

IN THE SUPREME COURT OF BELIZE, A.D. 2004.

Action No. 376 OF 2004.

(BELIZE WATER SERVICES LTD	APPLICANT
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(PUBLIC UTILITIES COMMISSION	RESPONDENT
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(ATTORNEY GENERAL	INTERESTED PARTY

Mr. Michael Young, S.C. for the applicant.

Mr. Fred Lumor, S. C. and Mr. Michel Chebat, for respondent.

No appearance by or for the Attorney General, an interested party.

AWICH J.

18.3.2005.

JUDGMENT

1. *Notes: Judicial review seeking court order to quash a decision of a statutory entity, the Public Utilities Commission, and Byelaws it made on the grounds of illegality as to content, procedural irregularity, irrationality, and procedural unfairness.*
2. The applicant, Belize Water Services Ltd, BWS, upon obtaining leave of this Court has brought this judicial review proceeding, seeking: (1) “an *order of certiorari to remove ... and quash the decision of the respondent, the Public*

Utilities Commission, (the PUC), dated 17.4. 2004,” conveyed to the applicant in a letter dated 19.4.2004, and (2) an order to quash the Water and Sewerage (Tariffs) (Amendments) Byelaws, 2004, in “Statutory Instrument No. 102 of 2004, in relation to the tariffs for water and sewerage industry to be charged by the applicant for the period 1.4.2004, to 31.3.2009”.

3. The decision complained about is statutorily termed, the “Final Decision” in byelaw 21 of the *Water and Sewerage (Tariffs) Byelaws, S.I. 67 of 2002*. It was set out in five parts according to the subject matters as follows:

“DECISION 1: First Business Plan

THE PUC HEREBY APPROVES

The Business Plan represented by the Income Statement, Balance Sheet and Cash Flow Statement as set out in **Appendix 1 (a), (b), and (c)**.

DECISION 2: Tariffs for First Full Tariff Period (FFTP)

THE PUC HEREBY APPROVES

- (1) A Tariff Structure as set out in Appendix 2 that provides for a revenue increase of 17% effective April 01, 2004; and
- (2) Other Charges as contained in Appendix 3.

The Tariffs in **Appendix 2** and Other Charges in **Appendix 3**

become effective April 1st, 2004 and are to be applied for water consumed by BWS customers after march 31st, 2004, which is the end of the transitional period as defined in the SI 67 of 2002.

DECISION 3: Notified Items.

Notified Items means unavoidable costs incurred by a Licensee proved to the satisfaction of the PUC and are costs due to factors outside of a licensee's control, being one or a combination of:

- (a) Inflation,
- (b) Interest cost;
- (c) Electricity power cost; and
- (d) Bad Debt cost.

Adjustments for notified Items will be made in accordance with procedures and methodologies established through governing Byelaws.

DECISION 4: Performance Targets.

The performance targets to be achieved during the FFTP by BWS are set out in Appendix 4. Failure to meet the targets by the specified periods and after written notice from the PUC to BWS shall constitute a basis for the PUC to issue financial penalties against BWS in the form of subsequent Tariff

adjustment and/or customer rebates or financial penalties.

DECISION 5: Codes of Practice.

Codes of Practice (Codes) approved by the PUC will become effective April 1st, 2004. The Codes set out the guidelines and standards for various categories of service provided by BWS and are a requirement of Condition 5 of BWS's License. The Codes will include a Customer Code, a Disconnection Code and a Leakage Code, which will be reviewed on an annual basis and updated as necessary. Failure on the part of BWS to meet the standard defined within the Codes, twelve months after the effective date, shall result in penalties.

BY ORDER OF THE OFFICE

SIGNED THIS 17TH DAY OF APRIL 2004

Dr. Gilbert Canton

Chairman".

4. It is clear from the affidavits filed to support the application that central to the contention of the applicant were that the correct increase to tariffs was not that which would generate 17% increase in revenue recommended by an independent expert and effected at "Decision 2"; it was, said BWS, 32%, and that PUC was required to provide a more detailed Business Plan than stated at "Decision 1". It seems BWS expected that a detailed Business Plan

would provide data from which it could do its own calculation to confirm or not whether the method of calculating tariffs agreed and stated in the Byelaws had been applied by BWS.

5. The grounds advanced to impugn the Final Decision were given as illegality, procedural impropriety and irrationality. They all may be regarded as illegality. The submissions made to urge the grounds may be summarised as follows: (1) the Decision was illegal because PUC did not follow statutory requirements; that it must adopt all the determinations made by the independent expert, that it must ensure that BWS was able to finance its operation providing services at the required standard, that the regulated 12% rate of return would be achieved for each of the 25 years of BWS' licence, and that the Decision was made without following the methods of calculating tariffs laid down in the Water and Sewerage (Tariffs) Byelaws, Statutory Instrument No. 67 of 2002; (2) the Decision was irrational to the extent that it may be regarded as *ultra vires* and illegal; (3) the Decision was made by unfair procedure that denied BWS a hearing and therefore illegal; (4) some parts of the Decision were mathematically erroneous; (5) the Decision did not cover all matters required to be decided such as detailed Business Plan; (6) full reasons and full information were not given for the Decision to the applicant; and (7) some recommendations of the independent expert were not included in the Decision in accordance with principles of public law.
6. The main reason for impugning Byelaws, S.I. No. 102 of 2004, was really that BWS regarded the Byelaws as the legal instrument by which the Final Decision was effected so the Byelaws should be quashed with the Decision.

