IN THE SUPREME COURT OF BELIZE A.D. 2008

Civil No. 512 of 2008

IN THE MATTER of the Final Decision of the Public Utilities Commission made on the 26th of June 2008 in respect of Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July 2008 to 30th June 2009

AND

IN THE MATTER of an Appeal in respect of the said Final Decision

BETWEEN: **BELIZE ELECTRICITY LIMITED** **APPELLANT**
of Mile 2 ½ Northern Highway
Belize City

AND

PUBLIC UTILITIES COMMISSION **RESPONDENT**

MINISTER OF PUBLIC UTILITIES **INTERESTED PARTY**

ATTORNEY GENERAL **INTERESTED PARTY**

BEFORE: Justice Minnet Hafiz

Mr. Vincent Nelson QC and Mr. Michael Young SC for Appellant

Mr. Andrew Marshalleck and Mrs. L. Barrow-Chung for Respondent

Ms. Illiana Swift for Interested Parties

Introduction

1. This is an appeal against the Final Decision of the Public Utilities Commission made on 26th June, 2008 in respect of the Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July, 2008 to 30th June, 2009. The Appellant is Belize Electricity Limited

("BEL"). The Respondent is the Public Utilities Commission ("PUC"). There are two interested parties, the Minister of Public Utilities and the Attorney General. The Interested Parties made no submissions.

Background

2. BEL and PUC in their written submissions have helpfully provided the regulatory framework regarding the supply of electricity in Belize. I am grateful to both sides for their assistance.

3. Prior to 1992, the sole supplier of electricity in Belize was the Belize Electricity Board, a statutory corporation owned exclusively by the Government of Belize and formed and existing under and by virtue of the Belize Electricity Board Act.

4. In 1992 the Electricity Act was passed (Act No. 13 of 1992) repealing the Belize Electricity Board Act and allowing for the Minister to grant licenses to private persons authorizing the commercial generation and supply of electricity in Belize. The Act also created an office of the Director of Electricity Supply and conferred certain regulatory powers on it. The Act effectively sought to create the enabling environment to privatize, subject to regulation, the provision of electricity services in Belize.

5. The 1992 Electricity Act gave the Director of Electricity Supply the power to make decisions and perform certain functions associated with the supply of electricity but the Minister responsible for electricity was the person ultimately responsible for the passing of regulations and the making of Byelaws regulating the industry.

6. In 1999 the **Public Utilities Commission Act, Chapter 223** was passed creating the Public Utilities Commission to regulate the services rendered by public utilities in Belize. Simultaneously, significant amendments were made to the **Electricity Act by Act No. 40 of 1999**. These amendments removed the office of Director of Electricity Supply and the Public Utilities Commission was created. The Commission was expressly conferred power to regulate electricity service providers by inter alia passing byelaws regulating rates to be charged for electricity services and mandated that service providers charge only approved rates.

7. On the 1st July, 2000 Belize Electricity Limited was granted a license authorizing it to engage in the sale and supply of electricity in Belize pursuant to the provisions of the Electricity Act as amended.

8. The Respondent in the exercise of its powers of regulation over electricity services caused to be passed the Electricity Tariffs, Charges and Quality of Service Standards Byelaws on the 12th April, 2001 by way of Statutory Instrument No. 60 of 2001 ("The 2001 Byelaws"). These were the first Byelaws promulgated pursuant to the provisions of the Electricity Act to regulate rates to be charged for electricity services in Belize.

9. The 2001 Byelaws were eventually repealed by the Respondent by Statutory Instrument No. 145 of 2005 passed on 20th December 2005 which also replaced the 2001 Byelaws with new byelaws entitled Electricity (Tariffs, Charges and Quality of Service Standard) Byelaws 2005 ("The 2005 Byelaws").

10. On the 9th October, 2007, the Electricity Act was amended by the Electricity (Amendment) Act 2007. That amendment vested the power to make byelaws pursuant to section 7 in the Minister.

11. In December 2007 the 2005 Byelaws were amended by the Minister by Statutory Instrument No. 141 of 2007 which effectively replaced the 2005 Bylaws with the Electricity (Tariffs, Charges and Quality of Service Standard) Byelaws 2007 ("The 2007 Byelaws").

12. On the 28th of March, 2008 the 2007 Byelaws were repealed and replaced by the Minister with the Electricity (Tariffs, Charges, and Quality Service Standards) (Amendment) Byelaws, 2005 by way of Statutory Instrument No. 58 of 2008. The rate review regime first enacted in 2005 was effectively re-enacted in 2008.

Decision of the PUC on Appeal

13. The decision under appeal is the Final Decision of the Public Utilities Commission made on the 26th of June 2008 in respect of Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July 2008 to 30th June 2009 and can be found at **Exhibit LY 14** of Lynn Young's first affidavit.

14. Summary of Grounds of Appeal

The grounds of appeal will be set out in detail upon determination. There are 38 Grounds of Appeal under the following Decisions of the PUC:

(a) Decision 1 – Rate Setting Methodology
(b) Decision 2 – Regulated Asset Values (RAV)

(c) Decision 3(a) – Depreciation Correction

(d) Decision 3(b) – Return Correction

(e) Decision 3(c) – Disallowance of Hurricane Cost Stabilisation Account (HCRSA).

(f) Decision 3(d) – Review of Decision to approve interest charges on Mollejon Transmission Line (MTL)

(g) Decision 4 – Rate of Return (ROR)

(h) Decision 5 – Value Added Delivery (VAD)

(i) Decision 6(a) – Approval of Tariff Basket Revenue

(j) Decision 9 – Capital Investments 2008 and 2009

(k) Decision 10 – Disapproval of any changes to Tariffs

(l) Decision 11 – Mollejon Transmission Line

(m) Process fundamentally unlawful

15. **Relief Sought**

1. A Declaration that the Final Decision of the Public Utilities Commission made on the 26th of June 2008 in respect of the Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July 2008 to 30th June 2009 was unlawful.

2. Any declarations, orders, or directions to the Respondent consequential on the Court's determination of the questions of law subject of the appeal that the Court deems requisite or necessary to ensure compliance with the said determinations made by the Court and the implementation of its decision

3. Such further or other relief as the Court deems fit and just

16. **The nature of the action before the Court**

It is clear from the action brought that this is an appeal in respect of the final decision made on 26th June, 2008 by the PUC. The rubric states that it is a matter of an Appeal in respect of the Final Decision of the

PUC. However, the relief sought in this appeal is in the form of a declaration. Further, in this appeal affidavits were filed and witnesses were called to be cross examined. The question to be asked however, is whether this is a rehearing as this was an issue in contention between the parties. The court will therefore look at the statutory provisions for guidance.

17. **Statutory provision on Right of Appeal**

The appeal brought by BEL is governed by the **Public Utilities Act, Chapter 223, (PUC Act) section 33** which provides that:

> *33. (1) An appeal shall lie on a question of law to the Supreme Court from a decision or Order of the Commission.*

The appeal of the Decision before the court is therefore based on a **question of law**.

The powers of the court on hearing of the appeal is provided for in section 35 which states:

> *35. On the hearing of an appeal and the determination of the question involved in the appeal, the Supreme Court shall certify its decision to the Commission and the Commission shall make an Order in accordance with that decision.*

I agree with the submissions of PUC that this is not a rehearing. **Part 60** of the **Supreme Court (Civil Procedure) Rules, rule 60.8 (1)** which governs the hearing of appeal provides that:

> *Unless an enactment otherwise provides, the appeal is to be by way of rehearing.*

Section 35 of the PUC Act provides otherwise as shown above. This provision is inconsistent with a rehearing. The court's power as submitted by the Respondent is therefore limited to questions of law raised on the Appeal and certifying its decision to the Commission. It is then for the Commission to make an Order in accordance with that decision.

18. Evidence

On behalf of BEL, 12 affidavits were deposed to by Mr. Lynn Young, Chief Executor Officer for BEL, five affidavits from Rene Blanco, Chief Financial Officer of BEL, an affidavit from Giacomo Sanchez, Professional Accountant, an affidavit from Stanley Ermeav, Professional Accountant and an affidavit from John Evans, Professional Engineer.

On behalf of the PUC, John Avery Chairman of the PUC deposed to seven affidavits, one affidavit form Victor Lewis, Director of Electricity Services for the PUC, two affidavits from Cedric Flowers, Professional Accountant.

The first affidavit of Lynn Young can be found in Bundle 1. All the other affidavits can be found in Bundle 2 and 3 except for the second affidavit of Cedric Flowers which can be found at Bundle 6.

The Disclosures in this matter is voluminous. There are over 600 hundred disclosures or more which includes a book on Energy Industry by Dr. Lesser, the court appointed Expert.

19. **Independent Expert appointed by the Court**

Dr. Jonathan A. Lesser was appointed by the Court to prepare an Independent Report. He has over 25 years of experience in the energy industry. Dr. Lesser first Report is dated 19th August, 2009. This Report was later revised on instructions of the Court. The Revised Report is dated 25th October, 2009. Also, Dr. Lesser submitted to the court Responses to Questions on the Report which is dated 14th July, 2010.

20. **Good Utility Practice**

Dr. Lesser in the his report placed much emphasis on the concept of *Good Utility Practice* and found in almost all of the issues that there was a failure by the PUC to comport with this concept. I therefore, intend to look at this concept before looking at the grounds of appeal.

Dr. Lesser defined the concept of Good Utility Practice as:

Good Utility Practice Defined

Good Utility Practice constitutes a broad-based set of standards that provide guidance as to how utilities should operate and how regulators should review those operations. Good Utility Practice incorporates everything from how utilities ought to make investments decisions that affect the availability and reliability of their services, to how costs should be classified and allocated amongst different customer groups. The most concise definition of Good Utility Practice of which I am aware comes from the U.S. Federal Energy Regulatory Commission ("FERC")

> *Any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.*

The **Electricity Act,** the **PUC Act** and the **Byelaws** in Belize do not define Good Utility Practice. However, a perusal of the relevant provisions show that the statutory duties of the PUC are consistent with Good Utility Practice to the extent that PUC has an obligation to protect both the consumers and the Licensee. See section 6(2)(b) of the Electricity Act which states that the PUC shall "*secure that licence holders are able to finance the carrying on of the activities which they are authorized by their licences to carry on*." Also see section 6(2)(d) which requires the PUC to protect the interest of consumers.

PUC in their submissions argued that the concept of Good Utility Practice forms a part of the laws of Belize only to the extent that it has been adopted and enacted by relevant provisions of the PUC and Electricity Acts and so informs the interpretation of those Acts. That contravention of the concept is therefore only unlawful where it is also a breach of statute. Further, that the concept cannot therefore properly be relied upon to assert illegality in the absence of any underlying statutory provision.

It is clear from the statutory provisions that the PUC is required to balance the interest of the consumers and the Utility Provider and to do so in a manner that is reasonable as provided by the Electricity Act and the PUC Act. See section (a) Section 6(2)(d) of the Electricity Act and 22(2) (c) of the PUC Act - the duty to protect the interests of consumers in respect of the tariffs (or prices) charged and the other terms of supply (ii) Section 6(2)(b) of Electricity Act and 22(2)(b) of PUC Act – duty to secure that licence holder are able to finance their operations and (iii) Section 7 of Electricity Act – duty to ensure that the licensee has a reasonable opportunity to recover the reasonable costs of providing service and secure a reasonable rate of return on investment. Where there is a

breach of these statutory provisions it would be unlawful. PUC therefore has a duty to act fairly to the Consumers and the Utility Provider and as such to act in a manner that is reasonable. However, I find that the concept of Good Utility Practice as defined by Dr. Lesser does not apply to Belize.

Determination of Grounds of Appeal

21. Decision 1 A to 1F – Rate Setting Methodology

(1A) That the Rate Setting Methodology ["RSM 2008"] made a part of the Final Decision related to and determined the methodology and process for the determination of tariffs, charges and fees to be charged for the provision of electrical services by licensees for the transmission and supply of electricity was made and issued by the Respondent *ultra vires* the Electricity Act Chapter 221 of the Laws of Belize.

(1B) That the RSM 2008 was made and issued by the Respondent which has no power or authority in law to make and issue the RSM 2008 since such power and authority is vested in the Minister of Public Utilities by Section 7 of the Electricity Act [as amended by the Electricity (Amendment) Act No. 12 of 2007].

(1C) That the RSM 2008 consists of purported changes or additions to Byelaws made under Section 7 of the Electricity Act, and the Electricity Act, on a proper and purposive interpretation, requires that prior to any Byelaws being made, changed, altered or added relating to the matters under Section 7, the Appellant as an interested party must be genuinely consulted and the requisite consultation did not take place.

(1D) That the purported changes to the Byelaws by the issuance of RSM 2008 was not promulgated by way of Statutory Instrument and was not published in the Government Gazette.

(1E) That the failure to effect the changes to the Byelaws by way of Statutory Instrument is in contravention of Section 21 of the Interpretation Act and is therefore *ultra vires* and void.

(1F) That the failure to publish the changes to the Byelaws in the Government Gazette is in contravention of Section 21 of the Interpretation Act and 7 of the Electricity Act and therefore *ultra vires* and void.

Issue 1:

Whether the 2008 RSM is *ultra vires* the Electricity Act.

Submissions by BEL

22. BEL submits that the **2008 RSM** is *ultra vires* the Electricity Act because, by its terms, it seeks to retrospectively set rates by making "corrections" to rates which had previously been agreed and set as being "just and reasonable".

23. BEL contends that it is clear from the Byelaws that the general pattern of the directing and empowering provisions that it is phrased in prospective terms. BEL relied on Part III and IV of the 2005 Byelaws which they say set out the prospective nature of the Commission's rate setting duties in an FTRP and ARP respectively. Further, there is nothing in the Electricity Act and its Bye-laws to indicate any power in the PUC to retroactively change decisions in respect of rates awarded to a utility in previous years in the sense of enabling the utility to recover a loss of any kind or to enable the PUC to recover an "excess profit" earned as a result of a rate fixing exercise which was considered fair and reasonable at the time when it was made.

24. BEL referred to the case of ***Northwestern Utilities Limited v City of Edmonton*** **1979 1 S.C.R. 684**, where it is stated that "*The statutory pattern is founded upon the concept of the establishment of rates in futuro for the recovery of the total forecast revenue requirement of the utility as determined by the Board. The establishment of the rates is thus a matching process whereby forecast revenues under the proposed rates will match the total revenue requirement of the utility".*

25. Further, Learned Counsel for BEL relied on ***City of Calgary and Home Oil Co. Ltd v Madison Natural Gas*** **(1959) 19 D.L.R. (2d) 655** where Johnson J.A. observed at p.661 – :

> *The powers of the Natural Gas Utilities Board have been quoted above and the Board's function was to determine "the just and reasonable price" or prices to be paid. It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board retrospective control would require clear language and there is here a complete absence of any intention to empower the Board.*

26. I am in agreement with BEL that **Part III** and **Part IV** of the **2005 Byelaws** set out the prospective nature of the Commission's rate setting duties in an FTRP and ARP respectively. See **Byelaw 14(1), 20, 23, and 26**. Also, See **Part IV** of the **2005 Byelaws** which sets out the procedure in an ARP. **Byelaw 28(1)** provides that:

> *During an ARP the regulated values, mean electricity rate, tariffs, rates, charges and fees to be* ***applied over the next twelve month period*** *(the Annual Tariff Period) shall be determined by the Commission.*

27. These provisions speak to the future. The regulated values, mean electricity rate, tariffs, rates, charges and fees are **to be applied** in the future for the FTP and the ATP.

