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Our File No.: 00019-1146

January 15, 2018

BY EMAIL

British Columbia Utilities Commission
Suite 410 – 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Sirs/Mesdames:

**Re: British Columbia Hydro and Power Authority
F2017 – F2019 Revenue Requirements Application ~
Project No. 3698869
Final Submission of FortisBC Energy Inc. and FortisBC
Inc.**

In accordance with the regulatory timetable in this proceeding as amended in Exhibit A-35, we enclose for filing the electronic version of the Final Submission of FortisBC Energy Inc. and FortisBC Inc.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: 

Ludmila B. Herbst, Q.C.

LBH/trw
Enclosure
c.c.: Registered Parties
Clients

BRITISH COLUMBIA UTILITIES COMMISSION

**IN THE MATTER OF the *Utilities Commission Act*,
R.S.B.C. 1996, Chapter 473 (the “Act”)**

and

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

FISCAL 2017 – FISCAL 2019 REVENUE REQUIREMENTS APPLICATION

**FINAL SUBMISSION OF
FORTISBC INC. and FORTISBC ENERGY INC. (FORTISBC)
ON RATE FREEZE AMENDMENT**

January 15, 2018

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PART 1 - INTRODUCTION

1. FortisBC Inc. and FortisBC Energy Inc. (collectively, **FortisBC**) recognize the tension between, on the one hand, the “Freeze BC Hydro rates” reference in the mandate letter to BC Hydro from the Minister of Energy, Mines and Petroleum Resources (the **Minister**) that is Attachment 1 to Exhibit B-23 (the **Mandate Letter**) and, on the other hand, the position previously advanced by BC Hydro in its F2017-2019 Revenue Requirements application (**2017-19 RRA**). FortisBC also emphasizes that it is not here to advocate in favour of a rate increase if the British Columbia Utilities Commission (the **Commission**) is satisfied there is sufficient regulatory justification not to have one.
2. FortisBC is, however, concerned that BC Hydro’s amended application represents a departure from the ordinary regulatory principles to which utilities should be subject. FortisBC is also concerned that unless the Commission can be satisfied of the regulatory justification that would underpin a rate freeze, the transparency and value of Commission process could be jeopardized if one is granted. As such and particularly from a utility-based perspective involving substantial experience and interest in rate-making and regulation in British Columbia, FortisBC makes the following comments for the Commission’s consideration.

PART 2 - FACTUAL BACKGROUND

A. July 2016 – July 2017

3. On July 28, 2016, BC Hydro filed its 2017-19 RRA seeking, among other relief, a 3 per cent rate increase for F2019. In accordance with regulatory timetables that the Commission established, several rounds of evidentiary process followed, including an evidentiary update, intervener evidence, rebuttal evidence and information requests.
4. BC Hydro filed its final argument on May 23, 2017. In its final argument it stated that “BC Hydro’s evidence makes a compelling case for granting the approvals sought in the Application”¹ which, though modified in some respects from the original filing by that point in time, continued to include the 3 per cent rate increase for F2019.

¹ Paragraph 2.

5. The evidence in the 2017-19 RRA was that a greater than 3 per cent rate increase for F2019 would have been required to generate, from rates, sufficient revenue to cover BC Hydro's costs, but that the 3 per cent reflected the rate cap set out in Direction No. 7 to the Commission. Section 9(1) of Direction No. 7 provides: "When regulating and setting rates for the authority for ... F2019, ... the commission must not allow the rates to increase by more than ... 3% in F2019, on average, compared to the rates of the authority immediately before the increase."

6. Direction No. 7 has not been amended to lower this cap.

7. On June 5, 2017, the Ministry filed a brief email requesting interested party status in a variety of proceedings, with the 2017-19 RRA being one of them.² The Ministry has not filed any additional materials in the 2017-19 RRA since making that request.

8. Between June 8 and 20, 2017, various interveners filed submissions responding to BC Hydro's May 23 argument. BC Hydro filed its reply argument on July 4, 2017.

9. From July 4 onward, the Commission was at liberty to conclude its deliberations and issue its decision on the 2017-19 RRA. Of course, the Commission was also engaged in the Site C inquiry, which understandably delayed its deliberations.³

B. August 2017 Onward

10. Every year, the government as the shareholder of numerous Crown corporations – a category that includes BC Hydro – issues mandate letters to each of them. As the government website describes, "[t]he B.C. government issues an annual mandate letter to each Crown corporation to communicate that Crown's annual strategic direction and priorities."⁴

11. As BC Hydro noted in its 2017-19 RRA, in which the mandate letter from a prior minister was included as Appendix D, "The Government issues a letter to BC Hydro each year

² Exhibit D-5.

³ As noted in its letter of November 15, 2017 (Exhibit A-31), "[t]he Panel wishes to acknowledge the delayed deliberation of this proceeding as a result of the Commission's additional workload over the summer respecting its Inquiry of the Site C project, and apologizes for the inconvenience this may have caused".

⁴ "Mandate letter instructions for Crown corporations", online:

<https://www2.gov.bc.ca/gov/content/governments/services-for-government/public-sector-management/plan-report/crown-corporations/mandate-letter>

that confirms BC Hydro's mandate, provides government's strategic direction and sets out key performance expectations for the fiscal year.”⁵

12. On August 24, 2017, in the same time period other mandate letters were being issued by various ministers to Crown corporations for which they were responsible, the Minister issued the Mandate Letter to BC Hydro. The three-page Mandate Letter includes the following (the quotations are italicized):

- (a) In common with the second paragraph of all mandate letters posted this year on the government website for all provincial Crown corporations (except for substitution of the name of the applicable Crown corporation)⁶: “*This Mandate*

⁵ Exhibit B-1-1, s. 2.2.5 (pp. 2-4 and 2-5) and Appendix D.

⁶ BC Assessment (September 8, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-assessment>); BC Council for International Education (August 11, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-council-for-international-education>); BC Games Society (September 5, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-games-society>); BC Housing (September 8, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-housing>); BC Immigrant Investment Fund Ltd. (September 11, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-immigrant-investment-fund>); BC Innovation Council (September 1, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-innovation-council>); BC Oil and Gas Commission (August 24, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-oil-and-gas-commission>); BC Pavilion Corporation (September 5, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-pavilion-corporation>); BC Transit (August 18, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/bc-transit>); British Columbia Lottery Corporation (August 23, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/british-columbia-lottery-corporation>); British Columbia Securities Commission (August 11, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/british-columbia-securities-commission>); Columbia Basin Trust (August 15, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/columbia-basin-trust>); Columbia Power Corporation (August 15, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/columbia-power-corporation>); Community Living BC (August 11, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/community-living-bc>); Destination BC (September 5, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/destination-bc>); First Peoples' Cultural Council (August 29, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/first-peoples-cultural-council>); Forest Enhancement Society of BC (August 25, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/forest-enhancement-society-of-bc>); Forestry Innovation Investment Ltd. (September 1, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown->

Letter lays out the principles of this government and you are to take these into consideration when revising your Service Plan for the Budget 2017 Update. It is expected that BC Hydro and Power Authority (BC Hydro) will manage its programs and initiatives within its existing budget targets, unless otherwise directed.”

- (b) A lengthy paragraph on the second page prefaced by “*As the Minister responsible for BC Hydro, I expect that BC Hydro will work with the Ministry of Energy, Mines and Petroleum Resources (Ministry) to*” contains a series of bullet points.
- (c) The second bullet point on page 2 under the above preface is “*Freeze BC Hydro rates and develop a refreshed plan to keep electricity rates low and predictable over the long-term while making significant investments to expand the system and maintain aging infrastructure*”.
- (d) The fourth bullet point on page 2 is “*Conduct an immediate and comprehensive review of BC Hydro’s activities, performance and organizational structure to identify potential efficiencies that could benefit ratepayers, and ensure that the organization is positioned to deliver on BC Hydro’s objectives and government’s priorities*”.

13. A “rate freeze” is not mentioned other than in the first four words of the second bullet point on page 2 of the Mandate Letter.

