
Office of Utilities Regulation

DECLARATORY ORDER

ADVISING JAMAICA PUBLIC SERVICE COMPANY LIMITED THAT ITS OBLIGATION TO REFUND/COLLECT FOR FUEL CHARGES OVER/UNDER-RECOVERED DURING THE PERIOD AUGUST 1993 TO DECEMBER 1998 INCLUSIVE IS NOW A CLOSED MATTER



OFFICE OF UTILITIES REGULATION

DOCUMENT TITLE AND APPROVAL PAGE

DOCUMENT NUMBER: Ele. 2007/06

1. DOCUMENT TITLE:

Declaratory Order advising Jamaica Public Service Company Limited that its obligation to refund/collect for fuel charges over/under-recovered during the period August 1993 to December 1998 inclusive is now a closed matter.

2. PURPOSE OF DOCUMENT

Advising Jamaica Public Service Company Limited that its obligation to refund or recover fuel/charges which were over/under-recovered from its customers over the sixty-five-month period from August 1993 to December 1998 inclusive is now a closed matter.

3. RECORD OF REVISION

4. APPROVAL

By Order of the Office:



**J. Paul Morgan
Director General**

November 2, 2007

November 2007

1. **WHEREAS** Jamaica Public Service Company Limited (JPS) incurred a liability for fuel over-recovered from its customers in the amount of \$2.9 billion at December 1998 and which represented the difference between the cost of fuel and that billed to its customers over the period August 1993 to December 1998 (i.e. 65 months) **AND**

2. **WHEREAS** in December 1998, JPS was instructed by Parliament to settle the said \$2.9 billion liability over a six-month period (i.e. February to August 1999) based on actual consumption during that period and to offset the amount to be rebated by a special rate s as follows:

Rate per kWh

- 1) February 1999 - \$1.252
- 2) March 1999 - \$7.305
- 3) April to August 1999 - \$1.088 **AND**

3. **WHEREAS** the rebate rates per kWh were determined for each period by dividing the total amount to be paid by the estimate of consumption (kWh) and such rebate rates were applied to each active customer's consumption between February and August 1999 **AND**

4. **WHEREAS** the decision was taken by JPS to calculate the rebate on the basis of current consumption, in view of the fact that information on individual consumption and entitlement amount was either incomplete or not readily available and accordingly it was recognized that payment on such a basis was unlikely to be the same as that based on the actual amount by which individual customers were overcharged and therefore was likely to result in some customers being overpaid and some underpaid **AND**

5. **WHEREAS** JPS advised customers by "Notice on Rebate" dated February 1999 that there would be a reconciliation and settlement of balances after August 1999 **AND**

6. **WHEREAS** JPS complied with instructions from the Office to develop individual entitlements for each and every customer for the period based on actual amounts that were over-billed or under-billed and, at the end of the rebate period (i.e. after August 1999), to do a reconciliation for the purpose of identifying and settling over- or under-payments with each customer (i.e. active and inactive) **AND**

7. **WHEREAS**, after the rebate period, the analysis of the individual accounts revealed that some customers were overpaid and others underpaid which required that the said overpayment be recovered and the underpayment settled by JPS **AND**

8. **WHEREAS** arising out of an audit it was determined that there was an overpayment of \$600 million and an underpayment of \$685 million **AND**

9. **WHEREAS** during the period May to December 2000 JPS made adjustments to customer accounts on the basis of the following principles:

- (a) CUSTOMERS WHO HAD AN ACTIVE ACCOUNT AND RECEIVED REBATES HIGHER THAN THEIR ENTITLEMENT

The total overpayment would be recovered from these accounts.

