In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 97

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 96 OF THE REGULATORY AUTHORITY ACT 2011

AND IN THE MATTER OF THE ELECTRICITY ACT 2016

AND IN THE MATTER OF THE REGULATORY AUTHORITY (RETAIL TARIFF METHODOLOGY) GENERAL DETERMINATION 2018

AND IN THE MATTER OF THE FINAL DECISION AND ORDERS TITLED (1) RETAIL TARIFF REVIEW – ALLOWED REVENUE DECISION & ORDER AND (2) RETAIL TARIFF REVIEW – RETAIL TARIFF DECISIONS AND ORDER

BETWEEN

BERMUDA ELECTRIC LIGHT COMPANY LIMITED

APPELLANT

AND

THE REGULATORY AUTHORITY OF BERMUDA

RESPONDENT

JUDGMENT

Appeal from a decision of a regulatory authority, Appeal involving questions of pure law or mixed fact and law, Statutory interpretation, Whether failure to explain reasons, Transparency, Reliance on expert evidence in a highly technical field, Deference to the decision-maker, Whether a decision was plainly wrong, Whether a process was fair or oppressive, Consequences of a breach

Date of Hearing: **9, 10, 11 May, 28 August 2023**
Date of Judgment: **22 February 2024**

Appearances: **Francis Tregear KC, Kyle Masters, Carey Olsen Bermuda Limited, for Appellant**

Mark Diel, Ronald Myers, Adam Richards, Marshall, Diel & Myers for Respondent

JUDGMENT of Mussenden CJ

Introduction

1. The Appellant, the Bermuda Electric Light Company ("**BELCO**"), is incorporated in Bermuda and supplies Bermuda with electricity. Since 9 November 2020, BELCO has been a subsidiary, indirectly, of Algonquin Power & Utilities Corp. domiciled in Ontario ("**Algonquin**"). Algonquin is a major company which is quoted on the Toronto and New York Stock Exchanges and indirectly owns a very large number of utilities which are principally domiciled in the US and Canada. Before 9 November 2020, BELCO's immediate parent, Liberty Group Limited, formerly named Ascendant Group Limited, was listed on the Bermuda Stock Exchange.

2. The Respondent is the Regulatory Authority ("**RA**") for Bermuda whose powers and functions are derived from the Regulatory Authority Act 2011 (the "**RAA**").

The Appeal

3. In this appeal, BELCO seeks, pursuant to section 96 of the RAA, to set aside and remit for further consideration and determination the following Decisions and Orders made by the RA in March 2022:
    a. Retail Tariff Review – Allowed Revenue Decision & Order No. 20220318 dated 18 March 2022 (the "**Decision**"); and

b. Retail Tariff Review – Retail Tariffs Decision & Order No. 20220324 dated 24 March 2022 (the "**Tariff Decision**").

4. The gravamen of BELCO's appeal is that BELCO applied for Allowed Revenue of $236,045,140 ($236.05m) and a rate of return of 8.96%. Under the Decision, BELCO was only permitted to collect a total of $224,055,622 for the period of 1 January – 31 December 2022 at a weighted average rate of return of 7.16%.

The Grounds of Appeal

5. Grounds of Appeal 1, 2 and 4 relate to the RA's failure properly to set the Return on Equity and the Rate of Return (i.e. the Weighted Average Cost of Capital ("**WACC**")). BELCO's case is that the RA's decision on these topics failed to conform to the tests in section 35(2) of the Electricity Act 2016 (the "**EA**") which require the rate of return to be commensurate with the return on investments of businesses with comparable risks and that is sufficient to attract needed capital.

6. Grounds of Appeal 3 and 5 relate to the RA's disallowance from recovery of expenses incurred by BELCO in providing services to customers. In part, the RA purported to implement the capital expenditure incentive mechanism ("**CAPEX**") provided for in the GD, without carrying out any or any proper analysis of whether the investments were prudently incurred. The purported implementation of the CAPEX was inconsistent with section 35(2).

7. Ground of Appeal 6 is based on the failure of the Decision to explain the RA's reasons for the Decision on several points. Thus it was symptomatic of a process that was opaque, lacked transparency and the reasoning of which was inadequately explained. Information provided by BELCO was not properly considered and the RA refused to engage with BELCO in its decision-making process in a way that enabled it to discuss the information it provided and understand how the RA intended to treat it.

8. Grounds of Appeal 7 and 8 relate to procedural unfairness in the rate setting process conducted by the RA which included the failure to give BELCO the chance to respond to it before the Decision was made, the failure to give BELCO sufficient time or opportunity to present information and the failure to enable the RA to give proper consideration to the information presented to it.

9. BELCO submits that none of the matters complained of could possibly have happened if the rate setting process had taken proper account of the terms of section 35 and, in particular, section 35(2) of the EA, and had been properly conducted as well as being properly documented in the administrative record of the RA. BELCO asserts that if this approach to rate setting were to become the norm, that would isolate Bermuda from the cohort of nations that have and attract investment on the basis of a predictable and stable regulatory system. That would lead to capital being harder to attract to the detriment of electricity consumers and the wider Bermuda economy. Further, BELCO assert that the effect of the Decision was to determine and limit the revenue recoverable by BELCO in respect of its operating expenses ("**OPEX**") and its CAPEX for the years 2022 and 2023. The effect of the Tariff Decision was to set the tariffs chargeable by BELCO to its various categories of customers.

The Law on Appeals

10. Section 96 of the RAA provides in relevant part:

> *"Appeals to the Supreme Court*
> *(1) Any person aggrieved by a final Authority action may appeal on that account to the Supreme Court.*
> *(2) Except as provided in subsection (3), any appeal shall be limited to points of law or mixed fact and law."*

11. In my view, in order to succeed, BELCO must establish that, in making the Decision and the Tariff Decision, the RA has made an error on a point of law or mixed fact and law. As I understand it, in the circumstances of this case, it is the Decision which is the subject of

BELCO's complaint and that the error of law made by the RA in respect of the Decision flows into the Tariff Decision which carried the Decision into effect by determining what BELCO can charge its customers.

12. In *Bermuda Telephone Company Limited v Minister of Telecommunications and E-Commerce* [2008] Bda L.R. 58, Ground CJ considered the standard of review when he observed that the extent of appellate review was restricted to points of law or mixed fact and law:

> *"14. In the case of appeals under the Act, the extent of appellate review is further restricted by section 60(1) to points of law or mixed fact and law. The latter expression, though well understood in the context of judicial review, is not a common expression to find in statutory provisions in this jurisdiction. It seems, however, that it is more frequently used in Canadian statutes, and the Canadian Supreme Court has explained it as follows:*
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> > *"It is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal." Housen v Nikolaisen [2002] 2 SCR 235 at para. 24.*
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> *15. I do not think it particularly necessary to belabour this. I accept the appellant's submission that the proper approach on an appeal such as this is:*
> *". . . not the same as a judicial review but engages the merits of the decision . . . [it] is an appellate style review, but [one] where the Court is prevented from questioning pure factual findings. It can review the commission's conclusions (namely that the rate was just and reasonable). In that review, the Court should give due deference to the original decision maker and only intervene if the decision is plainly wrong.""*

13. In respect of giving deference, it was submitted by BELCO that giving deference to a decision of the RA did not involve overlooking serious flaws in the decision-making process. Further, deference was a starting point to the review process, but it does not provide a defence to a decision or a decision-making process that is wrong as a matter of law or procedurally unfair.
14. In respect of an appeal on a point of law or mixed fact and law under section 96 of the RAA, in *Bermuda Digital Communications Ltd v Regulatory Authority* [2015] SC (Bda) 18 App (9 March 2015) the Chief Justice observed at paragraph 11.i that the restriction

manifested "… *a legislative intent that this Court should give deference to the primary factual and/or policy findings of the Authority"*.

15. In *Telecommunications Networks Ltd v Regulatory Authority of Bermuda* [2016] Bda LR 107 the Chief Justice observed at paragraphs 6 and 28 respectively that:

> *"… the scheme of the Act is clearly to allow the merits policy and technical judgments to be made by the regulatory body (and the Minister)."*
> *"The right of access to the Court is expressly restricted with a view to affording deference to the policy and technical judgments of the Authority. It seems self-evident that these restrictions serve a legitimate public policy goal of achieving expert adjudication in a highly technical field in which the public interest requires speed of action in a fast moving segment of the private sector economy. Mr. Potts helpfully referred the Court to the observations of Ground CJ in Bermuda Telephone Company Limited v The Minister of Telecommunications and Commerce [2008] Bda LR 58 at paragraphs 14 and 15, which are relevant in the present regard:*
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> > *"… the extent of appellate review is restricted … to points of law or mixed fact and law … the Court should give due deference to the original decision maker and only intervene if the decision is plainly wrong.""*

16. In reference to the principle of deference in cases involving statutory regulators, the Courts and others have opined as follows:

    a. In *Judicial Review, "The Discretion Afforded to Statutory Regulators in Public Law*", [2013] JR 116 at page 21 by Christopher Knight it was stated "*The themes of the case law … are clear and consistent: statutory regulators are to be given a wide margin of appreciation and a safe space in which to act. The courts will, ordinarily, adopt a hands-off approach to interfering with regulatory discretion, even to the extent of allowing a regulator to decline to take action against persons it considers to be acting unlawfully, and to make their own mistakes."*

    b. In *State of Mauritius v CT Power* [2019] UKPC 27 at paragraph 47 the Privy Council stated the statutory regulator has *"... a wide margin of appreciation in making the complex evaluative judgment required."*

    c. In *Regina (Lord Carlile of Berriew and others) v Secretary of State for the Home Department* [2015] AC 945 at paragraph 32, Lord Sumption of the UK Supreme Court held that, even where fundamental rights considerations are in play, the deferential approach based on the comparative institutional competence of the expert regulator and the Court, applies.

d. In *R v Social Fund Inspector, ex p Ali* (1994) 6 Admin LR 205 at 210E, the Court stated "… *when Parliament entrusts an expert body of people … with the task of fulfilling the intentions of Parliament in a specialist sphere, the Court should be very slow to interfere*".

e. In *R (Swire) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin) at paragraph 61 the Court stated "*Where a … decision is based on the opinion of experts, which is relevant and informed, the decision-maker is entitled to rely upon their advice … Where a statutory regulator makes a decision based upon an evaluation of scientific, technical and predictive assessments, the Court should afford the decision-maker an enhanced margin of appreciation*".

17. In respect of the addition of the word "plainly", it was submitted by BELCO that that was acceptable only so long as it was appreciated that for the purpose of an appeal under section 96 of the RAA a decision cannot be "slightly" wrong. In a statutory appeal in England governed by the Medical Act 1983 and CPR 52.21, pursuant to which a decision will be set aside if it is wrong or unjust because of a serious procedural or other irregularity, the English Administrative Court in *General Medical Council v Jagjivan* [2017] 1 WLR 4438 considered that it was not appropriate to add any qualification to the Part 52.21 test such as "clearly wrong". Thus, it would be equally inappropriate to add the qualification "plainly" if that created a hierarchy of wrongness in which only plainly wrong decisions would be liable to be set aside.

18. BELCO submitted that it would be consistent with the *Bermuda Telephone Company* case for the Court to remit the Decision if the Court considers that it was wrong.

19. In this appellate process under section 96, the question before the Court is ultimately the same as judicial review proceedings, namely, is the decision wrong or was the decision arrived at following a process which involved a serious procedural or other irregularity. The principles in judicial review cases as to whether a pubic body has made a decision that is wrong is relevant to the question of whether the Decision is wrong. Courts will review an exercise of power to ensure that the decision maker:

a. has not made an error of law;
b. has considered only relevant factors, and not taken into account any irrelevant factors; and
c. has observed statutory procedural requirements and the common law principles of natural justice and procedural fairness.

20. These principles were summarised by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Services* as *"illegality, irrationality procedural impropriety".*

21. In *De Smith's Judicial Review (8th Ed.)* it stated as follows:

> *"5-132 When exercising a discretionary power a decision-maker may take into account the range of lawful considerations. Some of these as specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised."*

22. An administrative decision is accordingly unlawful under the head of "illegality" if the decision-maker:
    a. misinterprets a legal instrument relevant to the function being performed;
    b. takes into account irrelevant considerations or fails to take account of relevant considerations.

23. The task for the Court in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power on the decision-maker. In the present case, the legal instruments are: (i) the EA; (ii) the RAA; and (iii) the Regulatory Authority (Retail Tariff Methodology) General Determination 2018 (the "**GD**"), further described below. The hierarchy is that the GD is subordinate to the provisions of the EA and the RAA and in the case of conflict between the GD and the EA, the provisions of the EA prevail.

24. In *Council of Civil Service Unions* at page 410, Lord Diplock observed that "*the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*" Although the Court will approach the RA's Decision with an appropriate level of deference, it will bear in mind what was said in *R (on the application of Unison) v Monitor* [2009] EWHC 3221 (Admin) at [60] "*while respect must be accorded to agencies entrusted by Parliament with the task of administering legislation, it would not be conformable with the rule of law for them to be given free rein, subject only to an irrationality challenge, to interpret legislation in whatever manner they wished."*

25. The objective of procedural fairness is to ensure that the relevant decision is to provide those affected by the decision with a fair opportunity to influence the outcome of the decision so as to ensure its integrity. It deals with aspects of the decision-making process such as requirements to consult, to hear representations, to hold hearings if necessary and to give reasons for decisions. To that point, BELCO's position is that in this case, the RA could have approached the setting of the rate by means of an adjudication process which would have addressed many of the issues which arise in this case. It chose, however, to set the rate by an informal process of making information requests and then processing information without giving BELCO a proper opportunity to address the information it provided or the RA's understanding and response to information.

26. In this case, there is considerable technical material that was produced by BELCO and submitted for consideration by the RA. Thus, I am cognizant of what the Court stated in *Ross v Secretary of State for Transport* [2020] EWHC 226 (Admin) [2020] PTSR 799 at [77] as follows:

> *"In light of these authorities, in my view the position in relation to Wednesbury based challenges to the legality of decisions which have been informed or influenced by scientific or technical matter is well settled. The approach is based upon the fundamental principle that the court is not retaking the decision: it is not equipped procedurally or substantively to do so. Whilst the court will not abandon all curiosity as to how the decision has been reached, and can (as was emphasised in Mott) expect that the decision taker will provide a full and accurate explanation of the facts and scientific analysis relevant to the decision, nevertheless it is not the role of the court to embark on its own technical appraisal of the issues. The courts must recognise and respect the expertise which has been brought to bear in reaching the decision, and*

appreciate that there may be more than one scientific view of an issue, as well as more than one way of modelling or forecasting an impact or effect. A decision-taker is entitled to give particular weight to a suitably scientifically qualified consultee and rely upon their advice in reaching a conclusion. All of these factors, and no doubt others, comprise the margin of appreciation to which the authorities refer. As Sullivan LJ observed in the case of Downs [2010] Env LR 7, this does not mean that the decisions are immune from judicial review, but that the hurdle for a claimant to surmount is one which is formidable."

The Statutory Framework

27. BELCO holds a transmission, distribution and retail ("**TD&R**") licence which was granted to it pursuant to Part 5 of the EA by the RA. The RA was established under the RAA. The EA and the RAA respectively govern the terms on which BELCO supplies electricity to Bermuda and the regulatory regime under which BELCO does so.

28. The EA and the RAA are supplemented by the GD in relation to rate-making. The provisions have to be read together, but as stated above, to the extent that the terms or effect of the GD are inconsistent with the EA and/or the RAA, they must yield to the terms of those statutes. In short:

    a. The EA sets out BELCO's obligations in respect of the supply of electricity in Bermuda and sets out the powers the RA can exercise to determine what BELCO can charge its customers in Bermuda for doing so;
    b. The RAA creates the RA together with the regulatory framework in which it operates and the obligations which it has in doing so; and
    c. The GD sets out the methodology for determining BELCO's "Allowed Revenue" and the tariffs it must charge its customers.

29. The current electricity regime in Bermuda is relatively new and there has been no Bermuda caselaw on the meaning and effect of the various statutes for rate setting. However, BELCO submitted that the concepts in the legislation and, in particular, section 35 of the EA are concepts which are consistent with and appear to derive from the mature regulatory regimes in use in North America. BELCO submit that the language of the EA has been judicially

considered in North America which has led to an established approach of regulators and utilities which has developed in accordance with similar legislation, caselaw and established principles which should guide the regulatory practice in Bermuda. As stated above, the RA does not agree with this position. It is submitted that it is common ground that BELCO has to compete with utilities in North America in the capital markets and thus consistency of approach between the RA in Bermuda and the regulatory authorities in North America to the issues including in setting the return on equity is important to attract capital from investors.

30. BELCO submitted that the Decision departed from the established approach in that:
    a. The allowed rate of return for BELCO was significantly below that of the comparable utilities analysed in the course of the process;
    b. The disallowance of prudently incurred capital spending departs from the established approach in North America; and
    c. The absence of transparency in the process and the RA's reasoning for the Decision is inconsistent with the established approach in North America.

31. BELCO submitted that in each of these respects, there was an error on the part of the RA in the rate setting process and, thus, an error of law.

32. BELCO submitted that the common theme of the regulatory regimes in North America is that the role of the regulator is to balance the interests of the utility and the consumer and to follow that approach would reflect well on Bermuda as a jurisdiction for energy investment. In relation to CAPEX, a utility is entitled to earn revenue that recovers the reasonable costs of service in achieving the service standards and the costs of: (i) investment if it is prudently incurred and for which the investment is used and useful; and (ii) a reasonable return on investment that is commensurate with the return on investments in business undertakings with comparable risks, and that is sufficient to attract needed capital, per section 35 of the EA.

