

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2003/0196

BETWEEN:

CABLE & WIRELESS (WEST INDIES) LIMITED

Claimant

and

THE NATIONAL TELECOMMUNICATIONS REGULATORY COMMISSION

Defendant

Appearances:

Mr. Anthony McNamara QC for the Claimant. With him are Mr. Derek N. Jones and Mr. Dave Garcia

Mr. Anthony Astaphan QC for the Defendant. With him is Mr. Leslie Mondesir

2003: May 29
July 14

JUDGMENT

1. **HARIPRASHAD-CHARLES J:** This is an application by Cable & Wireless for judicial review of a decision made by the National Telecommunications Regulatory Commission (the Commission) on 25th and 27th February 2003 (the decision). The parties are at loggerheads over the procedure to be adopted before Cable & Wireless is permitted to amend its prices. Cable & Wireless claims that the decision which purports to render its notice of price amendments, effective 1st March 2003 of no legal effect and requires Cable & Wireless to submit its proposed amendments to the Commission for prior approval is *ultra vires* the Commission and unlawful in that: (i) the Commission lacks the statutory basis or authority to do so and (ii) the Commission exceeded its jurisdiction in its unlawful attempt to modify the terms of the Agreement.

2. The Commission's arguments are strikingly the opposite. The gravamen of the Commission's case is that Cable & Wireless has not addressed the critical issue of the legal consequences of its consent and subsequent designation as the dominant provider in respect of four fixed line services. The Commission alleges that having been so designated, Cable & Wireless must apply for approval to amend its prices in accordance with Part IV of the Telecommunications (Tariff) Regulations, No. 16 of 2002 and that the May 2002 Agreement is no bar or fetter to the operations of the Regulations.
3. The Commission next contended that properly construed, the May 2002 Agreement does not permit amendments to rates for "regulated services" unless and until the period of 9 months expired and therefore, Cable & Wireless' notification was premature. Furthermore, Cable and Wireless required the approval of the Commission before it could amend its prices. And in any event, it claims that to the extent that there exists a dispute between the parties, the Agreement provides for the matter to be determined by dispute resolution and if that fails, by arbitration before Cable & Wireless has the right to come to court. Cable & Wireless denies that the issues it raises are proper for arbitration and seeks an order of certiorari to quash the impugned decision.

Background

4. It is convenient to state the core facts. Until quite recently, Cable & Wireless has been the monopoly provider of telecommunications services throughout all the States of the OECS region. The Commission is the statutory body responsible for regulating the telecommunications industry in St. Lucia. Its functions and powers are derived from the Telecommunications Act, No. 27 of 2000: sections 12 (1) (e) and 13.
5. Over the years, there have been on-going negotiations for the liberalization of the telecommunications market in the entire OECS region including St. Lucia. These negotiations culminated in a number of agreements with Cable & Wireless including the treaty establishing the Eastern Caribbean Telecommunications Authority signed in Grenada on 4th May 2000 to which the Government of St. Lucia is a party. The treaty created the Eastern Caribbean Telecommunications Authority (ECTEL) for making

recommendations to and coordinating with national regulatory bodies in matters concerning the regulation of telecommunications markets in the OECS states of St. Lucia, St. Kitts and Nevis, Dominica, St. Vincent & the Grenadines and Grenada. In furtherance of the treaty, the Parliament of St. Lucia enacted the Telecommunications Act of 2000 (the Act) which came into force on 22nd November 2000.

The Telecommunications Act and its Regulations

6. The Act requires any person who wishes to establish or operate a telecommunications network or provide a telecommunications service to first obtain a licence. Cable & Wireless was granted a licence. One of the terms of the licence is that Cable & Wireless must *"comply with any direction made by the Commission under Section 15(1) of the Act."* Section 15(1) empowers the Commission on the recommendation of ECTEL to *"provide guidelines as to cost and pricing standards on which the reasonableness of the rates, terms and conditions of interconnections will be determined."* Under section 8, the Commission is declared to be *"under the general direction and control of the Minister."* Section 24 states that the Minister may give directions to the Commission of a *"policy nature"*.

7. The Telecommunications (Tariff) Regulations were made by the Minister on 3rd March 2002. Regulation 4 (a) permits a licensee to set its own tariff for a telecommunications service where there is effective competition for that service. Where, on the other hand, the Commission has determined that one or more operators are dominant in the market for a telecommunication service, the licensee must set the tariff for that service in accordance with any incentive-based regulations (if applicable) and any regulation imposed as a condition of that licensee's licence: Regulation 4 (b). Further, if the Commission has determined that the telecommunications provider is dominant, that provider must file its tariff with the Commission and those tariffs shall be *"publicly available"* and must not *"discriminate between similarly situated customers of the relevant services."* - Regulation 6. A telecommunications provider determined to be dominant in respect of a particular service of which an incentive-based regulation applies must apply to the Commission for approval of a tariff for each regulated service or the modification of an existing tariff –

Regulation 12 (3) not later than 30 days prior to the scheduled effective date of such tariff-Regulation 8(1). Any such application must include a description of and justification for the tariff – Regulation 8 (2). Upon receipt of the application for approval of the tariff, the Commission is required to forward it to ECTEL – Regulation 8 (3).