[corporations/forestry-innovation-investment](#)); Industry Training Authority (August 11, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/industry-training-authority>); Insurance Corporation of British Columbia (August 23, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/insurance-corporation-of-british-columbia>); Knowledge Network (September 5, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/knowledge-network-corporation>); Legal Services Society (September 7, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/legal-services-society>); Liquor Distribution Branch (August 23, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/liquor-distribution-branch>); Partnerships BC (August 11, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/partnerships-british-columbia>); Royal BC Museum (September 5, 2017, online at <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/crown-corporations/royal-bc-museum-corporation>). The Transportation Investment Corporation is still listed as a Crown corporation but its 2016-17 mandate letter remains posted.

14. On November 8, 2017, BC Hydro sent a letter to the Commission in the 2017-19 RRA explaining that it was writing “to amend our requests as they relate to fiscal 2019 as follows: (i) Change the requested rate increase for fiscal 2019 from 3 per cent to 0 per cent ... [O]ur amended requests give effect to the B.C. Government’s recent Mandate Letter to BC Hydro ..., which contemplates a freeze of rates while a comprehensive review of BC Hydro is conducted, and while a refreshed plan to keep electricity rates low and predictable over the long-term is developed.”

15. BC Hydro explained, when responding to an information request about the delay between August 24 and November 8, that it sent its November 8 letter “once a decision had been made that the appropriate mechanism to give effect to the mandate to BC Hydro to freeze rates was for BC Hydro to apply to amend its Application to the Commission.”⁷

16. Consistent with its November 8 letter, BC Hydro has said that “the Minister’s Mandate to BC Hydro is the regulatory justification to freeze rates.”⁸ It has also said that it “continues to rely on all of its evidence and arguments in support of its overall revenue requirements [with forecast revenue requirements “exceed[ing] the 3 per cent cap for fiscal 2019”] and other requests, with the exception of the new evidence of the Minister’s Mandate Letter to BC Hydro which mandates a rate freeze.”⁹

17. BC Hydro has referred in its responses to information requests and in its final argument to a news release that the Minister issued on November 8, 2017, which is the same day on which BC Hydro filed Exhibit B-23. The news release presumably was intended to explain the BC Hydro letter rather than prompting it. It states, in full¹⁰:

The British Columbia government is delivering on its promise to freeze BC Hydro rates, putting an end to the years of spiralling electricity costs that have made life less affordable for B.C. homeowners and renters,

⁷ Exhibit B-25, BC Hydro response to BCSEA IR 4.1.1.

⁸ Exhibit B-25, BC Hydro response to BCSEA IR 4.1.14 (underlining added). See also Exhibit B-25, BC Hydro response to CEC IR 4.190.12: “BC Hydro confirms that the revenue requirements still exceed the 3 per cent cap, and that the reason for seeking a rate increase that is lower than the cap (zero per cent) is the Government Mandate Letter” (underlining added).

⁹ Exhibit B-25, BC Hydro response to BCSEA IR 4.1.14 (underlining added); BC Hydro response to BCUC IR 4.5.1.

¹⁰ <https://news.gov.bc.ca/releases/2017EMPR0021-001875>. This link to the full announcement is cited as well in footnote 33 of BC Hydro’s final argument.

Minister of Energy, Mines and Petroleum Resources Michelle Mungall announced today.

BC Hydro rates have gone up by more than 24% in the last four years, and by more than 70% since 2001. Mungall says that in 2016, BC Hydro applied to the BC Utilities Commission for three years of increases, with a 3% increase planned next year, but will be pulling back its request, consistent with this administration's commitment to a rate freeze.

"After years of escalating electricity costs, British Columbians deserve a break on their bills," said Mungall. "From the moment we took office, we've taken action to make life more affordable. As part of that, we're going to make sure that BC Hydro is working for the benefit of all British Columbians and that its rates reflect that commitment."

The rate freeze will provide government the time to undertake a comprehensive review of BC Hydro. That review will identify changes and cost savings to keep rates low while ensuring BC Hydro has the resources it needs to continue to provide clean, safe and reliable electricity. Details of the scope and process for the review will be developed once government has made a final decision on Site C.

After completing a comprehensive review of BC Hydro, any cost and revenue adjustments identified will be reflected in rates starting in April 2019.

The rate freeze follows government's commitment in its September budget update to phase out the provincial sales tax on electricity.

18. At least as of the time it filed its responses to the information requests, BC Hydro lacked "any additional written correspondence from government regarding the comprehensive review"¹¹ that is referred to above.

19. In questioning regarding the rate freeze (and the government announcement) in the Legislative Assembly on November 8, 2017, the Minister noted:¹²

Hon. M. Mungall: As I was saying yesterday, the rate freeze has always been tied to a review of B.C. Hydro. Also, as I said yesterday, the rate freeze will be starting in April 2018. If it goes forward.... We hope that it does. The BCUC, ultimately, is going to be looking at this.

¹¹ Exhibit B-25, BC Hydro response to Zone II Ratepayers Group IR 4.43.4.

¹² Online, at <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/2nd-session/20171108pm-Hansard-n57>.

What has happened is that we have collaboratively worked with B.C. Hydro. B.C. Hydro is changing its revenue requirements application from the 3 percent rate increase it had in that RRA for April 2018 to zero percent. They've amended their RRA that is currently before the B.C. Utilities Commission.

The B.C. Utilities Commission will then do the due diligence that is required and determine whether a zero rate increase is acceptable. Should it be acceptable, then we will move forward with that rate freeze and conduct a review of B.C. Hydro over the course of that year. Because the rate freeze doesn't come into effect until April 2018, it actually gives us time, by the time all the accounting is done in that year of review, to look at ways where we can mitigate any impacts of the freeze.

T. Redies: I'm now very confused. The minister and her government just announced today a rate freeze. But I think, based on her answer, she's saying it may or may not happen because the BCUC might decide it's not appropriate. Is that correct? Is there a rate freeze or isn't there?

Hon. M. Mungall: There is going to be an application for a rate freeze before the B.C. Utilities Commission.

.....

T. Redies: Now that the minister has gone out with this press release, what does she plan to tell British Columbians if BCUC comes back and says: "No, you can't have a zero percent rate increase"?

Hon. M. Mungall: That's a fair question, absolutely, and we'll cross that bridge when we come to it. We have to go through the B.C. Utilities Commission first. We value the input that the BCUC has in our rate-setting process. We value the input that they have overall in managing our public utility from an independent, expert body looking out for the interests of the public. So we feel that the appropriate process, as defined in legislation and regulation, is to go through the B.C. Utilities Commission first and foremost. We will see what their decision is.

.....

M. Bernier: Just trying to understand and clarify this, then. The minister made an announcement earlier, saying that they're saving \$150 million of taxpayers' money through the rate freeze. She's also on record saying that she respects the autonomy of the Utilities Commission. But by this announcement, she's also admitting, it sounds like, that she's prejudging the outcome now of that same group of which she says she respects their autonomy.

Can the minister explain to not only this House but to the people in British Columbia, because now we're really confused: are they saving \$150 million right now? Or are they, as she says, just putting the application forward and having to wait now to see what the Utilities Commission is actually going to say and whether they'll approve that application?

Hon. M. Mungall: I just want to be very clear, for the record, that I'm not prejudging, and nobody in this government is prejudging, the outcome at the B.C. Utilities Commission. What we are doing is the appropriate process, and we are being upfront and honest with the public. I think that is the right thing to do. I think we all in this government think it's the right thing to do, so that is what we're doing.

M. Bernier: Is she [the Minister] actually directing the Utilities Commission to accept this application? Is the Utilities Commission being told, then, by government that they have to actually put this rate freeze in and accept that?

Hon. M. Mungall: As I've said earlier, there's been no direction to the B.C. Utilities Commission. Should they disagree with the rate freeze, we'll deal with that when the time comes. [underlining added]

20. The Minister's comments in the Legislative Assembly properly indicate that:
 - (a) the government expects the Commission to "do the due diligence that is required";
 - (b) the Commission will "determine whether a zero rate increase is acceptable" and may "disagree with the rate freeze" (underlining added);
 - (c) the government is not "prejudging, the outcome";
 - (d) the government recognizes it has not issued a "direction" to the Commission;
 - (e) the government "value[s] the input that the BCUC has in our rate-setting process" and that "they have overall in managing our public utility from an independent, expert body looking out for the interests of the public"; and
 - (f) the government is aware that it may need to explore other options if the Commission does not agree with a rate freeze.