33. BELCO submitted that this reflects the approach in North America as set out in *Bluefield Waterworks & Improvement Co v Pub. Serv. Comm'n of West Virginia* 262 US 679 (1923) at 692-693 decided in the US Supreme Court:

> *"A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The returns should be reasonably sufficient to ensure confidence in the financial soundness of the utility and should be adequate under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."*

34. BELCO submitted that the same approach was taken in a later US Supreme Court decision in *Federal Power Comm'n v Hope Natural Gas 320 US 591* (1944), 603 in which the Court stated:

> *"The investors have a legitimate concern with the financial integrity of the company whose rates are regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for capital costs of the business. These include service on the debt and dividends on the stock…by that standard the return to the equity owner should be commensurate with returns on investments in other enterprises with corresponding risks. The return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital"*

35. Thus BELCO argue that these authorities establish that the return needs to align or be commensurate with a comparable level of risk. It follows that regulatory decisions made with respect to comparable utilities will provide a basic litmus test for reasonableness and a benchmark for investors to consider when investing in such businesses. Thus, if a utility in Bermuda offers a lower return than comparable companies, then it will not attract needed capital.

36. BELCO submitted that the use of the phrase "prudently incurred" is deliberate and the concept of "prudence" is long and well established in North America.

37. BELCO submitted that Bermuda has likely adopted the North American regulatory model given its geographical location and alignment of the Bermuda economy and that of North America. Further, Bermuda's established excellence in the law of trusts, restructuring and insurance and reinsurance demonstrates that the Courts of Bermuda take an internationalist approach responsive to international legal systems and consistently with this approach it is legitimate for the law of Bermuda in this case to be informed by reference to the law and practice applied in North America.

38. I will return to the issue of whether it is appropriate to follow the North American case law approach as contended by BELCO.

The EA

39. The preamble to the EA includes as follows:

> *"AND WHEREAS the Regulatory Authority has been established and has powers to supervise, monitor and regulate the electricity sector for the purposes set out in this Act, including the promotion of effective and sustainable competition, investment and the adoption of innovative technologies for renewable energy, energy efficiency and conventional energy, and the protection of the rights of consumers and end-users;"*

40. Section 6 provides for purposes of the EA and includes relevant subsections as follows:

> *"(a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Bermuda so that Bermuda continues to be well positioned to compete in the international business and global tourism markets;"*
> *(e) to protect the interests of end-users with respect to prices and affordability, and the adequacy, reliability and quality of electricity service;*
> *(f) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity."*

41. Section 14 provides for the functions of the RA which include:

> *"(1) The function of the Authority is generally to monitor and regulate the electricity sector.*
> *(2) For the purposes of subsection (1), the functions of the Authority shall include —*
> *(a) those conferred on it by this Act, including the functions necessary to effectively and efficiently achieve the purposes set out in section 6;*
> *(b) subject to this Act, those conferred on it by the Regulatory Authority Act 2011; the making of administrative determinations to provide for the control and conduct of the provision of electricity services, including —*

(i) the grant, renewal, modification, suspension or revocation of licences for the provision of electricity;

(ii) transparency measures and notice requirements relating to the rates, charges and other terms and conditions for the provision of electricity services for the benefit of end-users; "

42. Section 15 provides for how the RA should perform its functions:

"In performing its functions, the Authority shall—

(a) conform to any Ministerial directions issued by the Minister under section 8;

(b) have due regard to the purposes in section 6;

(c) have due regard to the regulatory principles in section 16 of the Regulatory Authority Act 2011."

43. Section 35 of the EA provides for retail tariff-setting principles and includes the following provisions:

"(1) The Authority shall determine the retail tariff in accordance with the methodology set by general determination and in accordance with the principles set out in this section.

(2) The tariff methodology shall seek to enable the TD&R Licensee to generate a total revenue that recovers reasonable costs of service incurred in achieving the service standards and, in particular, the reasonable costs in respect of—

(a) investment if it is prudently incurred and for which the investment is used and useful;

(b) reasonable return on investment that is commensurate with the return on investments in business undertakings with comparable risks, and that is sufficient to attract needed capital.

(3) The tariff shall seek to enable the TD&R Licensee to generate a total revenue that recovers reasonable costs of service incurred in achieving the service standards and, in particular, the reasonable costs in respect of the following expenses efficiently incurred—

(a) operating expenses;

(b) fuel procured for generation;

(c) generation procured;

(d) other expenses including—

(i) the Government authorisation fees and the Regulatory Authority fee; and

(ii) other statutory fees.

(4) The methodology set by administrative determination relating to the setting or approval of tariffs and the regulation of revenues shall—

(a) be designed to enable an efficient licensee to recover the cost of its licensed activities, including a reasonable return as set out in subsections (2) and (3);

(b) include information that gives end-users proper information regarding the costs that their demand imposes on the licensee's business.

(5) A licensee may not charge an end-user any other tariff or make use of provisions in agreements other than that determined or approved by the Authority pursuant to this Act and the regulations and rules."

The RAA

44. The preamble to the RAA include as follows:

> *"WHEREAS the establishment of an independent and accountable regulatory authority is necessary and in the public interest to protect the rights of consumers, encourage the deployment of innovative and affordable services, promote sustainable competition, foster investment, promote Bermudian ownership and employment and enhance Bermuda's position in the global market;*
>
> *...*
>
> *AND WHEREAS the regulatory authority should be subject to procedures which ensure that, to the maximum extent feasible, decisions will be made in a transparent manner, based on the administrative record;"*

45. Section 13 of the RAA provides for the powers of the RA and includes the following:

> *"13. For the purpose of the performance of its functions, the Authority, to the extent consistent with this Act, may-*
>
> *(o) review and, as appropriate, approve, reject or modify tariffs filed by a sectoral provider governing the provision of covered services;*
>
> *(z) take any other action, not expressly prohibited by law, that is necessary and proper to perform its duties under this Act and sectoral legislation."*

46. Section 15 of the RAA sets out the RA's scope of authority and includes the following powers:

> *"(1) The Authority shall have the power to supervise, monitor and regulate any regulated industry sector, in accordance with this Act, sectoral legislation and any regulations or policies made by a Minister."*

47. Section 16 of the RAA provides for regulatory principles including the following obligations:

> *"16 In performing its duties under this Act, the Authority shall—*
>
> *(b) rely on market forces, where practicable;*
>
> *(d) act in a reasonable, proportionate and consistent manner;*
>
> *(f) operate transparently, to the full extent practicable;*
>
> *(g) engage in reasoned decision-making, based on the administrative record;"*

The GD

48. The GD that was operative at the time of the RA's review in this case is dated 19 October 2018 and whilst subordinate to the EA and the RAA, it amplifies the principles which have been considered and which are contained in the primary legislation. It provides detail in respect of the process for determining rate allowance and the ingredients that go into the calculation of the revenue allowance.

49. In paragraph 4 of the GD, the formula for Allowed Revenue is set out as Allowed Revenue = OPEX + depreciation + rate base x return on rate base. The terms used in the formula are further explained in paragraph 7 of the GD:

    "Rate base – the components of rate base are plant in service and working capital. The initial valuation of assets is at historic cost in accordance with the annual CAPEX (ex-ante) which is updated in subsequent years and is subject to an asymmetric CAPEX incentive scheme; (The rate base was more fully described at paragraphs 14 – 53.)

    Depreciation is straight line;

    OPEX is: (i) core network OPEX ex-ante and subject to an asymmetric incentive scheme, (ii) power procurement which is a pass-through expense and (iii) other expenses such as fees and taxes; (The OPEX was more fully described at paragraphs 26 – 40.)

    Return on rate base – this is described as an ex-ante WACC (as defined above). (The return on base rate was more fully described at paragraphs 54 – 65)"

50. In the Revised Rationale for the Decision, the RA did not disclose its actual determination of rate base or how it had approached the calculation leading to its determination of base rate. BELCO claims that until the meeting of the Experts, it did not know what rate had been determined by the RA. Further, they claim that there was no good reason for not providing this information and that Mr. Burgess was wrong to say that the figure could be determined by "any competent retail tariff expert" because the way that the RA implemented the CAPEX incentive mechanism was inconsistent with the GD, as admitted by Mr. Amram.

Background - The Process

51. The process for determining the revenue allowance is detailed and very granular. It involves consideration of very technical information. BELCO claim that for it to work efficiently, the timetable needed to be realistic to allow for the proper supply of information and its consideration, and allow for an iterative process by which the RA and BELCO could properly discuss the effect of information and the RA can explain its conclusions. Its position is that in many North America jurisdictions this is achieved by formal hearings and interrogation of information in a formal process. It would have been possible for rate-setting to be carried out by the RA through an adjudication process. However, BELCO claims that the RA adopted an informal process of seeking information, considering it behind closed doors with its expert (Ricardo) and then delivering its Minded-to-Decision. They assert that at that point, no time was allowed for BELCO to gain a proper understanding of the decision-making process and to respond effectively as necessary before the final version was made along with the circumstance that the RA specifically rejected any further face to face discussion.

52. The process to set the rate for the two years, 2022 and 2023, took the following course:
    a. On 25 June 2021, the RA sent information requests to BELCO which BELCO assert were extensive and onerous covering every aspect of BELCO's operations and capital programmes. It is part of BELCO's case that in the information request stage, the RA's timing requirements were completely unreasonable and guided by a high-pressure timetable that was completely self-imposed. The RA sought to impose a deadline of 5 August 2021 for BELCO's responses.
    b. On 7 and 21 July 2021, BELCO made it clear that the supply of the information requested would take longer than the RA was prepared to allow willingly. BELCO said that it would provide the information by 30 September 2021 to which the RA did not agree. BELCO assert that it had to press the RA for time extensions which were agreed grudgingly so that the first stage of information would be provided by 31 August 2021. That proved impossible and eventually the RA agreed 30 September 2021 for the provision of information in response to the information requests.

c. Meetings were held between BELCO and the RA during this period which BELCO asserted should have continued throughout in order to promote a more transparent decision-making process.

d. In the course of that process, meetings took place which are described in the first affidavit of Mr Barbosa. The purpose of the meetings was to enable dialogue between the utility and the regulator to make the process more efficient and to enable all points of concern to be addressed and understood in advance of the RA's administrative decision.

e. Following BELCO's satisfaction of the information requirements, the RA raised a raft of further information requirements which BELCO complied with. BELCO also sought to continue the process of meeting to ensure that the information provided was properly understood and fairly treated – per 1st affidavit of Mr. Barbosa at paragraphs 21, 26-34.

f. BELCO assert that contrary to its expectations, after the supply of further information by BELCO in November 2021, the RA refused to attend any further meetings to discuss the information provided to it – per 1st affidavit of Mr. Barbosa at paragraphs 35-37 and 41-48. Thus, BELCO assert that inevitably this would and did have the effect that the RA's administrative decision-making process lacked the transparency required. It also had the effect that BELCO did not know what the RA's approach was on critical ingredients of the revenue allowance process until it released its "Minded-To-Decision in March 2022.

53. BELCO assert that the RA was guided in its approach by a report compiled by Ricardo which took a combative approach to BELCO's revenue allowance application. One of the lead authors was Thomas Amram who was also retained by the RA as its expert. Thus, BELCO assert that the effect is that Mr. Amram seeks to validate and support his own approach as an advocate for certain positions taken in the revenue allowance process except that he concedes that the RA set the rate of return too low at 7.16%.

The Hearing - Evidence

54. The hearing took place with evidence given by Mr. Jose Barbosa on behalf of BELCO and Mr. Nigel Burgess on behalf of the RA.

55. The parties called expert witnesses with Mr. John Reed giving expert evidence on behalf of BELCO and Mr. Thomas Amram giving evidence on behalf of the RA (the "**Experts**").

56. Mr. Barbosa provided two affidavits along with exhibits, the first one sworn 4 October 2022 ("**Barbosa 1**") and the second one sworn 16 November 2022 ("**Barbosa 2**") in reply to the affidavit of Mr. Burgess. Mr. Barbosa is the Senior Finance Director of BELCO and he had been involved in the development of the previous two rate cases submitted to the RA. In Barbosa 1 he provided the procedural history and substantive facts of the case including evidence as set out below. In Barbosa 2 he made replies to some of the evidence of Mr. Burgess.
    a. BELCO applied for Allowed Revenue of $236.05m and a rate of return of 8.96% but it was only allowed to collect a total of $224,055,622 for the period 1 January – 31 December 2022 at a weighted average rate of return of 7.16%.
    b. The reduced revenue allowance of $12 million for 2022 put BELCO in a difficult position whereby it had to make choices around the deployment of capital and the investment of capital required to maintain reliable infrastructure.
    c. In February 2022 the RA provided BELCO with its Draft Decision and Draft Rationale.
    d. The RA refused to provide BELCO with requested information to allow BELCO to review properly how the RA came to its conclusions. Further, the RA refused further time extensions for BELCO submissions and for meetings.
    e. On 18 March 2022 the RA provided BELCO with the Decision and Rationale. On 21 March 2022 the RA issued the Revised Rationale.

57. Mr. Burgess provided an affidavit filed on 1 November 2022 and later sworn on 15 November 2022. He is the Head of Regulation of the RA. He stated that the RA implemented and used a fair process and that careful consideration was given to the fairness and reasonableness of every decision made, including decisions concerning information

requests and timelines for responses. He also provided procedural history and substantive facts of the case including as follows:

a. He took issue with some of the evidence provided by Mr. Barbosa.
b. The RA met with BELCO on a number of occasions to discuss the process.
c. The RA provided BELCO with the Draft Decision and Draft Rationale in the spirit of transparency, although there was no statutory duty to do so. The documents were provided with specific instructions that responses were to be limited to glaring errors or omissions by the RA.
d. The RA considered a number of BELCO's information requests to be unreasonable.
e. The RA held the view that any reasonable expert would be able to recalculate the RA's values with the information provided in the Draft Rationale.
f. The RA evaluated BELCO's submissions and responses to the Draft Rationale in line with the GD, and with law and regulatory principles generally as explained in chapter 3 of the RA's final rationale document which provided BELCO with an exhaustive write up on the approach used to determine the rate of return.

58. I found that both Mr. Barbosa and Mr. Burgess gave their evidence in a professional manner befitting their roles and responsibilities. Also, they were knowledgeable about the issues and the process to a granular level. In my view, there was nothing about their evidence that undermined their credibility or how I should generally prefer one's evidence to the other.

The Expert Evidence

59. I have given significant consideration to the evidence of the Experts, both to their joint report and to the issues where they did not agree. Further, I have given consideration to their independence as discussed below.

60. The expert for BELCO was Mr. Reed. He is the chairman and CEO of Concentric Energy Advisors ("**Concentric**") located in Massachusetts, USA. Concentric is a financial advisory and management consulting firm that provides services relating to energy industry

firms and assets, energy market analysis, and litigation and regulatory support. He stated that he has 46 years of experience in the energy industry, having served as an executive in energy consulting firms, including the position of Co-CEO of North America's largest publicly-traded management consultant firm, Navigant Consulting Inc., and as Corporate Economist for North America's largest gas utility, Southern California Gas Company. He stated that he has provided advisory services in the areas of public utility rate and regulatory matters, energy industry mergers and acquisitions, asset divestitures and purchases, strategic planning, project finance, corporate valuation, energy market analysis, resource planning, and energy contract negotiations to energy industry clients across North and Central America.

61. Mr. Reed stated that over the last 42 years he has provided expert testimony in more than 300 proceedings before administrative agencies, state, provincial and federal courts, arbitration panels and legislative bodies. The topics have been energy economics and finance, with an emphasis on public utility regulation. He stated that he had no prior involvement in the BELCO rate case which is the subject of this appeal. He emphasized that whilst Concentric had provided services through other staff members on the case prior to this appeal, his involvement only began after the appeal had been lodged. In preparing his report he reviewed several hundred pages of documents that were relevant to his instructions.

62. The expert for the RA was Mr. Amram. He is the Head of Power Planning & Regulation in Power Planning and Solutions at Ricardo Energy and Environment ("**Ricardo**"). He is a Chartered Engineer with over ten years of experience in cost-of-service studies, integrated resource planning studies, regulation studies, wheeling framework studies, and economic/financial analysis for power generation projects for public and private utilities, private developers and regulators. He has had a key role in the successful delivery of over 60 projects, covering over 30 countries across 5 continents and he has been the Project Manager on numerous occasions. Mr. Amram has a Master's Degree in Electric Engineering, Renewable Energies and Smart Grids and another Master's Degree in Project Management, Program Management and Business Development.

63. Mr. Amram stated that he has wide experience outside of Bermuda which he asserted was directly relevant to the scope of his report including electricity pricing and regulation. Mr. Amram stated that he has a good understanding of the institutional, legal and regulatory framework for power sector regulation in Bermuda, having supported the RA whilst working at Ricardo, on numerous assignments over the last few years on a range of areas, including Retail Tariff Reviews for the period 2020 – 2023. He stated that since 2019, the RA retained the consulting services of Ricardo throughout the retail tariff review process in which he played a major role in line with best practices. In preparing his report, he was assisted by a Ricardo colleague, Mate Antosik, in addressing various general financing theories, macro-economic concepts and financial modelling. Mr. Antosik has a Bachelor's degree and two Master's degrees. Together, Mr. Amram and Mr. Antosik reviewed a range of documents.

Joint Expert Report

64. The Experts filed a Joint Expert Report dated 17 January 2023 with a corrected version dated 27 January 2023 (the "**JER**"). They understood their duty as expert witnesses is to the Court. I have accepted the conclusions of the JER and where necessary I have made further findings about their joint conclusions. The Experts agreed substantially on various matters as set out below and disagreed on others.