The technical grounds advanced against them were largely procedural, namely that; (1) the Byelaws were made without consultation with the licensee, BWS, contrary to S: 87 of the Water Industry Act, No. 1 of 2001; and (2) they were applied retrospectively from 1.4.2004, a date earlier than 19.4.2004, when they were made, and 12.6.2004, when they were gazatted, the PUC acted *ultra vires*. So far as the substance is concerned, the Byelaws are brief and related exclusively to “ *the setting of tariffs for water and sewerage industry to be charged by the applicant for the period 1.4.2004 to 31.3.2009*”. Their joint effects cancelled the tariffs and charges applied during the “transitional period” 23.3.2001 to 31.3.2004, which were the tariffs and charges authorised by the old Water and Sewerage (Rates) Order, 1996, and the Water and Sewerage (Rates) (San Pedro), Order 1997- see byelaw 38 of Byelaws, S.I. 67 of 2002. The Byelaws, S.I. 102 of 2004, then established new “*tariffs structures*” set out in appendix therein. For emphasis I set out the non-formal parts of the byelaws, namely byelaws 3,5,6,7,8,9 and 10:

“3. Byelaws 13 of the principal Byelaws is hereby amended by the addition of a new paragraph immediately after paragraph (3) as follows:

4. In determining the tariffs for any Full Tariff Period, the PUC shall take into account notified items and the performance standards of the licensee,

“5. Byelaw 25(2) of the principal Byelaws is hereby amended by substituting the word “may” for the word “shall” occurring therein

6. The principal Byelaws are hereby amended by the addition of a new Byelaw immediately after byelaw 37 as follows:

“37A. In the case of notified items, whereupon application by a licensee it has been proved by the said licensee to the satisfaction of the PUC that adjustment to tariffs are necessary, the PUC may without conducting Full Tariff Review proceedings or Annual Review proceedings, approve adjustments to tariffs.

7. Byelaw 38 of the principal Byelaws is hereby repealed and replaced by the following:

“38. (1) Notwithstanding any other provision of these Byelaws, the tariffs, terms and conditions for the supply of water and sewerage services (except infrastructure charges) shall be those specified in schedule 3.

8. The principal Byelaws are hereby amended by the addition of a new byelaw immediately after byelaw 38 as follows:

38A (1). The PUC may after consultation with licensee

established performance standards for the licensee.

(2) Where the licensee fails to meet the established standards, the PUC may refuse to grant the licensee an increase in tariffs.

9. The principal Byelaws are hereby amended by the addition of a new schedule 3 immediately after schedule 2.

10. These Byelaws shall come into force on the 1st day April 2004".

7. Byelaw 25(2) of Byelaws, S.I. 67 of 2002, after the amendment effected by byelaw 5 of Byelaws S.I. 102 of 2004, reads: "25(2). *The PUC's decision may [instead of shall] incorporate the expert's determination of any element of the Business Plan*".
8. The underlying reason for BWS objecting to substituting the word "may" for "shall" was this. It was the view of BWS that the use of the word "shall" in byelaw 25(2) of Byelaws, SI. No. 67 of 2002, meant that the PUC was bound to adopt all determinations including determinations of "any element of the business plan", made by an independent expert, so the change of the word "shall" to "may" introduced by byelaw 5, meant that PUC could, after the amendment, chose not to incorporate some determinations made by the expert. That choice, the applicant did not wish PUC to have. In this particular case, I do not know how that submission helps to secure for the

applicant the higher increase in tariffs at 32% that it desired. The independent expert advised amendment to tariffs increase from 15% to “17% which should not necessarily be applied equally across all consumption bands ...a lower proportional tariff rise and/or increase ... may be justified to the lower consumption bands than was assumed in the initial Decision”.

9. BWS wants the entire Byelaws, S.I. 102 of 2004, quashed. Perhaps BWS hopes that if the Byelaws are quashed, it will, during the consultation process required to precede the making of new Byelaws, be able to persuade PUC to adopt in its replacement Final Decision only points that BWS favours in the replacement Decision.

10. ***The Background: The Parties and the Agreements Between Them.***

It is necessary to understand the relationship between the parties to appreciate the weight of the objections of BWS fully. BWS was incorporated in Belize as a limited company in 2001, “to carry on the business of the supply of water and of sewerage services” in Belize. It is a subsidiary of Cascal BV, a foreign company, said “to have its seat in Amsterdam”. Cascal’s address was given as 120 A.H. Hiversum, the Netherlands.

11. In 2001, BWS acquired the assets, liabilities and business (termed undertaking), of an on-going establishment, the Water and Sewerage

Authority, WASA, by two agreements styled, Share Purchase Agreement, and Investment Agreement, both dated 23.3.2001. The former agreement was between the Government of Belize of the one part, and Cascal of the other. The latter was between the Government of the one part, and Cascal and BWS of the other. Several common facts were derived from the agreements and presented to the Court by counsel on both sides. Some of those facts were that the Government sold 82.68% shares to Cascal, and Cascal through BWS, invested in the business formerly carried on by WASA. Subsequently the parties entered an agreement styled, “Supplemental Agreement” dated 2.3.2003, to add to the terms of the two earlier agreements. The Supplemental Agreement was exhibited as evidence.