28. The question to be asked is whether the Commission seeks to retrospectively set rates. BEL submits that by virtue of Bye-Law 28(1) PUC has no power to include any words in the 2008 RSM, or any other RSM, which permits it to retrospectively reduce or otherwise revise or

review the regulated values, mean electricity rate, tariffs, charges and fees approved in prior years by it. Such an RSM would clearly be in breach of Bye-Law 28(1) as involving an *ultra vires* retrospective power.

29. BEL referred to **paragraph 19 (a)** and **(d), 78** and **112** of the **2008 RSM** and submits that this permits PUC to make retroactive "Corrections" on an annual basis to the TBR. That paragraph 112, in particular, gives the Commission the power to "set the allowed value for any cost item …for any calendar year in a FTP". BEL submits that it is, inter alia, pursuant to this power to make "Corrections" that the Commission claims that it has the right to retroactively reverse components of the rates which were approved and set by the Commission as "just and reasonable". That the Commission has directed that the sums from 2001 to 2007 that it has "reclaimed" by its retroactive reversals should be repaid by BEL to customers through a reduction in rates going forward. BEL submits that this is what the Canadian Supreme Court in **City of Calgary v ATCO Gas and Pipelines** supra described as illegal "highly sophisticated opportunism" and is a "serious misconception" of the PUC's power to act in the public interest. Insofar as the Commission purports to exercise such powers pursuant to the 2008 RSM by reason of paragraphs 19(a), (d), 78 and 112, it is *ultra vires* Bye-law 28(1) of the 2005 By-Laws.

<u>Is the PUC making retroactive corrections</u>?

30. Paragraphs **19(a), (d), 78 and 112** of the **RSM** states:

Paragraph 19 :

The Corrections component of the TBR is comprised of the following cost elements:

(a) *Adjustments made on an annual basis in an ARP to the TBR – the Annual Correction (AC)*

……...

(d) Adjustment/s made on an annual basis to the TBR to maintain the licensee's rate of return within the limits set by the Commission – Rate of Return Correction (RC)

Paragraph 78 :

In an ARP, the Commission may review the Total Return forecasted and allowed ….

Paragraph 112 *states:*

In an ARP the Commission shall adjust TBR in the next ATP by an Annual Correction (AC) comprised of : …..

31. These paragraphs above allow the PUC to make corrections. But whether this is considered to be retroactive reversals of past decisions can only be answered by looking at the rate review regime. The rate review regime governing the review and setting of electricity rates is defined by and contained within the 2005 Byelaws. According to Byelaw 3(1) of the 2005 Byelaws:

> *These Byelaws shall govern the tariffs, rates, charges and fees for the transmission and supply of electricity and for existing and new services to be charged by a licensee to consumers in Belize and the mechanisms, formulas, and procedures whereby such tariffs, rates, charges and fees shall be calculated and determined for all purposes.*

32. Byelaw 4 shows how the rate review regime is intended to operate. **Byelaw 4** states:

> *4. (1) The methodology developed and used by the Commission for determining electricity tariffs, rates, charges, fees and mean electricity rates shall include provisions for:*
>
> *(a) the timely recovery of the full cost of power;*
> *(b) a fee for the timely recovery of the amounts in the Rate Stabilization Accounts;*
> *(c) a fee for capacity support to compensate the licensee for capacity it owns, including, without limitation, a reasonable return on investment when operating in a manner compatible with international standards of an efficiently operated power system of similar characteristics to that of Belize;*
> *(d) a fee for power delivery service to compensate the licensee for the transport of electricity from its source to customers and for customer services associated with the supply of electricity including, without limitation, a reasonable return on investment when operating in a manner compatible with international standards of an efficiently operated power system of similar characteristics to that of Belize;*
>
> *(e) a financial incentive for improvement in service reliability.*
>
> *(2)* ***Using the methodology developed by the Commission and the regulated values determined by the Commission in a FTRP for the regulated parameters set out in the Schedules, the Commission shall fix mean electricity rates, tariffs, rates, fees and charges for the FTP.*** *(emphasis added)*
>
> *(3) The mean electricity rate, tariffs, rates, fees and charges fixed in accordance with* ***Byelaw 4(2)*** *herein, and the regulated values determined thereby* ***shall be adjusted*** *between each FTRP*

in an ARP or TERP as provided for in…these Byelaws.(emphasis added)

33. The rate review process, as provided for by the 2005 Byelaws, commences with what is called a Full Tariff Review Proceeding (FTRP). During a FTRP, the regulated values, mean electricity rates, tariffs, rates, charges and fees to be applied over the next four-year tariff period (the Full Tariff Period) are determined by the PUC. According to Byelaw 14 of the 2005 Byelaws the first FTRP shall determine the regulated values for the Full Tariff Period (FTP) commencing on July 1, 2005 and terminating on June 30, 2009.

34. Regulated values for the FTP include forecasts of the Costs of Power, appropriate fees for capacity support and appropriate fees for power delivery. The regulated values also provide for rate adjustments so that any amounts in the rate stabilization accounts as of the commencement of the FTP are reduced to zero as of the termination of the FTP.

35. The 2005 Byelaws also provide for Annual Review Proceedings (ARP) as part of the rate review regime. During an ARP the regulated values, mean electricity rates, tariffs, rates, charges and fees to be applied over the twelve month period running from July 1 through the end of June of the following year (the Annual Tariff Period) are reviewed and reset or adjusted by the Commission.

36. As such, the regulatory regime therefore provides for regulated values to be determined by the PUC and rates set for at four year intervals and for these values and rates to be reviewed and adjusted annually. See **Byelaw 4(3).** This is done by adjustments or corrections by the PUC as shown in the RSM.

37. BEL as licensee also has an obligation under the rate review regime. BEL identifies its revenue requirements for the upcoming review period and submit proposed values for regulated values, mean electricity rate, tariffs, rates, charges and fees. PUC then review the values submitted by BEL to determine what values are to be used for the purpose of fixing rates and in doing so PUC must apply the relevant provision in the Electricity Act, the Public Utilities Commission Act and the Byelaws

38. It is clear by the Acts and Byelaw that the rates are set on the basis of forecasts for blocks of four year periods in Full Tariff review Proceedings and reviewed and adjusted annually by way of Annual Review Proceedings. In the 2008 RSM, PUC forecast cost and revenue. There is nothing wrong in forecasting cost as recognized by Dr. Lesser the expert who applied the concept of Good Utility Practice. This concept as stated by Dr. Lesser clearly applies to estimating revenue requirement. *That, specifically, Good Utility Practice means that the revenue requirement should be estimated using all available information at the time the estimate is made. The 2008 RSM uses, in essence, a "future test year," at the time the estimate is made*.

39. Corrections being made, whether positive or negative, to rates set for previous year are applied prospectively for the current review period. Why this is done is because the rates are based on forecast or an estimate. However, there is no interference by the PUC of the past review period. That is, there is no retrospective control by the PUC of past review period. Values are adjusted and applied in the future so as to arrive at a mean electricity rate for the current review period. As such, it is my view that the PUC did not by the 2008 RSM seek to retrospectively or retroactively set rates. Thus, I disagree with BEL that the 2008 RSM is *ultra vires* the Electricity Act. I find that the 2008 RSM

is not ***ultra vires*** the Electricity Act.

Issue 2:
Whether PUC has the power or authority in law to make and issue the 2008 RSM.

40. On the ground that PUC has no power or authority in law to make and issue the RSM 2008 since such power and authority is vested in the Minister of Public Utilities by Section 7 of the Electricity Act, PUC submits that on an interpretation of the Electricity Act and PUC Act such power is clearly with the PUC. PUC relied on **section 7 of the Electricity Act** as amended which provides:

> *The Minister may after consultation with the Commission make Byelaws relating to - (g) the Methodology and process for the determination of tariffs, charges and fees to be charged for the provision of electrical services by licensees for transmission or supply.*

41. PUC further submits that it is clear that the Minister can make Byelaws relating to the Methodology and not prescribe or promulgate, make or issue that methodology. This can be seen by **Statutory Instrument No. 58 of 2008** where the Minister made Byelaws relating to the methodology by providing that the **Electricity (Tariffs, Charges and Quality of Service Standards) Byelaws, 2007**, stand amended by its repeal in t*oto* and by replacing those Byelaws with the **Electricity (Tariffs, Charges, and Quality of Services Standard) Byelaws, 2005.**

42. **Statutory Instrument No. 145 of 2005** which contains the 2005 Byelaws that were re-adopted by the Minister clearly recognizes that it is the PUC that is to make and issue a methodology for determining electricity rates.

See **Byelaw 4(1)** and **4(2)** which show that the methodology is to be developed by the PUC for determining electricity tariffs. The Minister however, by **section 7** of the **Electricity Act** makes byelaws relating to that methodology. **Section 7** of the **Electricity Act** and **Byelaw 4(1)** and **4 (2)** when read together show that the Minister and PUC have different functions. The Minister makes the byelaws in relation to the methodology and the Commission develops the methodology.

43. See also **section 22(1) (b)** of the **PUC Act** which confers a general power on the Commission to determine and prescribe rates. To do so the PUC has to determine rate setting methodologies.

> **Section 22(1) (b)** provides:
> *It shall be the duty of the Commission to ensure that the services rendered by a public utility undertaking… are satisfactory and that the charges… are reasonable, and for this purpose,…the Commission shall have the power – (b) to determine and prescribe in accordance with the provisions of this Act, the Electricity Act, … and other subsidiary legislations made under these Acts, the rates which may be charged in respect of utility services.*

44. As such, I agree with PUC that the power to develop and prescribe the methodology for setting electricity rates lies with the Commission. In doing so, the Commission must comply with the **2005 Byelaws** made by the Minister in relation to the methodology and also comply with section **22(1) (b)** of the **PUC Act.** I find that the PUC has the power or authority in law to make and issue the 2008 RSM.

Issue 3:

Whether the RSM 2008 consists of purported changes or additions to Byelaws made under section 7 of the Electricity Act and if so, whether BEL should have been consulted.

45. I find that the RSM 2008 does not consists of purported changes or additions to Byelaws and therefore it was not necessary for BEL to be consulted. It is the Minister who makes the Byelaws in relation to the methodology. What the Commission did was to make the methodology itself. Amendments made to the RSM therefore cannot be considered as amendments to the Byelaws. As such, I find that the 2008 RSM did not consist of purported changes to additions to Byelaws.

Issue 4:

Whether the RSM was required to be by way of Statutory Instrument as part of the Byelaws under section 7 of the Electricity Act and published in the Government Gazette.

46. In grounds 1 D - F BEL challenges the RSM on the basis that it was required to be made and promulgated by way of Statutory Instrument as a part of the Byelaws under **section 7** of the **Electricity Act** and published in the Government Gazette.

47. BEL says that the failure to effect the changes to the Byelaws by way of Statutory Instrument is in contravention of **Section 21 of the Interpretation Act** and is therefore *ultra vires* and void. Further, the failure to publish the changes to the Byelaws in the Government Gazette is in contravention of Section 21 of the Interpretation Act and 7 of the Electricity Act and therefore *ultra vires* and void.

PUC's submissions

48. PUC submits that if their submission is accepted that it is for the Commission to make and issue a methodology for determining electricity

rates then such amendments are outside the operation of Section 21 of the Interpretation Act as well as Section 7 of the Electricity Act as amended and need not be by statutory instrument or published in the Gazette as contended for by the Appellant.

49. Furthermore, PUC contends that section 11 of the PUC Act, the parent Act, clearly provides that the PUC may prescribe methodologies by Order made under the Electricity Act, among others.

50. The court has determined above that the Minister is responsible to make the Bye-laws relating to the methodology and that the Commission is responsible to make and issue a methodology for determining electricity rates. As such I agree with the submissions of the PUC that such amendments are outside the operation of Section 21 of the Interpretation Act as well as Section 7 of the Electricity Act as amended and need not be by statutory instrument or published in the Gazette as contended for by the Appellant.

51. **Section 11** of the **PUC Act** provides:

> *11 (1) Every rate made, demanded or received by any public utility provider shall be fair and reasonable and in any case shall be in conformity with and shall* ***use the rate setting methodologies*** *specified in any Regulations, By-laws, Orders, directions or other subsidiary legislation or administrative orders made under the Electricity Act……*

52. PUC in arriving at a rate used the '**Methodology for Electricity Tariffs and Mean Electricity Rates'** which is done by Order of the PUC Office. Section 11 shows that the said RSM can be made by Order. Thus, I find that the RSM was not required to be by way of Statutory Instrument

as part of the Byelaws under section 7 of the Electricity Act and published in the Government Gazette.

53. **Grounds 1 G to I**

(1G) Further, or in the alternative, the 2008 RSM does not fulfill the requirement prescribed by Section 7 of the Electricity Act that the Byelaws must be calculated to afford a licensee a reasonable opportunity to recover the reasonable costs of providing service and secure a reasonable rate of return on investment when operating in a manner compatible with international standards of efficiently operated power systems of similar characteristics to that of Belize.

(1H) Further or in the alternative, the 2008 RSM does not fulfill the requirement prescribed by Section 6(2) (a) & (b) of the Electricity Act and Section 22(2) of the Public Utilities Act that the Respondent must exercise its functions in a manner which it considers is best calculated to secure that all reasonable demands for electricity are satisfied and that licence holders are able to finance the carrying on of the activities which they are authorized by their license to carry on.

(1I) Further or in the alternative the 2008 RSM fails to comport with the requirements of Good Utility Practice.

There are three alternative arguments in Grounds 1G to 1I. IG and IH can be dealt with under one issue . As a result of the court's finding that Good Utility Practice as defined by Dr. Lesser is not applicable to Belize the court will not determine 1I.

Issue :

Whether the 2008 RSM fulfills the requirements of (i) section 7 of the Electricity Act (ii) Section 6(2) (a) & (b) of the Electricity Act and Section 22(2) of the Public Utilities Act.

