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March 15, 2017

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street, Box 250
Vancouver, BC, V6Z 2N3
Attn: Erica Hamilton, Commission Secretary
By email: commission.secretary@bcuc.com

Dear Madam:

Re: BCOAPO Application for Reconsideration and Variance of Order G-5-17;
BC Sustainable Energy Association and Sierra Club BC submission
on Phase One Questions

I represent the B.C. Sustainable Energy Association (BCSEA) and the Sierra Club of B.C. (SCBC) in this matter.

BCSEA-SCBC were interveners in the original proceeding regarding BC Hydro's 2015 Rate Design Application that led to Order G-5-17, a portion of which is the subject of BCOAPO's February 17, 2017 application for reconsideration. BCSEA-SCBC were interveners in the original proceeding. As such, they are permitted to be interveners in this reconsideration proceeding.¹

In its February 24, 2017 letter² to BC PIAC, counsel for BCOAPO, copied to BC Hydro and interveners in the original proceeding, the Commission invited submissions from BC Hydro and interveners regarding Phase One of the reconsideration proceeding by March 17, 2017. These are BCSEA-SCBC's submissions.

I. Background

(a) The Original Proceeding

On September 24, 2015, the British Columbia Hydro and Power Authority (BC Hydro) filed with the Commission, pursuant to sections 58-61 of the *Act*, the first module of a rate design application (2015 RDA). In the 2015 RDA, BC Hydro sought approvals related to residential, general service and transmission service rates as well as approval to amend the terms and conditions in BC Hydro's Electric Tariff.

BCOAPO was an intervener in the original proceeding. BCOAPO comprises: British Columbia Old Age Pensioners' Organization, 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. The constituent groups of BCOAPO represent the interests of BC Hydro's low and fixed income residential ratepayers.

¹ Rule 10.04.

² Exhibit A-2.

Subsequent to a procedural conference on January 19, 2016, the Commission issued Order G-12-16 which, among other things, included a regulatory timetable for the submission of intervener evidence, one round of IRs on intervener evidence, and a deadline for BC Hydro's filing of rebuttal evidence.

By Order G-50-16 dated April 13, 2016, the Commission amended the regulatory timetable and ordered that an oral hearing be held in August 2016.

On May 9, 2016, BCOAPO filed intervener evidence in support of its proposal that the Commission approve a low-income residential rate (which it referred to as an Essential Services Usage Block (ESUB)) and related tariff and business practices measures.³ The evidence included expert evidence of Mr. Roger Colton regarding low-income electricity rates and tariff terms and conditions, expert evidence of Mr. Seth Klein regarding poverty in B.C. and how BC Hydro's rates and practices impact low-income customers, direct testimony of six advocates with experience assisting low-income customers in their interactions with BC Hydro, and direct testimony of five BC Hydro customers who have experienced income-related hardships in paying electricity bills and dealing with BC Hydro.

On June 23, 2016, BCOAPO filed responses to information requests regarding its evidence from Commission staff, BC Hydro, and interveners Commercial Energy Consumers, BCSEA-SCBC, MoveUP, and Zone II Ratepayers Group.⁴

On July 6, 2016, BC Hydro filed rebuttal evidence in response to BCOAPO's intervener evidence.

An oral hearing in the original proceeding commenced in Vancouver on August 16, 2016. The original panel heard, among other things, direct evidence and cross-examination of BCOAPO's expert witnesses and BC Hydro's witnesses regarding poverty in B.C., low-income BC Hydro customers, BC Hydro rates, tariff terms and conditions and business practices as they affect low-income customers, and potential alternative rates, tariff terms and conditions and business practices. The oral hearing concluded on August 24, 2016.

In accordance with an approved schedule, final arguments were received by the Commission as follows:

- Filing of final arguments from BC Hydro on, among other things, the Commission's jurisdiction to approve rates specific to low-income customers and from BCOAPO related to the orders BCOAPO seeks from the Commission, on September 26, 2016;
- Filing of interveners' final arguments and BC Hydro and BCOAPO final arguments in response to each other on October 11, 2016; and
- Filing of BC Hydro and BCOAPO reply arguments related to the orders BCOAPO seeks from the Commission on October 24, 2016.

³ Exhibit C2-12, and Exhibit C2-12-1, filed confidentially, in the Original Proceeding.

⁴ Exhibits C2-19, C2-17, C2-20, C2-18, C2-21, and C2-22 in the Original Proceeding, respectively.

(b) The Original Decision

On January 20, 2017, the Commission issued Decision and Order G-5-17. In the material portions of Decision and Order G-5-17, the Panel denied BCOAPO's requests for establishment of an essential services usage block rate for qualified low-income ratepayers, for amendment of the Electric Tariff to exempt low-income customers from the minimum reconnection and account charges and to waive security deposits for low-income customers, and for exemption of low-income customers from late payment charges.

