

BRITISH COLUMBIA UTILITIES COMMISSION

Inquiry into the Regulation of Electric Vehicle Charging Service BCUC Project No. 1598941

Phase One Reply Argument by BC Sustainable Energy Association and Sierra Club BC

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1.0 Introduction

This is the reply argument of the interveners BC Sustainable Energy Association and Sierra Club BC (BCSEA-SCBC) in Phase One of the Commission’s Inquiry into the Regulation of Electric Vehicle Charging Service, pursuant to Order G-119-18.¹ This follows BCSEA-SCBC’s August 1, 2018 final argument.²

BCSEA-SCBC have reviewed all the final arguments filed by the other interveners. They commend the thoughtful, detailed submissions made by the other interveners.

BCSEA-SCBC endorse their August 1, 2018 submissions and will not repeat them here.

2.0 Reply Submissions

This reply submission focuses on the following selected topics:

- Is a provider of EVCS a public utility?
- Complete exemption for Level 1 and 2 EVCS,
- Complaint-based regulation,
- Exemption and rates regulation of EVCS,
- Proposal for broad exceptions to exemption of EVCS from regulation,
- CEA s.18 and GGRR s.4,
- No role for BCUC in setting EVCS technical standards,
- Safety regulation of EVCS, and
- EVCS by BC Hydro and FBC.

¹ Exhibit A-35.

² Exhibit C6-14. http://www.bcuc.com/Documents/Proceedings/2018/DOC_52151_C6-14-BCSEA-SCBC-Final%20Argument.pdf.

2.1 Is a provider of EVCS a public utility?

Intervenors such as Tesla and ChargePoint argue that, properly interpreted, the definition of public utility does not capture EV charging service by an entity not otherwise a public utility. BCSEA-SCBC did not address this point in their final argument. Rather, they assumed for the sake of the argument that “public utility” does capture EVCS,³ as stated by the Inquiry Panel.⁴ However, to address the point made by Tesla and ChargePoint, BCSEA-SCBC do support the Inquiry Panel considering this issue on the basis of the arguments now before it. And, substantively, BCSEA-SCBC support a finding that the definition of public utility does not include EV charging service by an entity not otherwise a public utility.

The way BCSEA-SCBC would put the argument is that the word “electricity” in the definition of public utility must be interpreted harmoniously with the purpose of the *Utilities Commission Act* to regulate natural monopolies and protect consumers from the exercise of economic power. The provision of EV charging service is not the provision of “electricity” within the meaning of “public utility” where the putative “electricity” is not provided by a natural monopoly in circumstances requiring the BCUC to protect consumers from the exercise of economic power. This is why a store selling flashlight batteries is not a public utility. This is why BC Hydro and FBC are public utilities.

The modern principle of statutory interpretation requires the Commission to interpret the definition of public utility “harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” This is not optional. It is not open to the Commission to conclude that the wording of the definition of public utility captures entities providing something, i.e., “electricity,” in circumstances that are beyond the purpose of the UCA. The definition of public utility is the foundation of the Commission’s jurisdiction to regulate public utilities under the Act. The Commission has the authority and the responsibility to interpret the definition of public utility in accordance with the purpose of the Act.

This argument requires consideration of the statements of the Commission panel in the AES report. It is respectfully submitted that the AES panel cited the modern principle of statutory interpretation but then incorrectly backed away from applying it to the definition of public utility. The AES panel acknowledged that the literal wording of the definition of public utility would lead to regulation of activities that are not intended to be regulated under the Act.⁵ However, the panel’s prescription was to exempt such activities from regulation (partially⁶), rather than to interpret “public utility” as excluding activities that are not intended to be regulated, as required, it is submitted, by the modern principle of statutory interpretation.

The AES panel suggests that “There would be greater clarity if the Government were to explicitly amend the *UCA* to exclude regulation of activities where competitive forces are found to provide sufficient protection to the public.” With respect, while the Legislature certainly could amend the definition of public utility to exclude providers of EVCS from

³ Exhibit C6-14, p.7, para.6.