PART 3 - NOT ALL GOVERNMENT POLICY SHOULD BE GIVEN THE SAME WEIGHT

A. Overview

21. FortisBC acknowledges and agrees that government policy is a factor that can be taken into account in proceedings before the Commission. FortisBC itself has referred in past proceedings to government policy and believes that consideration of government policy is appropriate.

22. The weight that should be given to government policy, however, may vary. It is not self-evident that the Mandate Letter should attract the “significant” weight that BC Hydro submits (paras. 1, 3, 7, 20).

23. Set out under heading (B) below are factors that FortisBC suggests may usefully inform the Commission’s consideration of the weight that a given policy should receive. Set out under heading (C) below are some examples of how those factors may intersect with one another; any given factor may become more or less important in the presence or absence of others. Under heading (D), in turn, is a discussion of how certain of these factors came up in the specific proceedings that BC Hydro has given as examples in which government policy was taken into account.

B. Factors That The Commission May Consider In Determining Weight

24. The Commission may consider numerous factors in determining the weight that should be given to a given government communication. Though not a checklist that must be satisfied in full before significant weight is given to a policy, FortisBC respectfully suggests that, in no particular order, the factors set out under subheadings (1)-(4) below may in appropriate circumstances inform the Commission’s deliberations. These factors may be grouped into the following, somewhat overlapping, categories: (1) the means by which the government has expressed the policy at issue; (2) the capacity in which the government has made its views known; (3) the content of the government statement that the Commission has been asked to consider; and (4) the nature and stage of the proceeding in which that government communication might be considered.

(1) Category 1: Means by which the government has expressed the policy at issue

25. Government has a variety of options at its disposal for expressing its views. In determining the weight that the Commission should give to a particular government policy, the Commission may, correspondingly, have regard to how the government has chosen to communicate the policy at issue. Considerations may include:

- (a) ***whether the mode of communication that the government has chosen is binding on the Commission, or not.*** The enactment of legislation, the making of a regulation, and the making of a direction under s. 3(1) of the *Utilities Commission Act* are all means of communication by the government to which the Commission is required to accede. For example, s. 3(2) of the *Utilities Commission Act* commences: “The commission must comply with a direction issued under subsection (1)...” By contrast, general policy statements not captured in a statute, regulation or s. 3(1) direction are not binding, and in fairness BC Hydro has not suggested that the Mandate Letter is. In one proceeding the Commission accepted “the view that the Act accords general policy statements of government no more weight than any other evidence brought before it, unless the policy statement is given the weight of a direction or special direction under Section 3(1) or 3.1 of the Act.”¹³
- (b) ***to whom the government has directed its communication of policy.*** Government may (i) write to BC Hydro for its consideration; (ii) speak directly to the Commission via directions or via a submission made by government in a Commission proceeding as an intervener/interested party; (iii) write indirectly to the Commission by writing to BC Hydro a letter intended for inclusion in an application; or (iv) speak to the general public. Here the Mandate Letter was directed to BC Hydro and, to an extent, the public, as it is posted on the government website. The Mandate Letter is not necessarily in a form intended for communication to the Commission, whether in the F2017-19 RRA or otherwise.

¹³ Utility System Extension Tests Reconsideration Decision-Phase II (August 13, 1996) at p. 10.

The number of other subjects covered in the Mandate Letter, the fact it was issued at the same time as other mandate letters, and the absence of any reference to the F2017-19 RRA, suggest the government did not put its mind to use of the Mandate Letter in this proceeding at the time it was written.

(2) Category 2: The capacity in which the government has made its views known

26. As discussed earlier, a mandate letter is a form of letter that government writes as the shareholder of a Crown corporation. Appendix D to the 2017-19 RRA, which contained the prior mandate letter, described it as the “shareholder’s letter of expectations”.¹⁴

27. Though certainly the letter’s content may be policy-oriented, it is not written by the Minister as legislator, nor is it otherwise written in a manner detached from the entity involved.

28. The letter is also not written as an intervener/interested party in a Commission proceeding or, as noted above, otherwise overtly for the purpose of a given proceeding.

(3) Category 3: The content of the government statement that the Commission has been asked to consider

29. In determining the weight that should be given to a particular government statement that the Commission has been asked to consider, the Commission may also consider its content. For example, the Commission may have regard to:

- (a) *whether the government has set out its reasoning for its view and, if so, whether that reasoning is persuasive.* Here, at least when looking specifically at the Mandate Letter to which BC Hydro points as the justification for the rate freeze, the rate freeze is in a four-word portion of a sentence of a letter dealing with a variety of matters. While perhaps loosely relatable to a government priority set out on the first page of the Mandate Letter (“Our first commitment is to make life more affordable”), that priority is also found in other mandate letters to other Crown corporations.¹⁵ Further, rather than being specific to a rate freeze, that

¹⁴ Exhibit B-1-1, Appendix D.

¹⁵ See footnote 6, earlier in this submission.

priority is tied in the same paragraph to the Minister's expectation that "all public service organizations" will "work to contain costs".¹⁶ In terms of the level of attention dedicated to a given subject, one might contrast the Mandate Letter to letters written specific to the given subject (which appear to have featured in several of the past applications that BC Hydro cites, as returned to below) and to the repeated measures that the Ontario government in the *Innisfil* proceeding, cited at paragraph 8 of BC Hydro's argument, took to set out and clarify its position (coupled with an offer to provide a witness to be cross-examined¹⁷), including a lengthy subject-specific letter of December 15, 1976 as well as a prior letter of September 30, 1976.

- (b) ***whether the content of the policy statement is clear.*** Perhaps due in part to the brevity of the communication here, little is clear beyond the government's wish for a "rate freeze". In this regard, the Mandate Letter does not refer with specificity to how the idea of a rate freeze is to be advanced,¹⁸ or when it is to be implemented. The Mandate Letter refers broadly to the fact it sets out principles that BC Hydro is "to take...into consideration when revising [its] Service Plan for the Budget 2017 Update" and to the Minister's expectation that BC Hydro will "work with" the Ministry on the rate freeze. In responding to information requests and in its final argument, BC Hydro has had to supplement the Mandate Letter with the government's November 8 news release.
- (c) ***whether the government statement is specific to the proceeding, or of more general application.*** "Policy" has been defined as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions" and "a high-level overall plan embracing the general goals and acceptable procedures especially of a

¹⁶ Exhibit B-23, Attachment 1.

¹⁷ The court noted in *Innisfil*: "The December 15th letter was introduced by a solicitor representing the Ministry who offered as a witness a senior person in the Local Government Division of the Ministry so that he might be examined with respect to its contents but no one sought to examine him."

¹⁸ As noted earlier, it took BC Hydro itself more than two months – despite the fact that a decision on the 2017-19 RRA could have been issued at any moment – to decide that seeking an amendment to its application was the means to address the sentence fragment in the Mandate Letter. See Exhibit B-25, BC Hydro response to BCSEA IR 4.1.1.

governmental body".¹⁹ This definition suggests that “policy”, strictly speaking, provides a framework within or against which to assess not only an immediate decision but also decisions going forward; the B.C. energy plans cited in certain of the proceedings to which BC Hydro refers in its final argument are an example. If the government is instead communicating its view of an appropriate result (rather than of factors to assess in getting to one) in a particular circumstance, the Commission may wish to weigh that in a manner more akin to submissions from other participants in one of its proceedings.