The OECS Agreement

8. On 7th April 2001, the Governments of the OECS Contracting States and Cable & Wireless entered into an OECS Agreement to ensure a smooth transition to a fully liberalized and competitive telecommunications sector in the OECS Contracting States. Pursuant to this agreement, Cable & Wireless and the OECS Governments agreed to collaborate in good faith to implement the measures necessary to transition these markets to competition.

9. Under the OECS Agreement, Cable & Wireless agreed to relinquish the remaining term of its exclusive operating licences in each of the State and waived all claims against each of the OECS Contracting States arising as a result of the introduction of the new Telecommunications Acts to be passed in these States and the consequent termination of its exclusive licence rights. In consideration of Cable & Wireless relinquishing these rights and waiving these claims, the Contracting States undertook certain obligations. These obligations included, among other things, ensuring that Cable & Wireless has input in the creation of a new regulatory regime that would include the establishment of price caps and an access deficit contribution scheme. In addition, the parties agree in principle to an interim rebalancing mechanism (to be based on full disclosure of supporting cost data) which would allow Cable & Wireless to raise rates for those services that are presently offered below cost (historically local rates) while reducing rates for other services which are profitable (mobile and international rates).

The May 2002 Agreement

10. On 20th May 2002, the OECS Contracting States and Cable & Wireless entered into a further agreement (May 2002 Agreement). The parties agreed to accelerate the date for full liberalization for the telecommunications markets in the region to 1st April 2002. They also agreed to incorporate Annex F of this Agreement into each of Cable & Wireless' fixed

licences in the Contracting States and to do all things reasonable and necessary to ensure that the Agreement is given effect.

11. Under Annex F to May 2002 Agreement, it was agreed that a price caps regime would be instituted in St. Lucia within 9 months of 1st June 2002. In other words, by 1st March 2003. In the interim, it was agreed that Cable & Wireless would price regulated services in accordance with a price table and price cap rules as set out in Annex F and would not be restricted in the price it would charge for unregulated services.
12. Annex F specifically contemplated amendments to the prices for regulated services should implementation of a price cap regime be delayed beyond 1st March 2003. Clause 7 permits Cable & Wireless to amend prices provided that:
 - (a) The overall weighted average price of a basket of all regulated services and IDD services shall not increase by more than the Consumer Price Index as published by the Eastern Caribbean Central Bank; and
 - (b) No price for any regulated service shall increase more than 20% in any calendar year.
13. Clause 8 provides that Cable & Wireless may amend prices for each regulated service no more than two times in a year and shall provide at least 30 days notice to its customers of a price amendment.

Ministerial Directive

14. On 20th May 2002, the Minister issued a Ministerial Direction to the Commission directing it to make decisions that were consistent with, and gave effect to the terms of the May 2002 Agreement. On 1st June 2002, the Minister wrote Cable & Wireless to confirm that its licence would be modified to include Annex F, which amendment to the licence was effected on the recommendations of ECTEL under s. 40 of the Telecommunications Act.

Price Cap Regime

15. Creating a price cap regime is one of the most important and complex matters that a telecommunications regulator can undertake. In his First Affidavit filed on 27th February 2003, Mr. Jonathan Daniels laboriously detailed the processes involved. I can do no better

than to adopt with gratitude paragraphs 28 to 38 of his affidavit and to add, that the success or failure of a price cap regime can be key to the viability not only of the provider that is subject to the regime but also to that of the very competitive marketplace itself. Therefore, it is essential that a price cap proceeding allow the opportunity for a full analysis of the relevant financial, economic and technical factors, including evidence and submissions of the regulated companies themselves. Only after a full and fair opportunity has been made for submissions, comments and/or consultation on the regulator's proposal can a final determination be made. This is the process that has been followed in such countries as Australia, Jamaica, Canada and the United Kingdom.

Consent to be designated a Dominant Provider

16. Following the conclusion of the May 2002 Agreement, there were correspondence between Cable & Wireless in respect of the establishment of a price cap regime and other regulatory matters. On 21st June 2002, the Commission wrote to Cable & Wireless seeking its consent to be designated the dominant provider in respect of certain telecommunications markets in order to trigger tariff approval procedures. On 26th July 2002, Cable & Wireless consented in writing to be so designated in respect of four fixed public telecommunications services namely monthly line rental, domestic and fixed-to-mobile telephone calls on Cable & Wireless's own network, network connection and network reconnection. Cable & Wireless accepted that "a designation of dominance under s. 5 (2) of the Regulations would trigger the tariff approval procedure under s. 8 of the said Regulations." On 24th February 2003, a notice designating Cable & Wireless a dominant provider in the four fixed public telecommunications services was duly gazetted in accordance with the Act.

Subsequent Events

17. Between July and mid October 2002, the Commission requested, albeit at short notice, and Cable & Wireless supplied voluminous financial data as to its rates and revenues for certain services. On 25th October ECTEL issued a preliminary report regarding price caps (the First ECTEL Proposal). Cable & Wireless received the document on 31st October. The Commission gave Cable & Wireless a 10-day deadline to prepare and file comments.

