider and go on to determine a rate base and a rate of return.

On the 31st October 1985 at a special sitting the Commission pronounced as follows:- "As the proceedings now stand, the Commission is unable to make an award because of insufficiency of evidence. However and until such time as the Commission is in a position to examine the regional accounts audited or unaudited of Cable and Wireless (West Indies) Ltd. to enable all concerned to examine and determine the reasonableness of the cost of its St. Lucia operations, further consideration is deferred. Accordingly, further hearing of the application is adjourned to November 15, 1985 at 10.00 a.m. to give the applicant an opportunity to tender the regional accounts required by the Commission if it so desires."

The Company did not tender accounts for its overall regional operations and the Commission gave its decision on the 28th November 1985. In that decision the Commission had this to say:

"If there is nothing to hide we see no reason why the Regional Accounts of their (the Company's) interlocking /branches.....

branches in those islands where they operate should not be produced. For example where there may be transfers of funds from island to island."

It held it was left with insufficient evidence to base an award and dismissed the Company's application.

The Company filed five grounds of appeal against the Commission's decision. The gravamen of the appeal is that the Commission was not justified in demanding the production of the Company's regional accounts in order to permit them to make an order. Before this Court, Counsel for the appellant submitted as he had done before the Commission.

In my view Counsel for the Company correctly reminded the Commission of the two stages in the traditional procedure in fixing a rate of return for a public utility. The first is to determine the amount called the rate-base representing property value, investment in property, cost of the property or some other attribute of property. The next step being to decide upon a percentage figure applied to the rate-base, to determine the number of dollars to be allowed. See Nichols on Ruling Principles of Utility Regulation 1955 Ed. at page 2.

In determination of the question of the rate of return guidance is to be had from the principle enunciated in *Smyth v Ames* 169 U.S. 466 and followed in jurisdictions with statutory provision similar to section 28 of the Public Utilities Commission Act, No. 12 of 1973 which places an onus on the public utility to show that the increase in the rates sought is fair and reasonable. In that case it was stated "what the Company is entitled to ask for is a fair return upon the value of that which it employs for the public convenience." The principle is frequently expressed as "a public utility is entitled to get a fair return upon the fair value of its property used and useful in the public service."

Applying the above principles to the present matter and looking first for what the Company employs for the public convenience or in other words the Company's property used and useful in the public service, one looks for that which is used and useful in the public service in St. Lucia, not what the Company employs for the public convenience in other Caribbean countries. Regard must therefore be paid to the Company's outlay or undertaking in St. Lucia. Turning next to decide a percentage figure to be applied to that rate-base, that percentage figure or rate of return has to bear relationship to the undertaking in St. Lucia or the rate-base.

/The road.....

The road which the Commission would take would involve consideration of the results of the Company's undertakings in numerous places. In my judgment there can be no relevance of these undertakings or the results therefrom to the determination of the Company's rate-base in St. Lucia. Consideration of such results would in my view lead to a distortion of the St. Lucia rate-base and those accounts would not provide a proper guide to the proper return for the undertaking in St. Lucia. The Company's undertakings or investment in other Caribbean countries may be affected by economic and other conditions in those other countries not necessarily similar to the conditions in St. Lucia.

For the above reasons I would hold that the Commission erred in holding that the production of the Company's overall regional accounts was necessary before the Commission could determine the reasonableness of the cost of the Company's St. Lucia operations and that the Commission was therefore left with insufficient evidence on which to base an award.

I would therefore allow the appeal and set aside the decision of the Commission. I would remit the matter to the Commission for consideration of the Company's application on the basis of the accounts and such other relevant evidence as already produced, independently of any consideration of regional accounts and for determination as to whether the Company should be granted the increase claimed or any part thereof in respect of the local rates for its services in St. Lucia.

In view of the fact that the Company's claim is long outstanding, having been filed more than one year ago I would express the hope that continuation of the hearing and determination of the matter by the Commission will be given some measure of priority.

I agree.

G.C.R. MOE
Justice of Appeal

I agree.

E.H.A. BISHOP
Justice of Appeal

L.L. ROBOTHAM
Chief Justice.