- (d) ***whether the policy is consistent, or at odds, with other evidence and considerations before the Commission***, including:
 - (i) ***whether the policy is consistent with the record as a whole***, notably the other evidence and submissions filed in the proceeding. If the policy is consistent, the Commission can take some comfort from the fact that it has before it a body of evidence wider than but supportive of the policy. Here, the remainder of the record on the 2017-19 RRA would point to a decision other than a rate freeze for F2019.
 - (ii) in a related sense, ***whether the utility appears to support the policy***. Often a utility may structure an application around a policy, or indeed take a stance in favour of what later becomes government policy; the Commission can in such circumstances take some comfort from the fact that others, including the utility itself, had applied their minds to the situation and determined the policy to make sense. Here, BC Hydro was on the record as supporting a 3 per cent rate increase for F2019, not a rate freeze. Though certainly BC Hydro has aligned itself with the policy to the extent of filing its request for amended relief on November 8 and otherwise participating in the process, BC Hydro has not tried to bolster arguments for a rate freeze by, for example, seeking to cut its F2019 costs (this is returned to in Part 4 below) and at the procedural conference did

¹⁹ “Policy”, online at <https://www.merriam-webster.com/dictionary/policy> (underlining added).

not seem to want more time or opportunity²⁰ to find ways of supporting the policy.

- (iii) ***whether the policy statement that the Commission is being asked to consider is consistent with other statements of government policy.*** In this regard:
- (A) If the government has stated the same policy view repeatedly, such as where it has written a series of consistent letters on the same subject over a sustained period, the Commission may rightly consider that the policy is important and long considered.
 - (B) If certain views on a given subject have been expressed in a binding fashion (such as Direction No. 7, which suggests that a cap of 3 per cent is the appropriate one) and other views are expressed on the same subject by non-binding means (such as the Mandate Letter, which suggests that the cap should be 0 per cent), the Commission might consider their relative weight and whether any implication is to be drawn from a government decision not directly to amend the first statement.
 - (C) If the government has expressed views on other but related subjects (such as the importance of Commission scrutiny of rate-making, or the importance of the utility continuing to make certain expenditures), again the Commission may consider the relative weight of these statements or seek to reconcile them.
 - (D) If policy has been crystallized or codified in the *Utilities Commission Act*, and that statute has not changed, it would prevail

²⁰ BC Hydro also responded to several information requests seeking further information along the lines that it was “unable to update the tables for the other items noted in the question as a result of the significant amount of modelling work that would be required to do so, and the limited time allotted to respond to these information requests”. However, while FortisBC recognizes the proceeding cannot stretch on indefinitely, it was BC Hydro that drove the tight schedule. See Exhibit B-25, BC Hydro response to BCOAPO IR 4.147.1, BC Hydro response to FortisBC IR 4.20.3, 4.20.4.1, 4.20.4.2, 4.20.5, 4.22.1 and BC Hydro response to NIARG IR 4.28.1.

over non-binding policy statements even if made later.²¹ As the Commission has recognized, while “government policy statements are made from time to time which also may affect regulatory decision-making”,²² and “[t]he pace of the legislation may not keep up and this can lead to difficulties in the correlation between evolving views and policies and the statutory framework within which the Commission must function,” “[i]n the final analysis, the statute must remain paramount” (underlining added).

- (iv) ***whether the government policy is consistent with established rate-making principles***, including (i) recovering costs by means of rates (see Part 4 below); (ii) related intergenerational equity considerations (again, see Part 4 below); and (iii) in appropriate cases, sending appropriate price signals for efficient use of electricity.²³ Though “special directions...take precedence over...regulatory principles otherwise applicable”,²⁴ non-binding government policy statements would not necessarily do so.

30. In this context particular care may need to be taken in determining the weight to be given to policy statements related to BC Hydro (including statements of government preference about what considerations should go into BC Hydro rates), if a binding direction is not actually issued to set the rates themselves. The Commission had occasion to address this issue in BC Hydro’s broad application, filed in October 1989, related to revenue requirements and other matters.²⁵ In

²¹ Though not over special directions, which “take precedence over inconsistent provisions of the Commission’s governing statutes”: *BC Hydro and Power Authority v. Terasen Gas (Vancouver Island) Inc.*, 2004 BCCA 346 (*Terasen*) at para. 23. In this regard, s. 3 of the *Utilities Commission Act* provides that “[t]he commission must comply with a direction issued under subsection (1), despite (a) any other provision of (i) this Act, except subsection (3) of this section, or (ii) the regulations, (a.1) any provision of the *Clean Energy Act* or the regulations under that Act...”

²² BC Gas Inc. Rate Design Decision (February 21, 1992) at p. 8; Pacific Northern Gas Ltd. 1998 Revenue Requirements Application and 1998 Cost of Service Allocation/Rate Design Study (June 18, 1998) at p. 34.

²³ BC Hydro stated that it “would agree” if “all else [were] equal” that “substituting a 0% F2019 rate increase for a 3% F2019 rate increase would worsen the sub-optimal price signal (i.e., rates lower than cost of electricity would encourage more use of electricity than is economically efficient) associated with the Rate Smoothing Regulatory Account.” However, it also stated “that the fiscal 2019 rate freeze is an unequivocal expression of Government policy, and that this outweighs any potential impacts related to price signals.” See Exhibit B-25, BC Hydro response to BCSEA IR 4.1.10.

²⁴ *Terasen*, *supra* note 21 at para. 23.

²⁵ See for the “revenue requirements” description, for example, p. 22 of the Commission’s Reasons of April 30, 1990.

that application BC Hydro advocated for “policy driven” rates, being in BC Hydro’s view “the level of rates needed to satisfy some enunciated [conservation-related] policy of government that has priority over meeting the traditional requirements of recovery of historical costs of construction, fair return on investment in public utility plant, plus all prudently-incurred operating expenses”.²⁶ If granted, the application would have, for the conservation purposes that the government appeared to favour, led to the collection of more revenue than BC Hydro needed. While the converse of the relief sought here (in the sense that BC Hydro there sought an increase, rather than a decrease or freeze) and in the present case the government can be construed to have expressed its rate preference in numerical terms (effectively, 0 per cent), the relief in neither instance is based on cost of service and in neither case did the government itself set a rate. The Commission was expressly uncomfortable about the policy-driven departure from what ordinary regulatory principles would yield. In this regard, the Commission noted:²⁷

...Directives which provide parameters for setting rates (but which do not set the rates), do not eliminate the requirement for identifiable and determinable costs.

It is incumbent on the Applicant to either demonstrate its need for increased revenue or present evidence which clearly supports and justifies the proposed rates....

The Commission must still examine prudence of construction expenditures and the propriety of operating expenses....The onus of proof on the utility extends to supporting its request for the Commission to move away from traditional cost-based tests by offering alternative measures that are appropriate to the new regulatory format.

The delicate relationship between the Commission, itself an agency of government, and a Crown corporation is made more difficult by diminution of readily understandable, quantifiable measures by which the Commission can, and can be seen to exercise its jurisdiction. Public suspicions could be heightened by the appearance of philosophical rather than tangible processes. Without widely-held credibility, a regulatory commission would lack the essential element for its functioning. Thus, the impartiality and the acceptance of regulation could be called into question by BC Hydro’s initiative to introduce a ‘policy-driven’ rate application without satisfactory restraints to ensure the public of efficient operations, prudent decision making and fair rates.

²⁶ *Ibid.* at p. 14.

²⁷ *Ibid.* at p. 21.