54. **Section 7(1)** grants the Minister power to make by-laws for the fixing of rates. Section 7(1) provides, inter alia:

7.-(1) The Minister may after consultation with the Commission, make by-laws relating to-

…

(g) the methodology and process for the determination of tariffs charges and fees to be charged for the provision of electrical services by licencees for transmission or supply;

(h) the quality of service standards, including penalties for violations of such standards, and the methodology and process for establishing and enforcing quality of service standards, and the calculation and assessment of penalties for their violations;

Section 7(4) sets out the manner in which the byelaws should be made. Section 7(4) provides:

(4) By-laws on tariffs, charges, fees and quality of service standards to be made by the Minister under subsection (1) (g) and (h) above shall be made in a manner:-

(a) calculated to afford a licensee a reasonable opportunity to recover the reasonable costs of providing service and secure a reasonable rate of return on investment when operating in a manner compatible with international standards of an efficiently operated power system of similar characteristics to that of Belize; and

(b) that reasonably allocates to particular customer classes the cost of serving such customers, subject to the implementation of rates for the needy that assures their access to basic electric services at an affordable price in accordance with overall government policy and objectives."

Section 6(2) (a) and (b) of the Electricity Act provides:

(2) Subject to subsection (1) above, the Commission shall exercise the functions assigned or transferred to it under this Act in a manner which it considers is best calculated to –

(a) secure that all reasonable demands for electricity are satisfied;

(b) secure that licence holders are able to finance the carrying on of the activities which they are authorized by their licences to carry on;

Section 22 (2) of the **PUC Act** provides:

The Commission shall exercise the functions assigned or transferred to it under this Act and other laws in a manner which it considers is best calculated to –

(a) secure that all reasonable demands for utility services are satisfied;
(b) secure that licence holders are able to finance the carrying on of the activities which they are authorized by their licences to carry on;
(c) protect the interest of consumers …
……

BEL submissions

55. BEL relying on the law as set out above submits that the implementation of the methodology of the 2008 RSM for setting rates must have as its end result the effect of setting a just and reasonable rate. If its implementation does not have this effect (a) the Commission has failed in its statutory duty and (b) the 2008 RSM is unlawful or (c) which amounts to the same as (a), if it is lawful the Commission has failed in its duty under the Electricity Act to implement the terms of the 2008 RSM.

56. BEL referred to the Report of the expert, Dr. Lesser who examined the issues of (a) whether the implementation of the 2008 RSM failed to afford BEL a reasonable opportunity to recover the just and reasonable costs of providing service and secure a reasonable rate of return (b) whether it enabled BEL to satisfy all reasonable demands for electricity and adequately finance all of the activities necessary to do so and (c) whether

it failed to meet the requirements of *Good Utility Practice*. The expert found that the 2008 RSM failed to meet all three thresholds.

57. BEL submits that it is clear from the analysis of Dr. Lesser that whatever the methodology employed by the PUC it is the "end result of the process which has to be judged as to whether the rate" satisfies the first and second questions posed above. It follows that if the implementation of the methodology does not satisfy the requirement of the Electricity Act the PUC has failed to comply with its rate setting duty. BEL referred to Dr. Lesser's findings which show that the end result of the PUC's implementation of the 2008 RSM is not only contrary to the Electricity Act and the PUC Act but fails to comport with *Good Utility Practice*, is unreasonable and has contributed to the financial instability of BEL and, consequently, is liable to affect consumers as a whole.

Respondent's submissions

58. In response to the argument that the 2008 RSM does not fulfill the requirement of **sections 6(2) (a)** and **(b)** or **section 22(2) of the PUC Act,** PUC submits that the 2008 RSM when applied by the Commission produced a mean electricity rate of 52.7 cents per kilowatt hour. BEL in its submissions to the Commission had contended for a mean electricity rate of only 50.0 cents. If 50.0 cents was considered by BEL as enough to meet its statutory requirements then the complaint against the 2008 RSM, per se, which produced an even higher rate must be specious.

59. PUC submits that the evidence before the Court proves that the 2008 RSM as implemented by PUC has been more than favourable to BEL. That if the Appellant had not booked the corrections of $36.2 million in the manner that it did, a manner which PUC says was wrong, BEL as confirmed by Mr. Rene Blanco, Chief Financial Officer of BEL, would have made a profit of $25,000,000.00 (see page 498 and 499 of Transcript) instead of a loss of $10,838,000.00 making it one of its more

profitable years. The evidence before the Court also proves that the Appellant billed consumers for some $178.7 million during the same period for which it reported electricity revenues of $140.6 million.

Determination

60. PUC in **Decision 1, The First Schedule (amended),** states:

> *The Commission hereby approves the **First Schedule (Rate Setting Methodology) (amended).***

PUC in their comments relating to Decision (1) states:

> *The 2005 First Schedule (Rate Setting Methodology (RSM) approved by the Commission in the Final Decision FTRP 2005 has been the subject of objections by BEL as well as by the Independent Expert for ARP 2007 and the Independent Expert for ARP 2008. It has also been the subject of concern by the Commission, **and hence the First Schedule of FTRP 2005 has been amended in this ARP 2008.*** (emphasis added).
>
> *The 2005 First Schedule included what appeared to be some revenue capped items relating to the Cost of Power; these items were unfair to Consumers and needed to be amended to be able to function. There were other items apparently intended to provide an incentive to the Utility; these items provided a reward if the Utility was within target, but no penalty if the Utility was outside the target; this structure does not work well as an incentive mechanism.*
>
> *Another important issue is that the First Schedule states that "The Methodology provides for the recovery of the full cost of power, the recovery of changes in cost of power, a fee for capacity support, and a fee for power delivery as is required under the Byelaws." The Cost of Power is a pass-through to consumers with no profit or loss to the Utility, there can be no "revenue cap" on the cost of power.*
>
> *…….*

61. As can be seen above the RSM was amended based on objections by BEL and the Independent Expert. The Commission also amended the

RSM on the basis that since cost of power is a pass through to customers there can be no revenue cap on cost of power. The RSM provides an orderly process for the PUC to develop and implement rates and tariffs such that the Utility is viable and consumers pay the lowest reasonable rates for electricity services. The cost components are addressed in the First Schedule. Further, it provides for the recovery of the full cost of power , the recovery of changes in cost of power, and a fee for power delivery as is required under the Byelaws. The Methodology also provides for annual corrections, full tariff period corrections, incentives or penalties as required by the respective process defined in the methodology itself.

62. Cost of power is a pass through to consumers therefore, in any year, consumers pay more when losses increase, and the consumers pay less when losses decrease. The Major Cost Components are Cost of Wholesale Power, Value Added Delivery (VAD), Cost of Power Rate Stabilization Account (CPRSA) , Corrections.

63. The basis for which BEL challenges this RSM is that it does not afford them to recover reasonable cost of providing service and secure a reasonable rate of return. BEL says that they are not able to finance the carrying on of the activities by which they are authorized by their licence to do. This can only be proved by looking at the evidence by the accountants on both sides.

64. Dr. Lesser, the court appointed expert is not an accountant but he gave his opinion nevertheless on the accounting aspect. The summary of his findings on the RSM is on page 2 of his Report. Dr. Lesser did not find the RSM to be *per se* unreasonable but stated that it is the implementation of the RSM which he finds unreasonable. Dr. Lesser stated that the implementation of the RSM by the PUC does not afford

BEL a reasonable opportunity to recover just and reasonable cost of providing service and secure a reasonable rate of return when operating in a manner compatible with international standards of efficiently operated systems of similar characteristics to Belize.

65. Dr. Lesser in his revised report at page 20 states that he is of the opinion "*that the 2008 RSM violates Good Utility Practice and should be replaced with a methodology that strikes a more reasonable balance between the interests of BEL investors and consumers."* However, he did not find the 2008 RSM to be unreasonable and this is because it did not mandate an allowed return of zero percent. He also stated in his questions and answers report dated 14th July, 2010 "*that the 2008 RSM allows for corrections is not evidence that it is per se unreasonable. Rather, it was the PUC's application of the 2008 RSM and the form of the retroactive corrections it made regarding previously approved expenditures and investments that I found to be unreasonable and failing to comport with Good Utility Practice.*

66. For reasons stated above, Good Utility Practice as defined by Dr. Lesser is not applicable to Belize. The court will therefore look at whether the RSM meets the statutory requirements to balance the interest of the Uitlity provider and the consumers by fixing just and reasonable rates. Although Dr. Lesser did not find the 2008 RSM to be unreasonable, he stated that the implementation of it was unreasonable because of retroactive corrections. The court has already dealt with the issue of retroactive ratemaking above and found that the PUC was not engaged in retroactive ratemaking. Further, I am not satisfied on the evidence as a whole that BEL is financially unstable as stated by Dr. Lesser.

67. The evidence of the financial position of BEL came from several witnesses. Mr. Lynn Young, Chief Executor Officer for BEL, Rene Blanco, Chief

Financial Officer of BEL, Giacomo Sanchez, Professional Accountant, Stanley Ermeav, Professional Accountant. Cedric Flowers, Professional Accountant gave evidence for the PUC. Mr. Avery also gave evidence for the PUC on the effect of the 2008-2009 Final Decision.

68. All of the witnesses gave evidence as to their understanding of the 2008 decision of the PUC and the accounting treatment of $36.2 million which is the total of corrections made by the PUC. Mr. Lynn Young and Mr. Blanco also gave evidence of financial difficulties of BEL. See their affidavit evidence and oral evidence.

69. The accounting policy of BEL is the Canadian Generally Accepted Accounting Principles (CGAAP). BEL commenced using CGAAP in March of 2000. The evidence shows that when the 2008 Final Decision was made by the PUC, BEL accountants understanding of the decision is that it had an impact on the financial position of the Company. That the decision created a $36.2 million liability on the company which had to be refunded to consumers. They also understood that a mean electricity rate of 44.1 cents was set by the PUC.

70. The PUC's evidence however, will show that the 2008 Final Decision did not have any impact on the financial position of BEL. Further, that although the word refund was used in the 2008 final decision, BEL was not required to make any refunds to customers and PUC did not order any refund to be made by BEL. The so called 'refund' was effected within the components of the current review period by setting a rate of 44.1 cents instead of 52.7 cents, the rate produced by the RSM. There was a reduction of 8.6 cents.

71. Mr. Stanley Ermeav, a qualified professional Accountant and witness for BEL deposed that he has been shown (a) two affidavits of John Avery

sworn on the 29th of April 2009 and the 14th of May 2009 respectively, filed in this case and (b) the Report of Accountant Cedric Flowers dated the 30th of April 2009 filed in this appeal. That he has also been shown a copy of affidavits sworn by Lynn Young and Rene Blanco in June 2009 for the purposes of this appeal and also memos from BEL relating to how it treated the Final Decision of the Respondent dated 26th June 2008 in the Annual Review Proceedings of 2008. He stated that:

I have been engaged by the Appellant to review the report of Mr. Cedric Flowers and specifically address his opinion that:

a. *The Appellant's accounting treatment of $36.2 million of corrections that the Respondent directed the Appellant to refund to customers was inappropriate.*

b. *That the said accounting treatment rendered the Appellant's statements unreliable.*

c. *That the $36.2 million refund did not alter nor affect the Appellant's cash position.*

72. In pursuance of such engagement, he deposed that he reviewed and considered the report of Mr. Flowers and prepared a report on the issues raised. See Exhibit **"SE1"**. In the Report, Mr. Ermeav stated inter alia:

Conclusion with respect to the appropriateness of the accounting treatment of the $36.2 million corrections that the PUC directed BEL to rebate to customers.

As previously indicated in the Memo of 22 July 2008, BEL's financial results earned prior to the 2008 Final Decision were consistent with the regulatory regime and rate setting mechanism that had been previously established by the previous government and the PUC. Accordingly, the charge associated with the PUC final Decision is not an accounting error as defined by IAS 8.

Similarly, the charge is not as a result of a change in accounting policy caused by a change in a CICA standard or the interpretation of a CICA standard.

The change resulting from the PUC Final Decision is likewise not a change in accounting estimate, although it most closely resembles a change in accounting estimate. The charge is in fact the result of an obligating event created by the PUC's Final Decision. Accordingly, it is my professional opinion that the provision made in 2008 for the refund mandated by the PUC's Final Decision is entirely in compliance with international accounting standards, specifically IAS 37, which requires prospective rather than retroactive accounting recognition of the charge as appropriately reflected in the 2008 financial statements of BEL.

Based on my research of possible differences between IAS and CICA, there is no difference between the two sets of standards in the accounting treatment of a provision required as a result of an obligating event. Therefore, it is also my professional opinion that the accounting treatment of $36.2 million corrections that the PUC directed BEL to refund to customers in full compliance with CICA standards and consequently appropriate.

Further, given the above considerations and BEL's compliance with both IAS and CICA standards in the accounting treatment of the $36.2 million corrections in its 2008 financial statements, and in the disclosure of sufficient information in its financial statements for users to be able to understand the impact of regulations on the BEL as a rate regulated entity, it is my professional opinion that BEL's financial statements are reliable.

73. Mr. Giacomo Sanchez also a professional accountant and witness for BEL stated at paragraph 4 of his affidavit he discussed at the length the PUC's final decision. He deposed that BEL had applied the mandatory treatment required by Canadian Financial Reporting Standards (CFRS) (section 1506) for all companies to record the $36.2 million. *Thus the accounting entry to book the liability is a credit to a regulatory liability account and a debit to a revenue account or expense account in the income statement*.

74. Mr. Rene Blanco in his first affidavit at paragraph 17 deposed that in respect of the $36.2 million, the accounting entry to book the liability is a credit to a regulatory liability account and a debit to a revenue account or expense account in the income statement. In his subsequent paragraphs he explained why the $36.2 million could not be booked in relation to

prior years. He stated the accounting standards CGAAP section 1506 states that "a restatement of prior financial period is only allowed for a change in an accounting policy that does not relate to a change in the substantive nature of the transaction and for the correction of a prior period error. Mr. Blanco in examination- in- chief said that the $36.2 did not correct a prior period error so it could not have been booked to prior years. That the said sum arose from the June 2008 decision so it could only be adjusted in the current year and so the adjustment booked was the recording of a liability and the reduction of the revenues in 2008.

75. Mr. Cedric Flowers, professional accountant in Belize for the past 20 years witness for PUC did not agree with the treatment by BEL of the $36.2 million. He deposed that on or about the 6th day of March, 2008 he was asked by the Respondent to review, evaluate and provide an opinion on the appropriateness of BEL's accounting treatment for the $36.2 million in corrections applied by the PUC in its final decision for the Annual Review Proceedings 2008. He stated that having considered the relevant accounting entries made by BEL and Canadian Generally Accepted Accounting Principles ("CGAAP") in accordance with which BEL accounts are prepared, he was unable to find any specialized industry practice, or principles and methods peculiar to the electric utility industry practice, which address the particular matter and which have been adopted by CGAAP. Further, Mr. Flowers deposed that in the course of his evaluation, he also reviewed BEL Annual audited financial statements, monthly in-house financial statements, and its adopted accounting policies as gathered from those reports.

