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VIA EMAIL

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Acting Commission Secretary
BC Utilities Commission
6th Floor 900 Howe Street
Vancouver, BC V6Z 2N3

**Re: BC Hydro 2015 Rate Design Application
BCOAPO Application for Reconsideration and Variance of Order G-5-17**

1. We are counsel for the British Columbia Old Age Pensioners' Organization, Disability Alliance BC, Council of Senior Citizens' Organizations of BC, Tenant Resource and Advisory Centre, Active Support Against Poverty, Together Against Poverty Society and the BC Poverty Reduction Coalition. These groups were referred to collectively in the BC Hydro Rate Design proceeding as "BCOAPO" and we continue that naming convention in this application. The constituent groups of BCOAPO represent the interests of BC Hydro's low and fixed income residential ratepayers.

I. INTRODUCTION

2. BCOAPO files this application for reconsideration and variance of Order G-5-17, dated January 20, 2017, in the matter of BC Hydro's 2015 Rate Design Application, pursuant to s.99 of the BC *Utilities Commission Act* (the "UCA"). Specifically, BCOAPO applies for reconsideration and variance of the following paragraphs contained within Order G-5-17: paragraphs 14, 16 and 17 (as it pertains to late payment charges). These paragraphs state:

14. BCOAPO's request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is denied.

16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are denied.

17. BCOAPO's proposal to exempt low-income customers from late payment charges ... [is] denied.

3. The grounds on which this reconsideration application is based are that the Commission erred in law in finding sections 23, 38, and 58 to 61 of the UCA do not provide the Commission with jurisdiction to order low income rates. The specific errors are that the Commission erred in law and in fact:
 - a. in artificially bifurcating its analysis on undue discrimination into personal characteristics and a "cost of service rationale";
 - b. as a result of (a), failing to consider socioeconomic evidence relevant to the determination of undue discrimination;
 - c. in applying the wrong test to its interpretation of sections 23, 38, and 58 to 61 of the Act;
 - d. in finding a lack of legislative intent to provide the Commission with jurisdiction to order low income rates; and
 - e. misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions.
4. The sections below set out:
 - the orders sought by BCOAPO in this Reconsideration Application;
 - the applicable procedure on an application for reconsideration and variance; and
 - each of the grounds for reconsideration and variance.

II. ORDERS SOUGHT IN THIS RECONSIDERATION APPLICATION

5. BCOAPO seeks an order that paragraphs 14, 16 and 17 of Order G-5-17 be varied to order as follows:
 14. BCOAPO's request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is granted.
 16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are granted.
 17. BCOAPO's proposal to exempt low-income customers from late payment charges is granted and the proposal to ban the use of external credit scores is denied.

III. PROCEDURE ON AN APPLICATION FOR RECONSIDERATION AND VARIANCE

6. The Commission's process for addressing reconsideration applications is to proceed in two phases. The first phase is a preliminary examination in which the application is assessed in light of some or all of the following questions:
 - a. Should there be a reconsideration by the Commission?
 - b. If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?
 - c. If there is to be reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?
7. After the first phase evidence has been received, the Commission generally applies the following criteria to determine whether or not a reasonable basis exists for reconsideration:
 - a. the Commission has made an error in fact or law;
 - b. there has been a fundamental change in circumstances or facts since the Decision;
 - c. a basic principle had not been raised in the original proceedings; or
 - d. a new principle has arisen as a result of the Decision.
8. In addition, the Commission will exercise its discretion to reconsider, in other situations, wherever it deems there to be just cause.¹
9. This Reconsideration Application is based on errors of law and fact with respect to the Commission's jurisdiction. In such circumstances, the Commission applies the following criteria to determine whether the reconsideration application should proceed to the second phase to be considered on its merits:
 - a. the claim of error is substantiated on a *prima facie* basis; and
 - b. the error has material implications.
10. BCOAPO submits that this Reconsideration Application establishes a *prima facie* case for reconsideration and variance of paragraphs 14, 16 and 17 (as it pertains to late payment charges) of Order G-5-17 based on the errors described, and justifies proceeding to the second phase.