Given the complexity of the issue, such an exercise required longer time. The document laid out a table summarizing proposed consultation timelines which range from 84 days for matters dealing with broad issues of regulatory policy to 28 days for consultations prior to issuing determinations in respect of market power, universal service or other matters. Cable & Wireless was therefore unable to comply within the stipulated deadline and sought an extension of time to do so. The Commission did not respond. Nevertheless, on 29th November, Cable & Wireless filed its initial comments on the First ECTEL Proposal but with a number of concerns. One of its concerns was ECTEL's justification for using international benchmarks which Cable & Wireless felt was inadequate for the creation of a cost-based regime in the OECS.

18. As it seemed highly unlikely that a price cap regime would be implemented by 1st March 2003, Cable & Wireless notified the Commission on 28th January 2003 of its intention to amend its rates for certain regulated services as defined in Annex F of the May 2002 Agreement. The following day, Cable & Wireless informed its subscribers and the public of the impending rate adjustments, effective 1st March 2003. However, Cable & Wireless did not seek the approval of the Commission.
19. On 31st January 2003, Cable & Wireless submitted its own proposal for price cap regulations to the Commission. The proposal purported to set up a means by which the price cap regime can provide fair prices for consumers, protect them from "rate shock", result in higher efficiency and offer a reasonable return for Cable & Wireless should it improve its productivity. In response to its letter of 28th January, ECTEL put out a press release stating that there has been a delay in the completion of the Price Cap Regime largely due to the failure on the part of Cable & Wireless to supply the Commission with the required information.
20. On 5th February, the Commission wrote to Cable & Wireless alleging that the notice of the intended price amendments was premature because it was announced prior to the expiration of the deadline of 1st March 2003. The Commission decided that the notification by Cable & Wireless "has no legal efficacy" and could not have been lawfully considered.

The Commission suggested that Cable & Wireless might apply in accordance with the Tariff Regulations for any proposed tariff changes.

21. On 7th February, Cable & Wireless responded claiming that the amendments were being made in accordance with the May 2002 Agreement and were not premature. On 25th February, the Commission wrote to Cable & Wireless informing the Company that a dispute has arisen in respect of the timeliness of the notice of the intended price amendments within the meaning of Clause 10 of Annex F and as a consequence, the matter should be referred to dispute resolution to be determined expeditiously.
22. On the same 25th February, the Commission also issued the letter (the Decision); the subject of these proceedings inviting Cable & Wireless to apply in accordance with the Tariff Regulations for any proposed tariff changes.
23. On 27th February, Cable & Wireless received two letters from the Commission. The first reads as follows:

"In light of my letter to you of February 3, indicating that Cable & Wireless has been designated dominant in the areas to which it has consented, and that the procedure for the implementation of increases in these areas must now follow that outlined in the Telecommunications (Tariff) Regulations, 2002, the Commission is of the expectation that the increases proposed by Cable & Wireless for implementation from 1st March will not now be imposed."
24. The second letter enclosed a copy of a Proposed Price Cap Regime for ECTEL States. Paragraph 4.3 contemplates (i) a 6-week period for public consultation on the consultative process; (ii) a 28-day period for public consultation on dominance and (iii) a 84-day period of public consultation on the price cap regime starting from the development of the ECTEL's price cap regime.
25. The same day, Cable & Wireless filed an application for judicial review claiming that the decision of the Commission is ultra vires and unlawful on the grounds that:

- (a) the Commission lacks the statutory basis or authority to determine the price amendment notice is of no legal effect;
- (b) the Commission exceeded its jurisdiction as the decision is an unlawful attempt to modify the terms of the agreement and
- (c) alternatively, if the Commission did have jurisdiction, it made an error of law in its interpretation of the agreement.

26. On 28th February, Saunders J. stayed the Decision of the Commission that purported to render Cable & Wireless's notice of price amendments of no legal effect and granted leave to Cable & Wireless to apply for judicial review.

27. In the meanwhile, several developments have taken place locally within the telecommunications industry. On 1st March, Cable & Wireless amended its prices in accordance with the notice it had sent to the Commission and its subscribers and the public. As part of its rate amendments, Cable & Wireless reduced its rates for international direct dial calls and increased its rates for domestic fixed line services. On 24th March, Digicel launched its services in St. Lucia followed by A T & T Wireless on 15th April increasing the number of telecommunications providers to three.

28. Without prejudice to its position that the 28th January 2003 notice was not premature, Cable & Wireless, by letter dated 24th March 2003, re-filed its notice of amendment this time effective 1st April 2003. It also explicitly sought the Commission's approval of the rate change without prejudice to its position that such approval was not required prior to the implementation of the amendments.

29. By letter dated 28th March, the Commission expressed the view that since Annex F was the interim pricing mechanism it was governed by regulation 27(2) which requires a telecommunications provider to obtain the approval of the Commission for its tariffs under any such interim pricing mechanism. The Commission reiterated its position that because Cable & Wireless had been designated the dominant provider in respect of the relevant services it must conform to the procedure established in Part IV of the Tariff Regulations

and that, in that regard, its application should include information pertinent to the matters which ECTEL was required to consider under Regulation 9. The Commission also advised Cable & Wireless that its new notice did not comply with Annex F because the period of notice was 7 days and not the required 30 days.