12. The three agreements together required, among other obligations, that Cascal through BWS supply water of certain quality, and provide water and sewerage services as a whole, at certain standard of customer satisfaction for 25 years in the major urban centres of Belize. The Government was required to ensure a minimum return of 12% per annum to shareholders, obtain unconditional loan of \$22 million from a commercial bank, and land for BWS, and to ensure that water and sewerage tariffs and other charges to be paid by consumers would be such that would enable BWS to meet its obligations under the agreements, in particular, to enable BWS to meet certain level of capital investment and certain codes of practice in providing services. The Government is not a party to this case, but its representative, the Attorney General, was served, as an interested party, with the case

papers. The Government may have considered that its interest in the case was sufficiently represented and protected by the respondent, the Public Utilities Commission, the PUC.

13. The PUC is a statutory entity established by the *Public Utilities Commission Act, Cap. 223, Laws of Belize*. It is a functionary of the Government, charged with licensing operations, and regulating activities of providers of public utilities such as water, electricity and telecommunications. Its authority includes monitoring the supply and quality of water and standards of water and sewerage services provided by licensed providers of water and sewerage services, which providers include BWS.

14. Pursuant to those duties PUC is authorised by *S: 7 of the Water Industry Act, No 1 of 2001*, to promulgate Byelaws which regulate activities of providers of water and sewerage services. Further, it is authorised by *S: 87* to promulgate Byelaws relating to: “(a) the methodology and process for the determination of tariffs, charges and fees to be charged for the provision of water and sewerage services by licensees; and (b) 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 calculations and assessment of penalties for the violations.” Section 7 in fact does cover, specifically at subsections (1) (d) and (e), those matters in S: 87 and several more. There is no apparent reason for the repetition.

15. ***The Actions of PUC Leading to the Complaints by BWS.***

On 22.3.2001, obviously in anticipation of the signing of the first two agreements the following day, PUC granted an exclusive licence to BWS, for providing water services and sewerage collection, treatment and disposal services. The licence was for 25 years, extendable for periods of 15 years at a time. The tariffs and charges prevailing were authorised for BWS to charge. They were based on the Water and Sewerage (Rates) Order, 1996, Water and Sewerage (Rates) (San Pedro) Order, 1997, and Water and Sewerage (Infrastructure Charges) Order, 2001.

16. Then in May 2002, PUC exercised its power under ***S: 87 of the Water Industry Act***, and made the ***Water and Sewerage (Tariffs) Byelaws, 2002, Statutory Instrument No 67 of 2002***. It came into effect on 31.5.2002. The Byelaws have not been impugned by the applicant. Byelaw 38 of the Byelaws, S.I. 67 of 2002, continued the prevailing tariffs and charges in the 1996 Order and the 1997 Order, for the period until 31.3.2004, referred to as “the transitional period”. For the period after 31.3.2004, byelaw 4 of the Byelaws provided that PUC would set tariffs for periods of five years at a time commencing 1.4.2004. It was under that byelaw 4, in particular, and generally under the Byelaws, S.I. 67 of 2002, that PUC acted and made its Final Decision now impugned. The powers in the Byelaws derived from ***S: 11 and 22 of the Public Utilities Commission Act***.

17. In the year 2003, PUC engaged in tariffs setting exercise for the first five

years due, 1.4.2004 to 31.3.2009, known as the First Full Tariff Period (FFTP) under Byelaws S.I. 67 of 2002. BWS was a *defacto* monopoly. It was consulted in great details and at great length. It recommended tariffs increase of 32%. In the process PUC engaged two consultants from Halcrow Water Services, a firm in the United Kingdom, to review tariffs and charges and make proposals. BWS recommended the firm to PUC. The consultants made a review, “based on a business plan and financial and tariffs models provided by BWS”, they said. At this stage, PUC was not required by law to engage experts. It chose to. The consultants “proposed ... a 15% tariffs increase...” on average. In Belize City the increase would be between 15% and 30%, and in San Pedro the increase would be 10%.

18. On 15.12.2003, PUC adopted the proposals by the consultants from Halcrow. It made a decision setting tariffs and charges for the First Full Tariff Period 1.4.2004, to 31.3.2009, in these words:

“The PUC has approved the following:

1. A revenue increase of 15% for the FFTRP (2004-2009), effective April 1, 2004.
2. A Tariff structure as contained in Appendix 1; and
3. A schedule of other charges as contained in Appendix 2”.

19. At this stage the decision is termed in *byelaw* 19, the “Initial Decision”. If no objection was raised against it, the Initial Decision would be confirmed

into a “Final Decision” by the PUC. That was not to be, BWS objected strongly. PUC proceeded as required under *byelaw* 22. On the recommendation of BWS, PUC appointed an independent expert, Dr. Richard Hern, “*to review the schedules and tariffs*” in the Initial Decision and “*to issue a written report on the adviseability of amending the schedules and tariffs and setting forth the amendments, if any*”. BWS was again consulted extensively.

20. Dr. Hern in his report dated February 26, 2004, reported adviseability of amending the schedules of charges and tariffs. His summary on page 2 of the report is as follows:

“A tariff structure and schedule of charges consistent with a revenue increase of 17% effective April 1, 2004.

In each year, starting April 1, 2005, the tariff structure and schedule of charges should be adjusted for inflation based on the Belize CRI Inflation Index for the prior year as published by IMF.

Within the First Full Tariff Period the tariffs and schedules of charges can be amended upwards or downwards at the start of each year to account for the impact on BWS’ costs of the following factors outside of BWS’ control: interest costs, customer complaint and customer services”.