- (b) CUSTOMERS WHO HAD AN ACTIVE ACCOUNT AND RECEIVED REBATES LOWER THAN THEIR ENTITLEMENT

The total amount of underpayment would be credited to the bill, **AND**

10. **WHEREAS** at the end of the adjustment period, the profile of the customers identified on JPS' Customer Accounting System with balances were as follows:

- (a) CUSTOMERS WHO MOVED TO A NEW ADDRESS DURING THE PERIOD AUGUST 1993 TO DECEMBER 1998 INCLUSIVE

Those customers had one active account and one or more inactive accounts. The audit statements at August 1999 reflected an overpayment in respect of the active account and underpayment in respect of the inactive account. As the customer was not uniquely identified (say by a TRN number) it was not possible to identify the balances in each of the active and inactive accounts for set-off against each other. This could only have been done where the customer went into the office to make a claim in respect of the inactive accounts.

- (b) PERSONS WHO ARE NO LONGER CUSTOMERS OF THE JPS AND ARE REFLECTED AS INACTIVE IN THE STATISTICS

Settlement with these customers could only have been done where they came forward to make a claim as their address would be unknown to JPS **AND**

11. **WHEREAS** the Office instructed JPS, by Memorandum dated April 3, 2003, to advertise in the major print media in April and October of each year up to December 2005 the names, account numbers and addresses of customers to whom funds were due **AND**

12. **WHEREAS** the amount of the under-payment payable by JPS in respect of such accounts was verified by an independent auditor and published in the Newspapers together with an invitation for such account holders to attend the offices of the JPS for the purpose of making and substantiating his or her claim in the manner which JPS had specified in the published Notice **AND**

13. **WHEREAS** the amounts currently being held by JPS represents sums to be repaid to customers who were underpaid and who have not claimed the amounts in question for one reason or another **AND**
14. **WHEREAS** there are amounts currently outstanding to JPS by customers who had been over compensated by the company **AND**
15. **WHEREAS** the incidence of unclaimed balances is more likely to occur in respect of inactive accounts held by untraceable customers **AND**
16. **WHEREAS** balances have remained unclaimed for more than six years and accordingly entitle JPS to rely on the Statute of Limitations to bar future claims to such balances and treat its liability in respect of such balances as unenforceable **AND**
17. **WHEREAS** Article 13 - "Liability and Indemnification", Clause 13.1 of the Shareholders' Agreement dated March 30, 2001 entered into between the Government of Jamaica acting through the National Investment Bank of Jamaica Limited ("the Minority Shareholder"), Mirant JPSCo (Barbados) SRL ("Majority Shareholder") and Jamaica Public Service Company Limited ("the Company") provides as follows:

"Liability – No party shall be liable for the debts, obligations or other liabilities of the Company, unless such liability is specifically undertaken by a Party in a document signed by such Party's duly authorized representative. Minority Shareholder shall be released from all liabilities for the debts, obligations or other liabilities of the Company whether in its capacity as guarantor or otherwise, except as may be expressly agreed and undertaken by Minority Shareholder in respect of the Short Term Debt subject to terms of the Share Purchase Agreement." **AND**
18. **WHEREAS** the "Short Term Debts" as reflected in Schedule 1 to the said Shareholders' Agreement does not include a liability in respect of the Fuel Rebate **AND**
19. **WHEREAS** Paragraph 3.2 of the Share Purchase Agreement requires the Seller, the Government of Jamaica, at the Closing to deliver to the Buyer "(a) the Certificate executed by the Minister of Finance and Planning that the Long Term Debt has been transferred to Seller and the Company has no debt obligation or other liability in respect of the Long Term Debt" **AND**
20. **WHEREAS** Schedule 1-A which lists the "Long Term Debt", does not include any liability in respect of the Final Rebate **AND**

21. **WHEREAS** a letter dated December 23, 2002 from the Office of the Minister of Finance & Planning to Mirant JPSCO (Barbados) SRL, provides as follows:

“Indemnification: The Government and Mirant agree that the Government shall indemnify and hold the Company harmless from any and all net liabilities incurred by the Company as a result of certain potential customer rebates or other payments or reimbursements by the Company (“a Rebate”), up to an aggregate amount of Two Hundred and Ninety Million Dollars (J\$290,000,000.00) in respect of fuel charges levied by the Company in relation to the Parliamentary resolution made in December 1998 and (i) where such customer rebate, payment or reimbursement arises out of an order, decree or other ruling of the Jamaican Office of Utilities Regulation, or (ii) as such customer rebate, payment or reimbursement may otherwise be required by statute or regulation or is paid in settlement or resolution of any administrative or judicial proceeding in respect of the foregoing. The Rebate comprises an amount payable to customers aggregating Two Hundred and Ninety Million Dollars (J\$290,000,000.00) and an amount recoverable from customers aggregating Thirty Three Million Dollars (J\$33,000,000.00). Notwithstanding the foregoing, the Government’s indemnification obligations under this Letter Agreement shall be limited to a maximum liability of Two Hundred and Ninety Million Dollars (J\$290,000,000.00), in aggregate, for any and all Rebates (“the Indemnification Cap”). Within thirty (30) days of the date on which the Company issues a Rebate, in the form of either a customer credit or a cash payment, Mirant and/or the Company shall submit a written notice to the Government demanding the Government’s payment to the Company of an amount equal to the total cost of such Rebate, not to exceed the Indemnification Cap and net of rebate amounts actually recovered from customers. The Government shall be required to make any payment required under this Letter Agreement in immediately available funds within thirty (30) days of the Government’s receipt of such written demand.”

“No Third-Party Beneficiaries: This Letter Agreement shall not confer any rights or remedies upon any Person other than the Government and Mirant and their respective successors and permitted assigns.” **AND**

22. **WHEREAS** the Office in considering the matter at its meeting held on September 7, 2007 having noted that -

1. JPS’ obligation to refund over-recovered amounts to customers and to recover under-recovered amounts from customers has become statute-barred and accordingly cannot be recovered respectively by either party through litigation;

2. extensive effort has been made by JPS over the period to provide a remedy for customers;
 3. JPS had complied with all the directives of the Office in the matter **AND**
23. **WHEREAS** JPS advertised on occasions inviting persons so entitled to claim and that there was limited success, in terms of customer response, as stated in JPS' letter of March 14, 2005 to the OUR reporting on the Fuel Rebate Reconciliation on the Inactive Accounts which indicated that –
- (i) over a nine-week period March 15 – July 10, 2003 it published a list containing 107,241 names. A total of 2,679 applications for payment were received over the period May 15 to December 31, 2003. The cost of the publication was J\$6,963,200.00 and the payment of the claims was \$4,870,420.54.
 - (ii) it again published between November 6 – 27, 2004 a list of 100,967 inactive accounts eligible for rebate. A total of 496 applications were received for the period November 2004 to March 2005. The cost of the publication was \$4,968,000.00 and the total payment was \$7,311,553.92.

The report stated –

- (i) “In summary, after 13 weeks of publication over two years of over 100,000 accounts the Company received 3,175 applications. Total payment for the period was \$12,181,974.46 at a publication cost of \$11,931,200.00”;
- (ii) the amounts to be recovered by JPS by way of set-off from such persons as a consequence of the overpayment made by JPS to such individuals would reduce JPS' liability for the unclaimed amounts;
- (iii) the Government of Jamaica has provided an indemnification to JPS; the specifics of which are set out above.

THE OFFICE HEREBY DECLARES that –

- (i) JPS' obligation for refunding fuel charges over recovered from customers as set out herein **IS NOW CLOSED**.
- (ii) JPS has no further claim on customers from whom they were entitled to recover for amounts under recovered.

AND FURTHER AUTHORISES JPS to take all necessary steps as may be required by any law, order, regulation, accounting standard or otherwise to bring final closure to the matter.

By Order of the Office:

.....
J. Paul Morgan
Director General
November 2, 2007