The Issues

30. Cable & Wireless is seeking an Order of Certiorari to quash the Decision made by the Commission on 25th and 27th February 2003. The following issues falls to be determined:

- (a) Whether the Commission's letters of 25th and 27th February 2003 constitute a "Decision."
- (b) Whether the Commission acted in excess of or without jurisdiction when it informed Cable & Wireless that its Notices of 28th January and 24th March 2003 were "*of no legal efficacy*" or "*could not be lawfully considered.*"
- (c) Whether the Commission's position that Cable & Wireless' proposed rate changes must be submitted for approval under Part IV of the Tariff Regulations is not maintainable either because (i) it contradicts Annex F and the June 2002 licence or (ii) it contradicts the Minister's directive that the Commission must make decisions consistent with the May 2002 Agreement or (iii) both.

(a) Whether contents of letters of 25th and 27th February 2003 amounted to "advice" of "decision"

31. The Commission contends that the "decision" complained of by Cable & Wireless, which was communicated to it in the Commission's letters of 25th and 27th February 2003 is not a "decision" for the purposes of a judicial review application. The Commission contends that the "decision" did not determine any of the rights or expectations of Cable & Wireless but merely informed Cable & Wireless of facts which led to a dispute and could lead to other disputes. Alternatively, if the "decision" constitutes a decision or determination for the purposes of judicial review, the "decision" was made in accordance with the Commission's jurisdiction and authority.

32. In the Marius affidavit at paragraph 28, the Commission declares:

"The Defendant denies that the letters now being impugned by the Claimant have the effect contended for by the Claimant. As the Regulatory Authority, the Defendant was bound by law to inform the Claimant that (i) its notice of intended price amendment was premature and that (ii) it had not sought the approval of the Defendant for its intended price amendment."

33. The Commission seems to be saying that its letters were merely advisory and did not constitute a decision.
34. In its 25th February letter, the Commission states: "The Commission is of the firm view that Cable & Wireless' notification of its tariff amendments dated 28th January 2003 has no legal efficacy."
35. The implication of this letter is a determination as to the perceived lawfulness of Cable & Wireless' notification.
36. Similarly, in the 27th February letter, the Commission states "...the procedure for the implementation of increases in these areas must now follow that outlined in the Telecommunications (Tariff) Regulations." The use of the word "must" is an imperative. Cable & Wireless submits that in both cases, the Commission was not simply giving advice but rendering a decision as found by Saunders J. in his order of 28th February 2003.
37. I too find that in both the 25th and 27th February letters, the Commission was rendering a "decision" but was not simply giving advice. Judicial authorities were cited to support my finding.

(b) Excess or lack of Jurisdiction

38. Mr. Astaphan S.C., Counsel for the Commission argued that the Commission has the statutory authority to make or communicate its Decision to Cable & Wireless. That authority, he contends, was confirmed under the Ministerial Directive, which confirmed its responsibility to ensure compliance with the Agreement and Clause 10 of the Agreement,

which gave it the right to declare a dispute and that conferred by sections 12 and 13 of the Act and Regulation 26 (d) of the Tariff Regulations.

39. Counsel argued somewhat diffidently that the Commission has the right enjoyed by any citizen to express an opinion as to the meaning and legal effect of an agreement or Regulations on any subject matter which affect or concern it. In addition, the Commission has added rights and obligations in that it is vested with contractual responsibilities and statutory functions which includes the regulation of prices for telecommunications services and the giving of advice to the Minister on all matters related to tariffs, including advice on the legal aspects of telecommunications – section 12 (e) (f) & (q) of the Act.
40. The Commission's case is that sections 13 (1) and 13 (2) (f) of the Act and Section 26 (d) of the Regulations which empower the Commission to do all things necessary or convenient to be done for or in connection with the performance of its functions, to do anything incidental to its powers and to do things as the Commission might deem desirable for the purpose of establishing and maintaining an acceptable regime of tariffs, make it clear that the Commission has and must have the power to form an opinion on the effect of the Act and its Regulations and to inform a telecommunications provider of that opinion.
41. I am of the view that the Commission's "decision" went beyond merely the giving of advice (as found above). The Commission contends further that the language used in its letters showed that the Commission fell short of issuing an order or a directive under the Act or the Regulations. Alternatively, the Commission argues, that even if the Court finds that the Commission had issued an order or a directive, it would clearly be issuing a written directive in connection with the performance of its statutory function of price regulation as it is empowered to do under section 15 (3) of the Act. In the circumstances, where the Commission is of the opinion that the proposed rate change is contrary to the Act or the Regulations, it would be acting within its jurisdiction to direct a telecommunications provider not to implement it.

42. The Commission contends that Cable & Wireless has failed to appreciate that distinction must be made between the power of the Commission to form an opinion on the legality of a proposed rate change and the power conclusively to pronounce upon the legality of such rate change. Accordingly, the Commission submits that Cable & Wireless is wrong to say that the Commission is not empowered to form or express an opinion or advice on the legality of Cable & Wireless' proposed rate changes in relation to regulated services.
43. Mr. Jones, Counsel for Cable & Wireless submitted that the Commission exceeded its jurisdiction in declaring that the price amendment notification was of "*no legal efficacy*." Counsel next submitted that although the precise basis for the decision seems unclear on the face of the Commission's correspondence, the Commission appears to be advancing as the basis for its decision the following: (i) the price amendment notification by Cable & Wireless was premature and (ii) Cable & Wireless required the prior approval of the Commission to amend its rates.
44. Counsel argued that the Commission has no statutory basis or authority to determine that Cable & Wireless' Notice was "of no legal efficacy". Its excess of jurisdiction is subject to review by the courts. Where a tribunal does something it has no power to do, there is a nullity and the court can interfere by certiorari: *Anisminic v Foreign Comp. Comm. (1969) 2 AC 147 (H.L.)*.
45. Nowhere in the Act, the Regulations or the May 2002 Agreement is there authority for the Commission to make a declaration that Cable & Wireless' notice was of no legal efficacy due to prematurity. Even if the Commission asserted that Cable & Wireless had breached its licence, the Act sets out at section 41 (2) the grounds on which the Minister, not the Commission, can take steps to either suspend, revoke or refuse to renew a licence on the recommendation of ECTEL.
46. The Commission has not contested the substance of Cable & Wireless' price amendments as being inconsistent with Annex F of the Agreement. It has only disputed the timing of the notice of the amendments. The issue of whether Cable & Wireless gave notice of an