⁴ Exhibit A-35, Reasons for Order G-119-18, pp.4-5.

⁵ “The Commission Panel agrees that a strict, literal interpretation of the definition of “public utility” in the *UCA* could lead to an absurd result such that a host of services and technologies that are available in a competitive marketplace would require regulation.” AES Report, p.15.

⁶ While the AES panel speaks in terms of exemption of regulation of public utilities whose activities are not intended to be regulated, the Commission has been reluctant to fully exempt a public utility from BCUC regulation and instead retains regulatory control through exceptions to the exemption.

the definition of public utility, under the modern principle of statutory interpretation it is the responsibility of the Commission to interpret the definition so that it makes sense in the context of the purpose of the UCA.

A good example is a store selling flashlight batteries. Taking the word “electricity” in isolation, the store is apparently selling electricity to the public, and yet at the same time economic regulation of a store selling flashlight batteries is clearly not intended under the UCA. Under the AES panel’s approach, the store would be considered a public utility and then exempted from regulation (subject to specified exceptions). Is a statutory amendment the only alternative? No. Under the modern principle of statutory interpretation, the BCUC has authority and responsibility to interpret the definition of public utility in the context of the purpose of the Act. Assuming the Commission would find that the UCA does not intend economic regulation of the sale of flashlight batteries, the proper approach – it is respectfully submitted – would be for the Commission to find that “electricity” in the definition of public utility does not include flashlight batteries and an entity is not a public utility by virtue of selling flashlight batteries.

It is respectfully submitted that the same approach applies to EV charging services.

2.2 Complete exemption for Level 1 and 2 EVCS

A number of interveners suggest that there should be a complete exemption of Level 1 and 2 EVCS from regulation by the Commission.⁷ These interveners also call for exemption with some exceptions for Level 3/DCFC services by entities not otherwise public utilities. In their final argument, BCSEA-SCBC took the position that there should be a single “class of cases” for an EVCS exemption that would be subject only to the minimum requirements to allow the Commission to determine in the future whether the criteria for an exemption are met in a specific case.⁸

BCSEA-SCBC endorse that position. In the alternative, however, they do acknowledge that a complete exemption for Level 1 and 2 EVCS (by entities not otherwise rates-regulated public utilities) would be a suitable and effective way to address a large number of existing and future EV charging stations.

2.3 Complaint-based regulation

One intervener suggests that “To the extent the market conditions allow, the Commission should forbear from regulating EV service providers, but remain available to resolve disputes on a complaint basis where EV service providers can exert undue market power because of market constraints.”⁹ While BCSEA-SCBC appreciate the intention to protect the consumer interests of EV drivers, they have several reservations they wish to express:

1. It is unclear that there are circumstances in which “EV service providers can exert undue market power because of market constraints.” EV drivers always

⁷ MEMPR, Exhibit C19-10, paras.16-19; Victoria EV Club, Exhibit 35-7, p.2, paragraph (b); Community Energy Association, Exhibit C34-6, pdf p.2, para.1(a); AddEnergie, Exhibit C20-6, p.2, lines 20-23. Commercial Energy Consumers, Exhibit C24-19, supports a BCUC recommendation to the Government to amend the UCA to exclude EVCS from “public utility.” Paras.111-118, 121. CEC also supports immediate exemption of Level 1 and 2 EVCS pending statutory exclusion of EVCS from the definition of public utility. Paras.141-144.

⁸ Exhibit C6-14, p.7, paras.12, 7-10.

⁹ City of Vancouver, Exhibit C5-7, p.3, lines 2-5.