76. Mr. Flowers evidence is that he is of the opinion that treatment of the 2008 corrections which reduced reported revenues for June 2008 by $36.2 million was inappropriate because it did not conform to the PUC's treatment of the Annual corrections for 2007 nor did it conform to the

BEL's own stated policy for the definition and measurement of revenues. Further the effect of the adjustment was to offset the entire amount of the corrections against current year earnings when in fact material amounts of the corrections related to prior years.

77. Mr. Flowers further deposed that he is of the further opinion that the adjustment made by the Appellant to its accounts and financial statements were unnecessary and resulted in a distortion of the financial statements of the Appellant for the year ended December 31, 2008. In particular the BEL's decision to decrease revenues and create a provision to effectively set aside $36.2 million is wholly unnecessary because the PUC's decision does not impose any liability or impose any financial obligation whether actual or contingent on BEL.

78. Mr. Flowers was also asked to give an opinion on the claim of financial hardship by BEL. He deposed that he was unable to come to any conclusion on the matter of the Appellant's claim of hardship resulting from the Respondent's 2008 ARP Final Decision because of a lack of adequate information. See Mr. Flowers Report exhibited at "**C.F.1**" .

79. Mr. Flowers also reviewed the report of Mr. Stanley Ermeav and prepared a response to same. See his second affidavit which is at Bundle 6. See **Exhibit C.F. "1**" to the second affidavit for that response. In that report he explained that:

> *Indeed, the PUC may have used words such as refund, rebate, corrections etc. These words, as used by the PUC, may have been necessary language in its regulatory scheme of things or simply may have had a certain public appeal. However, the substance of the PUC's decisions is very simple: the PUC prescribed a rate for the next tariff period and in so doing made mention of what it hoped to*

accomplish through BEL's implementation of that new rate. Notwithstanding the PUC's obligation for disclosure, the question arises: if the PUC had simply stated that the rate for the new tariff period would remain 44 cents (without further details), would BEL have recorded adjustments to its financial statements? Certainly, the substance of the PUC's decision would have remained unaffected by the absence of details.

The details of the factors considered by the PUC in arriving at its decision may have provided further and useful insights into the decision, but by themselves did not provide sufficient justification and support for the material adjustments made to BEL's financial statements.

80. Mr. Flowers in his conclusion stated inter alia that in his opinion IAS does not apply. Notwithstanding, he stated that the provisions of the IAS 37 were not properly incorporated in Bel's financial statements for the year ending 2008. He gave reasons for saying so including that there was a *failure to conform to the matching principle by recognizing and removing the expenses incurred in producing the $36.2 million in revenues which were removed.* Further that, BEL's financial statement are distorted for the year ended December 31, 2008 for the following reasons:

(a) Total revenues are understated in the financial statements;
(b) Total expenses are overstated in the financial statements; and
(*c) Net Earnings (Losses) are misstated.*

81. Mr. Avery, Chairman of the Commission in his evidence said that the Commission did not order BEL to make any refunds to consumers or to make any payments to them. He also explained that the word "refund" which appeared a number of times in the final decision were a poor

choice of words. He explained that in estimation the PUC made certain errors and so a review had to be done and make changes to the Regulated Asset Value, which they termed as corrections. (The affidavits relied on for Mr. Avery are in Bundle 2 Tab 8, Bundle 2 Tab 9, Bundle 3 Tab 10 and Bundle 3 Tab 23).

82. The court has carefully considered the evidence of all the Professional accountants and accepts the evidence of Mr. Flowers as to the understanding of the decision of the PUC and that BEL's decision to decrease revenues and create a provision to effectively set aside $36.2 million is wholly unnecessary because the PUC's decision does not impose any liability or impose any financial obligation whether actual or contingent on BEL. Further, Mr. Avery also said that no order was made by the PUC for BEL to make any refunds.

83. The court also accepts Mr. Flowers evidence that although PUC continually used the words such as refund, BEL in reality was not required to refund any monies to customer. The issue is the substance of the transaction and how it is being accounted. There cannot be refunds for something BEL never collected. Further, the effect of the adjustment by BEL was to offset the entire amount of the corrections against current year earnings when in fact material amounts of the corrections related to prior years. See Mr. Flowers evidence for explanation that the standard Mr. Ermeav cited will never support the transaction with the adjustment which was made to BEL's financial statement. Also, I agree with Mr. Flowers that the issue of prior period adjustment does not arise. BEL is not required to make any adjustments to their accounts as a result of the 2008 Final Decision.

84. The question that follows is: what would have been the earnings of BEL if the revenue was not reduced by the $36.2 million. Under cross-examination, Mr. Rene Blanco, Chief Financial Officer of BEL said that if the $36.2 million was added back to revenues for 2008, BEL would have had a profit of $25 million which is the at the rate of 44.1 cents instead of a loss of $10,838,000.00 making it one of its more profitable years. Mr. Young in cross-examination said that profits is related to asset base and that the return on asset is fairly low. However, Mr. Blanco testified that $25 million would have been a good year based on historical profits.

85. Having considered all the evidence before the court, I find that the $36.2 million reduction in revenues by BEL was inappropriate. That BEL would have made a profit of $25 million had it not been for the said accounting treatment. It means that the 2008 RSM which applied a future test year, with adjustments for differences between actual and previously forecast values, made reasonable projections of BEL's cost and set rates which cover operating cost and provided an opportunity to earn a reasonable rate of return. As such, I find that the 2008 RSM fulfills the requirements of **section 7** and **Section 6(2) (a) & (b)** of the **Electricity Act** and **Section 22(2)** of the **Public Utilities Act.**

Decision 2 – Regulated Asset Values

Under this decision there are two grounds:

(2A) The Respondent's decision to change the Regulated Asset Values retroactively for the years 2005, 2006 and 2007 amounted to a review and purported correction of prior decisions of the Respondent and as such it is *ultra vires* the statutory powers of the Respondent and void.

(2B) The Respondent's decision to change the Regulated Asset Values retroactively for the years 2005, 2006 and 2007 amounted to a review and

purported correction of prior decisions of the Respondent and as such it is unreasonable in the Wednesbury sense and therefore unlawful and void.

Issue:

Whether the Commission's decision to change the RAV for the years 2005, 2006 and 2007 was ultra vires its statutory powers and unreasonable in the Wednesbury sense.

86. A summary of the Decision by the Commission on the Regulated Asset Value is that:

The Commission approved the following values for BEL's RAV: a) for the year 2005 the approved RAV is $194,122,000; b) for the year 2006 the approved RAV is $ 207,885,000; c) for the year 2007 the approved RAV is $ 231,954,000; for the year 2008 the approved RAV is $ 248,379,000 and for the year 2009 the approved RAV is $281,819,000.

87. The comments by the PUC relating to Decision (2) states that the Appellant's Regulated Asset Value that provided service to Consumers during the year was referred to as the "Working RAV", or simply RAV. The Respondent reviewed and adjusted the RAV for the years ending 2005, 2006 and 2007 to ensure that Consumers paid a return and depreciation (capital consumption cost) only on those of BEL's capital assets that were of benefit to Consumers, that were not Contributed Capital, and were commissioned and in service during the respective years.

88. Annex 1 of the Final Decision shows how the RAV was adjusted for 2005, 2006 and 2007. It consisted of four items:

(1) Exclusion of the Mollejon Transmission Line.

(2) Exclusion of other "contributed capital."

(3) Exclusion of "construction work in progress." ("CWIP")

(4) Exclusion of a portion of newly commissioned facilities.

BEL's submissions

89. BEL contends that the retroactive changes in the Regulated Asset Values resulted in a retroactive reduction of BEL's earnings for 2005 to 2007 inclusive of $14,680,000. BEL also referred to Dr. Lesser's conclusion as regards the adjustments at page 9, 20, 21, and 22 of his Report and submitted that the retroactive adjustments to the Regulated Asset Values are unlawful. First, it is directly contrary to the strictures against retroactive ratemaking which cases such as ***Northwestern Utilities Limited v City of Edmonton, City of Calgary and Home Oil Co. Ltd v Madison and Bell Canada v Canada (CTRC).*** Secondly, **section 32** of the **PUC Act** does not permit retroactive ratemaking. Thirdly, BEL, its shareholders, lenders, suppliers and customers, relied upon the Commission's previous Final Decisions setting the original rates for the relevant periods and in so doing acted to their detriment. This reliance can be found in BEL organizing its financial affairs on the ability to receive the financial returns calculated on the RAV and rate of return thereon. In particular, it has secured borrowings to finance its activities on the basis of the returns that it was agreed by the Commission it would receive in the years 2004 to 2007. Secondly, it has prepared and issued its publicly published financial accounts on the basis of the settled rates that had been awarded it by the Commission. Thirdly, it has paid dividends to its shareholders on the basis of the rates so set by the Commission and paid tax. That the retrospective changing of those rates has resulted in a detriment to BEL which they say can be seen, for example, in the withdrawal of borrowing facilities by BEL's lender banks and the necessity to make adverse provisions in its accounts for the sums for the years 2001 to 2007 which it had previously taken into account as earned as a result of the Commission's previous Final Decisions. The Commission is therefore

estopped from resiling from previous Final Decisions made by it setting the original RAV.

90. Further, BEL submits that Dr. Lesser's finding that the retroactive ratemaking is unreasonable is an additional ground of unlawfulness, providing a basis upon which the decision should be quashed. In addition to the foregoing, it is clear from Dr. Lessor's conclusions that the Commission's 2008 Final Decision is devoid of reasons in material respects. It is therefore procedurally unfair and/or irrational. ***See R v. Ministry of Defence ex parte Murray (1998) C.O.D. 134*** relied on by BEL on procedural unfairness. BEL contends therefore, that the decision to review and adjust the Regulated Asset Values for the years 2005, 2006 and 2007 was *ultra vires* and unlawful.

Submissions by PUC

91. PUC submits that in its final decision they reviewed and adjusted the value of RAV for the years ending 2005, 2006 and 2007. That the PUC undertook the review and adjustment *"to ensure that consumers paid a return and depreciation (capital consumption cost) only on those of BEL's capital assets that are of benefit to consumers, were not contributed capital and were commissioned and in service during the respective years".*

92. PUC relying on section 32 of the PUC Act submits that while RAV was reviewed and adjusted during the course of the 2008 ARP, it was reviewed and adjusted only for the limited purpose of fixing rates for the current review period and did not effect any retroactive change to any prior decisions. That the PUC made adjustments going forward in time and the adjustments are to be implemented by charging the approved rate for the current review period.

Determination

93. As shown above the rate review process, as provided for by the 2005 Byelaws, commences with what is called a Full Tariff Review Proceeding (FTRP) which is for a four year period. The 2005 Byelaws also provide for Annual Review Proceedings (ARP) as part of the rate review regime. During an ARP the regulated values, mean electricity rates, tariffs, rates, charges and fees to be applied over the twelve month period running from July 1 through the end of June of the following year (the Annual Tariff Period) are reviewed and reset or adjusted by the Commission.

94. The regulatory regime provides for regulated values to be determined by the Commission and rates set for four year intervals and for these values and rates to be reviewed and adjusted annually. It is clear therefore from the Byelaws that rates can be reviewed and when rates are reviewed annually, there has to be some factors taken into consideration for such review. In this decision the reason for review and adjustment of the RAV is to ensure that Consumers paid a return and depreciation only on those of BEL's capital assets that were of benefit to Consumers, were in service during the respective years and were not contributed capital.

95. The RAV as explained by Mr. Avery in his evidence directly impacts the depreciation component of the Tariff Basket Revenue (TBR) and it directly impacts the return portion of the TBR. The Rate of Return that PUC approve is multiplied by the RAV to get the return component of the rates. The depreciation is based on the approved depreciation of the assets contained in RAV. Mr. Avery explained that by adjusting the RAV value the return and depreciation is automatically adjusted. That there were $9.6 million in depreciation correction and $14.7 million in return

corrections. This amount to approximately $24 million and about $12 million was directly related to the Mollejon Transmission facility.

96. The Independent Expert in his findings found that the retroactive adjustments made by the PUC to the Regulated Asset Values for the years 2005, 2006, and 2007 were not reasonable, because those adjustments do not comport with Good Utility Practice and, in his opinion, has contributed to the financial instability BEL now faces. The expert at page 20 of his report agreed with Mr. Avery that the Commission has the authority to review prior decision pursuant to **section 32** of the **PUC Act** but he stated that *having the authority and using it indiscriminately are two different matters.* He explained that the adjustments to RAV for the years 2005 – 2007 were significant, 25.7 % for 2005, 31.0% for 2006 and 31.1 % for 2007. For this reason he said that the RAV do not comport with Good Utility Practice and could affect BEL's financial stability.

97. The question to be asked is whether **section 32** of the **PUC Act** gives the PUC the authority to review prior decisions. BEL contends that section 32 is dealing with a position where a complaint is being made or proceedings have been instituted in respect of any matter that may arise and brought to the Commission to rule on and it does not apply to final decisions.

98. Interpretation of section 32 of the PUC Act

Section 32 provides:

> *The Commission may review, vary and rescind any decision or Order made by it and where under this Act a hearing is required before any decision or Order is made, such decision or Order shall not be altered, suspended or revoked without a hearing.*

In my view, this section is clear as it allows the PUC to review decisions made in the past. **The section is retrospective in nature as it allows a**

review of a decision already made and to make changes. However, it does <u>not allow for retroactive ratemaking</u>. The changes to rates are applied to the current review period as discussed above.

BEL contends that PUC is engaged in retroactive ratemaking and is doing so by relying on section 32. PUC disagrees with this submission and submits that there is no retroactive ratemaking.

Dr. Lesser in his report at page 8 and 9 said that:

Goodman defines "retroactive ratemaking" as the "improper recovery of costs that were properly recoverable only in a past period or periods. In the absence of express statutory direction, it is unlawful for an agency to alter the past legal consequences of past actions." PUC Chairman Mr. Avery stated in his Affidavit that section 32 of the PUC Act allows the Commission to "review, vary, and rescind and decision or Order made by it." I interpret this statement to mean that the PUC has the legal authority to engage in retroactive ratemaking.

Dr. Lesser, in my view has drawn a wrong conclusion from this statement made by Mr. Avery as the section does not allow for retroactive ratemaking. According to Goodman's definition retroactive ratemaking is the **improper recovery of costs**. By **section 32,** PUC lawfully reviewed past decision by making adjustments and corrections which is applied to a current review period. It follows that the PUC was not engaged in retroactive ratemaking.