¹ British Columbia Utilities Commission, "Understanding Utility Regulation: A Participant's Guide to the B.C. Utilities Commission"

IV. GROUNDS FOR RECONSIDERATION – MATERIAL ERRORS OF LAW AND FACT

11. BCOAPO submits that a review of the Decision shows the Panel made the following errors of law:
 - a. Artificially bifurcating its analysis on undue discrimination into personal characteristics and a “cost of service rationale”;
 - b. As a result of (a), failing to consider socioeconomic evidence relevant to the determination of undue discrimination;
 - c. Misinterpreting and misapplying sections 23, 38, and 58 to 61 of the UCA;
 - d. Finding a lack of legislative intent to provide the Commission with jurisdiction to order low income rates; and
 - e. Misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions.

A. ARTIFICIAL BIFURCATION OF ANALYSIS

12. BCOAPO submits that the Commission erred in failing to consider together the three rationales that BCOAPO argued collectively provide the Commission with jurisdiction to make distinctions between customers based on income, and in so doing, applied the wrong test in assessing whether the proposed discrimination is “undue”.
13. The Commission begins its analysis of its jurisdiction to order BC Hydro to implement BCOAPO’s low income proposals by rejecting BCOAPO’s argument that ability to pay should be considered together with “non-status justifications” in a holistic and integrative rate-setting analysis with the following words:

The Panel’s view is if there is no jurisdiction to consider low-income rates in isolation then the “non-status justifications” must be, in and of themselves, sufficient. Accordingly, as a starting point, the Panel considers the Commission’s jurisdiction regarding low income rates in the absence of an economic or a cost of service rationale. (section 7.1.1; page 50)

14. In the underlying proceeding, BCOAPO argued that increased affordability was only one of three interrelated factors making the proposed discrimination in rates just and reasonable (i.e., the discrimination being not “undue”). From the outset, the Commission’s analysis bifurcated the three interrelated factors into two categories: personal characteristics (or ability to pay) and cost of service factors (cost reflectivity and efficiency). The Commission determined that it did not have jurisdiction to order discrimination in rates based on the personal characteristics of the customer group, which are unrelated to cost of service. The Commission then went on to separately consider whether the non-status justifications (i.e.,

cost of service reasons) put forth by BCOAPO were independently sufficient to justify discrimination in rates.

15. However, BCOAPO's argument was that all three contributing factors must be examined in concert, in a balancing exercise. The weight of each factor needs to be added to the other two factors to determine whether collectively the three justifications for discrimination can overcome the appellation of "undue" discrimination. To use a simple mathematical example for purposes of illustration, if the weight which must be overcome is 50 kgs and each of three factors weighs 20 kgs, it is trite to say the first factor of 20 kgs is inadequate and also that the other two factors of 20 kgs are collectively inadequate.
16. It is clear that sections 59 to 60 of the UCA do not prohibit any and all discrimination in rates, but rather, provide the Commission with jurisdiction to order discrimination in rates which is "due". In BCOAPO's submission it was an error of law for the Commission to break its consideration of whether the discrimination was "due" into separate considerations of (a) whether affordability considerations in isolation were sufficient to overcome the hurdle, and (b) whether cost of service considerations in isolation were sufficient to overcome the hurdle.
17. While cost of service may be the starting point of the Commission's jurisdiction, the Commission has the discretion to consider factors in addition to cost of service. Where such factors have been put forward, as was "ability to pay" in this case, the Commission must consider the interaction of all relevant factors in determining whether proposed distinctions amount to "undue discrimination." The Commission failed to do so in this case.