- have the option of declining to use a particular EVCS station if they don't like the price or the service. EVCS is not a natural monopoly.
2. In order for the Commission to have an ongoing role in relation to EVCS it would have to have regulatory authority and be willing to use it. In BCSEA-SCBC's view, one cannot 'have it both ways.' Complaint-based regulation is still regulation.
 3. The rationale for eliminating BCUC regulation of EVCS by public utilities (that are not otherwise public utilities) is that such regulation is not necessary. And, the objective of eliminating BCUC regulation is to foster the expansion of EVCS in B.C. by removing disincentives that inhibit entities from starting or continuing to provide public EV charging services. BCSEA-SCBC are concerned that it would be counterproductive to tack on a residual role for the BCUC to exercise regulatory authority on a case by case basis. This would undermine the certainty associated with exemption from regulation. A would-be provider of public EV charging service would have to consider the expensive possibility of winding up defending its EVCS practices in a BCUC proceeding. In BCSEA-SCBC's view, this would seriously discourage many entities from providing EV charging services at all. This outcome would be worse for EV drivers in B.C. than having no opportunity to launch a complaint to the BCUC in the event that a particular EVCS station has prices or service levels a driver considers unacceptable.
 4. Put another way, the rationale for exempting EV charging services by a public utility (not otherwise a public utility) from regulation by the BCUC includes having confidence that competitive market forces or other dispute resolution mechanisms will be effective in protecting consumers. The concept of exemption from BCUC regulation is that if an EVCS provider sets prices or provides service that EV drivers consider unacceptable then EV drivers will not use that EVCS station. The outcome might be improved prices and service, or it might be that the provider goes out of business. Either way, the EVCS providers who stay in business will provide prices and service that are acceptable to their EV driver customers. In the case of EVCS provided by a strata corporation to strata owners, strata owners have remedies under the *Strata Property Act*.

2.4 Exemption and rates regulation of EVCS

One of the interveners suggested that an exemption of DCFC services (by public utilities not otherwise public utilities) should have an "upper price cap" rather than a fixed rate for EV charging services.¹⁰

To clarify, in BCSEA-SCBC's final argument their proposed exemption from Part 3 of the UCA, even with the exception of certain sections of the Act, includes exemption from the rates regulation sections of the Act. In other words, EVCS that is exempted (even with exceptions) would not be subject to any rates regulation by the BCUC, whether in the form of an upper price cap or an allowed fixed rate for EV charging services.

2.5 Proposal for broad exceptions to exemption of EVCS from regulation

One intervener calls for what BCSEA-SCBC regard as overly extensive BCUC regulation of EVCS (by public utilities not otherwise public utilities).¹¹ It says an exemption should:

¹⁰ Victoria EV Club, Exhibit C35-7, p.2, para.(c).

¹¹ BCOAPO, Exhibit C21-10.

retain the Commission's authority to require an EVCS to enable service to any type of EV; require extensive annual reporting; anticipate complaint-driven review of pricing enforceable by loss of the exemption, and require EVCS to pay fees to the Commission to defray the cost of regulating the sector.¹²

The intervener's rationale is that EV charging service in B.C. is not yet, but should eventually evolve into, a competitive market. It says some form of regulatory oversight is required, particularly in the near term, but that it "should not be so intrusive or heavy-handed so as to discourage new participants."¹³ In response, BCSEA-SCBC respectfully submit that the regulatory measures proposed by the intervener would indeed be "so intrusive or heavy-handed so as to discourage new participants [providing EV charging services]."

2.6 CEA s.18 and GGRR s.4

Further to BCSEA-SCBC's submissions¹⁴ regarding the electrification prescribed undertaking mechanism established by CEA s.18 and GGRR s.4, which they endorse, they add the following points in response to arguments by other interveners:

1. MEMPR invites the Commission to provide the government with recommendations for amending the electrification prescribed undertaking mechanism so as to address EV charging services directly. BCSEA-SCBC support that suggestion. In addition, if the Commission does so, it should recommend that the government consider limiting application of the mechanism to BC Hydro and FBC. The current wording ("public utility") includes any entity that is a public utility, including, for example, an entity that is a public utility due only to providing EVCS and that is not otherwise a public utility. Presumably this is unintentionally broad. For example, in CEA s.18(2) it is assumed that a public utility carrying out a prescribed undertaking is subject to rates regulation.
2. The "cost-effective" criterion in the GGRR s.4(4) applies only to two of the types of undertaking [s.4(3)(a) and (b)¹⁵] set out in s.4, and it does not apply to the other types of undertaking [s.4(3)(c), (d) and (e)] that some interveners have suggested could capture the provision of EV charging service by a public utility.¹⁶
3. It is noted that the structure of the electrification prescribed undertaking mechanism established under CEA s.18 is that the mechanism is available to BC Hydro or FBC, but they are not required to make use of it.¹⁷