65. BELCO urge the Court to accept the opinions of their expert, Mr. Reed, primarily based on his experience in the US Markets, his encyclopedic knowledge being more extensive than Mr. Amram and that Mr. Reed had no prior involvement in BELCO's submissions whereas Mr. Amram was involved in compiling the Ricardo Report. The RA rejects these points as they argue that Mr. Reed's experience is almost entirely limited to the electric power industry in North America and thus the narrowness of his knowledge is a significant limiting factor in the value of his opinion. Conversely, BELCO argue that Mr. Amram's report is driven by a lack of knowledge of the US markets. The RA argue that the US-centric approach by Mr. Reed and the US principles have little impact on the Decision because their provenance has not been proven and to do so would be to apply US principles

of statutory interpretation when the principles requiring application are the UK principles. Thus, Mr. Reed's report is of limited weight to the issues. The RA submit in essence that Mr. Amram's experience is more worldly along with experience in Bermuda. In any event, the RA assert that there is not significant disagreement between the Experts, with very little in dispute which illustrates how fine the distinction is between the parties having regard to the application of section 35. Thus, there is no need to prefer an Expert's opinion because their differences do not reach the significant hurdle to show that the ultimate decision was plainly wrong, and to do so would lead the Court to embark wrongly on its own technical appraisal.

66. The RA also urge the Court that the terms of the Consent Order dated 8 August 2023 be respected, which stated as follows: "*neither [party] will object to the admissibility or weight of the evidence of each other's expert on the basis that either does not or cannot have the requisite independence simply because of their pre-existing relationship*". The RA points to the submissions, orally and written, that counsel for BELCO failed to comply with the terms of that order highlighting the critical difference between the Experts given Mr. Amram's involvement in the Decision such that it would undermine any weight given to his evidence.

67. Both parties were critical of each other for the use of additional personnel or resources in the preparation of their respective reports. In my view, I accept that the issues in the matter are technically complex and it is unsurprising that the Experts looked to other relevantly qualified people for assistance. I take no issue with those circumstances and remind myself of the need to focus on the ultimate opinion of the Experts on the issues including about compliance with the methodology. I am also guided by the principles of deference that should be applied in this appeal. Further, I accept the principle that involvement prior to litigation actually increases the weight to be accorded to the opinion of the expert in the litigation as set out in *Expert Evidence: Law and Practice, Hodgkinson & James, Fifth Edition 2020* at paragraph 12-004 where it states as follows:

> *"The substance of the evidence, likewise, must be weighed and accorded value. Although the impressiveness of an expert's qualifications and experience are always relevant, they must not be employed as a substitute for the need to analyse the content*

of conflicting evidence by reference to the facts in the case. The true rule was stated by Jacob LJ in Technip France SA's Patent [2004] EWCA Civ 381,

> *"The court may resolve the matter not by the substance of the opinion, but by taking account of the circumstances in which the expert came to express it. In proceedings concerning expert mining issues, the opinion of one group of experts was preferred because they had expressed it before it was known that legal proceedings would ensue (Abinger v Ashton (1873) L.R. 17 Eq. 358) and at 375:*
>
> > *"they were called in to advise the defendants before any contest arose … for the more advantageous conduct of the mine, but not to assist them in the litigation."*
>
> *An expert of less eminence may however, by the opportunity of personal observation, be in a better position to express a view than a number of eminent specialists who could express only theoretical opinions after the event."*

68. In any event, I found both experts to be of some assistance to the Court, albeit in a limited manner. Both understood their duties to the Court in giving unbiased and objective evidence subject to their geographical areas of experience, were knowledgeable about the issues, the industry and the processes, Mr. Reed moreso on North America and Mr. Amram less on North America but familiar with a wider world view. In respect of the issues, I will refer to the evidence of the Experts as necessary.

Grounds 1 – 5 taken together - The interpretation of Section 35(2) and (4)

69. BELCO submitted that in the context of the regulatory regime in Bermuda, the wording of the statutes is clear and the fact that these statutes owe their origin to a similar regulatory structure in North America, means that the Court in Bermuda can legitimately and appropriately, construe the legislation and the concepts they embody with the assistance of the North American case law. On the other hand, the RA submitted that BELCO spent considerable time discussing the position in the US without establishing the foundation for doing so. I shall return to this issue in due course.

70. BELCO submitted that the concept behind section 35(2) of the EA is clear to the effect that the tariff determined by the RAA: "… *shall seek to enable the TD&R Licensee to generate a total revenue that recovers reasonable costs of service incurred in achieving the service standards and, in particular, the reasonable costs in respect of— (a) investment if it is prudently incurred and for which the investment is used and useful; (b) reasonable return*

on investment that is commensurate with the return on investments in business undertakings with comparable risks, and that is sufficient to attract needed capital." BELCO argued that the provisions are not qualified in any way and do not admit of any discretionary limiting factor, such as "to the extent that the RA thinks fit" or otherwise. Thus, any determination that does not give effect to this concept will be inconsistent with the EA and will be illegal/invalid. The RA take serious issue with BELCO's position on the concept of section 35(2) and I will return to that issue below.

71. The RA submitted that BELCO sought to address Grounds 1 to 5 on the basis that they attack the reasoning of the RA on which the calculation of the Allowed Revenue was based, the Allowed Revenue being "the amount of money an entity is allowed to earn in undertaking its regulated business activities, typically on an annual basis" as defined in paragraph 1 of the GD. Thus, it was an attack on the rationality of the Decision on the basis that it did not comply with various aspects of section 35 of the RAA. In respect of the grounds, the RA contended as follows:
    a. Grounds 1 & 2 asserted that the RA wrongly calculated the allowed rate because in doing so it did not comply with the principle set out in section 35(2)(b).
    b. Ground 3 asserted that the RA miscalculated the Allowed Revenue because it wrongly failed to allow BELCO to recover the costs of certain capital expenditures contrary to the principle set out in section 35(2)(b).
    c. Ground 4 was a complaint that the RA failed to consider the purposes set out in section 6(a) and (e) of the EA namely, to ensure the adequacy, safety, sustainability and reliability of electricity supply in Bermuda" and "to protect the interests of end-users with respect to prices and affordability, and the adequacy, reliability and quality of electrical services." The RA submit that this is really a complaint that the RA failed to act in accordance with section 35(2)(b) in that it asserted that the RA's decision on rate of return fails to consider whether it will permit BELCO "to access the capital it needs to in order to continue to provide safe and reliable electricity service". The RA submits that this is the same as Ground 2.
    d. Ground 5 on its face is a classic rationality ground in that it asserts that in making the Decision, the RA failed to consider relevant and to exclude irrelevant matters.

Thus, this ground refers back to the rate of return and prudency issues which come under the challenges in Grounds 1 – 4 and thus stands or falls with them.

72. In my view, the task of the RA in setting the Allowed Revenue is (i) one of mixed fact and law in that it involves applying a broad statutory standard to the facts and evidence presented to it by BELCO; (ii) it requires expertise given that the standards have technical meanings; and (iii) it involves evaluative decision-making where there will be assumptions and predictions with no one certain right answer. Thus, this is the sort of decision making requiring that it be shown that the ultimate decision, the Decision, was "plainly wrong" or subject to "palpable and overriding error" (*Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse (Gabriel and others intervening))* (2021) 52 BHRC 223, Supreme Court of Canada at [221], referring to *Housen v Nikolaisen* [2002] 2 SCR 235, Supreme Court of Canada), or so "outrageous in its defiance of logic … that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at page 410G). Thus, the RA argues that where the RA's case rests on expert opinion, which is within a reasonable range, the RA should succeed, even assuming BELCO's expert evidence is also within that range. I will return to the issue of the reasonable ranges below.

73. In respect of section 35, the RA submitted that the Grounds of Appeal are largely misconceived because they proceed on an incorrect assumption that the RA in making the Decision was required to comply with the provisions of section 35(2) and (4). To that point, I agree with the RA's interpretation of section 35 (the "**Section 35 Interpretation**") as follows.

    a. Section 35(1) establishes the general principle, which is that the RA must determine the retail tariff in accordance with the methodology set by general determination and in accordance with the principles set out in the section. Thus, having regard to sub-sections (2) and (4), the RA argued that it is the methodology which must be consistent with these provisions and principles because that is what the section clearly says. To that point, the RA asserts that it is the tariff methodology which must seek to achieve those stated aims and there is and can be no criticism of the

GD which was agreed upon in 2018 with BELCO's full involvement. I agree with this point.

b. I also agree that sub-sections (2) and (4) are to be contrasted with sub-section (3) which speaks only to the "tariff" and does not mention "methodology". Thus, the requirement is for the methodology to aim at making it possible for BELCO to generate a total revenue of the kind mentioned. To be in breach of these provisions, it would have to be shown that the methodology did not aim at making it possible for BELCO to achieve the total revenue referred to.

c. I also agree that in respect of sub-section (4), to be in breach, it would have to be shown that the methodology was not even designed to make it possible for an efficient licensee to recover the cost of its licensed activities, including a reasonable return as set out in subsection (2) and (3). The subsection does not require that such costs actually be recovered, only that the methodology be designed to make it possible for an efficient licensee to recover them.

74. Further, I accept the RA's submission that even assuming BELCO's interpretation were correct, and the section required the RA to comply with section 35(2) and (4), BELCO would have to show that the Decision did not even aim at making it possible for BELCO to earn the total revenue described in the section and that the Decision was not in any way designed to make it possible for an efficient licensee to recover the costs of its licensed activities.

75. Also, I accept the RA's submission that BELCO does not attempt to make the case that the Decision does not even have that aim, nor could it. Thus, the RA raise the question of how can the Decision be plainly wrong in circumstances where BELCO themselves accept that the result cannot be determined with any certainty, a point which the RA assert is the epitome of the principles of deference.

76. In light of the Section 35 Interpretation and the reasoning above, in my view, BELCO's Grounds of Appeal 1 to 5 are based on an incorrect interpretation of Section 35(2) and (4) and thus I would dismiss those grounds summarily.

Ground 1 – The Decision erred in law by failing to determine the retail tariff in a manner that authorizes BELCO to earn a reasonable return on investments commensurate with the return on investments in business undertakings with comparable risk which is the first of the two requirements of the determination of the retail tariff set out in section 35(2)(b)

77. The particularization of Ground 1 is that: (i) the rate of return set at an average of 7.16% was inconsistent with the requirements of section 35(2)(b); (ii) the RA failed to consider the multiple methodologies presented by BELCO for the purposes of estimating *ex ante* the correct range for the cost of equity; and (iii) the actual rate set was significantly below returns for other business undertakings with risk commensurate with BELCO.

78. The Experts agreed on the following issues:
    a. The RA appropriately utilized the WACC framework for the determination of BELCO's cost of capital;
    b. The appropriate ratio of debt to capital/equity was used for the calculation;
    c. That if the return set for BELCO is below the return offered by ventures with a comparable level of risk, it will not satisfy the capital attraction standard;
    d. That a proxy group of firms can be used as a starting point for the evaluation for some of the components of the cost of equity;
    e. That it is reasonable to use multiple economic models to estimate the cost of equity;
    f. That although BELCO used multiple methodologies, the RA only referred to the CAPM and did not refer to or apparently or explicitly take into account the ranges for the cost of equity presented for the CAPM and did not explicitly consider other cost of equity estimates which BELCO calculated using other methodologies;
    g. The components that have to be considered for the CAPM methodology; and
    h. The principles of the discounted cash-flow methodology ("**DCF**"), the Risk Premium approach and the Benchmark Returns approach

Appellant's Submissions

Failure to consider any methodology other than CAPM (Capital Asset Pricing Model)

79. Counsel for BELCO submitted that it is an obvious fault in the Decision and the Revised Rationale that the RA considered only the CAPM calculation instead of considering other methodologies used by BELCO even though the GD expressly states that consideration of other methodologies should be given. On that basis, BELCO argued that the RA failed to take into account an ingredient of the decision-making process that it was specifically required by the GD to take into account.

80. Counsel for BELCO relied on Mr. Reed's evidence in respect of the North American approach with further reference to section 4 of the Pampush Report for the reasons for considering other methodologies. In essence, that report set out that in North America, the courts and regulators have reached the conclusion that the reasonableness of the cost of capital determination is best judged by an evaluation of the results of multiple cost of capital estimation methodologies, and then judging the reasonableness of the overall result rather than relying on the theoretical support used to reach that overall result. Thus, BELCO submit that each method has advantages and disadvantages and different sensitivities which is why it is standard to use multiple methods, each premised on certain assumptions with regard to financial theory with those assumptions holding true under some circumstances and not under others.

81. BELCO made submissions about some of the methodologies as follows:
    a. The CAPM approach posits that a firm's equity capital cost is a linear function of the risk-free rate and the firm's exposure to systemic market risk with necessary inputs being (i) the risk-free rate of return, (ii) the firm's exposure coefficient or Beta and (iii) the Market Risk Premium ("**MRP**").
    b. The single-stage DCF approach which is based on the financial principle that in an efficient capital market, a stock's price will equal the stock's expected future dividends discounted at the relevant cost of equity.
    c. The multi-stage DCF approach which replaces the assumption of a single-stage growth in perpetuity with a three-stage approach: (i) near-term, (ii) transitional term

and (iii) long-term – where for each stage, that is, 1 -5 years, 6-10 years and over 10 years, a different growth rate is used.

d. Authorised return and risk premium approach is based on rates of return authorized for US companies by US regulators and a risk premium estimate of the cost of equity in 2 steps: (i) to compute a risk premium prediction equation and then (ii) to apply that premium to current or forecasted risk-free rates. The Pampush Report set out that there are different constituent elements from other approaches.

e. Authorised return benchmarking shows how the outcome of the technical cost of equity and cost of capital analyses line up with the returns authorized by US regulators for the purpose of verification. In this case, the methodology showed that there were no authorised returns on equity below 8.25% and the majority were in the 9.25% – 9.5% band. In JJR2, the exhibit to Mr. Reed's report, it showed that more recent returns showed an average of rate of return of 9.56%, meaning that all were well in excess of the risk-adjusted 7.22% which was the return on equity determined by the RA. BELCO argue that this placed it below every single integrated utility in North America that had a rate case decided in the period on question.

82. BELCO relied on Mr. Reed's surprised view that the RA did not consider or even acknowledge the results of any of the other four methodologies presented by BELCO stating essentially that a single estimate or methodology should be tested against other methodologies and benchmarked against the known returns being earned by other businesses. He opined that the RA's failure to consider other methodologies or corroborating/conflicting evidence of actual returns being earned is a significant flaw in the Revised Rationale.

83. BELCO submitted that North American regulators have studiously avoided endorsing one of the methodologies over the others, as it is the result which is crucial and not the method used to arrive at a result. Thus, they argue that the RA's process, in considering only one methodology and ignoring the others, was an error of law and was contrary to the GD. Further, the resulting low rate bore no relation to the return necessary to attract needed

capital. BELCO criticised Mr. Amram's position that he thought it was appropriate and reasonable to consider different approaches, but he did not think it was essential. They also criticised his view in the JER that it was entirely appropriate for the RA not to make reference to whichever of the other methodologies the RA had wrongly ignored. Thus, BELCO highlighted a contradiction of how can it both be appropriate to consider different approaches and appropriate not to consider them.

84. In respect of benchmarking, BELCO submitted that Mr. Amram said it was wrong to consider a group of US utilities as proxies but that the return on equity in other countries such as Lithuania, Slovakia or Ireland should be considered. BELCO highlighted that in his evidence before the Court, Mr. Amram maintained that there were no comparables which were of assistance to the Court. Further, he did not address the fact that the Ricardo Report concluded that Bermuda shows strong alignment with various US economic indicators making a case for the US-based benchmarking approach when determining benchmarks and proxies for estimating BELCO's WACC.

85. BELCO submitted that Mr. Amram agreed that other methodologies were not referred to in any iteration of the Rationale by the RA. Further, his position in the JER that it was not necessary to refer to the other methodologies was clearly inconsistent with the terms of the GD which he did not refer to. BELCO argued that the only explanation for the absence of any reference to the other methodologies in any iteration of the Rationale is that the RA did not consider them, noting that the RA only considered the CAPM methodology modifying key elements of it as calculated by BELCO with a view to reducing the resulting range for the cost of capital substantially. At that point, the RA did no more than see whether its reworked CAPM calculation fell within its own recalculated WACC calculation. BELCO argued that in doing so, the RA failed to take into account factors which were relevant to the Decision. BELCO assert that Mr. Burgess tried unconvincingly to maintain that the RA had considered all the methodologies by reference to section 3.5 in the Revised Rationale on the basis that that section set out the range of the various methodologies applied by BELCO, although he accepted that there is nothing in the Revised Rationale to support that assertion. Thus, BELCO's position is that simply plotting the result of the RA's recalculation into a modified range produced by other methodologies

does not amount to consideration of the calculations done by BELCO pursuant to those methodologies let alone to the transparent and reasoned considerations which is required as one of the regulatory principles in section 16 of the RAA. BELCO submit that if the other methodologies were considered then it is surprising that it was not included in Mr. Burgess' witness statement and Mr. Amram's report or the JER. BELCO then assert that Mr. Amram took the same position as Mr. Burgess but that Mr. Amram admitted that there was no express mention of any of the other methodologies and there was nothing explicit to support the assertion that there had been any consideration.