B. FAILURE TO CONSIDER SOCIOECONOMIC EVIDENCE

18. Because the Commission considered affordability in isolation and determined that it did not have jurisdiction to order discrimination in rates based solely on the personal characteristics of the customer, it failed to consider the socioeconomic evidence regarding poverty – and more specifically, energy poverty – put forward by BCOAPO. The Commission's only comment regarding such evidence was with respect to BCOAPO's "dynamic interpretation" argument, namely that the UCA should be interpreted in accordance with ongoing changes in the society which it governs.
19. BCOAPO put forward a significant body of expert evidence on poverty and energy poverty in BC, as well as evidence from advocate and ratepayer witnesses about the circumstances of low income people and increasing difficulties with bill affordability. In fact, as BCSEA noted in its argument, BCOAPO presented the Commission with "an unprecedented body of evidence on the relationship between BC Hydro's electricity service and the needs of low-income customers and their families" (BCSEA Final Argument, para. 215).
20. The Commission qualified BCOAPO's witness Seth Klein as an expert on the extent and profile of poverty in BC, and the difficulties that low income people in BC have paying for the basic necessities of life, including residential electricity. Mr. Klein's evidence situated BC

Hydro rates within a broader analysis of the circumstances of people living in poverty in BC, and outlined his view that there is a growing energy poverty problem in BC, one that has become more emergent in the face of escalating BC Hydro rates.

21. The evidence from the advocate and ratepayer witnesses provided first-hand accounts of the impact of rising BC Hydro rates on low income clients and families, respectively. The evidence from the advocate and ratepayer witnesses was unquestioned by other parties in the proceeding, and was therefore uncontroverted.
22. BCOAPO submits that the Commission erred in failing to consider all relevant evidence. BCOAPO's socioeconomic evidence is relevant to a much wider range of issues than identified by the Commission in its Decision (i.e., the dynamic interpretation argument). Specifically, the Commission erred in not considering the weight of BCOAPO's affordability argument in light of the evidence on the breadth and depth of poverty experienced by BC Hydro's customers. Such evidence goes to the weight to be afforded to BCOAPO's affordability argument, which is one of the three interrelated factors going to whether the discrimination is undue. As such, it is relevant to the Commission's overall consideration of BCOAPO's proposals and the Commission's jurisdiction to order the same.

**C. APPLYING THE WRONG TEST IN INTERPRETING SECTIONS 23, 38,
AND 58 TO 61 OF THE ACT**

23. The only statutory restrictions on the Commission's jurisdiction with respect to rates are set out in sections 59 to 61 of the UCA. In a nutshell, the statutory restrictions prohibit the Commission from ordering rates that are "unjust, unreasonable, unduly discriminatory or unduly preferential". There is no statutory restriction limiting the Commission's consideration of "just and reasonable" to cost of service factors.

i. ss. 23 & 38

24. While the Panel found that "words regarding customers' financial circumstances financial circumstances or income...in the rate-making sections of the UCA are conspicuously absent," BCOAPO submits that equally conspicuous is the fact that the legislature chose to afford both section 23 and section 38 with broadly worded "catch-all" provisions. These sections provide the Commission with a broad mandate to do a fulsome analysis to determine what orders are necessary and advisable for the public interest and to ensure utilities are providing a service to the public that is "adequate, safe, efficient, just and reasonable."
25. To be clear, BCOAPO did not argue that sections 23 and 38 provide the Commission with explicit jurisdiction to set low income rates; but rather, that sections 23 and 38 inform the Commission's rate approval authority, which is broad enough to include ability to pay in setting rates.

26. While the Panel states that it adopts the Driedger approach to statutory interpretation (p. 54), it failed to actually conduct an analysis consistent with that approach. Driedger's Modern Principle states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (Elmer Driedger, Construction of Statutes (2nd ed. 1983), cited in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, 1998 CanLII 837 (SCC) at para. 21).