21. On page 7 Dr. Hern recommended a tariff increase of 17%, which he said should not be applied equally across all the consumption bands. He supported his 17% increase by illustrating at table 6.2 on page 30 forecasts of revenue over 5 years when 17.2% tariffs increase is applied. The revenue forecasts were: \$26,072,000, \$27,083,000, \$29,891,000, \$31,183,000 and \$32,552,000. In his view the revenues were adequate to generate the 12% Regulated Rate of Return. In the same table Dr. Hern illustrated revenue forecasts when tariffs increases of 15% and 31.7% are applied. 15% was the rate recommended and adopted in the Initial Decision, 31.7% was the rate rounded to 32%, which BWS desired. On page 7 Dr. Hern advised that the adjustment for inflation be made, “in the form of an annualised tariff indexation mechanism”, but that BWS would submit the revised charges for approval by PUC annually. On pages 8 and 9 he advised that an annual price adjustment be made if there have been changes in the costs of electricity, costs of bad debts and costs of interest, (notified items), which have resulted in a change exceeding 5% of turnover, and that “focus be on changes between expected and actual costs that... could not have been avoided by prudent management action on the part of BWS”.
22. The above advices to amend, except the indexation of inflation, were incorporated in the Final Decision of PUC. Inflation was treated as one of the notified items.
23. About a request by BWS for “waiver or indemnity against all forms of criminal and civil prosecution that may arise as a consequence of not being

allowed the requisite level of capital expenditure [i.e. high enough tariffs and charges] to meet minimum standard of service”, Dr. Hern reported that it was “outside [his] jurisdiction”.

24. On 17.4.2004, PUC made the Final Decision now impugned. In the Decision PUC accepted *the advisability of amending the schedules of charges and tariffs* by dealing with most of the issues in the way proposed by Dr. Hern. Accordingly PUC amended its Initial Decision to the form set out above, known as the Final Decision. It authorised the Final Decision to take effect from 1.4.2004, which was retrospective to the date the Decision was made. BWS was not happy with the Final Decision, in particular, it still wanted tariffs increase of 32%, indexation of inflation and a detailed model of its business plan as amended by PUC.

25. Again on 12.6. 2004, PUC exercised its power under *S: 87 of the Water Industry Act* and published the *Water and Sewerage (Tariffs) (Amendments) Byelaws, 2004, Statutory Instrument No. 102 of 2004*. It directed that the Byelaws would come into effect on 1.4.2004, which again was retrospective to the date they were made. The Byelaws effected several amendments to the earlier Byelaws, S. I. No. 67 of 2002, identified above. The amendments reflected the Final Decision. BWS has complained about the amendments, it wants Byelaws, S.I. 102 of 2004, quashed altogether.

26. *Determination.*

It is not for the Court to determine whether the correct increase in tariffs and other charges is 32%, the increase proposed by BWS, or 17% or 15% recommended by experts or indeed any other percentage increase. It is also not the role of the Court to determine how best to deal with costs of inflation, costs of bad debts, costs due to rise in bank interest rates, capital expenditure and other financial and management issues. These are issues about which even Nobel Laureate professionals can disagree. The role of the Court is to decide whether or not the determination of the tariffs and other charges were made in accordance with the rules in Byelaws, S.I. 67 of 2002, the PUC Act, the Water Industry Act, and general principles of law, especially Administrative Law.

27. From reading the Water and Sewerage (Tariffs) Byelaws, 2002, together with the Supplemental Agreement, and taking into account common facts from the share purchase Agreement and the Investment Agreement, an impression is obtained that the Byelaws were made to suit the agreements between the Government and Cascad and BWS. Some parts of the Water Industry Act, No 1 of 2001, also give that impression. The commencement date of the Act was 9.2.2001, only 40 days before the first two agreements were signed. The Act, No. 1 of 2001, repealed an earlier *Water and Sewerage Act, Cap. 222 Laws of Belize*, but some of its provisions were adopted in the new Act. Because the agreements, the Byelaws and the Water Industry Act have several similar provisions, I have to mention that no terms of the agreements, which terms have not been included in the Act or Byelaws have been taken into consideration in deciding this case.

Whether or not any of the parties have complied with any terms of the agreements is not an issue in this case. That would have to be raised as a separate case.

28. In this case, I am concerned, so far as the first order sought is concerned, with whether the Final Decision of the PUC set out above was illegal, measured against the PUC Act, the Water Industry Act, the Byelaws, S.I. 67 of 2002, and principles of Public Law - Administrative Law. So far as the second order sought is concerned, I am concerned with whether when Byelaws S.I. 102 of 2004, were promulgated the procedural requirements of consultation under the Water Industry Act had been complied with, and whether the Byelaws were bad because they were applied retrospectively or because the amendments effected by the Byelaws were unlawful.
29. *The Water and Sewerage (Tariffs) Byelaws, S.I. No. 102 of 2004.*

PUC has conceded that it overlooked the requirements for consultation with BWS before it promulgated the Water and Sewerage (Tariffs) Byelaws, S.I. 102 of 2004. The requirements are in *S: 87(1) of the Water Industry Act*. It is stated therein that, “*PUC shall, in consultation with licensees and with the Minister’s approval, make byelaws ...*” It was, however, submitted by Mr. F. Lumor S.C., learned counsel for PUC, that the omission may be excused because the amendments and additions introduced by the Byelaws, S. I. 102 of 2004, to the principal Byelaws were about matters already discussed with BWS and decisions had been taken about them, the amendments were, Mr.