86. BELCO assert that there is nothing in the Revised Rationale or the evidence to support any consideration of the other methodologies as required by the GD and the explanations on behalf of the RA were desperate attempts to get around the RA's approach of only considering the CAPM as adjusted to get a low figure. The attempts were afterthoughts and the manner in which they were raised was a realization of the serious defect in the Decision as a result of the failure to consider other methodologies applied by BELCO. BELCO pointed to the Ricardo Report which set out that the rate of return set by the RA fell below the rate of 7.5% which was its low recommendation. Mr. Amram's only defence of the lower rate of 7.16% was that it fell within the RA's own rage albeit it was 34 basis points less, which according to Mr. Amram's calculation on day 3 of the hearing, reduced BELCO's allowed revenue by US$3, 091,949 over 2022 and 2023.

87. In summary, BELCO's position was that the failure to take into account the various methodologies applied by BELCO was a clear error of law. Further, no attempt was made to consider whether the rate of return was commensurate with the return on investments of undertakings with comparable risks. Thus, these are failures as to the requirements of section 35 of the EA which result in the Decision being wrong in substance and in law.

Appropriate dividend growth estimates in respect of the CAPM Methodology

88. BELCO submitted that in respect of the return on equity, the RA confined itself to considering the CAPM method. In its consideration of the future growth rate for common stock dividends, the RA substituted estimated GDP growth rates produced by the IMF and

other international bodies in place of rates that had been used by BELCO which were derived from stock market analysts. The alternative approach was developed by Ricardo in its report to the RA which relied on it exclusively for the return on equity determination, the effect of which was to lower the range of returns generated by the CAPM method. BELCO point to Mr. Amram's justification that the growth rates estimated by market analysts were affected by "optimism bias". In the JER, it was agreed that the components of the CAPM method are: (i) the risk-free rate of return; (ii) the MRP; and (iii) a measure of the individual asset's exposure to market risk or β (beta). It was agreed that that the risk-free rate, proxy company selection and beta estimates used by BELCO were reasonable. BELCO assert that these components of the CAPM methodology are all based on North American financial markets and the proxy group of utilities which operated under the North American regulatory model, which is premised on the agreed assumed comparability of the North American regulatory model to that which is used in Bermuda.

89. BELCO submitted that investors must earn a premium over the risk-free rate. Assets with an average risk are priced at the expected MRP over and in addition to the risk-free rate. The Experts agreed on using the US Standard & Poor's 500 index subset of dividend-paying stocks as a means of estimating the implied return of the average stock for the purposes of estimating the forward-looking computation of the MRP. In relation to the question of what the best measure of expected dividend growth was, the Experts disagreed as to whether it is better to use earnings forecasts prepared by stock market analysts, as Mr. Reed considers better, or short-term GDP growth rate forecasts. Mr. Reed's reasoning in the JER is that the use of investment analysts' forecasts provide the most direct indication of actual investors' expectations of dividends. Further, earnings and earnings estimates generally exhibit more volatility than GDP growth including growth spurts after recessions. On the other hand, using GDP growth "assumes away" the effects of the business cycle which were significant in the post-pandemic economy. Thus, the core point of disagreement was that using GDP growth rates "more naively" based on long-term historical averages is biased downwards. Thus, BELCO argue that Mr. Reeds' view was preferable in that near-term growth rates developed by equity market participants were

more reliable and more reflective of near-term market conditions, this being significant as the EA requires that the rate of return must be sufficient to attract needed capital.

90. BELCO submitted that the RA's approach had the following weaknesses:
    a. It was not based on actual investor expectations, such that it ran the risk that the allowed rate would fail to meet the capital attraction standard.
    b. The argument that growth rates developed by market participants has an optimism bias is weak and takes no account of the fact that the reason for considering different methodologies is to be able to use a different approach to inform the ranges that are open to consideration.
    c. The adoption of near-term growth rates is a symptom of the fact that the RA has confined itself wrongly to consideration of only one method of estimation.
    d. On cross-examination, Mr. Amram accepted that the business cycle (to which market analysis is relevant) was different from the overall economy (to which GDP growth was relevant). Thus, when Mr. Amram substituted GDP rates for market analysis, it produced a lower rate of return.

91. BELCO submitted that it was important to examine the results from different approaches to help identify outlying results and refine the appropriate range, particularly as the statutory framework required that other methodologies be considered, and if it had done so, it was likely that the Decision would have been different.

DCF Methodology

92. BELCO submit that Mr. Reed was correct to state in the JER that the multi-stage DCF provides a clearer indication of the risks priced into the market. He dismissed Mr. Amram's comments that the DCF analysis was considered as irrelevant as it formed no part of the Decision and was not disclosed to BELCO during the rate-setting process and formed no part of the administrative record.

Risk Premium Approach

93. This method is an important comparator as it indicates how informed decision-makers in the US have decided on the allowed return for utilities. Had it been considered it would have yielded a different result than was adopted by the RA. BELCO submit that Mr. Amram did not challenge BELCO's risk premium analysis and his comments similar to the DCF approach were equally weak and inconsistent with the Ricardo Report when he stated that the risk premium approach has to be considered with a certain degree of caution as the RA's problem was that there was no consideration of risk premium approach at all.

Benchmark Returns Approach

94. This approach computes the statistical spread of allowed equity returns in rate cases for vertically integrated electric utilities, like BELCO, in the US. BELCO submitted that Mr. Reed's reasoning is compelling as the benchmark returns reflect exactly the same requirements for return as set out in the EA. The updated comparison in JJR2, of the exhibit to Mr. Reed's report, showed a discrepancy between the RA's allowed return of 7.16% and the benchmark average of 9.56%.

95. BELCO submitted that there are no recent allowed returns in the US that even approximate to the RA's allowed return of 7.16%, in effect reflecting a view that a lower rate of return presupposes that an investment in BELCO is less risky than larger more diversified utilities operating in a mature regulatory environment. BELCO argue that this makes no sense and is unsustainable as BELCO is a small island-based utility relying on a non-integrated network with relatively few generation facilities, which is clearly a higher risk. Further, it is regulated in a recently established regulatory regime with very little regulatory or judicial precedent to give confidence that rates will be set at proper compensatory levels free of political interference.

96. BELCO submitted that although the Ricardo Report expressly endorsed North American utilities as comparators, Mr. Amram expressed the view that the only true comparator is a country with a similar level of country risk to Bermuda, that is, small island nations. Thus, he found some countries with a lower rate of return and opted for those ignoring the fact that Bermuda is linked to the US economy and it would make no sense for an investor in

utilities to invest with the prospect of a 7.16% return when a larger and less risky US utility is offering at least 2% more than that. Such a position showed a failure to factor in the capital-attraction standard.

Country Risk Premium

97. The County Risk Premium ("**CRP**") is the additional return demanded by investors as compensation for the higher risk associated with investing in a foreign jurisdiction compared with investing in their home market.

98. BELCO submitted that it was common ground that the return on capital should reflect country risk. In this case it has been measured by the spread between US treasury debt instruments and Bermudian government debt instruments. The issue is whether the analysis of CRP in calculating a proper rate of return for a utility should reflect the effect of country risk on the market sector in which that particular utility operated rather than assuming country risk affects all businesses in exactly the same way irrespective of the sector in which they operate.

99. In its application, BELCO applied a "*Lambda*" factor to reflect the effect of country risk on a utility. This was disallowed by the RA in the Revised Rationale on the basis that any individuation of country risk would be incorrect as it would fail to take account of balancing factors peculiar to utility companies such as monopolistic market power and statutory protection through the regulatory regime which insulated utilities from the ups and downs that affect commercial undertakings as changes occur in the domestic economy.

100. BELCO submitted that Mr. Reed explained that the RA arrived at the lowest possible CRP by taking the lowest possible range supported by data and removing the *Lambda*. However, Mr. Reed had explained that the *Lambda* was added to reflect how much more susceptible a utility is to country risk than other parts of the Bermuda economy – "*This greater susceptibility is the product of the electric utility been inextricably tied to offering service only in Bermuda, having fixed assets with virtually no portability and having customers who are all residents or citizens of Bermuda. This stands in sharp contrast to insurance,*

tourism, finance and other businesses operating on the island, where the ability to relocate or reduce on-island operations is very real in the event of adverse government action". But BELCO submitted that the RA noted that the concept was deserving of some consideration before rejecting it.

101. BELCO submitted that the grounds for rejection lacked merit and the objections of Mr. Amram did not object to the parallel logic between the Beta which was accepted and the Lambda which was rejected, despite the basis being the same which was to make the calculation more precise and more specific to the asset under consideration. BELCO pointed out that Mr. Amram accepted that companies were differently affected by government action but refused to accept that the obvious difference should be reflected. Also, BELCO criticized Mr. Amram's views as mutually contradictory as (i) BELCO was no less mobile than many other companies because it could supposedly export its plant and machinery to another jurisdiction; and (ii) the logic of the CRP was accepted but could not be reflected in the rate of return unless "*the mathematical model underpinning it has been proven to be accurate and precise*". Further, BELCO submitted that (i) Mr. Amram's position that the theory of country risk premium was not widely used should be rejected as if such a risk existed then a realistic attempt to assess it can be made; and (ii) a utility has virtually no scope to insulate itself from country risks whereas other companies in Bermuda typically have the ability to insulate themselves much more effectively than BELCO.

Respondent's Submissions

102. The RA submitted that the ground should fail for a number of reasons including:
    a. The RA was not required to comply with the provisions of section 35(2) and (4).
    b. There was no obligation on the RA to consider and apply multiple methodologies.
    c. It is inappropriate for the Court to try to determine which of the respective approaches to MRP is more appropriate, especially since neither state that the other's approach is wrong, but simply that one is more preferred or more appropriate.

d. Moreover, the Court is in no position to consider properly or at all BELCO's evidence in arriving at a decision by comparing it to the RA's Rationale.
e. The RA's expert evidence is clearly within the reasonable range.
f. It was appropriate for the RA to not consider the Lambda factor in its determination.

Analysis

103. In my view, BELCO has failed in respect of Ground 1 for several reasons.

Whether the RA's expert evidence of rate of return is within the reasonable range

104. First, the evidence is that BELCO applied for a rate of return of 8.96% from a WACC range of 8.31% to 9.62% using BELCO's notional gearing and cost of debt assumptions from BELCO's cost of capital report.

105. The evidence is that the RA arrived at a WACC range of 6.80% to 8.25% with a midpoint of 7.53% and approved an allowable rate of return of 7.16%. This was after removing *Lambda* from CRP and applying a different MRP in the CAPM.

106. Mr. Amram calculated a WACC range of 6.78% to 8.22% with a midpoint of 7.50%. He had differed from the RA's calculations because he had disagreed with: (i) the growth rate used in the formula to determine MRP; (ii) the principles underpinning the calculation of the gearing effect; and (iii) the principle of adjusting CRP by using a Lambda factor and therefore disagreed with resulting adjusted CRP range values calculated by BELCO.

107. Mr. Reed calculated a WACC range of 7.58% to 8.87%. I note here that BELCO's application for a rate of return of 8.96% is above this range.

108. In table form, the figures are as follows:

	Low end of range	The upper end of range %	Comment
BELCO	8.31	9.62	Applied for 8.96
Mr. Reed	7.58	8.87	
The RA	6.8	8.25	Midpoint of 7.53 Allowed at 7.16
Mr. Amram	6.78	8.22	Midpoint of 7.50

109. Mr. Amram's view was that the rate of return of 8.96% as applied for by BELCO fell outside of his calculation and thus he considered it excessive. Again, I note that it also fell outside the range calculated by Mr. Reed. In Mr. Amram's experience, it was standard practice to say that the allowed rate of return should be in line with the midpoint of a WACC calculation range using reasonable lower and upper boundaries for all key inputs. The 7.16% approved by the RA fell into his WACC calculation, thus in his opinion it was not unreasonable. Mr. Amram concluded that approving a value of 7.53% instead of 7.16% would have been a more appropriate conclusion as presented in the RA's analysis, however based on his analysis, the most appropriate conclusion would have been to approve a rate of return of 7.50%, that is, to retain the rate previously approved for 2021.

110. In my view, the RA's expert evidence of its rate of return is clearly within the reasonable range. I agree with the RA that BELCO has not shown and has not even asserted that the RA's expert's entire range was unreasonable. On that basis, I am inclined to dismiss summarily this Ground of Appeal. I note here that the RA contend that on this basis, Grounds 1 – 5 should be dismissed. I agree with that contention and therefore dismiss Grounds 1 – 5.

<u>Failure to consider any methodology other than CAPM (Capital Asset Pricing Model)</u>

111. Second, I accept that there was no obligation on the RA to consider and apply multiple methodologies. Paragraph 59 of the GD states as follows:

> "*The Authority concludes it appropriate for the T&DR licensee to apply multiple methodologies used to estimate the range for the cost of equity. These may, for example, include the CAPM, the discounted cash flow approach or a risk-premium approach. Based on the range of evidence, the Authority will make the final decision regarding the point estimate for the cost of equity allowance*."

112. Thus, it is clear that BELCO can avail itself of multiple methodologies to estimate the range for the cost of equity after which it is for the RA to make the final decision. In my view, as it is not required, it cannot be and is not plainly wrong. I have considered BELCO's arguments about the merits of using multiple methods as each has advantages and disadvantages. However, the true position is that while BELCO can use multiple methods to produce a range for the RA to make its determination, there is no statutory requirement for the RA to utilize multiple methods and thus there is no fundamental flaw in the RA choosing to use CAPM. To a greater extent, there is additional support to the argument in that Mr. Amram's evidence is that the CAPM calculations, after making two adjustments, were within the range proposed on BELCO's calculations utilizing the multiple method approach.

113. Third, I accept the evidence of Mr. Amram who confirmed that considering other approaches for computing costs of equity was not essential, pointing out that regulators in many jurisdictions only use CAPM including other similar small island nations.

114. Fourth, I accept the RA's position that the range of results were considered. I note here that the RA received the submission from BELCO which included all the projects and which produced a range of results. The RA confirmed that the WACC value fell within that range with the lowest range reflecting 7.06 which was derived from the single stage DCF approach - a figure produced by BELCO using alternative methodologies.

    a. I refer to paragraph 18 the JER which at the last bullet point agreed that the Rationale did not make reference to the DCF approach when determining BELCO's cost of equity, noting that no explanation was given as to why this was not done. On this point, Mr. Reed's opinion was about the importance of the DCF approach. However, I prefer the evidence of Mr. Amram's conclusion, in essence that the DCF approach was considered, at paragraph 18(b)(2) as follows – "*The review of the Ricardo Report shared by the Respondent clearly indicates that the results from the DCF approach were considered in the analysis carried out by Ricardo on behalf of the Respondent. It shows that the range of reasonable values for the allowable*

rate of return considered by the Respondent was construed from several approaches, including the DCF approach."

b. I refer to paragraph 19 of the JER which at the last bullet point agreed that the Rationale did not make reference to the Risk Premium approach when determining BELCO's cost of equity, again noting that no explanation was given as to why this was not done. On this point, Mr. Reed's evidence was about the significance of the approach. However, I prefer the evidence of Mr. Amram at paragraph 19(b)(2), similar to 18(b)(2) above and in essence that the Risk Premium approach was considered. Also, on the basis of the evidence that the approach was considered, I accept the argument that just because the method is not mentioned in the Decision, that does not mean that it was not taken into account and considered.

c. In paragraph 3 of the Revised Rationale it states "*The RA conducted a thorough review and analysis of BELCO's Filing and response dated 11 March 2022. Based on the analysis of BELCO's Filing and response dated 11 March 2022, the following was observed …"*. I accept the argument that the reference in paragraph 3.2 which refers to a range of percentages can only have been drawn from the various models propounded by BELCO. In a deportation case before me, *Brittonie Taylor v HE the Governor and Minister of Immigration* [2021] SC (Bda) at paragraph 35, I stated that I was bound to accept that the Minister took into account all the information listed in a letter in accordance with his duty to consider whether he should recommend deportation. Similarly, I take the position that I am bound to accept that the RA did as it stated, which was a thorough review and analysis of BELCO's Filing.

<u>The appropriate calculation of CAPM</u>

115. Fifth, I have given consideration to the submissions about the MRP. The JER agreed that CAPM has three components, one being the MRP, which is the expected market return premium over the risk-free rate. It also agreed that the risk-free rate, proxy company selection, and *Beta* estimates used by BELCO were reasonable. The JER also agreed with the application of the elements used to calculate CAPM save for the MRP. I agree here

with the submissions of the RA that the Court is being asked to consider one part of a calculation to determine CAPM, which in itself is one part of the wider determination of the WACC, which itself is a calculation used in the assessment of the Allowed Return. I accept that the EA requires the RA to apply the GD and that I should caution myself about embarking on a technical appraisal of the issues, especially one which requires consideration of the minutiae of the calculations in circumstances where there cannot be any argument that the RA applied the component parts of the calculation.

116. At paragraph 17 of the JER, the Experts agreed on the method for estimating the forward-looking computation of the MRP. However, they disagreed on the assumptions used in the calculation of the forward-looking MRP computation. In my view, the Experts have disagreed on the best method to calculate MRP but neither suggested that the other's position was wrong. At paragraph 17(a) Mr. Reed strongly believed that the sector-specific and timing-specific growth estimates of near–term growth rates developed by equity market participants were more reliable and more reflective of near-term capital market conditions than macroeconomic growth rates developed for decades-long perspectives on the entire economy. On the other hand, at paragraph 17(b) Mr. Reed believed that it was more appropriate to use the short-term growth rate forecasts as short-term dividend growth rates proxies.