27. The Commission did not consider ss. 23 and 38 of the UCA harmoniously with the scheme of the Act, the object of the Act, and the intention of, in this case, the provincial legislature. Instead, it drew conclusions based on a "plain reading" of section 23 and 38, divorced from the context of the broader statute of which those sections are part. In so doing, the Commission applied only the first piece of Driedger's approach to statutory interpretation. Although the Decision states that sections 23 and 38 should be interpreted "harmoniously within the scheme of the Act" (p. 54) the Commission fails to conduct such an analysis. BCOAPO submits that when read together, ss. 23, 38, and 58-61 provide the Commission with much broader jurisdiction in rate setting than the Commission found.

ii. ss. 58 to 61

28. As noted above, the Commission unnecessarily limited the broad authority granted by ss. 23 and 38. As a result, the Commission failed to examine the rate-setting provisions in ss. 58-61 of the UCA in the context of the broader authority granted by ss. 23 & 38. In so doing the Commission unreasonably limited the scope of ss.59-61 to cost of service considerations.
29. Similarly, the Commission unnecessarily limited its broad authority under s.60(1)(b.1) to set rates using "any mechanism, formula or other method of setting the rate that it considers advisable." There is nothing in the language of the statute that precludes the Commission from considering income and ability to pay as part of its "mechanism, formula, or other method."
30. The Commission's broad authority under s.60(1)(b.1) is expressly excluded from the requirement set out in Special Direction No. 7, section 5(c) and (d), which require that the Commission must otherwise ensure that BC Hydro's domestic service is provided on a cost-of-service basis. The Commission does not address this point in its decision.
31. The Commission again fails to conduct an analysis of ss. 59 & 60 that is consistent with the Driedger approach to statutory interpretation, instead simply stating that "[t]he rate setting provisions of the UCA are founded on the characteristic of the service provided and are primarily economic in nature. There is nothing in the plain wording of the UCA indicating that they mean otherwise" (Decision, p. 59). However, there is also nothing in the plain wording of the UCA indicating that only cost of service factors can be taken into

consideration. In fact, sections 23, 38 and 60(1) all suggest that a broader interpretation is permitted by the statute.

D. FINDING A LACK OF LEGISLATIVE INTENT TO PROVIDE THE COMMISSION WITH JURISDICTION TO ORDER LOW INCOME RATES

32. The Commission found no evidence of legislative intent to provide the Commission with jurisdiction to set low income rates (p. 67).
33. BCOAPO provided reference to the Honourable Robert H. McClelland's statements in the legislature underscoring the Commission's public interest function when the *Utilities Commission Act* was introduced for second reading. The Commission said that it could "find no evidence that included in government energy policy is an intention to provide low income rates" (p. 65). However, it is not a question of whether the legislature intends to provide low income rates per se; but rather, a question of whether the legislature intended the Commission's regulatory powers to be broad enough to approve such rates where necessary for the public interest.
34. Further, the Commission accepted as evidence of legislative intent the legislature's refusal, on three occasions, to pass proposed amendments to the Act to explicitly provide the Commission with the authority to create a low income rate. As noted in BCOAPO's argument, on all three occasions those amendments were Private Members' Bills put forward by the Official Opposition. The Commission made reviewable legal errors in relying on a private member's bill never adopted by the legislature to interpret the state of the law, and in finding that section 37 of the *Interpretation Act* does not apply to preclude such reliance.

E. MISCONSTRUING THE REGULATORY REGIMES AND RELEVANT DECISIONS IN OTHER CANADIAN JURISDICTIONS

35. The Panel found that the similarities between BC's *Utilities Commission Act* and the *Ontario Energy Board Act* are insufficient for decisions in Ontario to provide guidance in the present case. On the other hand, the Panel found that there are sufficient similarities between the UCA and the *Public Utilities Act* in Nova Scotia for decisions from Nova Scotia to provide guidance in the present case.
36. Finding Nova Scotia's *Public Utilities Act* (and relevant decisions made under that Act) directly applicable to the issue of the Commission's jurisdiction under the UCA reveals an error in statutory interpretation. BCOAPO submits that the *Public Utilities Act* in Nova Scotia has much stricter wording than the UCA. The UCA does not contain an absolute requirement that rates always be charged equally to all persons under substantially similar circumstances and conditions in respect of service of the same description as is required by s. 67 of the *Public Utilities Act*. Further, the Commission's analysis of the arguably comparable section of the UCA (s. 59(2)) failed to look at that section in the context of the broad authority granted to the Commission by sections 23 and 38 of the UCA.