Lumor argued, mere formalities. About the amendment in byelaw 25(2) of the Byelaws S.I. 67 of 2002, Mr. Lumor submitted that the amendment was consistent with the parent Act, the PUC Act.

30. From the evidence as a whole, I have no doubt that the subject matters of Byelaws, S.I. 102 of 2004, had been discussed between PUC and BWS several times. It is nonetheless, a requirement that once the PUC decided to formalise them into Byelaws, it had a duty under *S: 87 of the Water Industry Act*, to consult with BWS. The duty to consult was a duty to inform BWS clearly of PUC's intention and invite BWS' view. The duty extended to PUC considering BWS' views, if any, before PUC made a decision, even if in the end PUC were to decline to include BWS's views in the Final Decision. For the meaning of consultation see *R v Secretary of State for Social Services ex parte, Association of Metropolitan Authorities [1986] 1 ALL ER 164*, *R v North and East Devon Health Authority ex parte Conghan [2000] 2 WLR 661*, judgment of Lord Woolf, and also *R v Secretary of State for Education etc ex parte National Union of Teachers 2000 WL 976099*, the cases cited by Mr. M. Young SC, learned counsel for BWS. Then following a decision by PUC, approval by the Minister had to be sought.
31. The evidence is that PUC failed to consult BWS although it obtained approval by the Minister. The result is that the Water and Sewerage (Tariffs) Byelaws, Statutory Instrument No. 102 of 2004, was made irregularly. The question then arises: Whether the Court may quash the

Byelaws on that ground? It is convenient to consider the question together with the question: Whether the Final Decision may be quashed? PUC also directed that the Byelaws take effect retrospectively. Again the question arises: Whether the Court may quash the Byelaws on that ground? The questions are answered later.

32. The complaint that PUC unlawfully amended byelaws 25(2) of Byelaws 67 of 2002, after its Decision so as to give it discretion retrospectively to choose whether or not to adopt the report of the independent expert, is really of no consequence as to the validity of the amending Byelaws, S.I. 102 of 2004. If the particular amendment were unlawful, it could be severed from the rest of the Byelaws without quashing the entire Byelaws, S.I. 102 of 2004. I do not however, accept that the amendment of byelaw 25(2) was unlawful. In my view, the use of the word “shall” in byelaw 25(2) before it was amended could not be construed to cause PUC to abandon or lose its authority and discretion to make the Final Decision, to the independent expert. The authority and discretion were created by *S: 22(1)(b) of the PUC Act*, the parent legislation, the authority and discretion cannot be cancelled by a delegated legislation, notwithstanding the use of the word “shall”. The amendment only confirmed this view and clarified the byelaw.
33. The Final Decision was made under byelaw 25(2) of Byelaws, S.I. 67 of 2002, before it was amended. I would disregard the back-dating of the amending Byelaws, S.I. 102 of 2004.

34. *The Final Decision.*

It is obvious that any error of mathematical computation, in the Final Decision, should not concern the Court. That is a matter which can be verified mathematically without recourse to Court.

35. The complaint that the Final Decision was made by an unfair procedure, BWS was not given opportunity to be heard, that is, to present its case, cannot be sustained on the evidence. No doubt BWS had legitimate expectation, huge expectation, the entire exercise was about tariffs and charges only in its business. BWS is a monopoly in urban centres for 25 years. The evidence, however, abounds with instances when BWS was given opportunity to be heard and was allowed to actively participate in the decision making process except in the last word. In, *the Council of Civil Service Union v The Minister for the Civil Service [1985] AC 374*, one of the cases cited by Mr. Young, there had been no consultation at all before the Minister issued a circular varying the terms and conditions of service that the employees would no longer be permitted to belong to national trade unions. BWS' case is distinguishable.

36. The complaint that the Final Decision was illegal because it did not adopt "a number of determinations made by the independent expert" contrary to the requirement in byelaws 25(2) of Byelaws S.I. 67 of 2002, was like a double edged sword, I would have thought. For example, take BWS' argument that the expert, "determined ... that the tariffs be increased by 17.2% (17% in

final assessment), but the Final Decision instead provided for revenue increase of 17%..., the difference is significant...” The determination of 17% increase in tariffs and charges is in fact far away from BWS’ case for an increase of 32% in tariffs and charges. Adopting the amendment by the expert to 17% increase in tariffs and charges would still leave BWS complaining.

37. Moreover, the suggested difference between 17% increase in tariffs and 17% increase in revenue, said to be significant, was not illustrated by figures or at all, for the Court to see whether 17% increase in tariffs and charges does not result in 17% increase in revenue. The independent expert illustrated his choice of 17% increase with figures of expected revenue. His evidence is more persuasive.
38. As regards the general principle of law, there is no absolute rule that a decision maker must not depart from a determination of an expert. The case, *Northen Ireland Electricity’s Application for Judicial Review 1998 NI 300*, actually made the point that the decision maker must have valid reasons for departing from a determination of an expert. I agree, but it also largely depends on the statutory law authorising or requiring the appointment of the expert. In this case, I do not accept that PUC had obligation to adopt all the recommendations by the independent expert. There is good reason why court is not always obliged to adopt recommendation of an expert. For instance in this case, two experts settled on 15% increase, the other picked 15% increase.