Regarding the low-income rate proposal, Panel denied the request because it found that it has no jurisdiction under the *UCA* to approve a low income rate in the absence of an economic or a cost of service basis reason,⁵ and the Panel found that neither "BCOAPO's cost reflectivity pillar"⁶ nor "BCOAPO's improved efficiency pillar"⁷ provides a regulatory justification for the ESUB rate.

The Panel denied the request for amendment of the Electric Tariff to exempt low-income customers from the minimum reconnection charge, the account charge, and the late payment charge, and to waive security deposits for low-income customers, because of its determination that it has no jurisdiction under the *UCA* to approve a low income rate in the absence of an economic or a cost of service basis reason, a determination that BC Hydro had sufficiently demonstrated the cost of service basis for the minimum reconnection charge, the account charge and the late payment charge, and a determination that exempting low-income customers from security deposits would be discriminatory because it would put other ratepayers at risk for non-payment.⁸

(c) BCOAPO Reconsideration Application

Section 99 of the *Utilities Commission Act* states:

"99. The commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

BCOAPO applies under section 99 of the *UCA* for reconsideration and variance of paragraphs 14, 16 and 17 (as it pertains to late payment charges) of Order G-5-17. 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."⁹

⁵ Decision and Order G-5-17, Reasons for Decision, pp.80, 93.

⁶ *Ibid.*, p.85.

⁷ *Ibid.*, p.90.

⁸ *Ibid.*, p.101.

⁹ Exhibit B-1, para.2.

BCOAPO states that the grounds for reconsideration are, in summary, that the Commission erred in law in finding that sections 23, 38, and 58 to 61 of the *UCA* do not provide the Commission with jurisdiction to order low income rates.¹⁰

Specifically, BCOAPO states 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.

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.”¹¹

In terms of procedure, BCOAPO proposed adoption of the Commission’s usual two-phase process for reconsideration applications.¹² The two-phase process was adopted by the Commission in its February 24, 2017 letter, referred to above.¹³

(d) Phase One of Reconsideration Procedure

BCSEA-SCBC agree with BCOAPO that the reconsideration application should proceed to the second phase to be considered on its merits where (a) the claim of error is substantiated on a *prima facie* basis, and (b) the error has material implications.¹⁴ This is the test routinely applied by the Commission.

¹⁰ Exhibit B-1, para.3.

¹¹ Exhibit B-1, para.5.

¹² Exhibit B-1, paras.6-9.

¹³ Exhibit A-2.

¹⁴ Exhibit B-1, para.9.

II. BCSEA-SCBC Submissions on Phase One questions

1. Should there be a reconsideration by the Commission?

Yes, in BCSEA-SCBC's view there should be a reconsideration of paragraphs 14, 16 and 17 (as it pertains to late payment charges) of Order G-5-17. Both criteria are met: the claim of error is substantiated on a *prima facie* basis, and the error has material implications.

(a) *Prima Facie* Error

BCSEA-SCBC endorse, and will not repeat here, BCOAPO's submissions regarding the alleged errors of law and fact in the original decision.¹⁵

Rather than repeating BCOAPO's arguments in detail, BCSEA-SCBC will highlight three points on which, in BCSEA-SCBC's submission, the reconsideration panel should conclude that the claim of error is substantiated on a *prima facie* basis.

First, the original panel's conclusion – that the Commission has no jurisdiction under the UCA to approve a low-income rate in the absence of an economic or a cost of service basis¹⁶ – is circular and unreasonable because that was the same proposition that the panel took as the starting point of its analysis. At the very beginning of its discussion, the original panel defines the jurisdictional topic as “The Commission's jurisdiction to approve low-income rates in the absence of a regulatory justification.”¹⁷ The original panel's starting assumption is that low-income rates have no regulatory justification under the Act. Yet the panel was required to determine if low-income rates (in principle or as proposed) do have a regulatory justification under the Act. In effect, the original panel assumed its own conclusion.

Second, the original panel erred in conducting its statutory interpretation of the *Utilities Commission Act* and whether the *Act* provides the Commission with jurisdiction to approve a low-income rate. While the Panel expressed acceptance of the “modern approach” to statutory interpretation,¹⁸ it failed to actually apply the modern approach.

In contradistinction to the “plain language” or “plain meaning” approach, which the original panel cites frequently,¹⁹ the Supreme Court of Canada in the seminal case of *Rizzo & Rizzo Shoes Ltd.* adopted Professor Driedger's view that “statutory interpretation cannot be founded on the wording of the legislation alone.”²⁰ Rather, Iacobucci, JA, speaking for the court, endorsed Professor Driedger's statement that has become known as the modern approach as follows:

“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.”²¹

¹⁵ Exhibit B-1, paras.11-38.

¹⁶ Decision and Order G-5-17, Reasons for Decision, p.80.

¹⁷ Decision and Order G-5-17, Reasons for Decision, p.49.