37. The *Ontario Energy Board Act* and Manitoba's *Public Utilities Board Act*, with their broad authority to conduct contextual analysis in rate setting and approval, are more directly applicable to the Commission's jurisdiction under the UCA.
38. The Commission should not have ascribed the weight it did to the tribunal decisions in Alberta and New Brunswick. Although the Commission acknowledges that the New Brunswick decision is "less relevant" because it does not discuss cost of service justifications, both the Alberta and New Brunswick decisions have significantly less precedential value than the Ontario Superior Court of Justice decision, which was confirmed by the Ontario Court of Appeal.

V. THE ERRORS HAVE MATERIAL IMPLICATIONS

39. The errors of law and fact discussed above have material implications. By artificially bifurcating the factors relevant to the analysis of whether BCOAPO's low income rate proposals resulted in just and reasonable (not unduly discriminatory) rates, the Commission failed to engage in the holistic contextual analysis required by Driedger's modern approach. Consequently, the Commission found that a "cost of service justification" was required to ground discrimination in rates. As a result of this error, the Commission failed to properly consider BCOAPO's socioeconomic evidence of poverty in British Columbia.
40. The Commission made a similar error in statutory interpretation when it turned its attention to the wording of the UCA. That is, the Commission split its analysis of ss.23 and 38 off from its analysis of the rate setting provisions found in ss.59-61. This was an error in that the modern approach to interpretation requires a holistic analysis of the statutory provisions at issue.
41. The Commission then turned its attention to legislative intent, and found no evidence of a legislative intent to provide the Commission with jurisdiction to order low income rates. The Commission's analysis on this point ignored both the broad wording of the UCA and discussion in the legislature of the Commission's public interest function. The Commission also improperly relied on the fact that opposition private member's bills were not adopted by the government as evidence of legislative intention.
42. Finally, the Commission misconstrued the legislation in other Canadian jurisdictions, and incorrectly identified Nova Scotia's legislation as more similar to the UCA than is Ontario's. This led the Commission to discount the significance of the Ontario Court of Appeal decision allowing low income rates and over-emphasize the significance of the Nova Scotia Court of Appeal decision denying jurisdiction.
43. Collectively, these errors led to the finding that the Commission did not have jurisdiction to entertain BCOAPO's low income proposals. This had the material impact that these proposals were rejected by the Commission without any adequate analysis of their desirability as a public interest objective. The material impact on BC Hydro's low income

customers from this rejection is severe. They will continue to face difficult choices with respect to which bills to pay and disconnections for their ultimate inability to pay. We refer the Commission to the body of evidence provided by BCOAPO in the underlying proceeding for consideration of the materiality of the impact on this customer group.

VI. SHOULD THE COMMISSION HEAR NEW EVIDENCE AND SHOULD NEW PARTIES BE GIVEN THE OPPORTUNITY TO PRESENT EVIDENCE?

44. There was a significant evidentiary record in this proceeding, and in particular, a large body of evidence pertaining to the issues BCOAPO raises in this Application for Reconsideration. BCOAPO submits that there is no need for the Commission to hear new evidence in order to address these issues.
45. BCOAPO takes no position on whether the Commission should permit new parties – that is, parties that did not participate in the underlying proceeding – to participate in the Reconsideration.

VII. SHOULD THE RECONSIDERATION FOCUS ON THE ITEMS FROM THE APPLICATION FOR RECONSIDERATION, A SUBSET OF THESE ITEMS OR ADDITIONAL ITEMS?

46. BCOAPO submits that this Reconsideration Application establishes a *prima facie* case for reconsideration and variance of paragraphs 14, 16 and 17 (as it pertains to late payment charges) of Order G-5-17 based on the errors of law described, and justifies proceeding to the second phase. As such, the Reconsideration should focus on the items from this Application for Reconsideration.

All of which is respectfully submitted.
BC Public Interest Advocacy Centre

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- c. Registered Interveners in the BC Hydro 2016 Rate Design Proceeding