39. It is also my view that the PUC was not required to give reasons for its Final Decision. *Byelaws S.I. 67 of 2002*, do not require that reasons be given. The case, *Gaming Board for Great Britain ex parte Benaim and Khaida [1970] 2 QB 417*, is an example of when the decision maker is not required to give reason. The requirement in this case was for PUC to act fairly, that is, to afford BWS a hearing before PUC made a decision. That included giving BWS sufficient material to enable it to present its case. That was done. There is a lot of evidence about discussions of issues between the independent expert and BWS.
40. On the evidence, however, I concluded that PUC actually gave reasons for the Final Decision. Examples are exhibits GC3 and GC6 to the second affidavit of Dr. Gilbert Canton, which exhibits supplied the technical reasons including illustrations by figures. They were sent to BWS in response to inquiry it had made. It is also my view that where PUC adopted the recommendation by the independent expert, the reason given by the expert were available. That BWS disagreed with the reasons does not make them no reasons. Moreover, PUC was, as a matter of law in *SS: 8 and 87 (2) (b) of the Water Industry Act, SS: 11 and 22 of the PUC Act and Schedule 1 of S.I. 67 of 2002*, also obligated to ensure that tariffs, charges and prices are reasonable and affordable. PUC mentioned those reasons as early as in the Initial Decision and repeated them among other reasons, in the Final Decision in the opening paragraph headed, “Legal Framework”.

41. Note that the independent expert was appointed, and could only be appointed under byelaw 22, “*to review the schedules and tariffs*”, and was required to “*report on the adviseability of amending the schedules and tariffs and setting forth the proposed amendments, if any*”. He was not to make a complete new determination. It is my view that where the independent expert did not advise amendment, the PUC was entitled, even required, to confirm that part of the Initial Decision that the independent expert did not amend, it could not decide that part anew unless it was necessary for consistency with amendment effected by the expert and PUC has accepted the amendment.
42. It is my decision that on the facts of this case and on the law applicable, PUC was entitled to depart from some items in the report of the independent expert, about “*the adviseability of amending the schedules and tariffs*” for good reasons, especially for reasons of affordability and reasonableness which included ensuring that BWS could pay the costs of providing services at the standard set, and PUC was not required to give reasons for its Final Decision although it gave reasons.
43. The complaint that the Final Decision did not meet the requirements of **SS: 6 and 8 of the Water Industry Act** that PUC must set tariffs and charges that will ensure: (1) that BWS will be able to pay the costs of providing the services; and (2) that the regulated rate of return of 12% per annum over 25 years is attained, have simply not been proved at all, let alone on a balance of probabilities. The affidavit of Mr. Martin Roy Greenhalgh, the General

Manager, a well qualified and experienced person, but not necessarily an expert in the assessment of tariffs and charges, stood against two reports made by three persons accepted as experts. The assessments by the experts illustrated forecasts of revenue figures generated by increases in tariffs of 15% in the report of two consultants, and of 17.2% in the report of the independent expert, compared to revenue figures generated by an increase of 31.7% proposed by BWS, over five years. The experts concluded that it was possible with tariffs increase of 15% or 17%, to pay costs of services at the required standard and to attain 12% annual return for each of the 25 years by, for instance, spreading out over several years, costs of capital investment and excluding capital expenditure in two suburbs of Belize City. BWS has not demonstrated to a standard of a balance of probabilities, that the forecasts were wrong. It is for BWS to prove its claim with better evidence.

44. The ground that the Final Decision was unlawful and not a decision because the procedures required by statutory law were not followed was strongly contested. It is appropriate to start determination of the issue by quoting SS: 11 and 22 of the PUC Act, under which PUC has been given power to set tariffs and charges for water and sewerage services. The relevant parts are SS:; 11(1), 22(1) and (2) as follows:

“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 methodologies specified in any Regulations, Byelaws, Orders, directions or other subsidiary

legislations or administrative orders made under ... the Water Industry Act or any licence authorising the provision of such services.

...

22.(1) It shall be the duty of the Commission to ensure that the services rendered by a public utility undertaker ... are satisfactory and that the charges imposed in respect of those services are reasonable, and for this purpose, notwithstanding anything to the contrary in any law, the Commission shall have the power -

- (a) to enquire into the nature and extent of utility services and to determine and prescribe in accordance with the provisions of this Act...[and the Water Industry Act] and other subsidiary legislations made under these Acts, the standard which must be maintained in relation to such services;*
- (b) to determine and prescribe in accordance with the provisions of this Act... and the Water Industry Act and other subsidiary legislations made under these Acts, the rates which may be charged in respect of utility services.*

(2) 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 authorised by their licences to carry on;*
- (c) protect the interest of consumers in respect of -*
 - (c) the tariffs charged and other terms of supply;*
 - (d) the continuity of supply; and*
 - (e) the quality of the utility services supplied;*
- (d) promote efficiency and economy on the part of persons authorised by licences to supply utility services to consumers;”.*

...

45. In addition to these provisions in the PUC Act, Byelaws, S.I. 67 of 2002, provide in great details, *“the mechanisms, formulas and procedures”* for calculating and determining tariffs and charges. Those that are directly to the point are set out as follows:

“3. These Byelaws shall govern the Tariffs which may be charged by a licensee for the supply of water and sewerage services to consumers in Belize, and the mechanisms, formulas, and procedures whereby such Tariffs shall be calculated and

determined for all purposes.