117. Another area of differing approaches is where BELCO contended that in respect of CAPM, it was premised on the agreed assumed comparability of the North American regulatory model to that which is used in Bermuda, thus without such a premise, the proxy group would be invalid as a benchmark for what constitutes a compensatory return for BELCO. To that contention, the JER confirmed at paragraph 12 that the set of proxy group firms used by BELCO could be used as a starting point for the evaluation of at least some of the components of the cost of equity. The Experts then agreed at paragraph 15 that the proxy company selection made by BELCO was reasonable. Mr. Amram identified limiting factors to the use of the proxy group stating that over reliance on the North American model was not appropriate. At paragraph 20 of the JER Mr. Amram stated that he did not believe that it was relevant to derive the cost of equity on the basis of a comparison with peers

solely based in the US, noting that there will be differences between Bermuda and US jurisdictions which the analysis cannot fully offset, including in regulatory and tax regimes. On cross-examination, when it was put to Mr. Amram that he agreed that the market risk premium was based upon a cohort of US companies, he stated that the selection of peers plays a very important role in most, but not all, of the approaches that are considered in the analysis, that it plays different roles in different methodologies and that in CAPM, it is a fairly minor role that is almost only underpinning the calculation of *Beta*, noting that *Beta* was always going to be an imperfect estimate. Later on in cross-examination, Mr. Amram agreed that the *Beta*, as a measure of risk, used in this case in the CAPM method as derived from the proxy group of companies would be relevant for all the valuation methodologies.

118. In my view, it is inappropriate for the Court to try to determine which of the respective approaches to MRP is more appropriate, especially since neither state that the other's approach is wrong, but simply that one is more preferred or more appropriate. I also note that Mr. Reed stated at paragraph 14(a) that he would not place any particular reliance on the CAPM results and would consider both sets of CAPM results as constituting the possible range of results, without preferring one estimate over the other. To that point, I once again remind myself that I should be cautious about embarking on technical appraisals in such circumstances.

Country Risk Premiums – Should *Lambda* have been included

119. Sixth, I have given consideration to the submissions about the non-allowance of the *Lambda* factor. The Experts agreed that the return on capital should reflect country risk, which has been measured by the spread between US treasury debt instruments and Bermudian Government debt instruments, which the Experts agree results in a CRP of 1.70% - 1.95%. In paragraph 23 of the JER, the Experts disagreed as to the relative position of BELCO vis-à-vis the overall country risk and whether that position required a further adjustment of the overall country risk to address BELCO in particular. BELCO used a CRP of 2.9% which partially reflected the firm-specific CRP adjustment for an electric utility operating in Bermuda, that is, the introduction of a *Lambda* factor in the calculation. Mr. Reed addressed the matter extensively in the JER in essence concluding that he believed it

was reasonable to recognize that BELCO faced a disproportionate level of country risk. On the other hand, Mr. Amram concluded that he did not believe it was appropriate to use a *Lambda* factor in the determination of CRP, and thus the allowable costs of equity for several reasons.

a. He could not find one single precedent in utility regulation around the world where such *Lambda* factor was considered in in calculations. On the contrary there were abundant examples of regulatory regimes, in small island states with a higher country risk such as Jamaica and Barbados and countries with the same country risk premium as in Bermuda such as Ireland, Lithuania and Slovakia where *Lambda* factors are not included in calculations.
b. The specific regulatory regime in Bermuda mitigates BELCO's risk of exposure on the market – in particular that BELCO is exposed to virtually no volume risk on the recovery of capital expenditure. Thus, BELCO is in a much more favourable position than many other industry sectors in Bermuda.
c. The *Lambda* was derived by BELCO using arbitrary assumptions pertaining to the level of risk exposure of other sectors of Bermuda's economy, and thereby, its value is itself at least somewhat arbitrary.

Thus, Mr. Amram concluded that it would be improper to incorporate *Lambda* into calculations without considering all the relevant factors and that the comments made by the RA in the Rationale in relation to country risk and *Lambda* were appropriate and justified.

120. In my view, I am not satisfied that the RA erred in its assessment of the application of a *Lambda* factor. I preferred the evidence of Mr. Amram including when he highlighted that there was not any analysis by BELCO to justify the value of risk exposure weighting factors used in the calculation. Further, I agree with the submissions by the RA that: (a) *Beta* and *Lambda* are not attempting to do the same thing; (b) *Beta* is widely accepted as a measure of adjustments by economists - *Lambda* is not. To that point, Mr. Reed confirmed that the use of *Lambda* was an emerging concept; (c) *Lambda* was first theorized in 2006 and it has been criticised by economists as "pure nonsense" and that there is no empirical evidence

to support it; and (d) that applying 100% figure to the fact the assets are not portable is plainly wrong as Mr. Amram confirmed that a number of the assets are portable.

121. In light of the approach by the RA to this issue, I am not satisfied that it was wrong in law to not apply a *Lambda* in the circumstances that the RA determined.

Conclusion

122. In my view, in light of the reasons set out above, Ground 1 of the Appeal fails.

Ground 2 – The RA erred in law by failing to determine a tariff in a manner that authorized BELCO to earn a return sufficient to attract needed capital – section 35(2)(b) – the "Capital Attraction Standard" (the "CAS")

123. The particularization of Ground 2 set out that:
    a. The RA failed to consider whether the rate of return was sufficient to meet the CAS;
    b. The RA set a rate of return that was not sufficient to meet the CAS; and
    c. In this way, the RA failed to set a rate of return which was sufficient to attract the capital necessary to ensure the provision of a safe and reliable electricity supply.

Appellant's Submissions

124. BELCO made a number of submissions in respect of this ground including:
    a. Nothing in the Revised Rationale related to what, if any, consideration was given by the RA to meeting this standard.
    b. The clearest way to determine whether the CAS had been met was to consider the returns on equity in respect of comparable utilities in the US.
    c. The benchmark returns were ignored.
    d. The RA failed to give any consideration to the approved rates of return on equity for the US utilities which were referred to in BELCO's application.

e. Mr. Amram sought to rely on movements in Liberty's share price over an 11-day period in 2019 as support for the RA's approach to the CAS in the rate-setting process for 2021-2022.
f. The refusal to consider seriously the merits of benchmarking the RA's Decision against a proxy group of comparable utilities effectively amounted to a disabling of the CAS in section 35 which is fundamental to Bermuda regulatory law.
g. The failure to consider properly or at all the CAS in section 35(2)(b) was a clear error of law and/or mixed fact and law in that the wrong legal standard was applied to the facts before the RA.

Respondent's Submissions

125. The RA made a number of submissions in respect of this ground as follows:
a. The application of the Section 35 Interpretation results in this ground failing.
b. On appeal, the Court has to accept that any determination by the RA that falls within its own range must be reasonable, unless BELCO can show that the RA's expert's entire range was unreasonable.
c. BELCO would have to accept that the range of values for the rate of return of BELCO in the JER represents a reasonable range.

Analysis

126. In my view, BELCO has failed in respect of Ground 2 for several reasons.

127. It is necessary to set out some background at this point.
a. In paragraph 59 of Barbosa 1, Mr. Barbosa stated that the proper rate of return was a legal and technical question, thus the Court would be best assisted by legal submissions on the appropriate interpretation of section 35(2)(b) of the EA and expert evidence. In response, in paragraph 45 of Burgess 1, Mr. Burgess stated that he agreed on that point. He added that the RA evaluated BELCO's submission and response to the Draft Rationale in line with the GD, and with law and regulatory

principle generally as explained in the RA's final rationale document which provided BELCO with an exhaustive write up on the approach used to determine the rate of return, with differences in components fully explained. In Barbosa 2, Mr. Barbosa countered that the differences between the Rationale and the Revised Rationale were largely unexplained by the RA.

b. In respect of the CAS, the JER stated that in a market economy, the CAS return reflects the opportunity cost, which equals the earnings given up by placing investors' money in a competing venture of like risk. The Experts agreed that if investors believe that BELCO's returns are expected to fall below returns offered by ventures of comparable risk, BELCO may fail to attract adequate capital at a reasonable costs to provide service for its customers. Thereafter, the Experts' views as set out above in relation to Ground 1 applied equally to this ground of appeal.

128. First, I rely on my interpretation of section 35 which is in accordance with the submission on it by the RA. On this basis, I would dismiss this ground of appeal.

129. Second, as stated above, the RA's expert evidence of its rate of return is clearly within the reasonable range. I agree with the RA that BELCO has not shown and has not even asserted that the RA's expert's entire range was unreasonable. On this basis, I am inclined to dismiss summarily this ground of appeal.

130. I will now go on to consider the substantive points to this ground.

131. Third, counsel for BELCO pointed to the Benchmark Returns Approach, which as presented by BELCO, computes the statistical spread (a histogram) of allowed equity return in rate cases for vertically integrated electric utilities (like BELCO) in the US. He relied on Mr. Reed's submissions in paragraph 20 of the JER as compelling. There, the Experts agreed that the Rationale did not include an explanation as to why this analysis was not considered but they disagreed on the importance and relevance of this analysis to the final determination of cost of equity. To that point, Mr. Reed's view in essence was that consideration of the financial benchmarks established by regulators for firms of

comparable risks was the single most important basis for assuring investors that rates will be compensatory. Thus, US-based utility return allowances are important as a comparator.

132. On the other hand, Mr. Amram concluded that he did not believe that it was relevant to derive the costs of equity on the basis of a comparison with peers based solely in the US This was based on his view that since country risk was such an integral part to cost of equity calculations, the cost of equity approved for BELCO should only be compared with cost of equity values approved in jurisdictions with a similar level of country risk to Bermuda. Further, he concluded that although benchmarking can be a powerful tool if done properly, excessive reliance on benchmark values could lead to erroneous conclusions. His view was that BELCO's benchmarking analysis was restricted to US utilities and did not expand to other jurisdictions with similar regulatory regimes or ones operating under similar circumstances and risks, for example small island nations. He also took the view that BELCO's benchmarking approach covered a long period of time starting from January 2018, a period which may have had very different economic circumstances.

133. In my view, I prefer the evidence of Mr. Amram that Bermuda should be compared not solely to US utilities but to a wider group including small island nations. I have considered that BELCO argue that given Bermuda is linked in many respects with the US economy, such that it would make no sense for an investor in utilities to invest with the prospect of a 7.16% return when a larger and less risky US utility is offering at least 2% more than that. Thus, the point is that the RA failed to factor in the CAS. However, I am ever mindful of the fact that: (i) Mr. Amram determined a reasonable range for the rate of return was 6.78% to 8.22% with a midpoint of 7.5%; and (ii) the RA's determination of 7.16% fell within the range and thus was not unreasonable.

134. Fourth, I refer to my findings in relation to CRP which apply equally to this ground.

135. In my view, based on the evidence as set out in respect of grounds 1 and 2, the RA did not fail to determine a tariff in a manner that authorized BELCO to earn a return sufficient to attract needed capital.

Conclusion

136. In light of these reasons, I would dismiss this ground of appeal.

Ground 3 – The RA erred in law by failing to consider whether BELCO's investments were prudently incurred as required under section 35(2)(a) of the EA and/or otherwise misdirected itself in relation to section 35 of the EA

137. The issues in the Experts' evidence on this topic are: (i) whether the RA appropriately applied the CAPEX incentive mechanism and appropriately calculated BELCO's rate base; and (ii) whether the RA's decision to exclude certain expenditures was made using an appropriate standard of prudence.

138. In the GD, rate base means the total value of assets on which a utility in permitted to earn a return. Section 35(2)(b) allows for recovery of reasonable costs of investments if it is prudently incurred and for which the investment is used and useful.

Appellant's Submissions

139. BELCO made a number of submissions in respect of this ground as set out below.

140. BELCO submitted that Mr. Reed set out the meaning given to the prudence test pursuant to North American case law and the relation to the CAPEX incentive scheme. He explained the four principles which define the prudence test:

    a. Prudence related to actions and decisions. Costs are neither prudent nor imprudent and it is the decision that has generated the costs which must be reviewed;
    b. Prudence is a measure of the quality of decision-making irrespective of how the decisions have turned out;
    c. Hindsight is excluded from any prudence review; and

d. Decisions which are subject to a prudence review must be compared to a range of reasonable/prudent behavior. It is therefore necessary to consider what would be prudent if it is intended to exclude certain investments as imprudent. This is a necessary exercise to determine the range of reasonable actions and decisions. It follows that a decision can only be labelled as imprudent if it can be shown that the decision was outside the counterfactual range of what a reasonable person would have decided.

141. BELCO submitted that prudence is the means of determining the appropriate rate base. Mr. Reed complained that the RA never explained transparently, in any of its versions of the Rationale, what the rate base actually was determined by the RA to be. BELCO assert that Mr. Burgess stated that it could be worked out by BELCO and that the RA did not need to divulge it. BELCO submit that this was not transparent. Further, the RA refused to release its spreadsheet until November 2022 and that it was remarkable that the Experts only agreed the rate base in January 2023. BELCO assert that much of the difficulty arose from the fact that the RA did not implement the CAPEX incentive mechanism in accordance with provisions of the GD.

142. BELCO submitted that the RA made its adjustments pursuant to the "CAPEX Efficiency Regime Adjustment" (the "**CERA**") (which was substituted for CAPEX incentive scheme), claiming that they are more suited to and consistent with legislation, the GD, overarching policy and all stakeholders' interest. However, BELCO submitted that nothing in the legislative framework justified making a decision in accordance with "overarching policy or stakeholders' interests" suggesting that the RA has applied the wrong or irrelevant criteria in this aspect of the case.

143. BELCO submitted that in respect of CAPEX, Mr. Reed made the point that the RA had not explained how its formulaic approach to disallowing CAPEX amounts that are above the approved cost estimate for a project satisfies the requirement that rates be set to permit recovery of prudently incurred capital expenditure.

144. BELCO submitted that for the rate review exercise, capital expenditure was divided into three categories:
    a. Recently commissioned assets – assets previously approved and commissioned or anticipated to be commissioned in full before 1 January 2022;
    b. Ongoing residual investments – assets previously approved but due to be commissioned in full on or after 1 January 2022; and
    c. New assets – not previously approved (or assets with considerable scope changes) due to be commissioned on or after 1 January 2022.

145. The Experts agreed that 20% of the rate base adjustments related to cost exclusions in respect of costs which have been incurred. The total downward adjustment is this respect were US$3,234,140 for 2022 and US$7,402,868 for 2023. The Experts also agreed that the RA's approach to the CAPEX incentive mechanism disallowed revenue requirement impacts from another $21.1million of incurred investments. The exclusions made after costs are incurred are permanent exclusions from the revenue requirement for these assets. It was also agreed that the scope of what should be labelled as a prudence allowance is limited to the *ex post* disallowance of costs already incurred.

146. Mr. Reed made a number of criticisms in respect of new assets as follows:
    a. In Mr. Reed's report, although prudence was cited in Table 3 for the disallowance of Items 1, 2 and 4 there had been no or no proper prudence review in respect of those items. There had been no review of management decisions leading to the costs being incurred and no consideration of a range of reasonable action and no development of minimally prudent actions and associated costs, rather there has simply been a decree that the costs were imprudent.
    b. Prudence had only been referred to in connection with costs rather than actions/investment decisions which is a clear error of law in the context of North American case law. The RA had considered prudence in the context of whether it might be imprudent to pass costs on to customers which is the wrong approach.
    c. In respect of Item 4, there was no actual prudence determination.

d. In respect of other disallowances in Table 3, the RA determined that CAPEX projects should not be allowed cost recovery for several reasons, none of which recognized the need for a prudence review.

147. Mr. Reed's criticism in respect of ongoing residual assets was that the RA determined that US$14.3m should be disallowed in respect of 2022 costs based on overspending alone. There was no attempt to carry out a prudence review to determine whether the prudence test had been passed or failed. There were no examination of the decisions to invest.

148. BELCO submitted that Mr. Amram attempted to explain the lack of prudence reviews by stating that on the evidence available to him, he considered the decision to exclude specific capital and operational costs to have been made in line with a standard of prudence which, *ex post*, he deemed to be appropriate. BELCO submit that such evidence is a concession that the RA did not carry out the exercise it should have for the purposes of implementing the CAPEX incentive scheme, thus ignoring its legal obligations. BELCO make the point that it was not for Mr. Amram to carry out the exercise but for the RA to do so.

149. In relation to the CAPEX incentive mechanism/CERA, the Experts agreed that Table 6 was incorrect and that the RA did not factor into the final decision some of the information provided by BELCO to the RA after it received the Draft Rationale.

Respondent's Submissions

150. The RA submitted that the application of the Section 35 Interpretation results in this ground failing.

151. The RA submitted that the Experts disagree on the importance of the requirements of the methodology, that is, prudence, efficiency (useful) and reasonableness. It stressed that Mr. Reed sought to place his entire reliance upon the US methodology for determining if costs are prudent, despite there being no proper basis established for applying US guidance.

However, Mr. Amram had confirmed that based on his experience, the issues of experience, reasonableness, efficiency and prudency must be considered together. To that point, the RA submitted in essence that there is no evidence that legislators considered the North American regime when drafting the statutes nor is there any evidence from a US based legal expert as to how references to US law should be interpreted or how they are applicable in a Bermuda context. Thus, BELCO has based its case on the word "prudent" in the assessment of capital expenditure with Mr. Reed focused on North America to the exclusion of other equally competing considerations which the RA must take into account.

152. The RA submitted that in the absence of any evidence that the Bermuda legislation is in any way based on US law, "prudently incurred" is to be given its natural and ordinary meaning. Further, as the phrase is of the broad and open ended variety, the standard of review as to whether the RA acted appropriately in determining the prudence question is that the determination must be shown to be plainly wrong, or subject to "palpable and overriding error" or so "outrageous in its defiance of logic … that no sensible person who had applied his mind to the question to be decided could have arrived at it."