(4) Category 4: The nature and stage of the proceeding in which the government policy at issue has been raised

31. It may be more appropriate to give substantial weight to government policy in the context of some Commission proceedings than in others. Considerations that the Commission may take into account in this regard include:

- (a) ***the nature and extent of the potential impact of the decision that the policy is said to support.*** In particular, the Commission might take into account whether the proceeding is likely to have a broad effect in terms of customers or monetary consequence (such as in a revenue requirements application), or whether its effect is likely to be fairly confined (such as in the chiefly program-specific applications to which BC Hydro refers in its final argument).
- (b) ***novelty of the subject matter addressed in the proceeding.*** The Commission may in this regard wish to consider whether the proceeding is one in which (as in the context of revenue requirements or rate design across the customer base or broadly established categories) principles are well known and established, or whether the proceeding instead deals with a new area such as retail access or net metering (at least if novelty is measured in the time frame of the proceedings that BC Hydro cites in its final argument). In the latter case, the government may have as much or more expertise to offer as does the Commission, and there may be little regulatory principle or case law to follow or consider.
- (c) ***the function that the Commission is serving in the given proceeding in which the policy is cited.*** In the case cited at paragraph 8 of BC Hydro's argument, *Re Township of Innisfil*, the court characterized the tribunal (the Ontario Municipal Board, which was deciding on whether a municipality could annex parts of others) as one that exercised a “legislative” function (“[o]ne would, in my opinion, be hard-pressed indeed to find a more legislative function than that”) in which “account must be taken of a multitude of considerations foreign to proceedings characterized as ‘judicial’ or ‘quasi-judicial’”. The court noted that “[t]he facts upon which the Board may rely need not and often cannot be

supported by evidence sanctioned by rules applicable to a Court or other judicial-type hearing.”²⁸ Though not at all to detract from the Commission’s ability to take into account policy or from the deference which is due to its decision-making,²⁹ it should be noted that the Commission has repeatedly said that its “function is quasi-judicial”.³⁰

- (d) ***whether the Commission has jurisdiction apart from the policy.*** Does the policy statement inform the exercise of existing Commission powers, or is the policy being referred to in the hope that it will supply a mandate that the Commission otherwise lacks? As the Commission has said in considering B.C. government energy policies:³¹

The Commission’s mandate and jurisdiction is defined by the *UCA*. The Lieutenant Governor in Council may also issue regulations and special directions to the Commission with respect to the exercising of powers and the performance of the duties of the Commission. In addition, the Commission pays attention to Government policies in its deliberations; however, those policies do not directly provide the Commission with a mandate to act. Ultimately the Commission’s task is to determine whether the Application is in the public interest within the regulatory framework. [underlining added]

- (e) ***the timing of the government expression of policy*** in relation to the proceeding in which it is invoked. It might be expected in most cases – though certainly not all, as certain of BC Hydro’s examples illustrate – that a policy would be expressed no later than the commencement of the proceeding, rather than being done after the evidentiary and argument phases had concluded. The early issuance of the policy statement in turn maximizes the likelihood that the record would have developed around it and been consistent with it. It would not in all cases be a

²⁸ (1977), 17 O.R. (2d) 277 (Ont. Div. Ct.).

²⁹ Certainly in the context of its “rate-making mandate” it is “required to resolve and balance the economic interests of various constituencies, well illustrated by the parties to these proceedings, which gives its jurisdiction a polycentric quality” and has a function that is “pragmatic and often robust”: *Terasen*, *supra* note 21 at para. 24.

³⁰ See, for example, BC Hydro 2007 Rate Design Application Phase-1 Decision (October 26, 2007) at p. 1; FortisBC Inc 2009 Rate Design and Cost of Service Decision (October 19, 2010) at p. 6. See also the description under “Our Role” on the Commission’s website, online at <http://www.bcuc.com/about/our-role.html>.

³¹ Reasons for Order G-60-14 (Application for Approval of Rates Between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Tariff Schedule 3817) (May 6, 2014) at s. 2.2 (p. 5).

given that the applicant would even be permitted by the Commission to amend a pre-existing application to take a new policy into account, though FortisBC does not object to that occurring here and acknowledges that the Commission provided additional process to avoid prejudice to participants. Obviously given the change in government there is a reason that the new priorities were not reflected in BC Hydro's 2017-19 RRA as originally filed.

- (f) *whether there is existing guidance or legislation pertaining to the type of proceeding that points the Commission toward considering the policy.* For example, s. 4(1) of Direction No. 7 provides that “in regulating and setting rates for the authority, the commission must ensure that those rates allow the authority to collect sufficient revenue in each fiscal year to enable the authority to ... (c) comply with government policy directives, including, without limitation, government policy directives requiring the authority to construct, operate or extend a plant or system”. The Commission’s Resource Planning Guidelines note that “A resource plan filed in accordance with the UCA and these Guidelines should be consistent with government policy, as it is expressed in legislation (e.g. efficiency standards) or in specific policy statements and directives.” In some kinds of proceedings the Commission may need to consider afresh whether policy should be taken into account and if so, the weight it should be given.

C. **How The Above Factors May Interrelate**

32. It would not be realistic to expect that all the factors listed above must tilt one way in order for a policy statement to receive significant weight. However, it is reasonable to consider that some factors become more or less important in the presence or absence of others. For example:

- (a) if implementing a policy statement would have a wide-ranging or otherwise significant effect in terms of money or principle, the Commission might give greater weight to a statement of policy that is more thorough in how the policy is expressed and justified;

- (b) if the policy statement relates to a new or evolving subject matter with which the Commission is not already experienced and familiar, it might be more inclined to defer to government guidance even if informally given;
- (c) if the policy statement would point to a course of action that might not be intuitive under established rate-making principles, the Commission may give greater weight to it if carefully and persuasively reasoned;
- (d) if the policy statement is consistent with the record in a proceeding more broadly and with the utility's stance throughout the proceeding, the Commission may be more likely to decide in accordance with it – not necessarily because it has given weight to the policy in its status as such, but because it makes sense more generally;
- (e) if the government has expressed its view in binding form, such as a s. 3 direction, obviously it makes no difference whether it has also explained its reasoning; by virtue of the instrument used to convey it, the policy embodied in the direction is binding nonetheless;
- (f) if the statement from government is not as much a “policy” (in terms of a framework within which not just present but also future decisions may be made) as it is an expression of the government’s desire for a particular outcome in a given proceeding, the Commission may give greater weight to government communications if made as an intervener that files evidence or submissions in that forum.

D. Proceedings That BC Hydro Cites In Which Policy Was Considered

33. Certainly in the past the Commission has properly considered letters in which government policy has been expressed, including in proceedings that BC Hydro cites in its final argument. However, that has tended to be where other factors also militated in favour of considering the policy statement or the decision would in any event have been consistent with it.

34. More generally, as the examples provided in BC Hydro's argument suggest, the circumstances in which government policy was considered have tended to be quite different than in this case:

Retail Access:

(a) **Order G-39-12** (cited at paragraphs 10-11 of BC Hydro's final argument) involved BC Hydro's application to suspend the retail access program. In February 2011 BC Hydro informed customers "that it was reviewing the program and that during the review it would not process any requests for retail access".³² BC Hydro subsequently "filed an application seeking to suspend the Retail Access Tariff" (the application that led to Order G-39-12) in which it "state[d], among other things, that the Retail Access Program is fundamentally flawed".³³ (Clearly the government policy was not at odds with what BC Hydro was otherwise expressing.) With that application it enclosed a letter from the Minister of Energy and Mines "directing BC Hydro to extend the suspension of the Program until a comprehensive review of industrial electricity policy is complete".³⁴ BC Hydro set out four reasons (only one of which was the Minister's desire to suspend) not simply to amend the Retail Access Tariff.³⁵ The Commission viewed the Minister's letter as one indicating "support to suspend the Program"³⁶ (underlining added) though certainly, as BC Hydro has said, the Commission referred to the letter as having "the most bearing on the Commission's decision as it is a direct statement of government policy".³⁷

Net Metering:

(b) **Order G-26-04** (referred to at paragraphs 12-13 of BC Hydro's final argument) related to the net metering program. It was the culmination of a chain of events in which government policy certainly played a part, but in a very different way than

³² Reasons for Order G-39-12, p. 1 of 2.

³³ See preamble to Order G-39-12, especially Recitals C and D.

³⁴ Reasons for Order G-39-12, p. 2 of 2.

³⁵ *Ibid.* at p. 1 of 2.

³⁶ Recital D to Order G-39-12 (underlining added).

³⁷ Reasons for Order G-39-12, p. 2 of 2.

in this case: the policy itself was preceded by support from certain stakeholders, and a considered and detailed process ensued which ultimately involved an application by BC Hydro and considerable Commission review.