2. (1) *The methodology for the calculation of the water and sewerage Tariffs shall be that of the Regulatory Model as amended by the PUC from time to time.*

(1) *The PUC shall determine Tariffs for a Full Tariff Period in a Full Tariff Review Proceedings as described in Part III and based on:*

(a) *a Business Plan submitted by the licensee and approved by the PUC; and*

(b) *the Regulated Rate of Return in Schedule 1.*

(2) *The Tariffs determined through the Regulatory Model may be adjusted between Full Tariff Review Periods during an Interim Review Proceedings as provided for in Part IV of these Byelaws.*

13. (1) *During a Full tariff review Proceeding, the Business Plan shall be reviewed, amended (if necessary), and approved by the PUC who shall determine the applicable Tariffs for the next five-year tariff period (the Full Tariff Period).*

(2) *During the first Full Tariff Review Proceeding, the PUC shall approve the first Business Plan and determine the Tariffs for the*

First Full Tariff Period.

(3) Subsequent Full Tariff Periods shall commence and terminate, respectively, on the fifth anniversary of the commencement and termination of the previous Full Tariff Period.

14.(1) The Business Plan and The Tariffs for the Full Tariff Period shall be based on and be in harmony with the Regulatory Model and the Regulated Rate of Return which will include forecasts of the cost of providing water supply and sewerage services in Belize.

27 The PUC shall, on the request of the licensee or of its own volition, and on the basis of Exceptional Circumstances, hold an Annual Review Proceeding to ensure that the Tariffs to be charged by the licensee during the Annual tariff Period accurately reflect and give effect to the approved Business Plan and the Regulated Rate of Return.”

46. BWS contended that in determining tariffs and charges PUC did not use the Regulatory Model as the method of calculating tariffs, as required under byelaw 4(1) and 14(1) of Byelaws S.I. 67 of 2002, and PUC did not base its calculation on the Regulated Rate of Return, (12% annual dividend), as required under byelaws 4(2)(b) and 14(1).

47. The evidence, including that in the affidavits for BWS, actually proves the

contrary. Regulatory Model is defined as “*the model of the licensee’s business*”. So the method of calculation was to use the model of the business of the licensee. BWS’ evidence is that it gave the model of its business to PUC for the purpose of calculating tariffs and charges. The consultants and the independent expert stated in their reports that they used the model of BWS’ business. The independent expert in paragraph 1 of his report confirmed receipt of Business Plan and Financial Model from BWS. In paragraph 6 he stated that he took into account the “evidence.. regarding the key inputs into the regulatory model”. From these items alone, there is no doubt that the Regulatory Model, which is the model of the licensee’s business was used.

48. I suspect that the straight forward complaint by BWS was really that BWS was not given back the amended and approved copy of its business plan(the Regulatory Model), in electronic form, before the Final Decision was publicised so BWS was not able to check the calculations and possibly make further representation to PUC. BWS admitted that it received a hard copy of the Regulatory Model. I have to reject the contention that PUC did not apply the Regulatory Model in calculating the tariffs and charges.
49. That the calculations to set tariffs and charges were not based on the Regulated Rate of Return (12% annual dividend), was also not supported by evidence. The independent expert actually applied it in his table of figures illustration.

50. The submission, presented under 20 heads of argument, about irrationality in the reasoning process of the independent expert and therefore of the PUC, had only one merited point, namely, that PUC directed that the Codes of Practice were to come into effect retrospectively, that is, earlier than the date when the Decision was made, which meant that BWS would be liable under the Codes even before BWS knew the Codes. I straight away say that to that extent, the Final Decision is bad. I note, however, that there has not been evidence that BWS had been penalised or called upon to answer for past “breach” of the Codes. I do not expect it will.
51. It was argued that cutting or postponing some capital expenditures, and making forecasts based on increase in consumption were instances of irrationality. I say not so. PUC indeed accepted recommendations that certain expenditures for example, capital expenditure be omitted or spread over longer period. That is the sort of choice the expert and PUC could legitimately make based on their expertise. Some other professionals might have made different or the same choice. Whether the independent expert and PUC made the wrong choices and conclusions is a question on which Economists, business consultants, accountants and managers may differ. It is not the role of the Court to choose which view and conclusion is correct.
52. It was mentioned, but not pressed, that the Final Decision was applied retrospectively from 1.4.2004, a date before it was made on 17.4.2004. If by that it was meant to submit that the Decision was unlawful because of its retrospective application, then I reject the submission. Under Byelaws S.I.

67 of 2002, PUC is required to determine tariffs for periods of 5 years at a time for the 25 years of the licence of BWS. The first 5 year period, known as the “First Full Tariff Period” was stipulated to commence on 1.4.2004, and end on, 31.3.2009. That the Final Decision was finalised and made after 1.4.2004, could not change the stipulation in the Byelaws that the first tariffs and charges would apply to the First Full Tariff Period, 1.4.2004 to 31.3.2004. There has been no retrospectivity, as a matter of law, in the application of the Final Decision.

53. My determination of the grounds upon which the Final Decision has been impugned are as follows:

53.1 The Final Decision of the PUC dated, 17.4.2004, regarding setting of tariffs and schedules of charges for water and sewerage services for the First Full Tariff Period, 1.4.2004 to 31.3.2004:

53.1.1 is not illegal as to the contents, except to the extent that it applied the Codes of Practice regarding customer service, disconnection service, and leakage service, earlier than the date the Codes were made known to BWS;

53.1.2 is not illegal as to failure to use statutory method and bases (considerations) set out in the Water Industry

Act and the Water and Sewerage (Tariffs) Byelaws,
S.I. 67 of 2002;

53.1.3 is not illegal as regards procedural irregularity according
to general principles of law; and

53.1.4 is not illegal as to irrationality in the reasons or reasoning
process.