¹⁸ Decision and Order G-5-17, Reasons for Decision, p.51.

¹⁹ Decision and Order G-5-17, Reasons for Decision, pp. 54, 59, 77.

²⁰ *Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 SCR 27, para.21.

²¹ *Ibid.*

Contrary to the modern approach, the original panel conspicuously separated its analysis of sections 23 (commission has general supervision) and 38 (public utility service) from its analysis of sections 59-60 (ratemaking). First the panel concluded that neither section 23 nor section 38 alone provides the Commission with jurisdiction to set low-income rates, in isolation from sections 59-60. Then, the panel concluded that sections 59-60 do not support low-income rates, in isolation from sections 23 and 38.

The panel's error in this respect is evident on page 54 of the Reasons for Decision where it claims to adopt E.A. Driedger's modern approach but then expressly states, and applies, the legally incorrect plain reading approach that was rejected in *Rizzo & Rizzo Shoes Ltd*. The Panel states:

“As noted previously, the Panel adopts E.A. Driedger's approach to statutory interpretation as it applies to reading the words of the UCA. In applying this approach, the Panel concludes that a plain reading of sections 23 and 38 does not support the view that these sections provide the Commission with jurisdiction to set low-income rates. There is no reference to the characteristics of a ratepayer and no requirement for the Commission to consider the economic status of a ratepayer.” [underline added]

The panel's error here is not merely its use of the phrase “plain meaning” but its attempt to interpret sections 23 and 38 with no reference to the context of the Act as a whole. BCOAPO did not argue that sections 23 and 38, in isolation from the whole of Act, provide the Commission with jurisdiction to set low-income rates. Section 23 and section 38 must be interpreted harmoniously with the scheme of the Act. It is to be expected that sections 23 and 38 are silent regarding the characteristics and economic status of a ratepayer: rates and the Commission's approval of rates are specific topics addressed elsewhere in the Act, i.e., sections 59-60. Yet when the original panel addresses sections 59-60 it makes no mention of sections 23 and 38.

Third, the original panel errs in finding that low-income rates, whether in principle or as proposed, are necessarily and intrinsically “unduly discriminatory” without any consideration of the socioeconomic evidence. The Commission has statutory authority under the Act to determine whether a public utility's rates are, or would be, “unduly discriminatory.” It is submitted that the original panel improperly fettered that discretion when it determined, without reference to any evidence, that “low-income rates unsupported by an economic or cost of service justification are unjust, unreasonable and unduly discriminatory and are therefore not in accordance with sections 59 - 60 of the UCA.”²²

The original panel itself acknowledged that rates that require subsidization from other ratepayers in the same class are, by definition, discriminatory, yet may not be unduly discriminatory. The panel gave rate smoothing as an example. It states:

“Rate smoothing to prevent rate shock may give rise to discrimination among generations of customers (intergenerational equity). However, in most cases rate smoothing arguably does not take place over sufficient time to affect a

²² Decision and Order G-5-17, Reasons for Decision, p.59.

“generation” so the applicability of this comparator may be limited. In any event, the issue is whether the discrimination is undue.”²³

A similar but more commonly encountered example would be the Commission’s consideration of “bill impacts” in approving rate structures, as occurred numerous times in Decision and Order G-5-17 itself. The point is that under the UCA it is the Commission’s statutory duty and prerogative to determine whether a rate structure that is discriminatory is unduly discriminatory. The Commission cannot lawfully refuse to exercise that discretion by issuing a blanket statement that low-income rates are always unduly discriminatory.

(b) Error is Material

BCSEA-SCBC submit that the alleged error in denying approval of low-income rates and tariff measures meets the materiality criterion for reconsideration. The error has significant financial and quality of life consequences for qualified low-income customers of BC Hydro. For reference, proposed ESUB rate would cost \$26.9 million annually based on 100% participation.²⁴

For the reasons set out above, including BCOAPO’s arguments endorsed by BCSEA-SCBC, it is respectfully submitted that the claim of error is substantiated on a *prima facie* basis and the claimed error is material. The reconsideration should proceed to the second phase.

2. If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?

From BCSEA-SCBC’s perspective, the evidentiary record is already substantial and sufficient. BCSEA-SCBC are not aware of any need for new evidence or for new parties to be given an opportunity to present evidence.

3. If there is to be a reconsideration, should it focus on the items from the application for reconsideration, a subset of these items, or additional items?

If there is to be a reconsideration, in BCSEA-SCBC’s view it should focus on the items identified by BCOAPO in BC PIAC’s February 24, 2017 letter applying for reconsideration.²⁵

All the above is respectfully submitted.

Yours truly,

William J. Andrews



Barrister & Solicitor

cc. Distribution List by email

²³ Decision and Order G-5-17, Reasons for Decision, p.59, underline added.

²⁴ Exhibit C2-12, Schedule RDC-2 in the original proceeding.

²⁵ Exhibit B-1.