amendment of its prices prematurely is a question of contractual interpretation which was referred by the Commission to dispute resolution pursuant to Clause 10 of the Agreement.

47. The action which Cable & Wireless seeks to judicially review arises out of the Commission's decision to render Cable & Wireless' notice of price amendments premature. Given my finding that the notice was not premature, the remaining question is whether the Commission has jurisdiction to interfere with rates established pursuant to the May 2002 Agreement.

48. Cable & Wireless contended that the Commission exceeded its jurisdiction by arguing that the Agreement requires 10 months before Cable & Wireless could put into effect a price amendment, rather than 9 months as is plainly stated in the Agreement and as such, the Commission exceeded its jurisdiction in its attempt to unlawfully modify the terms of the Agreement. Such a modification, it argued, could only be made pursuant to section 40 of the Act, by the Minister acting upon a recommendation of ECTEL. The Commission has no authority to make such modifications on its own.

49. Furthermore, Section 24 of the Act specifically provides:

"The Minister may generally give to the Commission directions of a policy nature, and the Commission shall comply with those directions."

50. In my judgment, the Minister's Direction requires the Commission to give effect to the May 2002 Agreement as enshrined in Cable & Wireless' licence. No flexibility was afforded to the Commission by the Minister to alter the terms of either the May 2002 Agreement or the licence and any attempt to do so is in contravention of the Act and unlawful.

51. Cable & Wireless argued further, that the Commission exceeded its jurisdiction as there is a dispute resolution clause in the May 2002 Agreement which is applicable to any dispute arising out of the Agreement. The Commission rendered Cable & Wireless' price amendments notice to be of no legal efficacy pursuant to the provisions of Annex F of the Agreement. Yet, the Decision is inconsistent with Clause 10. Clause 10 in effect states that

any dispute as to any aspect of the interim arrangement shall be referred to a Joint Committee for resolution, not to the Commission.

52. The Commission did in fact refer this matter to dispute resolution by letter dated 25th February 2003. The dispute resolution process has been ongoing since that time. The Commission issued a second letter on the same day, declaring Cable & Wireless' notice of no legal efficacy which was clearly in excess of its jurisdiction.

53. To summarize, my findings are as follows:

- (a) The Commission lacked the statutory basis or authority to determine Cable & Wireless' notice of price amendments was of no legal efficacy and;
- (b) The Commission exceeded its jurisdiction as the Decision is an unlawful attempt to modify the terms of the May 2002 Agreement.

54. Even if I were wrong to come to this conclusion, I have explained below that the Commission erred in law when it interpreted the May 2002 Agreement as requiring Cable & Wireless to wait for 10 months instead of 9 before it could give notice of its price amendments. The second issue of prior approval will be dealt with later under the sub-heading: effect of consent and designation as a dominant provider.

(i) Premature Notice

55. Clause 7 of Annex F of the May 2002 Agreement, incorporated into Cable & Wireless' licence provides that where the Commission has not set a new Price Cap as contemplated by 1st March 2003, Cable & Wireless shall be permitted to amend its prices for regulated services under the Agreement. Clause 8 provides for Cable & Wireless to give at least 30 days notice to its customers. Clause 9 provides that this interim arrangement shall apply until the Commission shall set a new price cap as contemplated by the Agreement.

56. Mr. Astaphan, S.C. appearing for the Commission submitted that Annex F makes it abundantly clear that Cable & Wireless is only permitted to amend its prices after 1st

March 2003. The Commission submitted that Cable & Wireless' right to amend its prices can only crystallize after 1st March 2003 whereupon Cable & Wireless must apply for approval and give notice of at least 30 days. Therefore Cable & Wireless was required to wait the full 9 months before giving the Notice. It next submitted that the notice being bad the court had no authority to amend it to give it a later date of implementation. Counsel submitted that Clause 7 has to be read conjunctively with Clause 9. In support of his argument, Mr. Astaphan referred to the unreported judgment of Mitchell J in *Cable & Wireless (St. Kitts & Nevis) Limited v NTRC* delivered on 15th April 2003.