As such, I do not agree with BEL that the adjustments to the RAV was retroactive rate making. I agree with the PUC that the RAV was reviewed and adjusted only for the limited purpose of fixing rates for the current review period and did not effect any retroactive change to any prior decisions. Even further, I find that PUC complied with the Byelaws in making the adjustments. Annex 1 of the Final Decision shows how PUC arrived at the calculation of the adjustments of the RAV. PUC made

its decision in the best interest of the Utility and the Consumers. Further, as explained in their comments the review was done to ensure that Consumers paid a return and depreciation (capital consumption cost) only on those of BEL's assets that were of benefit to Consumers, that were not Contributed Capital, and were in commissioned and in service during the respective years. As such, I find that the Commission's decision to change the RAV for the years 2005, 2006 and 2007 was not *ultra vires* its statutory powers and was not unreasonable in the Wednesbury sense.

Decision 3(a) – Depreciation Correction

(3A) The Respondent's decision to review and apply a depreciation correction to depreciation levels approved by the Respondent in prior decisions is *ultra vires* its powers Under the Electricity Act and/or the Public Utilities Commission Act and unlawful and void

(3B) The Respondent's decision to apply a depreciation correction to depreciation levels approved by the Respondent in prior decisions is unreasonable in the Wednesbury sense and therefore unlawful and void

Issue:

Whether the Respondent's decision to apply a depreciation correction to depreciation levels approved by the PUC in prior decisions is ulta vires and unreasonable in the Wednesbury sense.

99. The PUC in the 2008 Final Decision under the heading of Depreciation Correction stated:

(3a) Depreciation Correction

The Commission in FTRP 2005 forecast values of depreciation for the Full Tariff Period (FTP). Those values for depreciation were included in the forecasted VAD, and the forecasted VAD for each calendar year has been employed when assembling the actual Tariff Basket Revenue for the respective calendar year. The Commission has reviewed the allowed

depreciation in VAD and has concluded that the allowed depreciation was in excess of the actual depreciation for the years 2005, 2006 and 2007.

The Commission hereby applies a depreciation correction to recover from the Utility, the variance in forecast depreciation above actual depreciation for the years 2005, 2006 and 2007.

The total Depreciation Correction approved by the PUC is $9,628,000.

In Annex 2, PUC shows the Annual Depreciation Corrections for 2005, 2006 and 2007 totaling of $9,628.00.

BEL submissions

100. BEL referred to the report of the Independent Expert and submits that if Dr. Lesser cannot understand the basis for the PUC's decision to change the depreciation levels previously approved which is based on lack of breakdown and explanation, then it corroborates BEL's own incapacity to understand. That, in those circumstances, it meets the criteria for an unlawful decision.

Respondent's argument

101. PUC submits that the decision to adjust depreciation flows from the decision to adjust RAV. That as in the case of the RAV, it did not review or apply a correction to any prior decision. PUC adjusted previously used depreciation values only for the purpose of the current review period. The depreciation figures previously used for setting rates for the past periods remain unaffected for the relevant periods. So too the rates previously fixed remain unaffected by the decision.

Determination

102. The PUC in its 2008 decision stated that it *has reviewed the allowed depreciation in VAD and has concluded that the allowed depreciation* ***was in excess*** *of the actual depreciation for the years 2005, 2006 and 2007. As such, PUC reduced the depreciation by $9,628,000.*

103. In my view, a more detailed breakdown of the depreciation corrections should have been published, however, this does not make the PUC decision to apply a depreciation correction ultra vires and unreasonable in the Wednesbury sense. There is no evidence that PUC arbitrarily arrived at a depreciation. What is in evidence is the depreciation was in excess of the actual depreciation. Further, the decision to adjust depreciation correction flows from the decision to adjust RAV. See Mr. Avery's explanation above that by adjusting the RAV value the return and depreciation is automatically adjusted. As such, I find that the PUC's decision to apply the depreciation correction is not ulta vires and unreasonable in the Wednesbury sense.

Decision 3(b) – Return Correction

(4A) The Respondent's decision to review the return in Value Added Delivery ["VAD"] allowed by the Respondent to the Appellant in prior decisions and apply a "return correction" of the VAD retroactively for the years 2005, 2006 and 2007 is *ultra vires* its powers Under the Electricity Act and/or the Public Utilities Commission Act and unlawful and void

(4B) The Respondent's decision to review the return in Value Added Delivery ["VAD"] allowed by the Respondent to the Appellant in prior decisions and apply a "return correction" of the VAD retroactively for the years 2005, 2006 and 2007 is unreasonable in the Wednesbury sense and therefore unlawful and void.

Issue:

Whether the Respondent's decision to review the return in VAD and apply a return correction is ultra vires and unreasonable in the Wednesbury sense.

104. PUC under the heading of Return Correction stated the following:

The Commission in FTRP 2005 forecast values of total return for the FTP. These values for return were included in the forecast VAD, and the forecast VAD for each calendar year has been employed when assembling the actual Tariff Basket Revenue for the respective calendar year.

The Commission has reviewed the allowed return in VAD and has concluded that the allowed return was in ***excess of the actual return*** *that should have been received by the Utility for the years 2005, 2006 and 2007.*

The Commission hereby ***applies a return correction*** *to recover from the Utility, the variance in forecasted return in excess of actual return that should have been received by the Utility for the years 2005, 2006 and 2007.*

The total Return Correction approved by the PUC is $14,686,000.
Annex 3.

105. The expert finding on this issue is that the retroactive correction is not reasonable because it does not comport with *Good Utility Practice* and it is his opinion that this contributed to the financial instability BEL now faces.

106. The argument for the Appellant and the Respondent on the Value Added Delivery (VAD) mirrors those in relation to the Regulated Asset Value (RAV). Dr. Lesser in his report stated that the return corrections for the years 2005 – 2007 stem from the reduction in the RAV. That if it was not for the reduction in RAV for those years there would be no return correction.

107. The court's finding on the issue of the RAV above is that the Commission's decision to change the RAV for the years 2005, 2006 and 2007 was not ultra vires its statutory powers and was not unreasonable in the Wednesbury sense. Since the return corrections for the years 2005 – 2007 stem from the reduction in the RAV, I find that the PUC's decision to review the return in VAD allowed by the PUC to BEL in prior decisions and apply a return correction is not unlawful and unreasonable in the Wednesbury sense.

Decision 3(c) – Disallowance of Hurricane Cost Stabilisation Account (HCRSA)

(5A) The Respondent's decision to review and reverse the prior PUC's decision to approve Hurricane Cost Stabilisation Account (HCRSA) related interest charges and approve a similar amount as a correction to be recovered from BEL and refunded to Consumers is *ultra vires* its powers Under the Electricity Act and/or the Public Utilities Commission Act and unlawful and void.

(5B) The Respondent's decision to review and reverse the prior PUC's decision to approve Hurricane Cost Stabilisation Account (HCRSA) related interest charges and approve a similar amount as a correction to be recovered from BEL and refunded to Consumers is unreasonable in the Wednesbury sense and therefore unlawful void.

(5C) The Respondent's decision requiring that the Appellant from its own funds [being funds out of profits] re-establish the deposit of $5,000,000 as the Insurance Reserve Fund is *ultra vires* its powers Under the Electricity Act and/or the Public Utilities Commission Act and unlawful and void.

(5D) The Respondent's decision requiring that the Appellant from its own funds [being funds out of profits] re-establish the deposit of $5,000,000 as the Insurance Reserve Fund is unreasonable in the Wednesbury sense and therefore unlawful and void.

(5E) The Respondent's decision requiring that the Appellant from its own funds [being funds out of profits] re-establish the deposit of $5,000,000 as the Insurance Reserve Fund was based on an erroneous premise that consumers were required to pay twice for hurricane rehabilitation and for that reason also the decision is unreasonable in the Wednesbury sense and therefore unlawful and void.

108. The decision of the PUC on the disallowance of Hurricane Cost Rate Stabilization Account (HCRSA) states:

> *The Commission has concluded that BEL had actual expenditures of $4,485,413 to implement recovery from hurricanes in c/y 2002 and 2003. The Commission also concluded that the actual expenditures attracted interest charges amounting to $1,552.664 over the period that BEL was recovering the hurricane expenditures through the HCRSA recovery.*
>
> *The Commission hereby disallows all previously approved HCRSA related Interest Charges amounting to $1,552,664 and approve a similar amount as a Correction to be recovered from BEL and refunded to Consumers during the ATP July 01, 2008 to June 30, 2009.*
>
> *The Commission hereby approves $4,485,413 in hurricane recovery expenditure, but recognizes the recovery of this amount as a replenishment of the Insurance Reserve Fund.*
>
> *The Commission requires that BEL, from its own funds, re-establish the $5,000,000 deposit for the Insurance Reserve Fund and that all interest attracted by the fund be deposited into the account until it reaches a balance of $7,500,000. The Commission further requires that the Insurance Reserve Fund be established as a Trust to be managed by an Independent Trustee to be appointed mutually by BEL and the Commission. The $5,000.000 shall be deposited into the Insurance Reserve Fund by June 30, 2009.*

See the comments of the PUC on this decision at page 31 of the 2008 Final Decision.

Submissions by BEL

109. BEL submits that the order for the establishment of the $5,000,000 by BEL is based on the charge or assumption by PUC that it is consumers that had funded the Insurance Reserve Fund. That before PUC made the charge or assumption they should have ensured that factually this was indeed the case. Further, Dr. Lesser himself noted that there was no evidence to substantiate the charge and thus he recommended that the Court inquire into and seek evidence to verify the position. BEL contends that the facts are now verified: (a) consumers did not provide a designated annual contribution to the insurance reserve and did not fund or contribute to the reserve; (b) the reserve had been funded by BEL gradually over the years (from 1995) out of retained earnings. BEL relied on the Seventh Affidavit of Lynn Young where he deposed at paragraphs 7 and 8 that that no contributions were paid by consumers:

110. BEL submits that the PUC's decision was not only based on an unsubstantiated factual premise but one which was untrue. That for this reason it is irrational and manifestly unlawful: see *De Smith's Judicial Review* (6th ed.) para. 11-036 to 11-038 and 11-048 to 11-051. Further, the decision is unlawful as being retroactive reversal of a rate-setting decision and irrational for the lack of reasons being given by the Commissions for the decision.

111. On the PUC's decision requiring that BEL re-establish from its own funds the deposit of $5 million as the Insurance Reserve Fund, Dr. Lesser says that this:

> *… is not per se unreasonable. However, the reasonableness of the Respondent's requirement depends on whether BEL customers have previously funded the $5 million storm reserve. If they have not, then the PUC's requirement is unreasonable.*

PUC's submission

112. PUC submits that in its final decision in ARP 2008, it disallowed all previously approved HCRSA related interest charges and applied a correction to be recovered from BEL and refunded to consumers during the annual tariff period running July 1, 2008 to June 30, 2009.

113. PUC contends that it was seised of the necessary power to effect the review and change by virtue of **section 32** of the **PUC Act.** Further, that for the reasons set out in the First Affidavit of John Avery at paragraphs 56 to 68 the decision was entirely reasonable.

114. In its final decision in ARP 2008 the Commission also required that the Appellant from its own funds re-establish the $5,000,000.00 deposit for the Insurance Reserve Fund and that all interest attracted by the fund be deposited until it reaches a balance of $7,500,000.00. The Respondent submits that it had the necessary power to so order the re-establishment of the fund and that the order was imposed with a view to securing the supply of electricity to customers.

Determination

Issue 1: Ground 5(A) and 5 (B):

Whether PUC's decision to review and reverse its prior decision to approve Hurricane Cost Stabilisation Account (HCRSA) related interest charges and approve a similar amount as a correction to be recovered from BEL and refunded to Consumers is ultra vires and unreasonable and therefore unlawful and void.

115. I do not agree with BEL that PUC's decision to disallow previously approved HCRSA related interest charges is unreasonable because it has contributed to the financial instability BEL now faces. I am not satisfied on the evidence before the court that BEL is financially unstable. Though there is evidence of cancellation of BEL's $4 million overdraft by

First Caribbean Bank, this does not prove financial instability. According to Mr. Flowers whose evidence the court accepts, BEL's financial statements are distorted because revenues are understated, expenses are overstated and net earnings are misstated.

116. Mr. Avery's evidence which the court finds credible shows that in calendar years 2002 and 2003 the Appellant incurred expenditures totaling $4,485,413 in repairing hurricane damage to its assets. It also incurred interest costs totaling $1,552,664 as a result of procuring the funds required by the repairers from a commercial banking institution, rather than meeting the expenditures with money available from the insurance reserve fund. That these sums of money identified above were credited to the Hurricane Cost Rate Stabilization Account (HCRSA), and were fully recovered by BEL as a result of allowances for their recovery in rates previously approved by the Commission.

117. As such, I find that the PUC's decision to review its prior decision to approve Hurricane Cost Stabilisation Account (HCRSA) related interest charges and approve a similar amount as a correction to be recovered from BEL is not *ultra vires* and unreasonable in the Wednesbury sense and therefore is not unlawful and void.

Issue 2: Whether the PUC's decision requiring BEL to re-establish from its own funds the deposit of $ 5 million as the Insurance Reserve Fund is ultra vires and unreasonable.

118. As to whether BEL customers have previously funded the 5 million storm reserve, the evidence before the court by Mr. Lynn Young for BEL is that the customers did not do so. The evidence of Mr. Avery for the PUC is that the customers did fund the 5 million. I have carefully considered the evidence on both sides and find that the $5 million Insurance

Reserve Fund was previously funded by the customers.

119. Dr. Lesser stated that the PUC's requirement is reasonable only if BEL consumers have contributed to the reserve account over time through the rates they have been charged which under the 2008 RSM would appear as a component of VAD. Since the finding of the court is that BEL consumers did contribute to the reserve account, I find that that the PUC's decision requiring BEL to re-establish from its own funds the deposit of $ 5 million as the Insurance Reserve Fund is not *ultra vires* and unreasonable in the Wednesbury sense and therefore not unlawful and void.

Issue 3: Whether the PUC's decision requiring BEL to re-establish the deposit of $5,000,000 as the Insurance Reserve Fund was based on an erroneous premise that consumers were required to pay twice for hurricane rehabilitation and thus unreasonable.

120. BEL's AGM's Report for 1995 shows that the Company discontinued the insurance coverage of its transmission and distribution assets due to a decline in the availability and a significant increase in the cost of insurance. I agree with the conclusion of the PUC that since actual insurance premiums were being paid prior to setting up of the self-insurance scheme that the consumers were paying the premiums in the electricity rates. Further, the sums approved for the scheme as stated by the Commission for the payment of insurance premiums for BEL's external plant were never intended to form part of BEL's profits. PUC's directive was that $500.000. to be set aside annually and deposited into the bank account. As such, I agree with the PUC that when consumers were required to pay out the HCRSA account, this amounted to Consumers paying twice for hurricane rehabilitation. As such, I find that the decision to re-establish the deposit of $5,000.000 as the Insurance Reserve Fund

was not based on an erroneous premise that consumers were required to pay twice for hurricane rehabilitation and therefore not unreasonable.