153. The RA made some submissions about the approach in Bermuda to the use of US authority in particular and overseas authority generally. In *Offshore Commercial Law in Bermuda, Second Edition 2018,* ed Ian Kawaley, paragraph 13.38 *"Commercial litigation on Bermuda"* by Narinder Hargun and Alex Potts, it stated in essence that where issues of common law in Bermuda have not been expressly considered by Bermuda courts, then the Bermuda courts often find assistance in the judgments or rulings by judges of the Superior Courts of England and Wales and depending on the facts and circumstances, from the Superior Courts of other common law and offshore jurisdictions. Further, there may be circumstances in which the judgments of US state or federal courts are cited, although it is rare, in practice, for the Bermuda courts to place any particular weight on US case law, given the differences between the legal systems. The RA submitted that in any event, the meaning of section 35 of the EA is a question of statutory interpretation, with section 10 of the Interpretation Act 1951 giving express primacy to the rules for the interpretation and construction of provisions of law for the time being binding upon the Supreme Court of

Judicature in England in the absence of express statutory provision. Thus, there was no indication that in any relevant legislation that the primary rules of statutory interpretation should be displaced.

154. The RA argued that it was important to note that the US case law being cited was based on: (i) particular provisions of the US Constitution as to due process and regulatory matters; (ii) on US statute law which does not refer to prudency but imposes a statutory requirement that rates be "just and reasonable"; (iii) on US rules of statutory interpretation; and (iv) on procedural context of the US Administrative Procedure Act, which is not replicated by any comparable statute in Bermuda. Thus, the application of US principles of statutory interpretation disqualifies US case law from consideration or relevance.

155. The RA referred to several US cases relied on by BELCO as set out above, namely *Missouri ex. rel. Southwestern Bell Telephone Company v Public Service Commission of Missouri* 262 U.S. 276, *Bluefield Waterworks and Improvement Company v Public Service Commission of West Virginia* 262 U.S. 679, and *Federal Power Commission v Hope Natural Gas Company* 320 U.S. 591. The RA highlighted various points about the cases in relation to prudence and rate-making submitting that, applicability aside, it was far from clear that that they were supportive of the propositions advanced by BELCO and thus there was no evidential or legal reason to import North American regulatory models. On that basis, the RA took the position that BELCO sought to elevate prudence to the North American standard or that it should be presumed but on the plain wording of the statute, the EA does not do that, especially where any presumptions would be set out in express language. For this reason, Mr. Amram concluded that prudency should not be elevated as proposed by BELCO as if it had some greater weight or meaning but that it must be considered in the context of other considerations, that is, "*a cost cannot be deemed to be prudent if they are not first established to be reasonable and efficiently incurred*" and "*I do not believe standards implemented in North America are any more relevant to the Bermuda context than those implemented in all of the other mature regulatory regimes across the world*." Notably Mr. Amram disputed the principle that there should be a presumption of prudence pointing to various approaches in other jurisdictions. Thus, the

RA submitted that there was nothing in the statutes or the GD which suggested any presumption of prudency, highlighting that it was for BELCO to make its case and then for the RA to consider and determine the rate base.

Whether the RA's decision to exclude certain capital expenditure was appropriate

156. In the JER, the question asked is if the decision to exclude capital was made using an appropriate standard of prudence. The Experts agreed that that prudence is more commonly established on an *ex post* basis (after costs are incurred) and therefore that the scope of what should be labelled as prudence disallowance is limited to those costs. On this basis, the assets subject to review are as agreed by the Experts follows:
    a. Recently commissioned assets, 51 of them, for which costs were excluded in the calculation of the claw back on an *ex post* basis.
    b. Ongoing residual investments – 7 of 26 assets in this category where costs were excluded were made on an *ex post* basis; and
    c. New assets – only 1 of 15 assets where costs were excluded was made on an *ex post* basis- the North Power Station;

157. Mr. Reed concludes that the RA have not applied the prudency test based on established method in over 60 regulatory regimes in North America and that the standard and methodology must be applied in Bermuda. The RA submit that BELCO must fail as prudency is not to be defined or determined in the manner put forth by BELCO.

158. The RA submitted that Mr. Amram considered each determination of the various assets by reference to the information available justifying why each decision was reasonable. He highlighted that BELCO was given the opportunity to provide information in respect of the disputed assets but failed to provide any information that the overspend was prudent. Further, Mr. Amram used his expertise to assess the decisions and gave his reasons why such decisions were reasonable having regard to the requirements of efficiency.

Analysis

159. In my view, this ground fails for a number of reasons.

160. First, I rely on my interpretation of section 35 which is in accordance with the submission on it by the RA. On this basis, I would dismiss this ground of appeal.

161. Second, I do not accept the reasoning advanced by BELCO that the North American caselaw approach to the meaning and application of a prudence test should be followed in Bermuda as it has been done in a large amount (approximately 60) of regulatory regimes in North America. I agree with the RA that there is no evidence to support such a conclusion. In my view, the starting point is that as set out in *Offshore Commercial Law in Bermuda, Second Edition*, where issues of common law have not been addressed by the Bermuda courts, then assistance is found in the judgments or rulings by the judges of the Superior Courts of England and Wales and if necessary from the Superior Courts of other common law and offshore jurisdictions. I also accept that the text sets out that US state or federal court cases may be cited but it is rare to place and particular weight on the US case law. Thus, in the present circumstances, I am cautious to apply weight to the US case authorities on the meaning of prudence.

162. Third, I accept the arguments of the RA that the US caselaw was based on provisions of the US Constitution as to due process and regulatory matters and on US rules of statutory interpretation such that it disqualifies US caselaw from consideration and relevance. Although the RA went into some detail about the North American caselaw as set out above in detail, in my view, it is not helpful for me to assess the cases in such granular detail.

163. Fourth, in my view, I agree with the RA, that "prudently incurred" is to be given its natural and ordinary meaning. The effect of this is that the standard as to whether the RA acted appropriately in determining the prudence question is that the determination must be shown to be plainly wrong or subject to "palpable and overriding error" or so "outrageous in its defiance of logic … that no sensible person who had applied his mind to the question could have arrived at it".

164. Fifth, I agree with the RA that BELCO has sought to elevate prudence to the North American standard or that it should be presumed. I also agree with the RA that the EA does not elevate prudence to that standard especially in the absence of any express language to do so. To that point, and getting to the crux of the matter of prudency, I accept Mr. Amram's position that prudency should be considered in the context of other considerations, namely that costs cannot be deemed to be prudent if they are not first established to be reasonable and efficiently incurred. In doing so, I recognize Mr. Amram's expertise arises from a non-US based experience and from his experience with other mature regulatory regimes across the world. Thus, I also accept his position that prudency should not be presumed in the Bermuda legislative framework.

165. Sixth, I now rely on the JER where the Experts agreed that prudence is more commonly established on an *ex post* basis, that is, after costs have been incurred. I also rely on their agreement that the assets subject to review are Recently Commissioned Assets, Ongoing Residual Investments and New Assets as set out above. I have considered the criticisms of these categories by Mr. Reed whose stated position is that the determinations generally were not in accordance with the North American caselaw and as such constituted clear errors of law, including that there was a lack of a consideration of actions and investment decisions but a focus on whether it was prudent to pass costs onto customers, a wrong approach under North American caselaw.

166. Seventh, I have considered the argument by BELCO that Mr. Amram has sought to explain the prudence reviews or as BELCO states the lack of prudence reviews by the RA. The point made is that it was for the RA to carry out the prudence reviews, not Mr. Amram. Initially, I had attached some weight to this complaint. However, I have also considered the evidence that BELCO was given the opportunity to provide information as to each of the disputed assets but yet failed to provide any specific information that the overspend was prudent. I accept that Mr. Amram considered each determination of the various assets by reference to the information that was available justifying why each decision was reasonable, whilst using his expertise to assess the decisions having regard to the requirements of efficiency, reasonableness and prudency. Thus, I am satisfied to agree with

the RA that this approach was clearly preferable to an assessment that prudence should be presumed. Further, I am also satisfied that the approach of the RA was clearly set out in the GD at paragraphs 46 and 47.

167. Eight, in relation to this ground of appeal, I am satisfied that the RA did not err in law by failing to consider whether BELCO's investments were prudently incurred as required under section 35(2)(a) of the EA or otherwise misdirected itself in relation to section 35 of the EA.

Conclusion

168. In light of these reasons I would dismiss this ground of appeal.

Ground 4 – The RA erred in law when reaching the Decision by failing to consider the purpose of the EA enshrined in section 6(a) and (e), namely, to ensure the adequacy, safety, sustainability and reliability of electricity supply and to protect the interest of end-users with respect to prices, affordability, and the adequacy, reliability and quality of electricity service.

Appellant's Submissions

169. BELCO made a number of submissions in respect of this ground including as follows:
    a. The effect of section 35 of the EA and the GD is that the level of investment for which BELCO is entitled to a reasonable return should provide BELCO's customers in Bermuda with an electricity supply that is consistent with the requirements of the EA. Section 6(a) and (e) of the EA express that the balance that the RA is to achieve. However, unexplained and substantial disallowances made pursuant to one-sided provisions of Annex 5 and the other changes made to BELCO's application disturb that balance and carry with them the risk that BELCO will not be able to sustain its level or service where there is no or insufficient return.
    b. BELCO submitted that a regulator's role should be to supervise an electric utility to ensure there is balance between customers who need reliable electricity service at a price that reflects the capital investment and operating costs borne by the utility.

It referred to a footnote citation excerpted from the judgment of Justice Brandeis in *Missouri Ex rel Southwestern Bell Telephone CO v Public Sector Commission* at paragraph 17 of Mr. Reed's expert report which stated as follows: "*The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.*"

c. The RA's approach threatens that balance, and it does so in a way that potentially jeopardises the requirements of section 6 of the EA and is antithetical to the interests of customers as well as to the interests of BELCO and the jurisdiction.

Respondent's Submissions

170. The RA submitted that the application of the Section 35 Interpretation results in this ground failing.

171. The RA submitted that subsequent to the hearing, BELCO had considered amending their appeal since Mr. Amram had conceded under cross-examination that the RA had implemented and utilized a methodology not contained in the GD when making the decisions complained upon in this appeal. That methodology was outlined in Annex 5 to the Retail Tariff Review 2022 – Information Request of 25 June 2023 entitled "Minded-to Methodology to Review BELCO's CAPEX Plan with Provisions for CAPEX Efficiency Regime Adjustment". BELCO had expressed that since the RA's own expert stated that the RA had failed to determine the retail tariff for 2022 and 2023 pursuant to section 35(1) an amendment to the grounds of appeal might be necessary. Eventually, BELCO did not proceed with an application for leave to amend the ground of appeal on the basis that the issue was already covered by existing grounds.

172. Mr. Diel submitted that the issue was whether the Annex 5 methodology was consistent with the methodology and whether, if it was not, the requirement that the tariff be determined in accordance with the methodology means that the Decision was unlawful and invalid. He made various submissions about the effect of Annex 5.

173. The RA submitted that its duty was one of substantial compliance.

Analysis

174. First, in my view, this ground fails for the general reason where I have relied on my interpretation of section 35 which is in accordance with the submissions on it by the RA. On this basis, I would dismiss this ground of appeal.

175. Second, I accept the evidence that BELCO had been aware of the Annex 5 methodological approach since 5 June 2021 which was reinforced several times since with BELCO never objecting to proceeding in accordance with the approach. In turn, BELCO eventually produced their submission in accordance with it. Also, I accept Mr. Amram's explanation on cross-examination that any difference between the methodology and Annex 5 was merely presentational and that the numerical application of the disallowance was the same. Thus, in my view, BELCO was not prejudiced in any way and it follows that there was not a 'person aggrieved' on this point.

176. Third, in my view, the background to Annex 5 as supported by the evidence of the RA is such that I am not satisfied that the allowances made pursuant to Annex 5 along with other changes made to BELCO's application disturbs the balance in respect of the purposes of the EA set out in sections 6(a) and (e).

Conclusion

177. In light of these reasons I would dismiss this ground of appeal.

Ground 5 – The RA failed to consider relevant considerations and took into account irrelevant considerations when making the Decision and/or failed to engage in reasoned decision-making on the record contrary to section 16(g) of the RAA.

Appellant's Submissions

178. BELCO made a number of submissions in support of this ground.

179. BELCO submitted that section 16(g) of the RAA provides for the regulatory principles that the RA should, in performing its duties, engage in reasoned decision-making, based on the administrative record, the principle being amplified by section 16(f) which requires the RA to operate transparently. BELCO submitted that Mr. Burgess accepted in his evidence that the only written record of the Decision and the process by which it was reached were the Decision and the Revised Rationale. Thus, there was no other place to find and be able to consider what the reasoned decision-making process was. Further, the Ricardo Report was not disclosed and the RA refused to provide it or any information that would disclose the reasons for the decisions made in respect of the retail tariff review for 2022 and 2023.

180. BELCO submitted that the RA failed to take into account a number of matters as follows:
    a. Country risk calculations in considering only the country risk posed by operating commercially in Bermuda over the whole economy which is composed of different sectors. However the RA refused to consider the calculation of country risk by reference to the utility sector which is characterized as being immobile and undiversifiable. The refusal to consider *Lambda* was no more than a way of driving/keeping the retail tariff down.
    b. Market Risk Premium – The RA gave no consideration to the MRP or how it should be approached by reference to market analysis but simply substituted a MRP based on GDP forecasts reflecting the whole national economy rather than the part relevant to BELCO's market sector.
    c. The RA misdirected itself as to the obligations for rate setting process contained in the GD, firstly by considering that it was at liberty to deviate from the GD and to

implement a methodology that was different from the GD, imposing different test for the inclusion/exclusion of capital costs in rate base from the GD, such methodology that was inconsistent with the core principles of section 35 of the EA. Further the RA failed to consider different methodologies applied by BELCO.

d. In applying the unauthorized Annex 5 scheme, BELCO was penalized in that the RA failed to consider capital investment despite the fact that information had been provided by BELCO in respect of that investment. In paragraph 30 of the JER, the Experts agreed that from a review of the record, some of the information does not seem to have been factored in the final Rationale. Mr. Reed's view was that this information should have been taken into account for the rates set for 2022 and 2023 and involved the recovery of millions of dollars. Both the Experts agreed that at some future date this could be corrected on the basis of further information. Mr. Amran's explanation for it being ignored was that it was provided at a late stage in the process of setting the rate. However, BELCO submit that at no time did the RA suggest that it was proposing a restriction on the provision of further information, an act which BELCO says was arbitrary and denied the possibility of recovery of the capital costs incurred.

e. In relation to OPEX, the RA ignored the actual operating expense costs and instead used forecasted costs. Further, the RA refused to allow BELCO to recover fees payable to its parent company pursuant to the increased costs under the Algonquin Shared Service Fees. BELCO submit that Mr. Amram set out his concerns at paragraph 48(b) of the JER but that he and RA face the same problem, namely that his comments are his and not the RA's.

f. The RA's failure to carry out prudence reviews involved a failure to take into account relevant information that would have had to be taken into account if a proper prudence review had been carried out. BELCO submitted that Mr. Amram's own after-the-event commentary on what the RA did not do is irrelevant and simply exposes the problem faced by the RA on this appeal.

<u>Respondent's Submissions</u>

181. The RA submitted that the application of the Section 35 Interpretation results in this ground failing.

182. Counsel for the RA repeated the ground 4 submissions about Annex 5. Further, it was submitted that there was nothing in ground 5 on which it was assumed reliance would be placed which touched on the issue of whether the Decision was unlawful and invalid.

Analysis

183. In my view, this ground fails for the general reason where I have relied on my interpretation of section 35 which is in accordance with the submissions on it by the RA. On this basis, I would dismiss this ground of appeal.

184. Further, in light of the various issues complained about in the preceding grounds of appeal and generally repeated in this ground, and my reasoning in respect of each of them as set out above, I am not satisfied that the RA has breached section 16(g) of the RAA. In my view, the RA in performing its duties, did engage in reasoned decision-making, based on the administrative record, the principle being amplified by section 16(f) which requires the RA to operate transparently.

Conclusion

185. In light of these reasons I would dismiss this ground of appeal.

Grounds 1 – 5 taken together - Deference

186. In taking Grounds 1 – 5 together as an attack on the Decision, I am obliged to accept that the duties of the RA were to assess highly technical information as supported by expert evidence provided to both BELCO and the RA. I am also guided by the case law as set out above about the intention of Parliament when appointing statutory bodies such as the RA. Further, in my view the rate setting exercise involved a process of evaluative analysis and

judgment in relation to issues of technical scientific, economic and financial complexity. It also involved an exercise where there are no single right answers but where there was a range of outcomes which could be arrived at with equal proprietary as demonstrated by the Expert evidence in this case.

187. I also recognize that despite the extent of and reliance on the expert evidence in this case, this Court could have been drawn into a technical analysis of complex issues which are reserved for expert analysis with an aim of retaking a decision. However, as stated in the case of *Ross*, the Court is not equipped procedurally or substantively to do so. I also considered the case of *Council of Civil Service Unions* on this point.

188. Thus in respect of Grounds 1 – 5, pursuant to the case authorities in reference to deference as set out above, I am obliged to be very slow to interfere in the findings of the RA. I am also obliged to give the decision-maker a safe space in which to act and per the Privy Council in *State of Mauritius v CT Power*, I am reminded that the RA has a wide margin of appreciation in making the complex evaluative judgments required. In my view, upon the full consideration of the abundance of evidence in this case including the complex expert evidence I would dismiss Grounds 1 to 5 on the basis that this Court should give deference to the RA in the evaluative process and in the absence of any actions by the RA that were plainly wrong.