In this regard, as the Commission's Reasons for Order G-26-04 set out, in October 2001 stakeholders proposed a change to BC Hydro's standard metering practices to include a form of net metering. The Commission, with input from BC Hydro, deferred consideration of net metering until after the government's 2002 Energy Plan. After issuance of the 2002 Energy Plan, interested stakeholders including a Mr. Wheatley then applied again (the **Wheatley application**), "citing Policy Action No. 20" of that plan. (The Commission has described the 2002 energy plan elsewhere as a "comprehensive statement of government energy policy" that "contains four cornerstones, as well as 26 Policy Actions designed to accomplish the objectives of the 2002 Energy Plan."³⁸ Policy Action No. 20 was that "Electricity distributors will pursue a voluntary goal to acquire 50 percent of new supply from BC Clean Electricity over the next 10 years.")

Though the Wheatley application was supported by reference to the 2002 Energy Plan, that fact was not sufficient from the perspective of either BC Hydro or the Commission for it to be granted. The Commission issued Letter L-3-03 (which is cited in the Reasons for Order G-26-04, including in the portion quoted at paragraph 12 of BC Hydro's final argument), in which with BC Hydro's input it developed a process by which means of implementing the government policy could be studied. Without detracting from the importance of the policy, it was only part of broader work that had to be undertaken. As the Commission set out in Letter L-3-03, on January 30, 2003:

B.C. Hydro has asked the Commission to decline to hear Mr. Wheatley's renewed application. B.C. Hydro reasons that specific suggestions such as Mr. Wheatley's should not be dealt with on an *ad hoc* basis. Rather, B.C. Hydro notes that such suggestions should form part of an integrated process that will develop in the coming months as Government, B.C. Hydro, and stakeholders

³⁸ BC Hydro 2007 Rate Design Decision (October 26, 2007) at p. 7 (underlining added).

consider the means for implementing the policy actions of the new Energy Policy.

The new Energy Policy makes a clear directive for utilities to develop policies to support the voluntary goal of acquiring 50 percent of new supply from BC Clean Electricity over the next 10 years. The Commission requests that B.C. Hydro prepare, in consultation with customer groups and other utilities such as Aquila Networks, a report to assess the merits of a net metering policy. [underlining added]

As set out in the later Letter L-37-03, “[t]he Commission’s request was based in part on the new Energy Policy” (underlining added).

BC Hydro then “submitted a consultant’s report on net metering and written comment from various interest groups and individuals”.³⁹ The Commission considered that input and in Letter L-37-03, issued on July 22, 2003, stated:

The Commission has considered the findings of the report, the submissions of the various interested groups, and BC Hydro’s conclusions. The Commission supports the concept of net metering in general....

The Commission recommends the development and implementation of a net metering tariff. However, given that a small amount of energy will likely be involved, the Commission’s support for a net metering tariff is conditional on development and implementation that does not incur any substantial cost on the utility, and that does not impose any inordinate barrier to ratepayers seeking to net meter. Therefore, the Commission directs BC Hydro to prepare an application for a simple net metering tariff, with at minimum the following parameters.... [underlining added]

BC Hydro submitted its application on November 3, 2003, and that application was reviewed, ultimately leading to Order G-26-04. In this regard, again, the application was consistent with the policy, as well as shaped by a wider process undertaken in light of the policy and other considerations, rather than the policy being injected into a wider body of divergent material at the last moment.

³⁹ Reasons for Order G-26-04, p. 1 of 15.

- (c) **Order G-4-09** (referred to at paragraph 15 of BC Hydro’s final argument) is another net metering-related decision. The application filed by BC Hydro that led to this order was filed after the 2007 Energy Plan (which contained the policy there at issue) and was argued by BC Hydro to be “consistent” with it.⁴⁰

Standing Offer Program:

- (d) **Order G-43-08** (referred to at paragraph 14 of BC Hydro’s final argument) related to the Standing Offer Program. BC Hydro points to it at paragraph 14 as reflecting the Commission “approv[ing] the establishment of the SOP [Standing Offer Program] based on that Policy Action [from the 2007 Energy Plan].” The reference to the policy action is in a recital to Order G-43-08 (B); that recital simply says “Policy Action No. 11 of the Provincial Government’s 2007 Energy Plan: A Vision for Clean Energy Leadership (“2007 Energy Plan”) directs BC Hydro to establish a standing offer for clean energy projects up to 10 megawatts”. Recital A says that BC Hydro itself “filed...an application for the Standing Offer Program” (in other words, this was again not a policy interjection in the middle of and contrary to the rest of the application). Most of the recitals refer to the negotiated settlement process that unfolded.

Rate rebalancing:

- (e) **Order G-34-08** (referred to at paragraphs 16-18 of BC Hydro’s final argument) related to rate rebalancing. In that case, BC Hydro applied on the basis of a ministerial letter to the Commission to reconsider what the Commission had already decided. The letter was Appendix B to BC Hydro’s reconsideration application and referred to the government’s intention to introduce legislation in relation to the subject matter. The relief sought by BC Hydro in its reconsideration application, and granted by the Commission, was not the same as BC Hydro seeks here, which (though BC Hydro acknowledges the Commission’s

⁴⁰ Recital D to Order G-4-09.

jurisdiction to order interim refundable rates) is a permanent F2019 rate freeze.⁴¹ Recital G to Order G-34-08 makes clear that BC Hydro sought “Commission orders temporarily suspending the specific orders and directions that BC Hydro has identified ... (‘the Rate Rebalancing Orders’) pending the sooner of the end of the Spring 2008 session of the Legislature, or the coming into effect of the legislation referred to in Appendix B to the Reconsideration Application” (underlining added). In other words, either the government would legislate (with the minister’s letter noting that “the contemplated legislation is expected to apply retroactively”, in which case it would not make sense to proceed) or it would not (in which case the pre-letter orders would remain in force). Something actually still had to happen at the government level in order for changes to orders that the Commission had made in the absence of the letter, to become permanent.

The distinction between the present proceeding and the one that led to Order G-34-08 is also apparent from the Commission’s Letter No. L-5-08 (referred to in Recital N to Order G-34-08), in which the Commission had determined that the reconsideration application should proceed directly to Phase 2. In Letter L-5-08, the Commission observed on p. 2:

BC Hydro notes that the relief it is requesting does not require a final and permanent reversal of the Rate Rebalancing Orders and that the requested relief, if granted, would result in the temporary suspension of the effect of those orders on BC Hydro’s rates pending the anticipated legislation. If the legislation does not materialize, BC Hydro submits that the Rate Rebalancing Orders would apply to BC Hydro’s rates so as to achieve the objective of those Orders.

All interveners who filed submissions in the reconsideration application “either supported or did not oppose the relief requested given the circumstances of the Minister’s letter.”⁴²

⁴¹ See BC Hydro’s response to CEC IR 4.189.1 in Exhibit B-25, setting out BC Hydro’s reasons for the view “that the Commission should approve final rates for fiscal 2019 at this time”.

⁴² Recital P to Order G-34-08.

As the Commission later summarized, “[t]he Commission allowed the Reconsideration and, pursuant to a Written Hearing, by Order G-34-08 dated March 7, 2008 granted BC Hydro the relief it requested – the relevant Directives were stayed pending the earlier of the coming into force of the legislative amendments or the end of the spring session of the legislature. Bill 15 became the statutory vehicle for the amendments.” It noted: “The amendments to the Act brought about by Bill 15 became effective May 1, 2008, except for the new section 58.1, which was made effective as of March 31, 2008.”⁴³

35. The proceedings referred to in BC Hydro’s argument thus:

- (a) generally dealt with particular programs (net metering, retail access) rather than rate-making or revenue requirements as applied across the whole customer base;
- (b) for the most part addressed new (at the time) programs, like net metering, rather than ones to which well-established principles applied;
- (c) in most cases the government policy was a component of a utility application structured from the outset in a manner consistent with it (rather than being at odds with what the utility had presented); and
- (d) in the one case involving rates (rebalancing) BC Hydro sought and the Commission gave simply a temporary order to give government the opportunity to legislate, which ultimately it did.