54. The Court refuses to issue an *order of certiorari* to quash the Final Decision dated, 17.4.2004, except to the limited extent that the Decision about the date when the Codes of Practice was to take effect (not about the contents) is removed and quashed.
55. I have determined earlier that the Water and Sewerage (Tariffs) Byelaws, S.I. 102 of 2004, was made irregularly because PUC failed to consult BWS before PUC made the Byelaws. I would grant a declaratory order accordingly.
56. The question that I postponed must now be determined. Is it appropriate that the Court grants an order of *certiorari* to quash the Byelaws? The question is one of the discretion of Court. Some of the factors that courts take into account in deciding whether or not to exercise the discretion to quash administrative decision (in this case, the Byelaws), is the practical consequence to the applicant, and to the public.

57. The first consideration is whether the Byelaws have any effect on the Final Decision. I do not think that quashing the Water and Sewerage (Tariffs) Byelaws S.I. 102 of 2004, will invalidate the Final Decision. The point was not raised in the submissions rather, the point was raised that if the Decision was quashed, the Byelaws had to be quashed. As the Final Decision will not be affected, it will serve no purpose to quash the Byelaws. It is inconceivable anyway, that if the Byelaws are quashed, the PUC will ignore the points of advice by the independent expert, even upon consultation with BWS, and make Byelaws that will be different.
58. If I am wrong, then the effect of quashing the Byelaws would be to restore the tariffs and charges applied during the “transitional period” which were the tariffs and charges authorised in the Water and Sewerage (Rates) Order, 1996, and the Water and Sewerage (Rates)(San Pedro) Order 1997- see byelaw 38 of Byelaws S.I. 67 of 2002. Those tariffs and charges have been increased by the Final Decision on 17.4.2004, published in Byelaws S.I. 102 of 2004. BWS has acted on the Decision already, to the extent that BWS’ revenue increased by 17%. Reverting to the tariffs and charges applied during the transitional period would result in immediate plunge in BWS’ revenue. That is not desirable. Moreover, when this case was in Court BWS applied to PUC for annual review based on changes in notified items. The question was referred to this Court as to whether annual review of the Decision under challenge could be carried out. The Court answered in the positive. I expect that the review may be underway. That would be a

complication to take account of. The consequence to the public of quashing the Final Decision and the Byelaws; would be a very short period of rejoicing before the public is presented with even higher bills than it now receives. PUC will have to authorise high tariffs that will ensure that the regulated 12% rate of return is attained over each of the 25 years of the licence of BWS.

59. I have looked at the judgment in the case of *R v Tandridge District Council, ex parte, Al Fayed [1999] 1 PLR 104*. In the case, the court found that the objection of the applicant to an application for permission to erect a radio telephone mast, on the ground of health risk posed by the antennae mast was improperly excluded from the consideration of the Council respondent who granted the permission. The court, however, declined to quash the decision of the respondent because had the content of the applicant's objection been properly taken into consideration, the decision of the respondent would have been the same, the respondent would have granted the permission. That was because the result of subsequent assessment based on the material supplied by the applicant was that there was no health risk. The judgment persuaded me. I think the same situation exists in this case. If PUC consulted BWS there would have been nothing new that BWS would have furnished for consideration, which BWS had not furnished to the independent expert, some of whose recommendations PUC accepted and acted on. The sort of material BWS has raised to this Court are matters on which PUC is entitled to take different views.

60. I also considered the judgment in, *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities [1986] 1 ALL ER 164*. In the case, it was found that the Secretary of State failed to properly consult the applicant before making new Regulations setting up a housing benefit scheme. A declaration to that effect was made. However, the Regulations were not quashed because they were already in operation. They were meant to stamp out as soon as possible, improper claims which were estimated at 200 million pounds in a year. The judgement also persuaded me.
61. It is my decision that the proper order would be to declare the Water and Sewerage (Tariffs) Byelaws, S. I. 102 of 2004, irregular, but to refuse the order of *certiorari* to quash them. I would order so.
62. The final result is that the application by BWS dated, 7.10.2004, asking for *certiorari* orders to quash the Final Decision dated, 17.4.2004, of the PUC, and the Water and Sewerage Byelaws, S.I. No. 102 of 2004, is dismissed with costs to be paid by BWS to PUC.
63. ***Observation.***
- The practical difficulty in the choice of tariffs and charges that PUC has to make revealed by this case arises because byelaws 4(1) and 14(1) of Byelaws, S.I. 67 of 2002, obligate PUC to apply a formula and feed into that formula certain factors such as, 12% rate of return and others, and on the other hand, PUC is obligated under S: 8(1)(d) of the Water Industry Act, and S: 22 of the Public Utilities Commission Act, to protect the interest of

consumers by ensuring that tariffs and charges are reasonable and affordable. The two statutory obligations of PUC cannot work in harmony all the time. A formula with fixed input is a mathematical device, its result may or may not produce reasonable affordable tariffs and charges. If PUC does not apply the set formula, it renders itself liable to a challenge under byelaws 4(1) and(2) and 14 of Byelaws, S.I. 67 of 2002. If PUC applies the formula and ignores reasonableness and affordability, it renders itself liable to challenge under S: 8(1)(d) of The Water Industry Act, and S: 22 of the Public Utilities Commission Act.

64. Pronounced this Monday the 4th day of April, 2005.

At the Supreme Court,

Belize City.

Sam Lungole Awich

Judge

Supreme Court