Decision 4 – Rate of Return (ROR)

(7A) The Respondent's decision to approve a rate of return (ROR) of 10% for ATP July 1st 2008 to 30th June 2009 is contrary to Section 7 of the Electricity Act in that it contravenes the requirement that the rates must be set to afford the utility the opportunity to realize a reasonable rate of return and the Respondent therefore acted *ultra vires* and unlawfully.

(7B) The Respondent's decision to approve a rate of return (ROR) of 10% for ATP July 1st 2008 to 30th June 2009 is contrary to Section 7 of the Electricity Act in that it is inconsistent with the Byelaws made or purportedly made under the Electricity Act and the Respondent therefore acted *ultra vires* and unlawfully.

(7C) In making its decision to approve a rate of return (ROR) of 10% for ATP July 1st 2008 to 30th June 2009 the Respondent was guided by parameters contrary to or outside the requirements of the Electricity Act or Byelaws made or purportedly made thereunder and in that respect also the Respondent therefore acted *ultra vires* and unlawfully.

(7D) The Respondent's decision to approve a rate of return (ROR) of 10% for ATP July 1st 2008 to 30th June 2009 is unreasonable in the Wednesbury sense and therefore unlawful and void.

Issue:
Whether the PUC's decision to approve a rate of return of 10 % for July 1st 2008 to 30th June 2009 is *ultra vires* and unreasonable in the Wednesbury sense in that the rates set failed to afford the Utility the opportunity to realize a reasonable rate of return as provided by section 7 of the Electricity Act and the Byelaws.

121. For Decision 4, the PUC stated that:

The Commission hereby approves a rate of return (ROR) of 10% for ATP July 1, 2008 to June 30, 2009. The approved rate of return is to be

applied to BEL's RAV for the purpose of calculating the total return for calendar years 2008 and 2009.

122. BEL referred to Dr. Lesser findings in his Report at page 41 and his conclusion at page 54 where he stated that *…I find that the 10% ROR is not just and reasonable because it violates the "comparable risk" requirement that has long been a part of utility regulation under the Regulatory Compact*

123. BEL contends that the reasoning and evidence is overwhelming and that the 10% ROR approved by the Respondent did not fulfill the requirement that the rates must be set to afford the utility an opportunity to realize a reasonable rate of return. It was therefore contrary to Section 7 of the *Electricity Act* and *ultra vires*. Further, that in making its Final Decision the PUC was guided by parameters contrary to or outside the requirements of the Electricity Act or Byelaws.

124. Further BEL contends that section 7(4) is specific in requiring the assessment to be done by comparison with international standards of an efficiently operated power system of similar characteristics to that of Belize. That there is no evidence that in reaching its decision as regards the appropriate ROR the PUC carried out any such comparison, or, if they did, that they adopted the conclusion of such analysis.

<u>PUC submissions</u>

125. PUC submits that the submissions on this issue by BEL is grounded on its allegation that the decisions have caused them financial hardship which PUC denies. PUC contends that this argument fails if in fact the decision did not result in such hardship and financial losses. Further, that BEL's financial hardship resulted from a fundamental misunderstanding of the

decision and a consequent wrongful accounting treatment by BEL and not from the decision of the PUC.

Determination

126. Dr. Lesser in his report stated that the 10% approved by PUC does not afford BEL an opportunity to earn a risk-comparable rate of return on its capital investment and therefore is not just and reasonable. He stated that his *analysis demonstrates that a 10% ROR is not compensatory. Rather, based on an after tax ROE value of between 12.3% and 16.5% and BEL's capital structure as reported in its 2007 Annual Report, an appropriate ROR for BEL as of May 2008 would have been 11.3% and 14.2% with an average of 12.8%.* Dr. Lesser at the end of page 54 shows how the values were calculated.

127. The PUC in determining the ROR to be applied to RAV was guided by the following:

> *In determining the ROR to be applied to the RAV, the Commission was guided by the following parameters: a) a regulated lower limit of 10%, a target of 12% and a regulated upper limit of 15% b) Section 11(1) of the Public Utilities Commission Act which states that 'Every rate made, demanded or received by any public utility provider shall be fair and reasonable and in any case shall be in conformity with and shall use the rate setting methodologies specified in any Regulations, By-laws, Orders, directions or other subsidiary legislation or administrative orders made under the Electricity Act c) the Commission's own assessment of the current economic climate in Belize and worldwide d) BEL's Weighted Average Cost of Capital (WACC) of below 10%*

It is the Commission's assessment that in balancing the needs of all stakeholders within the three parameters described above, an ROR of 10% is fair and reasonable to all stakeholders"

128. The question for the court is whether the 10% approved by the PUC is reasonable. Dr. Lesser says an appropriate ROR for BEL as of May 2008 would have been an average of 12.8%. Both the 10% approved by the PUC and the 12.8% recommended by Dr. Lesser fall within the 10% - 15% range specified in the 2008 RSM and which is one of the parameters considered by the PUC. The 10% is within the lower limit but nevertheless within the limit. Also, PUC considered **section 11(1)** of the **PUC Act** which provides that the rate must be in conformity with the rate setting methodologies specified in the Regulations and Byelaws made under the **Electricity Act.** The evidence is lacking as to whether PUC made comparisons with International Standards as provided by **section 7(4)** of the **Electricity Act.** Nevertheless, the court must consider whether the 10% set afforded BEL an opportunity to realize a reasonable rate of return as provided by the **Electricity Act.**

129. The court's finding above is that the accounting treatment of the $36.2 million was incorrect and that BEL would have made a profit of $25 million if it was not for this incorrect accounting treatment. In fact, the evidence shows that the methodology produced a rate of 52.7 cents and BEL required 50 cents which is 2.7 cents less than what the methodology produced. It is because of corrections which the PUC is empowered to make by virtue of **section 32** of the **PUC Act** that the mean electricity rate was reduced to 44.1 cents. Had it not been for the corrections the ROR would have been higher. Dr. Lesser in his report stated that there was retroactive ratemaking (contrary to the court's findings) and therefore did not consider that BEL did in fact make a profit. As such, the court does not accept the position as stated by Dr. Lesser that the 10% approved by

PUC is not just and reasonable. I find that the PUC's decision to approve a rate of return of 10 % for July 1st 2008 to 30th June 2009 is not *ultra vires* and unreasonable in the Wednesbury sense as it afforded the Utility the opportunity to realize a reasonable rate of return in compliance with the Electricity Act and Byelaws.

Ground 8

Decision 5 – Value Added Delivery (VAD)

The Respondent's approval of the amount of VAD in respect of the ATP of 1st July 2008 to 30th June 2009 is wrongful, unlawful and void for the reasons stated otherwise in these grounds relating to or impacting on the VAD.

Issue:

Whether PUC's approval of the amount of VAD in respect of the ATP of 1st July 2008 to 30th June 2009 is reasonable.

130. In Decision 5 PUC stated:

> *The Commission hereby approves a VAD for ATP July 01, 2008 to June 30, 2009 of $56.917 million*.

In its comments relating to Decision 5 PUC stated:

In both ARP 2006 and ARP 2007 the Utility exceeded the target value of Opex and offered the Commission no explanation. This reallocates additional costs to Consumers, without reasonable justification. The Commission has increased the target Opex for ARP 2008 and 2009, and in the interest of all stakeholders, requires that the Utility stay within this increased value of target Opex.

BEL's submissions

131. BEL referred to Dr. Lesser's Report where he explains at page 55 that Value Added Delivery (VAD) comprises "operating expenditures (excluding the cost of power), depreciation, taxes and fees and *force majeure* costs, and a return on regulated asset value (RAV). Dr Lesser found that "*the retroactive adjustments to depreciation wrongly disallowed depreciation expenditures associated with the Mollejon Transmission Facility and other contributed capital…failed to comport with Good Utility Practice. I concluded that the PUC's disallowance of interest expenses paid by BEL for the remaining balance on the line failed to comport with Good Utility Practice. I also concluded that the retroactive reductions in RAV failed to comport with Good Utility Practice …"*

132. BEL contends that these retroactive disallowances had implications for the components that make up the VAD for the ATP for 2008 and 2009. That in light of these knock on effects, Dr. Lesser therefore concluded that "*Given my findings, I conclude that the approved VAD for the 2009 ATP, 1st July 2008 to 30th June 2009, is not reasonable".* BEL submits that in light of this finding of unreasonableness the Commission's decision is unlawful both in respect of its retroactivity and its irrationality.

133. PUC for reasons already stated in relation to RAV, Depreciation and the Return Component of VAD and the Rate of Return submits that the decision of the PUC in respect of the ATP 1st July, 2008 to 30th June, 2009 was within its statutory powers and entirely reasonable.

Determination

134. In light of the court's findings on RAV, Depreciation Correction and Return Correction (which stem from the reduction in RAV) that that there was no retroactive ratemaking and that adjustments were made only for the

purpose of fixing rates for the current review period and also for the reasons stated by the PUC in their comments as shown above, I find that the decision to approve a VAD for ATP July 01, 2008 to June 30, 2009 of $56.917 million is reasonable and thus not unlawful and void.

Ground 9

Decision 6(a) - Approval of Tariff Basket Revenue

(9A) The Respondent's approval of the Tariff Basket Revenue (TBR) and the Mean Electricity Rate (MER) for the ARP for 1st July 2008 to 30th June 2009 is wrongful, unlawful and void for the reasons stated otherwise in these grounds relating to or impacting on these items.

(9B) The Respondents approval of the TBR and the MER for the ARP 1st July 2008 to 30th June 2009 is unlawful and void in that it is not calculated to secure and does not secure that BEL can provide a reliable supply of electricity .

(9C) The Respondents approval of the TBR and the MER for the ATP 1st July 2008 to 30th June 2009 is unlawful and void in that it is not calculated to secure and does not secure that BEL can adequately finance its operations.

(9D) The Respondents approval of the TBR and the MER for the ARP 1st July 2008 to 30th June 2009 is unlawful and void in that it is not calculated to secure and does not secure that BEL can realize a reasonable rate of return.

Issue:

Whether the PUC's approval of the Tariff Basket Revenue and the Mean Electricity Rates is wrongful, unlawful and void.

135. BEL submits that the components of the Tariff Basket Revenue (which in turn is subsequently converted to a Mean Electricity Rate) include, among other things the VAD, hurricane restoration costs and depreciations allowances which were disallowed or adjusted by the Commission as set out in Decisions 3(a) and 3(c) above. Due to the fact of these disallowances and reductions, Dr. Lesser concludes that the result is that the MER is not reasonable for the ATP of 1st July 2008 to 30th June 2009.

136. Further, BEL contends that the decision is also contrary to the Electricity Act in that the TBR and MER are not calculated to secure, and does not secure, so that BEL can realize a reasonable rate of return. That BEL reported a second quarter 2008 loss of approximately $20 million as a result of the Final Decision.

137. PUC's argument is the same as in Ground 8.

Determination

138. The PUC's decision under this ground is:

Decision (6a)

The Commission hereby approves a forecast Tariff Basket Revenue (TBR) for BEL of $185,367,014 for ATP 2008/09, for expected 420,333 kilowatt-hours of electricity sales. The forecast TBR and sales convert to a Mean Electricity Rate (MER) of $0.441/kWh.

139. Page 33 of the 2008 Decision shows how the MER was calculated. The Commission made adjustments pursuant to section 32 of the PUC Act to Base Unit Cost of Power, VAD, CPRSA recovery rate and Force Majeure Cost Rate Stabilisation Account Adjustment.

140. The court's finding above is that the treatment of the $36.2 million by BEL was incorrect. Had it not been for that incorrect treatment the profit recorded would have been $25 million which according to Mr. Blanco would have been a good year for BEL. As such, I find that the PUC's approval of the TBR and the MER for the ARP 1st July 2008 to 30th June 2009 is calculated to secure that BEL can provide a reliable supply of electricity, adequately finance its operations and make a reasonable rate of return. As such, the court finds that the approval of the Tariff Basket Revenue (TBR) and the Mean Electricity Rate (MER) for the ARP for 1st July 2008 to 30th June 2009 is not wrongful, unlawful and void.

Ground 10

Decision 9 – Capital Investments 2008 and 2009

(10) The Respondent's decision approving allowed capital investments for calendar year 2008 at $25 Million and calendar year 2009 at $25 Million is unreasonable in the Wednesbury sense in that (a) no breakdown or reasonable explanation has been given by the Respondent in respect of the approved allowed figures and (b) the amounts approved are for the calendar years and the tariff periods run from the 1st of July in one year to the 30th of June in the following year.

Issue:

Whether the PUC's decision approving allowed capital investments for calendar year 2008 at $25 million and calendar year 2009 at $25 million is reasonable.

BEL's submissions

141. BEL contends that decision 9 is flawed and unlawful in two important respects. First, there is a legal duty upon the Commission to give reasons for its decisions so that BEL can know the case it has to meet. Further, the figures approved as capital expenditures do not permit BEL to

meet its statutory duty of providing a reasonable standard of service to its customers. BEL says that it is pointed out by Dr. Lesser at p.62 of his report that the PUC argues that limiting BEL's capital investments to $25 million per calendar year does not limit BEL's capital expenditure made as a result of capital provided from third party sources, excluding monies received from customers for services. BEL submits that by approving only $25 million, the PUC is stating that if BEL spends more it will not be allowed in the RAV. This indicates that the PUC is under the impression that BEL pay for all its capital expenditure out of the rates and appears to be saying that BEL can only spend $25 million out of internal cash flow but are free to borrow to spend more than the $25 million. But no one will lend BEL money for capital expenditures when the PUC is saying that BEL will not be allowed to recover the capital expenditures nor earn a just and reasonable return as required by the Electricity Act.

142. Secondly, the capital expenditure limit for a calendar year means that the company is being prevented from carrying out its statutory duty of investing to meet demand and to maintain good service. The methodology recognizes that BEL has to have flexibility from year to year in making investments. Many of its projects are large projects and there are considerable uncertainty of the timing of the investments due to the time period for procuring financing, environmental permits and the like.

PUC's submissions

143. PUC relied on the reasons set out at paragraphs 99 to 105 in the first affidavit of John Avery and contends that the decision to limit capital investments in terms of the decision was in fact and law reasonable.

Determination

144. PUC in their decision stated:

The Commission hereby approves allowed capital investments for c/y 2008 at $25 million, and allowed capital investments for c/y 2009 at $25 million.

In its comments relating PUC stated that:

Capital Investments have the potential to have an impact on efficiency, electricity rates, as well as on quality of service to Consumers. The Commission requires that capital investments be supported by reasonable explanations as to how consumers will benefit.