36. Again, to return to the points set out under headings (A) and (B) above, it may be that for certain purposes (such as relatively narrow or new programs, or the setting of priorities, which was the context in which BC Hydro referred to the 2016-17 mandate letter in its May 23, 2017 final argument⁴⁴), a fairly informal or brief expression of policy is sufficient. In other circumstances, such as a revenue requirements proceeding that affects customers as a whole, involves tens of millions of dollars and is already specifically governed by a direction that sets a

⁴³ Reasons for Order G-124-08 (BC Hydro and Power Authority Residential Inclining Block Rate Application) at s. 1.3, p. 3 (September 24, 2008).

⁴⁴ Paragraphs 26-27.

cap, the Commission might be more inclined to consider whether there are other *indicia* that would point to giving the government communication substantial weight.

PART 4 - COST OF SERVICE CONCERNS

A. Cost of Service Considerations

37. The setting of rates in a manner that reflects a utility's cost to serve its customers has an important basis in statute, case law and regulatory principle. For example, s. 59(1) of the *Utilities Commission Act* provides that “[a] public utility must not make, demand or receive (a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia”. Section 59(5) provides that “[i]n this section, a rate is ‘unjust’ or ‘unreasonable’ if the rate is ... (b) insufficient to yield a fair and reasonable compensation for the service provided by the utility ...”

38. Further, subject to s. 7 (which is returned to below and involves the Rate Smoothing Regulatory Account), s. 4 of Direction No. 7 provides that “in regulating and setting rates for the authority, the commission must ensure that those rates allow the authority to collect sufficient revenue in each fiscal year to enable the authority to (a) provide reliable electricity service, (b) meet all of its debt service, tax and other financial obligations, (c) comply with government policy directives, including, without limitation, government policy directives requiring the authority to construct, operate or extend a plant or system, and (d) achieve an annual rate of return on deemed equity, ... (iii) for F2019 and subsequent fiscal years, that would be necessary to yield a distributable surplus of \$712 million” (underlining added).

B. A Rate Freeze Would Put Revenue Recovered Through BC Hydro Rates Even Further Below Cost of Service

39. Independent of the Mandate Letter, regulatory justification for a 0 per cent increase could be provided on a cost of service basis in the appropriate circumstances. For example, if there are now actual or projected savings at BC Hydro which allow BC Hydro to collect less rate revenue in order to recover its F2019 costs of service, in accordance with ordinary regulatory principles there might be a good reason not to have a rate increase for that year.

40. However, it is clear that BC Hydro would not reduce F2019 costs in order to match the drop in revenue represented by the rate freeze. To the contrary, BC Hydro is clear that it “anticipate[s] continuing the activities related to our expenditures filed in our Application in fiscal 2019”.⁴⁵

41. The Mandate Letter did not prevent BC Hydro from taking steps to decrease F2019 costs at least so as not to increase the gap between F2019 rate-derived revenues and costs (of course, a gap already existed with the 3 per cent rate cap under Direction No. 7). The Mandate Letter did not prevent BC Hydro from examining options rather than relying on the Rate Smoothing Regulatory Account to address the shortfall.

42. In its responses to information requests and in its final argument BC Hydro repeatedly refers to the statement in the Mandate Letter that “[i]t is expected that BC Hydro and Power Authority (BC Hydro) will manage its programs and initiatives within existing budget targets, unless otherwise directed”. However, these words do not mean that the government wished to prevent BC Hydro from cutting costs in order to allow for a rate freeze to occur. As noted earlier, this is a sentence found in other mandate letters to Crown corporations as well; obviously government did not want what it said to any of its Crown corporations to inspire increased spending by them. The wording that the Minister used referred to those Crown corporations staying “within existing budget targets” (underlining added); an entity may stay “within” a target without spending up to the full amount. Further, as noted earlier, in the paragraph of the Mandate Letter in which the government expressed its commitment to “mak[ing] life more affordable”, it continued: “We expect all public service organizations to work to contain costs.⁴⁶”

43. FortisBC acknowledges that:

- (a) cost savings were linked in the government’s news release to its “comprehensive review”, but the news release did not say that cost savings could not pre-date it. Indeed the Mandate Letter referred, as of August 24, to “conduct[ing] an immediate and comprehensive review of BC Hydro’s activities, performance and

⁴⁵ Exhibit B-25, BC Hydro response to BCUC IR 4.5.1.

⁴⁶ Exhibit B-23, Attachment 1 (underlining added).

- organizational structure to identify potential efficiencies that could benefit ratepayers” (underlining added); and
- (b) certainly costs would need to be incurred to deal with other priorities in the Mandate Letter. However, the government was not specific as to how much or when.

C. **Rate Smoothing Regulatory Account**

44. As noted above, FortisBC recognizes that s. 4 of Direction No. 7 makes the Commission’s obligation to ensure that rates allow BC Hydro to collect sufficient annual revenue to do such things as provide reliable electricity service and meet financial obligations subject to s. 7. Section 7 provides for establishment of the Rate Smoothing Regulatory Account.

45. However, the availability of the Rate Smoothing Regulatory Account does not mean that resort to it should be preferred over immediate cost-cutting as a means of avoiding a (further) shortfall of rate-derived revenue as compared to costs.

46. The examples that BC Hydro cites in its response to BCUC IR 4.6.1 of accounts that it says have “similar features” to the Rate Smoothing Regulatory Account (in smoothing rates over a multi-year period) are quite different. The examples that BC Hydro cites are “FortisBC Energy (Vancouver Island) Inc.’s Revenue Deficiency Deferral Account and accounts that the Commission has approved for thermal energy utilities to mitigate the rate impacts of high up-front costs and smooth rates over time”.⁴⁷

47. As BC Hydro’s answer in part suggests, these are situations of new, immature utilities with “up-front” costs to bear while the customer base is just being established, not established utilities with large existing customer bases like BC Hydro.

48. The Commission has commented on the history of the FortisBC Energy (Vancouver Island) Inc. (**FEVI**) revenue deficiency deferral account in past proceedings, as follows:

⁴⁷ Exhibit B-25.

- (a) Centra Gas Vancouver Island Inc. was “a predecessor company” to FEVI.⁴⁸
- (b) “As a relatively small greenfield utility, Centra’s market was built from the ground up and its rates were structured to compete with alternative energy sources and to induce potential customers to convert to natural gas. Until 2003 its rates were set at a discount to competing fuels, too low to recover its cost of service and resulting in accumulations to the Revenue Deficiency Deferral Account (‘RDDA’).”⁴⁹ This was “as part of the [*Vancouver Island Natural Gas Pipeline Act Special Direction* (Special Direction)] and the [*Vancouver Island Natural Gas Pipeline Agreement*]”: under those, “FEVI was approved to establish the Revenue Deficiency Deferral Account (RDDA) to hold annual revenue shortfalls through 2002.”⁵⁰
- (c) “Since 2003 its rates have been based on a cost of service model, incorporating a soft cap mechanism to maintain the competitiveness of rates in the residential and commercial sectors relative to electricity or oil alternatives.”⁵¹
- (d) “[T]he British Columbia Utilities Commission (Commission) was directed by the Special Direction to set rates so as to permit the recovery of the RDDA as expeditiously as possible.”⁵²
- (e) “The RDDA balance was fully eliminated by the end of 2009.”⁵³

49. The Commission in turn addressed the situation of thermal energy utilities in relation to, for example, the River District Energy Limited Partnership.⁵⁴ In doing so the Commission again emphasized the unusual circumstances involved:

⁴⁸ Reasons for Order G-65-14 (FortisBC Energy (Vancouver Island) Inc. 2014 Revenue Requirements) at s. 1.1, p. 1 (May 23, 2014).

⁴⁹ Reasons for Order G-53-06 (Terasen Gas (Whistler) Inc. 2005 Resource Plan Update and Certificate of Public Convenience and Necessity for the Whistler Natural Gas Project and Terasen Gas (Vancouver Island) Inc. Certificate of Public Convenience and Necessity for the Squamish to Whistler Intermediate Pressure Pipeline) at s. 1.1, p. 3 (May 18, 2006).

⁵⁰ *Supra* note 48.

⁵¹ *Supra* note 49.