57. Mr. Jones contended that Cable & Wireless was not required to wait until after 1st March 2003 to give its notice. Such a wait, it argued would mean that Cable & Wireless would be required to give one month's notice after 1st March which would mean that the new rates would come into effect at its earliest on 1st April and not 1st March as envisaged in the May 2002 Agreement. Cable & Wireless argued further that even if the Notice was premature, it was entitled to bring the proposed amended rates into effect from 1st April 2003 without having to send out a new notice.
58. Clause 7 is clear and unambiguous. It provides that if the Commission has not set a new Price Cap by 1st March 2003, Cable & Wireless shall be permitted to amend its prices but after giving its customers at least 30 days notice. A new Price Cap was supposed to have been in place by 1st March 2003. By the end of January, it was manifestly clear that the new Price Cap could not be ready for the 1st March deadline as the Commission had taken no steps to obtain cost information necessary to validly establish a Price Cap Regime. The Proposed ECTEL Price Cap Regime contemplates 3 stages of consultation and altogether, it could last for 22 weeks.
59. On 29th January, Cable & Wireless informed its customers of the new rate amendments. If Cable & Wireless were to wait until 1st March to notify its customers, then it would mean that the new price amendments would not come into effect by 1st April. This is one month later than agreed in Annex F. Mitchell J in his judgment (dealing with the very same issue)

at paragraph 25 felt that Cable & Wireless “jumped the gun” and gave Notice prior to the deadline set out in the Agreement.

60. In deference to my learned brother judge, I do not think that the Agreement set a deadline in respect of Notice. The deadline was in relation to a new price cap. Had the parties intended that a term be a part of the contract: there would be no difficulty in so providing by an express term of the contract”: *Luxor (Eastbourne Ltd v Cooper (1941) AC 108 at 118 (H.L.)*.

61. In my judgment, the clear unequivocal intention of the parties to the Agreement was that Cable & Wireless shall be permitted to amend its prices if a price cap is not set by 1st March 2003, but it must give at least 30 days notice to its customers. The Agreement did not stipulate when the Notice should be given but it set a deadline in respect of a new price cap. I therefore hold that the Price Amendments Notice of 28th January 2003 was not premature.

(ii) Whether 24th March Notice was in breach of Annex F?

62. Based on my findings above, the issue in respect of the 24th March Notice is now moot.

(iii) Arbitration

63. On 25th February 2003, the Commission wrote to Cable & Wireless informing the Company that a dispute has arisen within the meaning of Clause 10 of the Agreement and as such, the matter should be referred to dispute resolution to be determined expeditiously and that Cable & Wireless has no right to institute these proceedings. The Commission also alleges that the issue as to whether or not the Notice of amended rates was premature must first be determined by dispute resolution, and if that fails, by arbitration.

64. Clause 10 provides that in the event that the Commission and Cable & Wireless are in dispute as to any aspect of this arrangement, this issue shall be referred to a Joint Committee comprising of two representatives of ECTEL and two representatives of Cable

& Wireless for resolution, such matter to be determined within 15 days of the dispute having arisen. Where the Committee is unable to reach an unanimous decision, the matter shall be referred to arbitration.

65. It is settled law that judicial review will not be entertained if there exists an alternative remedy or forum for the resolution of the dispute, which must first be pursued before an application is made for judicial review.

66. At the time that Cable & Wireless came to the High Court seeking judicial review, the issue was not the interpretation of any aspect of the arrangement but it was a matter of the rules of natural justice and procedural fairness. The court had to consider whether these rules were followed by the Commission. A claim that the Commission lacks the statutory authority to determine a legal issue and or the Commission exceeded its jurisdiction is not an aspect of the Agreement that can properly be decided at arbitration. The law on judicial review is long settled. I need not exhaust it. I therefore conclude that the application for judicial review is proper before the Court.

(c) Effect of consent and designation as dominant provider

67. As stated earlier, the Commission by letter dated 21st June 2003 (MM1) informed Cable & Wireless that it proposed to designate it the dominant provider in respect of six markets under s. 5 (2) of the Tariff Regulations. On 26th July 2003, Cable & Wireless consented to being designated the dominant provider but in respect of four services namely monthly line rental, domestic and fixed-to-mobile telephone calls wholly on Cable & Wireless' own network, network connection and network reconnection. These services were all designated "regulated" services under the May 2002 Agreement. Cable & Wireless noted *"that a designation of dominance under s. 5 (2) of the Regulations would trigger the tariff approval procedures under s. 8 of the Regulations and in the absence of a designation of dominance or an incentive-based pricing scheme with respect to a given service, a telecommunications provider is only required to file a notice of proposed rates 21 days prior to their implementation, under s. 13 of the Regulations."*

68. By letter dated 3rd September 2002, (Exhibit JD4), the Commission advised Cable & Wireless that the Commission was the sole authority to determine the issue of dominance, that the May 2002 Agreement did not deal with the issue of dominance, far less precluded the Commission from determining dominance and accordingly, it would be incorrect to state that the Commission would be in non-compliance with any Ministerial Directive or in breach of the May 2002 Agreement if it determined that Cable & Wireless was a dominant provider in respect of services agreed under the Agreement to be unregulated. In the premises, the Commission invited Cable & Wireless to reconsider its position in the light of the definition of a dominant provider in the Regulations.
69. By letter dated 1st November (Exhibit JD5), Cable & Wireless reiterated its position that the Commission was bound to act in accordance with the Minister's Directive and the June 2002 licence that he (the Minister) issued, both of which had designated certain services to be unregulated. As such, any declaration that Cable & Wireless was a dominant provider in respect of those services would violate the Minister's Directive. Cable & Wireless therefore declined to review its decision not to consent to be designated dominant in respect of those services, but reiterated its consent to being dominant in respect of the services agreed to be regulated under the May 2002 Agreement.
70. Thereafter, correspondence passed between the parties concerning the establishment of a price cap regime. By 28th January 2003, the Commission had not yet made any final decision concerning the price cap so by letter dated 28th January 2003 (Exhibit JD20). Cable & Wireless informed the Commission that *"In accordance with the Price Cap Rules set out in Annex F of the May 2002 Agreement, it would be amending its prices for the regulated services with effect from 1st March 2003."* In the last paragraph of that letter, Cable & Wireless wrote: *"Notwithstanding the language contained in the Annex, should the Commission be of the view that its approval is required for the proposed price amendments, we trust that such approval will be in compliance with the Ministerial Directive dated 20th May 2002, whereby the Minister required the Commission to 'make decisions that are consistent with, and give effect to, the terms of the Agreement made between the Government and Cable & Wireless."*