Ground 6 – The RA erred in law by failing to provide adequate reasons for the Decision

Appellant's Submissions

189. BELCO made a number of submissions in support of this ground.

190. BELCO submitted that it was a strange fact that the RA never provided a figure for its rate base. The Experts had been able, confidently, to arrive at a rate base figure of US$442,276,760 for 2022 and $470,250,383 for 2023 but such failure militates against obligations of transparency and the principles of reasoned decision making. Further

BELCO submitted that on the affidavit evidence, when Mr. Barbosa complained that there was no figure for rate base, Mr. Burgess replied that it could be easily calculated from the figures provided in the Revised Rationale, but on evidence Mr. Burgess calculated it incorrectly. Similarly, Mr. Amram took the position that it could be calculated from the figures provided but that accepted that it was impossible confidently to calculate it from the figures given.

191. BELCO submitted that on this basis, it was impossible to infer that the RA had upheld its obligations under the RAA of transparency and reasoned decision-making reflected in the administrative record in relation to the rate setting exercise. Further, BELCO submitted that the RA sought to hold back information and play its cards close to its chest, which was fundamentally inconsistent with the regulatory principles which are included at section 16 of the RAA in order to set the tone for Bermuda's regulatory regime which by law must be transparent.

192. BELCO also submitted that there was uncertainty as to what capital investments were included in the rate base, as Barbosa 1 explained that the Revised Rationale increased allowed revenue for BELCO for 2022 by US$5M and for 2023 by US$100,000 without any explanation of the reasons for the increased figures, thus leaving BELCO unable to determine what additional capital investment in respect of what capital projects had been allowed.

Ground 7 – The RA erred in law by failing to act in a reasonable proportionate and consistent manner contrary to section 16(d) of the RAA and/or failing to operate transparently to the full extent practicable contrary to section 16(f) of the RAA and/or failing to engage in reasoned decision making on the record contrary to section 16(g) of the RAA

Appellant's Submissions

193. BELCO made a number of submissions in support of this ground.

194. BELCO submitted that this ground of appeal covers some of the same ground as Ground 6 but further highlights the lack of transparency around the revisions to the Revised Rationale between 18 – 21 March 2022. They rely on Mr. Reed's position that the making of changes at that stage was remarkable and his criticism of the RA for proceeding that way. BELCO submit that it appeared that the RA had not reached a fixed conclusion by 18 March 2022, and if that was so, then it was subjecting BELCO to a compressed timetable to provide information but it was itself rushing the process in an unsatisfactory manner when there was no need to do so.

195. BELCO submitted that the RA's reliance on the possibility of a price-shock was misplaced because of the various techniques advanced in Barbosa 2. Further, BELCO submitted that the process appeared to be a top-down approach to the exercise of setting a rate of return rather than a bottom-up approach. Also Barbosa 1 complained that the RA took inconsistent positions with respect to whether it was necessary to provide capital justification forms for capital costs under $500,000 and items were entered into rate base at negative values which was perplexing and for which there has been no explanation.

Ground 8 – The RA operated in an otherwise procedurally unfair manner in reaching the Decision

Appellant's Submissions

196. BELCO made a number of submissions in support of this ground.

197. BELCO submitted that the process related to rate setting for two years rather than one and introduced CERA which was a wholly new approach to CAPEX allowance and disallowance. This was not permitted by the statutory framework and it was extremely complex and left issues as to what was in and what was out of the rate base as well as what capital costs included in the rate base were permitted to generate a return. BELCO complained that the RA's conduct led to a process that should have been fair and based on

mutual understanding and information and concern turning into a somewhat adversarial process, including examples as follows:

a. Initial grudging allowance of limited further time in which to provide a massive volume of information to the RA.
b. A failure to disclose to BELCO any indication of the RA's approach to crucial ingredients in the calculation of the rate of return and the rate base.
c. The unwillingness to have further meetings with or entertain further representations from BELCO after it had submitted the information requested.
d. The insistence that all the RA was interested in receiving from BELCO after delivery of the Minded-to-Decision was "noteworthy methodological errors or omissions" or what Mr. Burgess termed "glaring errors", when BELCO wanted a "walk through in relation to certain elements of the Minded-to Decision" but this was declined.
e. Mr. Burgess' rejection out of hand of a request for further time to make written representations.

198. BELCO complained that although it did submit further information, its request through its president for further discussions was rejected, leading the Experts to find in the JER that the further information supplied by BELCO was ignored and there was no evidence that any account was taken of BELCO's further submissions in relation to cost of capital.

199. BELCO complained of the process with reference to key dates and events as follows:

a. The 25 June 2021 and 28 July 2021 information requests – requested huge volumes of information, with a one month deadline, that the RA knew or should have known would impose significant burdens on BELCO. The compressed timetable of information gathering and determination produced difficulty for BELCO and it led the RA to determining the tariff without giving BELCO an opportunity to understand and discuss with the RA assumptions underpinning the Decision and Tariff Decision, such that the Decision and its reasoning were opaque.
b. On 2 December 2021, BELCO submitted the information requested, which was then considered by the RA's expert Ricardo, which provided a report to the RA

dated 7 January 2022, which was never discussed with BELCO and only revealed in this appeal litigation.

c. On 14 December 2021, BELCO's efforts to seek further meetings with the RA were unsuccessful although BELCO made it clear that it wanted to meet with the RA to discuss the information provided and if that was not possible to have the opportunity to make representations in a meeting with the RA.

d. On 14 January 2022 the RA wrote that it would issue its Minded-to Decision on 4 February (actually provided on 16 February 2022) and would finalise its decision on revenue allowances on 25 February 2022 leaving only the determination of tariffs to be released. BELCO sought a meeting as the only opportunity BELCO had to make representations was to submit noteworthy errors or omissions by 15 February 2022 (later changed to 7 March 2022).

e. On 2 March 2022 Mr. Burgess rejected BELCO's request for an extension to submit its representations stating that it only required identifying any apparent methodological, calculation or legal errors made in arriving at its decision. Thus, BELCO submit that considering the information with no discussion with BELCO was unfair.

f. On 11 March 2022 BELCO did submit information to the RA. BELCO submits that the RA's rejection of BELCO's president's request for discussions was unfair.

200. In light of these circumstances, BELCO submits that the process was unfair as follows:

a. According to Barbosa 1, the RA's timetable was unrealistic and oppressive. Mr. Burgess' responses for further time was unnecessarily adversarial and calculated to risk a potentially unfair and unsatisfactory process.

b. The compression of the timetable distorted the whole process in that there was a total failure on the part of the RA to carry out the process transparently and openly in a manner that would afford BELCO an opportunity to know and address the matters that would have emerged if the RA had carried out any or any proper prudence review.

c. The RA conducted the review in a manner that made it impossible to determine how the RA had decided certain issues, there being four iterations of the Rationale

and where Mr. Reed concluded that the Revised Rationale provided no visibility into whether aspects of the determination of the rate base were properly followed.

d. The RA refused to provide information, including the Ricardo Report, to BELCO and would not even provide the actual rate base and withheld information on spreadsheets that would have enabled BELCO to know the actual rate base. Thus, it was absurd for the RA to take such a position that its workings were confidential or proprietary from production when it was required to be transparent and to enable BELCO to know the rate base decision and the basis for it.
e. The RA was required to conduct the rate review transparently and be open about its decision making process but it failed on both counts as Mr. Reed has serious complaints about the informal information gathering process without clear rules to inform its decision in rate proceedings which he found to be almost entirely opaque.
f. The RA has only provided information in these proceedings which should have been provided to BELCO in the course of the rate setting process.
g. There was no apparent separation of functions between the advisory and the regulatory staff who recommend the rates to the Board of Commissioners on the advice of the advisory staff, which is why the functions were fused with the RA acting as both advocate and judge in the case leading Mr. Reed to state this was an important flaw in the process.
h. The RA refused BELCO's requests for discussion and closed down the process of weekly meetings which had been part of the process.

201. BELCO submitted that Mr. Burgess' evidence did not begin to address the issues other than to rely on the fact that the regulatory regime did not spell out specific requirements. It asserted that such a contention was irrelevant since the rate process mandates a fair process. Thus the rate review process was fatally flawed by the unfairness of the process conducted by the RA and thus the Decision should be set aside.

Grounds 6, 7 and 8 - Respondent's Submissions

202. The RA responded to Grounds 6, 7 and 8 together.

Transparency

203. Mr. Diel submitted that it was accepted that there was a duty to pay "due regard" to the "regulatory principle" to "operate transparently, to the full extent practicable", as well as to other "regulatory principles" as set out in section 16 of the RAA, subject to the usual requirement to act for the proper and discernible purposes of the statute. He also accepted that the preamble to the RAA provides that the RA should be subject to procedures which ensure that, to the maximum extent feasible, decisions will be made in a transparent manner.

204. Mr. Diel submitted that there was a significant distinction between an obligation to have due regard to a regulatory principle of operating transparently to the full extent possible and a direct duty to operate transparently to that extent. He relied on the cases of *R (on the application of Lumsdon and others) v Legal Services Board* [2014] EWCA Civ 1276 and *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin). In *Inclusion Housing* the Court stated "*The words 'so far as possible' do not transform an obligation of result into a 'have regard' obligation. They simply qualify the result that is to be achieved. This means that Parliament intended the court to decide whether the Regulator did, or did not, exercise its powers in a way that was so far as possible proportionate - and not merely whether the decision-maker rationally concluded that the result was so far as possible proportionate.*" Thus, in the case of a duty to "have regard", the question was "whether the decision-maker rationally concluded that the result was so far as possible proportionate". Further, the regulatory principles to which the RA is required to have "due regard" are numerous, aspirational and all that is required in relation to them is that the RA arrive at a rational conclusion that the procedure adopted was transparent, in so far as practicable, with rationality. The RA submitted that nothing that BELCO complained of came close to establishing that no rational regulator could have concluded the procedure which the RA adopted was not transparent.

Transparency – the meaning of "transparent"

205. The RA argued that the duty of transparency at common law has been limited to the *Lumsdon* principle which was analysed by the Divisional Court in *R (Manchester Airports Holdings Limited) v Secretary of State for Transport* [2021] 1 WLR 6190 and in *De Smith's Judicial Review, Ninth Edition* (2023), in essence that persons affected by the exercise of discretion who have a right to make representations ought to be clearly told the principles being applied by the decision-maker for the exercise of the discretion, in any event as much as the person needs to know in order to make informed and meaningful representations and that as Green J stated in *Manchester Airports* "*a policy should be sufficiently clear to enable those affected by it to regulate their conduct, that is to avoid being misled*." Thus, the RA argued that its conduct of the case satisfied these two tests, assuming the duty was a direct one, which in any event they argued it was not. Further, the RA submitted that all that was required is that the aspirational objective of transparency, whether in the broad or narrow sense, be taken into account and that the RA's procedure be such that it could be described as transparent by a rational regulator in either sense.

Procedural fairness generally

206. The RA submitted that the general principles of procedural fairness applied in this case, namely the principle *audi alteram partem*, the right to be heard or to have a fair hearing, which was "flexi-principle" and "context specific". Relying on the *Judicial Review Handbook, Seventh Edition* 2020 paragraphs 61.4 and 61.6, they submitted that the general principles are: (i) the decision-maker must give the person affected a prior opportunity to make representations, that is, the right to be heard, and (ii) the decision-maker must give the person affected sufficient information for the person to be in a position to make proper representations, that is, the right to be informed. The RA submitted that there were relevant general qualifications to the principles: (i) it was possible to waive natural justice rights; (ii) the right to be informed is the right to be informed of the gist; (iii) the court will give great weight to the tribunal's own view of what is fair; and (iv) the courts cannot substitute their preferred version of procedure for the decision-maker's; they must determine whether the procedures already chosen are fair.

Asserted breaches of fairness

207. In respect of Grounds 6 & 7, the RA submitted that reasons must be adequate and intelligible, but need not be exhaustive or refer to every material consideration. Further, a reasons challenge will only succeed if the party aggrieved can satisfy the Court that he has genuinely been substantially prejudiced by the failure to provide an adequate reasoned decision.

The Rationale

208. In respect of Ground 7, the RA submitted that Mr. Burgess confirmed that the Rationale included tables detailing each approved or rejected project. Also, in respect of the detail needed to calculate the rate base, the RA submitted that the figures provided generally and specifically for the rate base were produced by BELCO with certain adjustments explained in detail and provided to BELCO by way of pdf excel spreadsheets showing calculations, consistent with how BELCO supplied the information to the RA. As the rate base was easily calculable from the information provided, there was no substantial prejudice. The RA relied on the case of *R (Eisai Ltd) v National Institute for Health and Clinical Excellence* [2008] EWCA Civ 438 which was a case about the provision of information in a pdf read-only version as opposed to an executable version with issues being about tracking formulae, checking sensitivity analyses and testing reliability. The Court of Appeal held that in the circumstances fairness required the release of the fully executable version of the economic model as withholding it placed Eisai at a significant disadvantage in challenging the reliability of the model, thus limiting Eisai's ability to make an intelligent response on something that is central to the appraisal process.

209. However, the RA argued that there were huge distinctions between the present case and *Eisai*, namely that BELCO produced the model to which the RA made adjustments as documented in the Rationale, thus no issue of tracking formulae, checking sensitivity analyses and testing reliability arose. The edits by the RA had to do with inputs, not

calculations, and they were transparently described in the Rationale granularly as asset by asset, noting:

a. The rate base is not an input but an output of the calculations;
b. CAPEX adjustments aspects did not impact the calculation of the rate base and each adjustment was documented in the Rationale;
c. Other key inputs were documented in the Rationale.

Thus BELCO was not at any significant disadvantage as the Rationale provided more than adequate guidance for BELCO to edit its own file and produce the same results.

210. The RA also submitted other reasons for non-disclosure including that there was a duty of confidentiality, there were other significant and weighty regulatory reasons not to disclose, there was no detailed process with assurances as to what would or would not be disclosed, the degree of significance of the undisclosed information was slim and entirely incomparable with the degree of significance in the *Eisai* case. The RA submitted that in another case *R (Bristol-Myers Squibb Pharmaceuticals Ltd) v National Institute for Health and Clinical Excellence* [2009] EWHC 2722 (Admin) the Court ruled against claimant because of the distinguishing factor that it "*was the author of the original model and would have been able to put into the model alternative figures …. [and] could then run its own model for the purpose of calculating what difference that would make.*"

211. In light of these reasons, the RA submits that BELCO's central fairness complaints must fail.

Capital Justification Forms

212. In respect of Ground 8, the RA submitted that the timetable was subject to significant evidence from Mr. Barbosa and Mr. Burgess and thus the question for the Court was whether the timetable was unrealistic or oppressive. The RA submitted that BELCO cannot make out their argument given that on 7 July 2021 the RA extended the time significantly allowing the information to be submitted in three sets and then again on 25 August 2021

the RA allowed a further extension for the first set of information to 30 September 2021. Further, the RA held 8 technical meetings and workshops with BELCO for the purpose of helping BELCO with their understanding of the process. Thus, the RA state that the proposal for such meetings and the intent behind them was completely antithetical to the suggestion of a rushed and oppressive process. The RA relied on the letter from BELCO president, Mr. Caines, in which he stated that he was tremendously encouraged by the work BELCO and the RA had undertaken to that point and that the willingness of the RA to engage with BELCO had clarified the requirements and reduced uncertainties. Thus, the RA submitted that BELCO cannot now complain that natural justice rights have been infringed at that stage and there can be no proper complaint as to timing or the nature of the process to that point.

213. The RA submitted that the weekly meetings continued until 6 December 2021 when the RA received BELCO's final filing. Also, despite their complaints, BELCO responded broadly within the timeframes proposed. With Mr. Barbosa confirming that BELCO provided all the information requested which was voluminous and technically complex and that it had answered the questions posed and the information was complete. Thus, the RA submits that on BELCO's evidence, the timetable, even if compressed, did not impact the ability of BELCO to file, voluminous, technical and complete submissions. The RA submitted that the Court needed to consider that what is required is that the aspirational objective of transparency, whether in the broad or narrow sense, be taken into account and the RA's procedure be such that it could be described as transparent by a rational regulator in either sense. On that basis, the RA asks the Court to reject the hyperbole of BELCO's complaint that there was a total failure to carry out the process transparently as the meetings were arranged to BELCO's advantage, starting with the kickoff meeting and then the weekly meetings which were designed and implemented to ensure the process was not only transparent but understood by BELCO.

214. The RA submitted that it provided a Minded-to-Order decision and Rationale to BELCO. Thus, it asks the Court to reject the complaint from BELCO that it did not have the chance to engage further on the Minded-to-Decision as the evidence confirmed that BELCO filed

submissions in response to the Minded-to-Decision which went way beyond addressing calculation errors. Thereafter, the evidence showed that the RA considered those submissions and in some instances applied the new information in the Revised Rationale, an example being that the WACC calculation reflected BELCO's recommendations to switch the cost of debt from 4.15% to 4.29% in the Revised Rationale. The RA submitted that there was no legal duty to provide a response to a Minded-to-Decision document as once representations have been permitted and made fairly, and the decision-making process had begun, there is no further duty to inform or disclose internal deliberations, provided no new point or evidence arises. The RA relied on the case of *Hoffman-La Roche (F.) & Co AG v Trade Secretary for Trade and Industry* [1975] AC 295 where Lord Diplock stated "*Even in judicial proceedings in a court of law, once a fair hearing has been given to the rival cases presented by the parties the rules of natural justice do not require the decision-maker to disclose what he has minded to decide so that the parties may have a further opportunity of criticizing his mental processes before he reaches a decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.*" The RA also relied on the Court of Appeal case of *R (on the application of Hexpress Healthcare Ltd) v Care Quality Commission* [2023] EWCA Civ 238 at [35] to [36] and [38] where the Court of Appeal held in both *In re Pergamon Press* [1971] Ch 388 and *Maxwell v Department of Trade and Industry* [1974] QB 523 that fairness did not generally require "*the opportunity for comment on a draft report*", which was the decision in that case.