⁵² *Supra* note 48.

⁵³ *Ibid.*

⁵⁴ Reasons for Order C-14-11 (Certificate of Public Convenience and Necessity to Construct and Operate a District Energy System for the River District Development in Southeast Vancouver and Proposed Revenue Requirement,

4.3 Proposed Levelized Rate Approach

RDE proposes a leveled rate structure in order to reduce the energy rates for early customers of the DEU and to distribute the costs of developing this project over all customers for a 20-year period. Under this approach, the utility would agree to under-recover its costs of service during the early years of operation, capture these amounts in a deferral account, and fully recover the value of the deferral account by the 20th year of operation. (Exhibit B-1, p. 35) Consistent with this approach RDE is seeking approval of a Revenue Deficiency Deferral Account (RDDA) for accounting purposes.

BCSEA supports RDE's application for approval of a RDDA to support a leveled approach to rates. (BCSEA Final Submission, p. 1) BCSEA further considers the proposal for a leveled rate structure both fair and practical. As such, BCSEA accepts RDE's explanation that 20 years is a suitable levelization period because it corresponds roughly to the anticipated duration of the development build-out. BCSEA is of the view that a longer levelization period would add unnecessary financing costs to the revenue requirement. (BCSEA Final Submission, p. 3)

Commission Determination

In accordance with section 60 of the *Act*, the Commission Panel must ensure that rates being charged to customers are just and reasonable while allowing the utility to earn a fair return. The Commission Panel recognizes that it is not uncommon to allow “Greenfield” start-up utilities to charge leveled rates. The Commission Panel agrees with BCSEA that this approach to rate setting is both fair and practical as it provides affordable energy rates for early customers while distributing the project’s costs over all customers for a 20-year period, thus avoiding prohibitive energy rates in the early years. Therefore, **the Commission Panel grants approval for the 20-year leveled rate structure in which RDE defers a portion of its annual revenue requirements during the initial years.** Consequently, **the Panel also approves the establishment of a Revenue Deficiency Deferral Account or rate stabilization account to record shortfalls in the recovery of revenue requirements in the early years.** [bold in original; underlining added]

50. Here, the situation will have veered far off the ordinary course for an established utility if the rate freeze is granted. In contrast to the utilities discussed in paragraphs 48 and 49 above, BC Hydro has been in operation for many years, with an established and large infrastructure, and approximately two million customers. Yet it confirmed in responding to BCSEA IR 4.4.2 that it

would be “accurate to say that the combined effect of the F2017 and F2018 rate caps and the proposed F2019 rate freeze is to produce F2019 rates that are approximately 10% lower than they would have been in the absence of the rate smoothing account”.⁵⁵

51. Concerns regarding intergenerational equity arise in such a context. The Commission has previously discussed the importance of addressing matters related to intergenerational equity, for example noting the following in the context of utility rate design and cost allocation:⁵⁶

One principle of utility rate design and cost allocation is to ensure intergenerational equity to the extent practicable. The goal is to have the appropriate share of costs that are incurred to provide services to ratepayers in a particular time period recovered from the ratepayers benefiting from the services in that same time period

....Adherence to the principle of intergenerational equity provides challenges with respect to accurately determining appropriate periods over which to amortize costs. However, the Commission Panel believes that putting in place measures to ensure costs are borne by those who benefit is far more appropriate than ignoring such costs and passing them on to a future generation of customers well after any benefits have been realized. While there may be a temptation to defer costs to a future time period as a means of achieving lower rates, the view of the Panel is that where practical, both the cost and the benefits of a particular undertaking should be balanced over the same period. [underlining added]

52. Intergenerational equity concerns are associated specifically with the Rate Smoothing Regulatory Account among others. As stated on p. 12 of the Commission’s August 25, 2017 “Key Findings-Load Forecast”:

The Panel notes the majority of interveners have not made a case for adjusting the load forecast in the test period. The Panel observes that, in the absence of a rate cap, a lower load forecast would result in a higher rate increase, and it is likely interveners are supportive of keeping actual rate increases lower than necessary.

- The use of the NHDA has inherent intergenerational equity concerns in that current period under-recoveries are shifted into the future. This can be seen by examining Table 2 above. There is almost one billion dollars that

⁵⁵ Exhibit B-25. See also the BC Hydro response to FortisBC IR 4.21.1, in the same exhibit.

⁵⁶ FortisBC Energy Utilities 2012-13 Revenue Requirements and Rates Decision (April 12, 2012) at s. 4.3, pp. 22-23.

has accumulated in this account due to forecast variances over the past 8 years.

.....

- Any adjustments to BC Hydro's load forecast may impact the variances accruing into the NHDA. However under section 9 of Direction No. 7 to the Commission, the Panel's interpretation is that any variances related to BC Hydro's base line rate change above the rate caps established for each year of the test period will be deferred to BC Hydro's rate smoothing regulatory account. Accordingly, adjustments to the load forecast result in a shifting of variances from the NHDA regulatory account to the rate smoothing regulatory account. We have previously commented on the intergenerational inequity concerns associated with the NHDA; similar concerns arise with the use of the rate smoothing regulatory account.

.....

As discussed above, given the rate caps, any adjustment to the load forecast in the test period would result in a shift from one regulatory account to another, thereby affecting only the timing of the recovery of the amount. The Panel notes amounts added to the NHDA in excess of \$500,000 are recovered by the DARR mechanism. Given that the recovery mechanism for the rate smoothing regulatory account has not yet be established, in the Panel's view it is not possible to quantify the difference in these recovery mechanisms at this time. Both accounts may result in intergenerational inequity concerns if the recovery period is prolonged. [underlining added]

53. Section 7(k) of Direction No. 7 provides that subject to s. 9(1), which contains the rate caps, the Commission "must set the authority's rates in such a way as to allow the regulatory accounts to be cleared from time to time and within a reasonable period." One rate-setting mechanism that would contribute to an ability to clear the regulatory accounts within a reasonable period would be not allowing them to grow – for example, by not allowing a rate freeze in the absence of costs being cut for the same fiscal period.

54. Even in the absence of a rate freeze, recovery of accumulated balances in the Rate Smoothing Regulatory Account was already to be a fairly long-term proposition, with recovery of the balance previously planned, at least without the addition associated with a fiscal 2019 rate freeze, to be by the end of Ten-Year Rate Plan. Adding extra amounts to the account by adopting a rate freeze exacerbates intergenerational equity concern already associated with the Rate Smoothing Regulatory Account.

55. While it is possible that the recovery would ultimately be facilitated by the cost savings in future years, and it is possible that what BC Hydro describes as the “opportunities” presented by the planned (though amorphous) comprehensive review would be realized, this is far from certain – not even the content of the review is certain.

56. In accordance with s. 7(k), particularly if the Commission is concerned that the regulatory accounts would not be cleared within a reasonable period, the Rate Smoothing Regulatory Account should not be further added to in preference to taking cost-related measures to avoid the shortfall. In the evidence that BC Hydro has filed via its responses to information requests, there appears to be little of a tangible nature supporting BC Hydro’s claimed prospects of recovering the balance within 10 years. For example, in response to FortisBC’s request for the aggregate financial impact on F2019 of “commitments” made during the F2017-F2019 RRA hearing process,⁵⁷ BC Hydro referred to a listing of revisions to the application provided in paragraphs 579 and 580 of its May 23, 2017 final argument but did not provide any estimate of the financial impact these items may have, stating there was not sufficient time to model the impacts. Very few of the items identified in those paragraphs identify specific dollar amounts and in some cases the items appear to be referring to cost increases, leaving the reader uncertain of the combined impacts of the changes.

PART 5 - CONCLUSION

57. FortisBC has highlighted above its concerns regarding adoption of the rate freeze based on the Mandate Letter. Again, however, FortisBC emphasizes that it is not here to advocate in favour of a rate increase if the Commission is satisfied on consideration of all the circumstances that there is sufficient regulatory justification not to have one.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 15, 2018



Counsel for FortisBC

⁵⁷ Exhibit B-25, BC Hydro response to FortisBC IR 4.20.4.1.