71. Three days later, Cable & Wireless wrote in its Price Cap Proposals, Abridged Version dated 31st January 2003 at paragraph III, page 8 (Exhibit JD 21): "The fixed licence is the only C & W Licence that empowers the NTRC to rate regulate the retail rates of C & W. Annex F sets out the limits of that rate regulation."
72. The Commission submits that by those words in Exhibit JD 20 and Exhibit JD 21, Cable & Wireless acknowledged and accepted that the Commission was empowered and had the authority to regulate Cable & Wireless' prices for "regulated" services under the May 2002 Agreement.
73. On 3rd February 2003 the Commission, in the exercise of its powers under Regulation 5 (2), designated Cable & Wireless as the dominant provider of the services in respect of which Cable & Wireless had already consented. Notice of such designation appeared in The Official Gazette of 25th February 2003.
74. On 25th February, the Commission issued the letter containing the "Decision" which is the subject of these proceedings informing Cable & Wireless to apply under the Tariff Regulations for an amendment to its tariff.
75. The Commission submits that where it has designated a telecommunications operator as a dominant provider in the market of telecommunications service under the Regulations, tariffs for that service must be set in accordance with any incentive-based regulation and any regulation imposed as a condition of its licensee's licence: Regulation 4 (b). Where, however, an incentive-based regulation has not yet been defined, the Commission, on the recommendation of ECTEL, may adopt an interim pricing mechanism: Regulation 27 (1).
76. In any event, a telecommunications provider who is designated a dominant provider and proposes a tariff or modification thereto in relation to services in which it has been designated dominant, must apply to the Commission under Regulation 8 (1) of Part IV for approval of the proposed tariff not later than 30 days prior to the scheduled effective date of such tariff. Upon receipt of such application for approval, the Commission must forward

- the request for approval to ECTEL for its review and recommendations: Regulation 8 (3) and in determining an application, ECTEL must consider the matters listed in Regulation 9.
77. Part IV of the Regulations does not prohibit a provider from increasing its rates for regulated/dominant services. What Part IV does, is prescribe a procedure to be followed if the provider intends to amend its rates. Therefore, if Cable & Wireless intends to increase rates for regulated/ dominant services, it must comply with or satisfy the matters set out in Regulation 9. Regulation 9 (c) requires Cable & Wireless to show that the proposed regulated changes are based on or oriented toward costs.
78. Cable & Wireless submits that the Tariff Regulations do not apply and even if they do, Part VIII is applicable and not Part IV. Cable & Wireless submits that although it consented to being a dominant provider in respect of four “regulated” services, it was designated dominant on 3rd February 2003. Notice of such designation appeared in The Official Gazette of 25th February 2003. Therefore, on the date of its notification to the Commission of its intention to modify its rates and its subsequent notice to its subscribers, it was not the dominant provider to trigger the tariff approval procedures under s. 8 of Part IV of the Regulations. Indeed, the Regulations did not apply at all. Annex F of the May 2002 was applicable.
79. Cable & Wireless argues that the Commission has no statutory authority to require that it submit its rate amendments for prior approval. Section 40 (1) of the Act grants the Minister the specific statutory right, on the receipt of a recommendation from ECTEL, to modify an individual license where he and the licensee agree in writing. By entering into an agreement with Cable & Wireless that incorporated the terms of Annex F into its licence, the Minister was acting in accordance with his statutory right. The Minister further directed the Commission, pursuant to s. 24 of the Act, to make decisions consistent with, and giving effect to the terms of the Agreement.
80. Unlike rate amendments in the normal course which as noted in Cable & Wireless' letter to the Commission, are subject to the Commission's jurisdiction to regulate rates pursuant to

s.8 of the Regulations, the amendments in question were pre-determined by agreement, enshrined in Cable & Wireless' licence, and to which the Commission was bound by the Minister's Direction. To require Cable & Wireless to apply for the approval of the Commission, notwithstanding the clear provisions of Annex F, would eviscerate both the May 2002 Agreement and the special statutory rights granted to the Minister under the Act. No subordinate legislation can be interpreted to have such an effect.