145. Mr. Avery in his evidence gave a reason why it was necessary to set the Capital investments at $25M. The reason as shown in paragraph 101 was that PUC approved $152 M for the years 2005 to 2009. BEL however, during the ARP submitted a revised figure of $223 million for the said years. Since the figure exceeded the previous approved sum by $71 million, the PUC in compliance with its functions recognized the need to closely scrutinize and supervise the Capital investments.

146. These comments made by PUC for its decision in my view, is reasonable as the revised figure was increased by some $71 million. Dr. Lesser also recognized that the statement is reasonable, necessary, and fully consistent with the prudent investment standard. This is because BEL should be able to demonstrate that the capital investments are needed to maintain quality and reliability. There is no evidence before the court how the PUC reduced the figure by $71 but what is clear is that PUC was acting in a prudent and reasonable manner and requires BEL to submit reports to justify its capital investments.

147. Dr. Lesser found that the PUC's decision limiting capital investments in the manner it did in the 2008 ARP Final Decision is not *per se* unreasonable. Mr. Young in his first affidavit at paragraph 101 stated that BEL's objection to the limit on capital investment is that there is no explanation or breakdown on the $25 million and the investment capitals are based on calendar year basis rather than ATP basis. Dr. Lesser disagrees however that this is the true nature of the dispute and stated that it appears that it is because BEL has not properly maintained the Mollejon Transmission facility.

148. The court however, in looking at the decision of the PUC and the reasons for doing so, does not find the limit unreasonable as the Commission has a duty to protect both the Utility and the interest of the consumers hence the reason the requirement that capital investments be supported by reasonable explanations as to how consumers will benefit. Mr. Avery explained at paragraph 102 that by setting the capital investments at $25 million the Commission did not limit capital expenditures by BEL. The reason being is that capital expenditures will routinely exceed capital investments by BEL because a significant portion of BEL's capital expenditures are directly recoverable from third parties such as government's rural electrification programs. I find this to be a reasonable explanation by Mr. Avery and not in the least confusing. The PUC is clearly saying that there is no limit on capital expenditures but as Mr Avery deposed the Commission required a *listing and justification of all capital expenditures in progress and all capital expenditures expected to be proceeded with in 2008 and 2009 also as a regulatory tool to ensure that capital expenditures undertaken by the Appellant are appropriately prioritized and in the best interest of all stakeholders, including consumers.* So, although there is no limit on the expenditures there must be a justification for same. As such, the court finds that the reasons stated by the PUC for their decision approving allowed capital

investments for calendar year 2008 at $25 million and calendar year 2009 at $25 million are not unreasonable in the Wednesbury sense.

Ground 11

Decision 10 – Disapproval of any changes to Tariffs

(11A) The Respondent's disapproval of any changes to the electricity tariffs is wrongful, unlawful and void for the reasons stated otherwise in these grounds relating to or impacting on these items.

(11B) The Respondent's disapproval of any changes to the electricity tariffs is unreasonable in the Wednesbury sense and therefore unlawful and void.

Issue:

Whether PUC's decision to disapprove the changes in tariff is unlawful and void.

PUC in their decision stated as follows:

> *THE PUC HEREBY DISAPPROVES any changes to the tariffs. The Present tariffs shall remain in effect for the Annual Tariff period July 1, 2008 to June 30, 2009, until otherwise adjusted under the new RSM.*

BEL's submissions

149. BEL submits that Dr. Lesser unequivocally concludes that the PUC's decision is unreasonable and therefore unlawful. BEL contends that not only is Decision 10 unreasonable, it is contrary to section 6 of the Electricity Act if its effect, as found by Dr. Lesser, is to deny BEL a fair return on its capital so as to maintain its financial viability. BEL referred to Dr. Lessor's findings as follows:

> "p. 64 – *I find the Respondent's disapproval of any changes to the electricity tariffs violate Good Utility Practice and are not reasonable. Under the regulatory compact, the rates BEL charges should be compensatory, and maintain the Company's financial*

viability and ability to attract capital as required under Bluefield and Hope Natural Gas. In light of my finding that the MER is neither compensatory nor reasonable (based on my findings regarding specific elements that determine the MER) then establishing a set of rates and tariffs based on that MER also cannot be reasonable"

150. PUC relied on their submissions in relation to RAV, Depreciation and the Return Component of VAD and the Rate of Return.

Determination

151. As a result of the court's findings that BEL had a reasonable rate of return and adequately compensated under the current tariff structure PUC's decision to disapprove changes to the electricity tariffs is not wrongful, unlawful and void.

Ground 12

Decision 11 – Mollejon Transmission Line not a part of the RAV

(12) The Respondent's decision that the Mollejon Transmission Line [the "MTL"] is not in any way a part of the Regulated Asset Value (RAV) is wrongful, erroneous and unreasonable in the Wednesbury sense in that: (a) it does not accord with the intent, facts and obligations agreed to between the Government of Belize, the Appellant, Belize Electricity Company Limited ("BECOL") and the Respondent relating to the MTL over the period 1996 to 2001 as reflected in the Memorandum of Understanding of 19th October 2001 between Government of Belize, the Appellant, BECOL and the Third Master Agreement of November 2001 (b) it is based on a wrong premise that Respondent has always concluded that the MTL is a form of contributed capital to BEL (C) the decision constitutes a reversal of the acceptance [by way of inclusion in the 2007 Amendment Byelaws] of the MTL as a part of the assets of BEL for the purposes of RAV and not contributed capital.

Issue:
Whether PUC's decision that the MTL is not part of the RAV is wrongful, erroneous and unreasonable.

BEL submissions

152. BEL submits that it is clear from the MOU that (a) the PUC, as a signatory to the MOU, was fully aware that BEL, BECOL and GOB had agreed to vary the Power Purchase Agreement and Franchise Agreement and that BEL was to increase the consideration paid by it for the Mollejon Transmission Line; (b) BEL abided by the agreement contained in the MOU (negotiated with the consent and knowledge of the PUC through its chairman as evidenced by his signature) to pay the unamortized costs of the Mollejon Transmission Line; and (c) At all material times up to the revocation of the 2007 RSM (which formed the Third Schedule to the 2007 Byelaws) the payment of the unamortized sum has been approved and treated by the PUC as representing acquisition of a capital asset and thus part of the RAV and the interest and depreciation relevant for the purposes of VAD.

153 BEL further contends that as a matter of law, it matters not that a previous price of US$1.00 had been agreed as the consideration for the Mollejon Transmission Line and that ownership had been conveyed to BEL. Where a party undertakes to make a payment because by so doing it will gain an advantage arising out of a continuing contractual relationship with the other party the new payment or increased consideration for the value delivered under the continuing contract will be sufficient to vary the contract in the terms intended by the parties. See ***Williams v Roffey Bros* [1990] 2 W.L.R. 1153**. Thus, where there is a continuing obligation to pay a capacity charge under the Franchise Agreement and the Power Purchase Agreement, the parties are entitled to eliminate or vary the capacity charges in any manner they deem fit.

154. BEL submits that read against the background of the Power Purchase and Franchise Agreement and Mr. Lynn Young's and Mr. John Evans' evidence, it is clear that as a matter of legal analysis (a) the parties were under a continuing legal obligation pursuant to the Franchise and Power Purchase Agreements, particularly in relation to the "capacity charge" (b) they agreed to eliminate the capacity charge by increasing the consideration paid by BEL for the acquisition of the Mollejon Transmission Line. That the effect therefore is that there is a valid and subsisting agreement between BEL and BECOL to pay an increased consideration for the Mollejon Transmission Line. That PUC was aware of the terms of that increased consideration and approved the same because the PUC Chairman signed same.

155. BEL further contends that there are three further fundamental reasons why the PUC's decision to treat the Mollejon Transmission Line as contributed capital is wrong in law. First, its decision to now treat the Mollejon Transmission Line as contributed capital for the years 2001 to 2004 is retroactive rate-making and thus *ultra vires* the Electricity Act. Secondly, the PUC is bound by the principle of "legitimate expectation" and cannot now resile from its agreement to the purchase by BEL and its prior treatment of the line as acquired capital. Thirdly, in private law, where the parties to a transaction "act on an assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other…the parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it". See ***Chitty on Contracts* (30th ed) para 3-107**.

156. BEL contends that as a matter of law, the language and intent is manifest and clear – the provision that the MTL would be conveyed to BEL for the sum of $1.00 was removed as if it were never in the Agreements. Thus,

BEL, properly in the eyes of the parties and the law would be the owners of the MTL with all the usual entitlement and accounting rights and procedures that would follow from such investment. Further, that Dr. Lesser points out, the proper cost for BEL would be the unamortized cost of US$14.9 million.

PUC's Submissions

157. PUC contends that the exclusion of the Mollejon transmission line from RAV reflects a determination by the Commission that the line is properly contributed capital which is by definition excluded from RAV. PUC says that BEL maintained that while the transmission line was indeed originally treated as contributed capital that it was agreed to reverse that treatment and instead to classify it as part of RAV and that this was approved by PUC. PUC submits that was a dispute of fact which have been resolved by the PUC against BEL. PUC submits that its finding in this regard was in accordance with the evidence and ought not to be disturbed by the Court.

158. PUC further submits that for reasons set forth in the First Affidavit of John Avery at paragraphs 115 to 136, the decision was entirely reasonable and in accordance with the facts as found by the Commission. Also, that BEL asserts that there is a continuing obligation to pay a capacity charge under the Franchise Agreement and the Power Purchase Agreement but PUC submits that nothing in those documents speaks to this continued capacity charge. There is no capacity charge in the Power Purchase Agreement approved by PUC. Therefore, PUC is not aware of any benefits to the BEL or consumers in the entire transaction. Additionally, PUC is of the opinion that the changes it approved to the Power Purchase Agreement provide enough incentive for BECOL to have proceeded with the Chalillo project. That the documents show that the Appellant paid $1.00 for the purchase of the Mollejon Transmission Line

and that ownership of it had been transferred to the Appellant from 2001. Further, nothing is mentioned in the Power Purchase Agreement, the Franchise Agreement, or the 3rd Master Agreement that a "new" purchase price has been agreed to or that there would be a "repurchase" of the Mollejon Transmission Line.

159. PUC submits that BEL's treatment of the transmission line in 2005 has been a source of contention between BEL and PUC as confirmed in the evidence of Mr. Lynn Young, who also confirmed in cross-examination that the decision to exclude the Mollejon Facility from RAV was one made by the PUC since 2005 therefore the Appellant could not have had a legitimate expectation as claimed.

Determination

160. PUC in its decision stated:

The Commission has always concluded and now reiterates that the Mollejon Transmission Facilities (the Mollejon Transmission Line) is a form of Contributed Capital to BEL.

The Commission concludes that the Mollejon Transmission Line is not in any way a part of the Regulated Asset Value (RAV) of BEL, and that BEL will not receive a return on the Mollejon Transmission Line through electricity rates.

Comments relating to Decision 11

The following sequence of events, extracted from BECOL/BEL Agreements and from BEL AGM report/s, should contribute to a reasonably clear understanding of the decision:

a) In Article 4.1 of the Franchise Agreement of April 19, 1991, it is stated that on the completion of the Transmission Facility by the Producer

(BECOL), the facility would be conveyed to the Electricity Board for 1US dollar.

b) *In Article 9 of the Power Purchase Agreement of April 1991, it is again stated that Transmission Facilities are to be built by the Producer at the Producer's expense, and that "upon completion the Transmission Facilities will be dedicated, transferred and assigned to the Utility for one dollar US."*

c) *In Article 2.3 in the Second Master Agreement of December 18, 1996, it is stated that "BECOL conveyed and BEL accepted, all of BECOL's right, title and interest in and to the Transmission Facilities as of April 1, 1996, as contemplated by Article 9 of the Power Purchase Agreement (PPA) and Section 13.2 of the Franchise Agreement, and as conveyed by the Deed of Assignment and Conveyance dated December 18, 1996 by and between BECOL and BEL."*

d) *In BEL's Annual General Meeting (AGM) report of 1997, note 15 Capital Contributions, it is stated as follows: "During 1997, the Company settled the BECOL dispute (see note 16) and accepted the transmission facility from BECOL connecting the Mollejon hydroelectric plant to the Company's distribution system. The facility was recorded at fair market value (BECOL's cost) with a corresponding capital contribution recorded. A total of $29,751,632 was recorded." At this juncture the Mollejon Transmission Line is on BEL's books as a Contributed Capital.*

161. My Lynn Young, CEO of BEL in his second affidavit deposed that extensive discussions were held between representatives of the Government of Belize, PUC, BEL and BECOL relating to (a) the construction by BECOL of a new hydroelectric facility on the Macal River which would include a storage facility and a power house upstream of the Mollejon Plant (b) changing of the terms of compensation payable by the Appellant to BECOL for energy from the hydro electric projects and (c) the payment by BEL to BECOL of the cost of the Transmission Facilities. That in consequence a Memorandum of Understanding was prepared and

executed on the 19th of October 2001 by the Government of Belize, PUC, BEL and BECOL and the Memorandum included the following agreement relating to the Transmission Facilities:

> "*Transmission Line*
>
> *The Utility will agree to pay to the Producer the unamortized cost (US$14.9 million) of the existing Mollejon transmission line in monthly installments over a 10 year period, with a 10% interest rate. The government will confirm (i) that its existing guaranty of the obligations of the Utility covers the payments with respect to the transmission line, (ii) the payments can be made in US dollars (iii) the payments can be received by the producer free of tax and (iv) the payments can be freely transferred out of Belize. These obligations and confirmations will be contained in a new agreement that is separate from the Power Purchase Agreement"*

See **Exhibit LY10** of Lynn Young's affidavit for copy of Memorandum of Understanding. Also see Bundle 6 for copy of Franchise Agreement and Power Purchase Agreement.

162. Mr. Young deposed that following upon the Memorandum of Understanding the Franchise Agreement and the Power Purchase Agreement [as amended by the Second Master Agreement] were further amended by a Third Master Agreement dated the 21st of November 2001. That the Third Master Agreement included the elimination of the "capacity charge" by which BEL was formerly exposed to the possibility of paying for electrical energy which the plant could not produce.

163. Mr. Young further deposed that this was negotiated and concluded on the basis, that the original arrangement of the Transmission Facilities being transferred to the Appellant for the price of $1.00 which in effect is a contribution would be changed retroactively to BEL purchasing the

unamortized Transmission Facilities from BECOL. In cross examination, Mr. Young explained that as a result of the MOU the Capital contribution was written off and changed into a liability of $14.9 million.