Transparency – consequences of breach

215. The RA submitted that it is necessary to decide what the consequences of a breach of the statutory transparency requirements should be, whether the result should be that the action taken is rendered invalid or not, or some other consequence. It relied on the case of *Benevides v Attorney General and the Corporation of Hamilton* [2014] Bda LR 33 at [57], which cited *R v Soneji* [2006] 1 AC 340 at [23], per Lord Steyn, giving the judgment of the majority of the House of Lords, adopted and applied by the Bermuda Court of Appeal in *Roberts v DPP* [2008] Bda LR 37, per Stuart-Smith JA at [18] that "*The Court must ask*

what consequences did the legislature intend should flow from that breach." In *One Communications Ltd v Regulatory Authority* [2017] Bda LR 123 at [40] the Chief Justice applied the pre-*Soneji* test formulated by Lord Wolf MR in *R v Home Secretary, ex parte Jeyeanthan* [2000] 1 WLR 354 at 362 which the Court held still to be relevant and helpful. Lord Wolf stated that in deciding whether the failure to follow a procedural step renders what follows a nullity or merely irregular, the questions which arise are:

> *"1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)*
>
> *2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) …*
>
> *3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The compliance question).*
>
> *Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."*

216. The RA submitted that the Chief Justice held, applying the test of substantial compliance in relation to a procedural requirement of the Electronics Communications Acts 2011 setting a time within which the RA had to complete a particular market review that there had not been such compliance. He also held that waiver was no longer possible.

217. The RA submitted that it was important to recognize the role of the "no difference" principle, namely that where a decision-maker has acted in a procedurally unfair manner, the courts will usually look to whether the flaw made a difference to the outcome. The "no difference" principle suggests that where the outcome would be no different the claim will

be unsuccessful. In *R v Chief Constable of the Thames Valley Police, ex parte Cotton* [1990] IRLR 344, at pages 351-352 Bingham LJ commented "*there can be no such thing as a technical breach of natural justice … because, to my mind, a procedure must in all the circumstances of a given case be either fair or unfair … There is no third category embracing procedures which are unfair to the subject of the decision as a matter of technicality but not of substance … the subject of a decision who has been denied a right to be heard cannot complain of a breach of natural justice (or unfairness) unless he can show that the decision might have been different if he had been heard.*" The RA submitted that the principle is increasingly being applied as a substantive rule rather than one going to remedy. However, in the Privy Council case of *Public Service Commission v Richards (Trinidad and Tobago)* [2022] UKPC 1, the Court recently applied the principle as a reason to refuse relief and dismissed the appeal partly on that basis. There it was held that since, had the PSC considered a letter which it was held accountable for not having received, it would have made no difference to the outcome, and would therefore have had no impact on the decision, relief should be refused.

218. The RA submitted that BELCO complained that: (i) the Ricardo Report was never the subject of any discussion and was disclosed until the course of the litigation; (ii) the process was opaque and that the RA had to explain how it purported to set the rates through its evidence; and (iii) that what happened in the litigation should have happened in the course of the rate setting exercise. The RA submitted that in respect of the Ricardo Report, the confidentiality of the sensitive commercial information may trump the duty to inform. It relied on the case of *R (Bedford) v London Borough of Islington* [2002] EWHC 2044 (Admin) (followed in *English (Ian Fraser) (R on the application of) v East Staffordshire Borough Council* [2010] EWHC 2744 (Admin) both cases which concerned a planning process where Ousely J stated:

> *"100. A planning authority needs to be able to examine matters in a confidential manner with applicants, as was done here, and for that purpose to use independent consultants to whom disclosure of the relevant information is made in confidence. This is the same process that the GLA went through. If a local planning authority cannot do that, it will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing and other legitimate*

benefits related to the value of the development and its funding. The public interest would be harmed.

101. It is quite clear that the information is confidential and disclosure of it would be in breach of confidence. There is nothing unfair in the non-disclosure of that document, with the gist of the DTZ appraisal being available."

219. Thus the RA submitted that once representation had been permitted and made fairly, and the decision-making process had begun, there was no further duty to inform or disclose internal deliberations, provided no new point or evidence arose. It relied on the case of *R v Secretary of State Ex Parte Skitt* [1995] ELR 388 at pages 400-401 where Justice Sedley referred to the case of *R v Secretary of State for Education ex parte S* [1995] ELR 71 where Gibson LJ stated:

"There is simply no basis in law or in fact for dividing the decision-making process on an appeal to the Secretary of State as consisting of an earlier stage in the course of which Mr. Woodhouse provided his appraisal and a final state in which the Secretary of State made up his mind … In my judgment the advice received from Mr. Woodhouse was an integral part of the decision-making process. It is not necessary in the interests of fairness to require the disclosure of departmental advice unless the Secretary of State was minded to take into account a new point upon which the parties have had no opportunity to make representations."

220. In respect of the more general contention that the information provided was in some way lacking, the RA relied on the case of *Brittonie Taylor v HE the Governor and Minister of Immigration* [2021] SC (Bda) (29 October 2021) which was about remitting a matter where some information had not been disclosed, even in the proceedings. At paragraph 40 I stated:

"…In my view, it would not be an effective use of time and resources to quash the Deportation Order and recommence the process. An effective and efficient resolution would be to stay the deportation on a temporary basis to allow the deficiency in the disclosure to be addressed and for the Applicant to file written submissions if desired with the Minister for his consideration. The Minister could then confirm his position of deportation or rescind it. If the Minister stands by his recommendation then the Governor can then proceed with her duties in respect of the Minister's recommendation."

221. In respect of an appeal under section 96 of the RAA, as governed by Rules of the Supreme Court 1985 Order 55, the RA submitted that it is reinforced by the no substantial wrong or miscarriage of justice principle of Order 55 Rule 7(7) and by the locus provisions of the

section which permit only an aggrieved person to appeal, that being a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Thus, in the absence of any prejudice, there is no locus to complain on appeal. The RA relied on the case of *Re Mentor Insurance Ltd. (in liquidation)* [1987] Bda LR 62 at pages 5 – 6 which applied the Privy Council decision in *Attorney-General of the Gambia v. N'Jie* [1961] AC 617 which approach was re-affirmed by the Court of Appeal in *East Asia Company Limited v PT Satria Tirtatama Energindo* [2016] CA (Bda) 20 Civ at paragraph 16 as upheld by the Privy Council on unrelated grounds in *East Asia Co Ltd v PT Satria Tirtatama* [2019] 4 LRC 646. In *Mentor,* Collett J referred to the case of *Attorney General of the Gambia v N'jie* [1961] A.C. 617 where Lord Denning referred to an earlier decision in *Ex Parte Sidebotham* (1887) 19 QBD, 174 wherein James LJ said:

> *"... a person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly deprived him of something, wrongfully refused him something or wrongfully affected his title to something. That definition, said Lord Denning, is not to be regarded as exhaustive and he went onto cite with approval words of Lord Fisher M.R. on Re Reed Bowen & Co. (1867) 19 QBD 174, that the phrase "person aggrieved" is of wide import and should not be subjected to a restrictive interpretation. While excluding a mere busybody interfering with things which do not concern him, they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests, said Lord Denning."*

222. In relation to Order 55 Rule 7(7), the RA submits that the rule is that "an appellant seeking to challenge a decision made by the Tribunal under the Act must establish not only an error of law but also, further, that the error complained of has caused 'substantial wrong or miscarriage'", and further, "Any error of law can only justify this Court's intervention if it has occasioned substantial injustice." The RA relied on the case of *Elbow Beach Hotel Bermuda v Lynam* [2016] Bda LR 112 per Kawaley CJ at paragraph 4 and 16 approved by the Court of Appeal in *Wolda Gardener v R* [2016] CA Bda 12 Crim at paragraph 19.

> *"4. In essence, an appellant seeking to challenge a decision made by the Tribunal under the Act must establish not only an error of law but also, further, that the error complained of has caused "substantial wrong or miscarriage". How well the statutory scheme of an entirely lay Tribunal serves the public is hard to tell. It is inevitable that decisions will not usually be expressed in legalistic terms and will not infrequently contain technical legal errors. The most important general legal requirement is that sufficient reasons should be given for Tribunal decisions so the parties and an appellate court can confirm that no substantial miscarriage of justice occurred. The Tribunal*

generally fulfils this basic function reasonably well. However, it may still be difficult for litigants and their legal advisers in cases such as the present to easily assess when errors of law will or will likely not be viewed by this Court as sufficiently serious to vitiate an appealed decision.

16. The burden of proof was on the Employer to prove serious misconduct and the Tribunal resolved this factual issue against the Employer, after having heard and seen the Employee give oral evidence. Any error of law can only justify this Court's intervention if it has occasioned substantial injustice. Any error of law was wholly technical and reflected imperfections of expression. In substance, the Tribunal in my judgment applied the correct legal test in all the circumstances of the present case and its crucial findings were not ones which no reasonable tribunal could have properly reached. It is clear that the Tribunal crucially found that, based on its view of the facts, there was no basis for finding that the Employee was guilty of theft. It is not a fair reading of the Decision to suggest that the Tribunal did not appreciate that, on one view of the evidence, it was indeed possible to find that the Employer was justified in finding that the Employee had acted dishonestly."

223. The RA submitted that for all the reasons set out, the appeal must fail and should be dismissed by the Court.

Analysis

224. In my view, BELCO fails on Grounds 6, 7 and 8 for several reasons.

225. First, in relation to the principle of transparency, as Mr. Diel accepted, there was a duty by the RA to pay "due regard" to the regulatory principle to operate transparently to the full extent practicable as well as to other regulatory principles as set out in section 16 of the RAA. It is also clear from the preamble to the RAA that provides that the RA should be subject to procedures which ensure that to the maximum extent feasible, decisions will be made in a transparent manner based on the administrative record. In my view, following the principles set out in *Inclusion Housing*, in respect of the duty to have due regard, the question to be determined is whether the RA rationally concluded that the result was so far as possible transparent. Further, the Court should consider whether the RA arrived at a rational conclusion that the procedure adopted was transparent, in so far as practicable, with rationality. I have considered the process and the events that took place in the form of meetings and correspondence. On the face of it, per *Manchester Airports* and *De Smith's*

Judicial Review, Ninth Edition, it is clear that BELCO were fully apprised of the principles being applied by the RA for the exercise of its discretion to the extent that BELCO was able to make informed and meaningful representations. Further, in my view, the policy and process was sufficiently clear to BELCO to regulate its conduct to avoid being misled.

226. Second, in respect of procedural fairness generally, in my view, BELCO had the benefit of the principle of *audi alteram partem*, that is the right to be heard or to have a fair hearing. Per the *Judicial Review Handbook, Seventh Edition* as set out above; in my view: (i) the RA gave BELCO a prior opportunity to make representations, that is the right to be heard; and (ii) the RA gave BELCO sufficient information for it to be in a position to make proper representations, that is the right to be informed. To those points, it is compelling that the RA's procedure were fair to BELCO.

227. Third, in respect of Ground 6 and calculating the rate base, much has centred on the fact that the RA did not inform BELCO of the rate base but took the position that it could be easily calculated. At first blush, this seemed perplexing as the rate base was a figure that BELCO would be keenly interested to receive from the RA. However, on the evidence, it became clear that the figures provided generally and specifically for the rate base were provided by BELCO to the RA. Thereafter certain adjustments and a pdf spreadsheet were provided to BELCO by the RA showing calculations consistent with how BELCO originally supplied the information. To my mind, it is understandable that BELCO wanted an executable version of the spreadsheet as in modern times, it would be more convenient to have access to the formulae behind the spreadsheet with which they could make adjustments. I accept that the case of *Eisai* can be distinguished from the present case because in *Eisai* it was placed at a significant disadvantage in challenging the reliability of the model. In the present case, I accept the evidence that BELCO produced the spreadsheet model to which the RA made adjustments which were documented in the Rationale with no underlying formulaic issues present. Therefore, similar to the Court's findings in *Bristol-Myers Squibb Pharmaceuticals Ltd*, I am not satisfied that the RA's decision not to provide the executable spreadsheet to BELCO was unfair as BELCO was not at any significant disadvantage as the Rationale did provide guidance to edit its own file and

produce the same results. Having taken that position, in the future, it would be a modern convenience to a regulated body for the RA to provide executable spreadsheets with adjustments even if the regulated entity was the originator of the spreadsheet, unless there were other overwhelming circumstances such as confidentiality that prevented such provision.

228. Fourth, in respect of Ground 7 and the Rationale, it is clear from the evidence of Mr. Burgess that the Rationale included tables detailing each approved or rejected project. To that point the information provided was transparent and to my mind there is no basis for BELCO to make complaint about transparency in respect of the approved and rejected projects.

229. Fifth, in respect of Ground 8 and the timetable, I do not accept BELCO's complaint that it was unrealistic and oppressive. To that point there were two extensions of information submission deadlines and there were 8 technical meetings and workshops with BELCO. I find compelling that BELCO's president, Mr. Caines, was complimentary about the process and the willingness of the RA to engage with BELCO to clarify the requirements and to reduce uncertainties. Up to that point, I am satisfied that the timetable was not unrealistic or oppressive. I have considered that BELCO did provide all the information requested within the proposed timeframes, even though it was voluminous and technically complex. I should add here that it is a testament to BELCO, Mr. Caines, Mr. Barbosa and the BELCO team that they were able to do so. In the circumstances, in my view, a rational regulator, in considering the aspirational objective of transparency, would find that the procedure utilized by the RA and complied with in the main by BELCO was transparent. To my mind it follows that BELCO's complaint that there was a total failure to carry out the process transparently must fail.

230. Sixth, in respect of the Minded-to-Decision, I do not accept BELCO's submissions that it did not have the opportunity to engage further with the RA. I accept the evidence that BELCO filed evidence in response to the Minded-to-Decision and that it was considered by the RA which applied the new information and amended some findings. Further, I find

that it was reasonable for the RA to determine a cut-off point for submissions so that it could proceed with the process to consider all the information and issue its Decision. I rely on the case of *Hoffman-La Roche* where it was found that once a fair hearing has been given to the rival cases presented by the parties, the rules of natural justice do not require the decision-maker to disclose what he had minded to decide for the purpose of allowing further submissions. I also rely on the case of *Hexpress Healthcare* where the Court of Appeal held in two cases that fairness did not generally require the opportunity for comment on a draft report. Therefore, to my mind, it follows that although the RA issued the Minded-to-Decision to BELCO, the RA was not obliged to accept further submissions and it was not unfair to take that position.

231. Seventh, I have given consideration to other complaints of BELCO as to unfairness as set out above. In my view, I am not satisfied that any of them support the complaint of unfairness such as to allow any of the Grounds of Appeal 6, 7 and 8.

Consequences of a breach

232. Eighth, notwithstanding my findings above generally that the process was not unfair per each ground, I have now given consideration to the issues complained of in respect of process, including that the Ricardo Report was only disclosed in the litigation process, the timeline for BELCO to submit information was oppressive, the rate base calculation was not disclosed and the spreadsheet was not provided in an executable form. If it could be considered that these issues were founded as breaches, I have given consideration to the consequences of any such breaches in line with the cases of *Benevides* and *Roberts* as to what consequences did Parliament intend should flow from any such breaches. In my view, and by answering the questions posed in the case of *Jeyeanthan* as cited in the case of *One Communication Ltd*, and by reference to my reasoning above on these issues, there has been substantial compliance by the RA in fulfilling the statutory requirements.

233. In respect of any non-compliance, in my view, based on the facts of the case, they can be waived in this case based on the following. In respect of the issue of the Ricardo Report, I accept the RA's position that confidentiality attached to it, relying on the case of *Bedford*,

such that the RA was entitled to use independent consultants, the information was confidential and there was nothing unfair in the non-disclosure of it. In not allowing further submission by BELCO once the determination had begun, relying on the case of *Skitt*, there was no further duty to inform BELCO or disclose internal deliberations, provided no new point or evidence arose. In respect of the contention that the information provided to BELCO was lacking, relying on the case of *Brittonie Taylor*, it would not be an effective use of time and resources to quash the Decision when allowance could be made for further information to be supplied.

Conclusion

234. In light of these reasons I would dismiss Grounds of Appeal 6, 7 and 8.

Grounds 6, 7 and 8 taken together - Deference

235. In taking Grounds 6 – 8 together as an attack on the process employed by the RA, in my view I should follow the principles of the cases as set out above in respect of giving deference to the RA and as stated in *R v Social Fund Inspector, ex p Ali*, the Court should be slow to interfere when Parliament has entrusted an expert body of people with the task of fulfilling its intentions in a specialist sphere.

Conclusion

236. In summary I have made the following findings:
    a. In respect of Grounds of Appeal 1 to 5:
        i. I have dismissed the grounds on the basis of the Section 35 Interpretation;
        ii. I have dismissed the grounds on substantive issues in respect of each ground;
        iii. I have dismissed the grounds on the basis that the rate of return is clearly within the reasonable range; and
        iv. I have dismissed the grounds on the basis of deference.
    b. In respect of Grounds 6, 7 and 8:

i. I have dismissed the grounds on the substantive issues of each ground; and

ii. I have dismissed the grounds on the basis of deference.

237. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs fit for two counsel shall follow the event in favour of the RA as against BELCO on a standard basis to be taxed by the Registrar if not agreed.

Dated 22 February 2024

HON. MR. JUSTICE LARRY MUSSENDEN
CHIEF JUSTICE OF THE SUPREME COURT