81. Accordingly, the Commission had no unilateral authority under the Regulations to approve or disapprove the rate amendments, or to make declarations as to its propriety. Rather, if the Commission disagreed with Cable & Wireless, interpretation of the May 2002 Agreement, it was required by s. 10 of annex F to proceed to dispute resolution.
82. Cable & Wireless also submits that the Commission' interpretation of the May 2002 Agreement would lead to an absurd interpretation of the Agreement and thus constitutes an error of law: *Wickman Tools v Schuler A.G. (1974) AC 235 at 251*. It is also submitted that it would be incoherent if Cable & Wireless were required to seek further approval pursuant to the regulations for its pricing amendments because s. 7 of Annex F provides that "the Licensee *"shall"* be permitted to amend prices for regulated services." The language is imperative. If further approval were required, and especially if such approval was to be in accordance with the provisions of the Regulations and not in accordance with the Agreement itself, the government would be unable to comply with its contractual obligation that the Licensee *"shall "* be permitted to amend prices because, under the Regulations, it is the Commission, not the Government that can approve tariffs.
83. In addition, s. 12 (1) of the Regulations provides that a telecommunications provider shall inform the public of the new tariff not less than 5 days prior to the effective date of the charge. In contrast, Annex F provides that the Licensee shall provide at least 30 days notice to customers. It would be ludicrous to presume that the parties intended to be bound by 2 completely different notice periods in respect of the same matter. That is the interpretation advanced by the Commission.

84. Cable & Wireless submits that the Government is estopped from breaching the May 2002 Agreement. If a Government takes it upon itself to assume authority for a matter, a person dealing with the Government is entitled to rely upon the Government having the authority which it assumes, and cannot be expected to know of any limits to that authority: *R v Liverpool Taxi Fleet Operators' Association et al* (1972) 2 Q.B.299. In the absence of express statutory provisions to the contrary, a Government must honour its contractual obligations. "To argue the opposite is to say that the government is bound only by its whim, not its word": *Wells v Newfoundland* (1999) 3 SCR 199, para. 46.

85. In my opinion, if the Commission were permitted to ignore the Government's contractual obligations under the Agreement, the net result would be that Cable & Wireless would suffer the detriment of the regime established by the Agreement without being able to enjoy its benefits. I do not think this is what the parties contemplated when they made the Agreement.

86. In the final analysis, I am in full agreement with Mr. Jones that the Regulations do not apply at all and even if they do, Part VIII which deals with Interim Pricing Mechanism becomes applicable.

Legitimate Expectation

87. Cable & Wireless submits that given the two Agreements, the amendment to its licence and the Ministerial Direction, it had a legitimate expectation that it could amend its rates in a manner consistent with paragraph 7 of Annex F and without the approval of the Commission.

88. The contention of the Commission is that no legitimate expectation can go beyond or conflict with the law whether primary or subsidiary legislation: *R v Secretary of State for Education and Employment, ex parte Begbie* (2001) 1 WLR 1115.

89. The Commission submits that Cable & Wireless was consulted on the terms of the Tariff Regulations, knew its contents and was fully aware of the consequences of being

designated a dominant provider by the Commission. Consequently, Cable & Wireless possessed with such knowledge, cannot claim that the May 2002 Agreement gave it the legitimate expectation now being claimed by it. Further, in its letter of consent, Cable & Wireless accepted that the effect of its consent and designation was regulated under Part IV of the Regulations.

90. In *Council of Civil Service Unions and others v Minister for the Civil Service (1984) 3 All ER 935*, Lord Fraser of Tullybelton at pages 943-944 said:

“But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by judicial review.”

91. And in *O’Reilly v Mackman (1982) 3 All ER 1124*, Lord Diplock said:

“Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

92. Accordingly, legitimate expectations are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.

93. Where a promise or practice is found to have been induced a legitimate expectation of a substantial benefit, the court will similarly decide whether frustrating that expectation will amount to an abuse of power: *R v North & East Devon Health Authority ex parte Coughlan (2000) 3 All ER 850*.

Conclusion

94. For the reasons given above, the "Decision" of the Commission made on 25th and 27th February 2003 is ordered removed into court and quashed.
95. Part 56:13 governs the award of costs in an administrative action. The general rule is no order for costs may be made against an applicant for an administrative action unless the court considers that the applicant has acted unreasonably in making the application. However, I think that the general rule holds good when a suppliant citizen is seeking the sanctuary of the court, not when two powerful giants are before the court. Under Part 56:13 (4) and (5) the judge may, however, make such orders as to costs and if the judge makes any order, the judge must assess them in accordance with Rule 65.11 and 65.12. I therefore assess costs to Cable & Wireless at \$25,000.00. I take judicial notice of the oral judgment of the Court of Appeal in *Martinus Francois v The Attorney-General of St. Lucia (unreported) Civil Appeal No. 8 of 2002* in respect of Costs.
96. Although implied in the decision, I think that I need to spell it out for clarity. Since 1st March 2003, Cable & Wireless has implemented the amended rate changes. Basically, it reduced the rates for international direct dial calls on fixed lines and increased its rates for domestic fixed line services. The present amended regime will be maintained until a new price cap is implemented. It is urged that both parties work together harmoniously over the ensuing weeks to implement a price cap regime as soon as practicable. Cable & Wireless must comply with all future requests of the Commission within a reasonable time.
97. Lastly, I would like to commend all lawyers especially Mr. Jones and Mr. Astaphan S.C. for their sterling presentation and immeasurable assistance to this Court. For this, I am indeed grateful.

INDRA HARIPRASHAD-CHARLES

High Court Judge