164. Mr. John Evans who represented BECOL also gave evidence for BEL. He deposed that he can confirm that the PUC Chairman did not at anytime during the discussions leading up to and including the conclusion of the MOU stipulate that his agreement was confined to the cost of power element of the MOU and that he was not agreeing to the purchase by BEL of the Mollejon Transmission Line for the sum agreed. He deposed at paragraph 22 that:

> 22. *The MOU, which we executed, recorded the above agreement. I drafted the MOU, and I did not insert that the BEL purchase of the transmission line was a rate-base expenditure because it did not occur to me that such language would be required. In all my years of regulated utility experience, I had never known a utility to purchase utility assets which did not form part of its rate base. It would make no commercial sense for a utility to make a purchase of that magnitude which it could not place in rate base. Certainly, the benefits that were to be realized by consumers of electricity as a result of the agreement indicated that both the PUC and BEL regarded the transaction as being a rate based transaction.*

Title of Mollejon Transmission Facilities conveyed to BEL by Deed of Assignment for US$1.00

165. Article 2.3 of the Second Master Agreement of December 18, 1996, states that "BECOL conveyed and BEL accepted, all of BECOL's right, title and interest in and to the Transmission Facilities as of April 1, 1996, as contemplated by Article 9 of the Power Purchase Agreement (PPA) and Section 13.2 of the Franchise Agreement, and as conveyed by the Deed of Assignment and Conveyance dated December 18, 1996 by and

between BECOL and BEL. The consideration as stated is US$1.00. See Bundle 6, Tab 4.

Memorandum of Understanding

166. By Memorandum of Understanding dated October 19, 2001 . BEL, BECOL, GOB and the Chairman of the Commission signed a Memorandum of Understanding related to a Third Master Agreement between the Appellant, BECOL and GOB. At the top of the MOU it is stated "*Memorandum of Understanding on Principal Revisions to Franchise and Power Purchase Arrangements between the Government of Belize, Belize Electric Company Limited and Belize Electricity Limited."* At the time the Chairman of the PUC who signed the agreement was Dr. Gilbert Canton.

167. The Memorandum of Understanding states in the first paragraph,

> *Following discussions at meetings held between representatives of the* GOB, PUC, BEL and BECOL *the representatives of GOB, BEL and BECOL agree to the points listed below, subject to approval by the Cabinet and the BEL/BECOL principals, and the PUC acknowledge the discussions and agrees to the amendments in the Power Purchase Agreement as described below.*

168. In the MOU under the heading of Power Purchase, the agreement states that *"The existing capacity charge under the Power Purchase Agreement will be eliminated effective as of April 1, 2001"*.

169. Under the heading of Transmission Line it is stated that :

"*The Utility will agree to pay to the Producer the unamortized cost (US$14.9 million) of the existing Mollejon transmission line in monthly installments over a 10 year period with a 10% interest rate*. ..

170. The question is whether PUC agreed to eliminate the capacity charge by increasing the consideration paid by BEL for the acquisition of the Mollejon Transmission Line. PUC's argument is that it did not agree to this payment as BEL already owned the line. Mr. Avery in his affidavit evidence deposed at paragraphs 121 and 122 that by signing on to the Memorandum of Understanding, the Commission's Chairman at the time merely indicated his agreement to the proposed amendments to the Power Purchase Agreement and acknowledged that discussions were held with respect to the other agreements that comprised the Third Master Agreement, including the Mollejon Transmission Facility Agreement. That the Commission did not thereby agree to or approve BEL's purchase of a transmission line that it already owned. He referred to the email exchange between Mr. Young and Mr. Canton to show that they never approved the payment.

171. **Exhibit "J.A" 3** to Mr. Avery's first affidavit shows email from Lynn Young to Dr. Canton and Dr. Canton's response where he stated that:

Lynn Young to Gilbert Canton
Dr. Canton,
We have discussed at length our positions with respect to the treatment of the transmission line. You indicated to us that you never agreed to the treatment. However, it was our understanding based on the memorandum of understanding that you had agreed to the changes as outlined in the memorandum.

Dr. Gilbert Canton to Lynn Young

Lynn,
You may recall that on October 5, 2001 you faxed to Minister Fonseca a 'Summary of principal revisions in Franchise and Power Arrangements between the GOB, BECOL, and BEL'. The PUC was asked to comment and at the time I made my comments stating that ***in our opinion the elimination of the capacity charge 'had no commercial value' and that the 'payment for the transmission facilities seems to be a double payment'.*** *Mr. Ghandi forwarded my comments and those of Mr. Lue's together with his comments to the Minister. In his comments Mr. Ghandi also pointed out that there appears to be a double payment.* ***When your summary was being translated to an MOU, I insisted that the first paragraph be added in which it was clear that the PUC agreed only with the amendments to the PPA and merely acknowledged the other discussions. My position and that of the PUC has always been consistent.***

172. There is no doubt that title was passed to BEL for a consideration of US.$1.00 by the Deed of Assignment and Conveyance and was subsequently recorded as Contributed Capital. The question to be asked is whether the PUC by signing the MOU agreed to the payment of US $ 14.9 million for the Transmission Line. This can only be answered by looking at the evidence as the MOU addressed other topics and not just the elimination of the capacity charge and the payment of *the unamortized cost (US$14.9 million) of the existing Mollejon transmission line.*

173. I have considered the evidence of Mr. Lynn Young and Mr. John Evans for BEL and that of Mr. Avery for PUC. I accept My Avery's evidence which is confirmed by the email from Dr. Canton that the PUC has been consistent with their position that the MTL is contributed capital. In light of the evidence before the court, the signing of the MOU by the PUC in my view, does not change the position of the PUC with regards to the Transmission Line. The evidence shows that Mr. Young in his email to Dr. Canton stated that *it was our understanding based on the*

memorandum of understanding that you had agreed to the changes as outlined in the memorandum and Dr. Canton in his reply as shown above stated that PUC agreed only with the amendments to the PPA and merely acknowledged the other discussions. The court is satisfied that when PUC signed the MOU, it was not approving an increased payment for the Transmission Line.

174. There is also further evidence that BEL and PUC had a dispute over the increased payment and PUC issued a document entitled ***Determination on the Mollejon Transmission Facility (April 8, 2005), which states categorically that "the incremental costs of this transaction will not be borne by electricity consumers.*** This shows PUC did not approve of the further payment for the Transmission Facility.

175. Also, the court further considered that there is no evidence that the PUC approved the payment of a capacity charge under the Franchise Agreement and the Power Purchase Agreement. As a result, the court will not disturb the finding of facts by the PUC that they have never approved the further payment for the Transmission Facilities.

176. I agree with the submissions for the PUC that the line was already owned by BEL and it is contributed capital. Also, the court agrees with the argument by the PUC that there could be no legitimate expectation because the treatment of the MLT has been a source of contention since 2005. Based on the foregoing, I find that the PUC's 2008 ARP decision that the MTL is not part of the RAV is not wrongful, erroneous and unreasonable.

Decision 3d – Review of Decision to approve interest charges on Mollejon Transmission Line

(6A) The decision to disallow all interest charges that the Appellant paid to BECOL related to the Mollejon Transmission Facility was *ultra vires* the Respondent's powers Under the Electricity Act and/or the Public Utilities Commission Act and unlawful in that it was not a part of the Initial Decision and was introduced only after the final report of the Independent Expert Dr. Jonathan Lesser.

(6B) The Respondent's decision to review and reverse the decision of the prior PUC to approve interest charges paid by the Appellant to BECOL in respect of the Mollejon Transmission Facility including retroactively for the years 2001 to 2004 is *ultra vires* its powers Under the Electricity Act and/or the Public Utilities Commission Act and is therefore unlawful and void.

(6C) The Respondent's decision to review and reverse the decision of the prior PUC to approve interest charges paid by the Appellant to BECOL in respect of the Mollejon Transmission Facility including retroactively for the years 2001 to 2004 is unreasonable in the Wednesbury and therefore unlawful and void.

177. In Decision 3d – Review of Decision to approve interest charges on Mollejon Transmission Line, PUC states:

> *The Commission hereby disallows all interest charges that the Utility paid to BECOL related to the Mollejon Transmission Facility.*
>
> *The Commission hereby approves an interest charge correction of $10.34 million to provide for the recovery of interest charges from 2001 to 2004 related to the Mollejon Transmission Facility Loan that was paid out of rates levied on consumers.*

178. In the comments relating to decision (3d) PUC stated that from 2001 to 2004, BEL paid interest charges to BECOL amounting to $10.34 million; and from 2005 to 2006 BEL paid interest charges to BECOL amounting to $3.56 million. Those interest charges were in connection with the

Mollejon Transmission Facility Agreement of November 2001. PUC concluded that the Mollejon Transmission Facility was a form of Contributed Capital, and therefore there could be no interest charges related to the Mollejon Transmission Facility. Those payments for interest charges were made from the electricity rates paid by Consumers, and therefore, it was only fair that those interest charges be recovered and refunded to Consumers.

179. As a result the court's findings that the MTL is not part of RAV and the PUC never approved the further payment for the transmission facilities, there could not have been an approval for any interest charges. Further, for reasons already stated that the PUC never engaged in retroactive ratemaking, the review was conducted in the context of the 2008 ARP only and was made in the current period for fixing rates.

Process fundamentally unlawful

180. BEL challenges the Final Decision of the PUC on the ground that it was conducted irregularly and under Byelaws and a methodology which were and are not lawful. As a result of the findings above, the Final Decision of 2008 of the PUC was conducted in accordance with the law and therefore lawful.

181. BEL also challenges the Final Decision on the ground that it was not published as required by **section 7(5)** of the **Electricity Act**. BEL says that it is appreciated that this omission can be remedied.

182. In oral submissions, Counsel for PUC submitted that the final decision was not published in the Gazette because of the pending appeal. Further, if the decision was published then it would have the force of law and there could be no appeal.

183. It is not disputed that the 2008 Final Decision was not made by a statutory instrument and therefore was not published in the government gazette. At the end of the decision the following is written:

BY ORDER OF THE OFFICE

SIGNED THIS 26th DAY OF JUNE 2008

_____

John P. Avery
Chairman

184. As amended by **Act No. 12 of 2007, section 7(5)** of the Electricity Act provides as follows:

> *Any final decision of the Commission made pursuant to the by-laws on tariffs, charges, fees and quality of service standards shall be published in the Gazette in the form of a statutory instrument and shall upon such publication or from such date as may be specified therein, have the force of law.*

185. In my view, section 7(5) above clearly provides that any final decision of the Commission shall be published in the Gazette. However, this does not make the Order made by the PUC null and void. BEL has rightly acknowledged that this omission can be remedied. As such, the court orders that the Final Decision of the Public Utilities Commission made on the 26th of June 2008 in respect of the Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July 2008 to 30th June 2009 is to be published in the Gazette in the form of a Statutory Instrument.

186. Summary of Findings

The court finds as follows:

1. Good Utility Practice as defined by Dr. Lesser in his Report is not applicable to Belize. However, PUC has a duty to act in a reasonable manner to protect the interest of the Consumers and the Utility Provider.

2. The PUC has the power or authority in law to make and issue the 2008 RSM which is not *ultra vires* the Electricity Act as it does not seek to retrospectively or retroactively set rates.

3. The 2008 RSM does not consists of purported changes or additions to Byelaws and therefore, it is not required to be by way of Statutory Instrument as part of the Byelaws under section 7 of the Electricity Act and published in the Government Gazette.

4. The 2008 RSM fulfills the requirements of section 7 and Section 6(2) (a) & (b) of the Electricity Act and Section 22(2) of the Public Utilities Act by making reasonable projections of BEL's cost and set rates which cover operating cost and provided an opportunity to earn a reasonable rate of return.

5. The Commission's decision to change the Regulated Asset Value for the years 2005, 2006 and 2007 was not *ultra vires* its statutory powers and was not unreasonable in the Wednesbury sense as PUC was empowered by section 32 of the PUC Act to review past decisions by making adjustments and corrections which is applied to a current review period and as such PUC was not engaged in retroactive ratemaking.

6 The PUC's decision to apply a depreciation correction is not ultra vires and unreasonable in the Wednesbury sense as the depreciation forecasted was in excess of actual depreciation and stem from the reduction in RAV. Further, since the Return Corrections stem from the reduction in RAV it follows that the decision to apply a return correction is also not *ultra vires* and unreasonable in the Wednesbury sense.

7. PUC's decision to review its prior decision to approve Hurricane Cost Stabilisation Account (HCRSA) related interest charges and approve a similar amount as a correction to be recovered from BEL is not unlawful and void.

8. The PUC's decision requiring BEL to re-establish from its own funds the deposit of $5 million as the Insurance Reserve Fund is not *ultra vires* and unreasonable because the Insurance Reserve Fund was previously funded by Customers.

9. The PUC's decision to approve a rate of return of 10 % for July 1st 2008 to 30th June 2009 is not *ultra vires* and unreasonable in the Wednesbury sense as it afforded the Utility the opportunity to realize a reasonable rate of return in accordance with the Electricity Act and Byelaws.

10. In light of the court's findings on Regulated Asset Value, Depreciation Correction and Return Correction (which stem from the reduction in RAV) that that there was no retroactive ratemaking and that adjustments were made only for the purpose of fixing rates for the current review period, I find that the decision to approve a Value

Added Delivery for ATP July 01, 2008 to June 30, 2009 of $56.917 million is reasonable and thus not unlawful and void.

11. The PUC's approval of the Tariff Basket Revenue and the Mean Electricity Rate for the ARP 1st July 2008 to 30th June 2009 is calculated to secure that BEL can provide a reliable supply of electricity, adequately finance its operations and make a reasonable rate of return. As such, the approval of the Tariff Basket Revenue and the Mean Electricity Rate for the ARP for 1st July 2008 to 30th June 2009 is not wrongful, unlawful and void.

12. The reasons stated by the PUC for their decision approving allowed capital investments for 2008 at $25 million and 2009 at $25 million are not unreasonable in the Wednesbury sense.

13. As a result of the court's findings that BEL had a reasonable rate of return and adequately compensated under the current tariff structure, PUC's decision to disapprove changes to the electricity tariffs is not wrongful, unlawful and void.

14. The Mollejon Transmission Line is contributed capital and as such the PUC's decision that the MTL is not part of the Regulated Asset Value is not wrongful, erroneous and unreasonable.

15. As a result of the court's findings that the MTL is not part of RAV and that PUC never approved the further payment for the transmission facilities, they could not have approved any interest charges.

17. The Final Decision of the Public Utilities Commission made on the 26th of June 2008 in respect of the Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July 2008 to

30th June 2009 is to be published in the Gazette in the form of a Statutory Instrument.

187. **Order**

The Declaration is refused that the Final Decision of the Public Utilities Commission made on the 26th of June 2008 in respect of the Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July 2008 to 30th June 2009 was unlawful.

The Final Decision of the Public Utilities Commission made on the 26th of June 2008 in respect of the Annual Review Proceedings for the setting of electricity rates and tariffs for the period 1st July 2008 to 30th June 2009 to be published in the Gazette in the form of a Statutory Instrument.

Cost for the Public Utilities Commission to be taxed if not agreed.

Dated this 15th day of March, 2011

.....

Minnet Hafiz

Supreme Court Judge