2.7 No role for BCUC in setting EVCS technical standards

The straw man regulatory framework in Exhibit A-35 includes an exception of UCA s.26 [among other sections] from an exemption of EVCS (by public utilities not otherwise public utilities) from regulation. Section 26 provides that the Commission may set technical standards for the delivery of service by a public utility. The exception of s.26 in

¹² Exhibit C21-10, pp.8-9, paras.i-iv.

¹³ Exhibit C21-10, p.7.

¹⁴ Exhibit C6-14, p.8, paras.16-17; p.38, para.3; section 5.4, pp.40-41; p.42, para.3.

¹⁵ GGRR s.4(3)(a)(i) relates to education and public awareness, and s.4(3)(a)(ii) relates to funding to customers to acquire equipment. GGRR s.4(3)(b)(i) relates to education and public awareness, and s.4(3)(b)(ii) relates to funding to equipment providers.

¹⁶ Cf. Exhibit C21-10, p.13.

¹⁷ Cf. Exhibit C5-7, p.10, lines 8-15.

the straw man framework is notable because it is not an exception in the Bakerview EcoDairy exemption model.

MEMPR and Tesla oppose exception of s.26 because it could result in the Commission setting equipment, hardware or software standards for DCFC stations in B.C.¹⁸ Tesla says this would be expensive and duplicative. Both Tesla and MEMPR say this could limit opportunities for entry in the EVCS market in B.C.

BCSEA-SCBC in their final argument implicitly rejected exception of s.26 but did not specifically address it. In response to MEMPR and Tesla, BCSEA-SCBC agree that s.26 should not be excepted from an exemption from Part 3 for the reasons stated by MEMPR and Tesla. In addition, it is noted that none of the examples of BCUC exemption orders canvassed in BCSEA-SCBC's final argument excepted s.26 from the general exemption from Part 3.

2.8 Safety regulation of EVCS

Several interveners¹⁹ note the fact that the Electrical Safety Regulation under the B.C. *Safety Standards Act* does not (generally) apply to a public utility as defined in the UCA.²⁰ BCSEA-SCBC offer the following comments:

1. It can be presumed that the regulatory scheme under *Safety Standards Act* excludes “public utilities” in the expectation that the BCUC provides equivalent safety regulation of public utilities. Regarding fully regulated public utilities, the expectation that the BCUC provides safety regulation is presumably accurate.
2. However, there is no indication on the record of the Inquiry proceeding that the BCUC, in practice, actively provides safety regulation of EVCS by public utilities that are not otherwise public utilities. In BCSEA-SCBC's view, it would likely not be effective and efficient for the BCUC to take on safety regulation of EVCS by public utilities that are not otherwise public utilities. Rather, it would likely be more effective and efficient for this function to be provided under the *Safety Standards Act* through the existing framework for safety regulation of EVCS by non-public utilities.
3. Consideration of this factor (i.e., which agency is best suited to provide safety regulation of EVCS by entities that are not fully regulated public utilities) supports a determination by the Commission that entities providing EVCS to the public for compensation, that are not otherwise public utilities, are not public utilities under the UCA. This would be consistent with the purpose of the UCA (to regulate natural monopolies and protect consumers from the exercise of economic power) and it would remove the *de facto* gap in active safety regulation of EVCS by entities that in doing so are public utilities and that are not otherwise public utilities.
4. Alternatively, if the Commission finds that entities providing EVCS to the public for compensation, that are not otherwise public utilities, are indeed public utilities under the UCA, then the Inquiry Panel may wish to examine (in a subsequent phase) how best to deliver safety regulation of the operations, including the possibility of an amendment to the exclusion of public utilities in the Electrical Safety Regulation.

¹⁸ MEMPR, Exhibit C19-10, para.24; Tesla, Exhibit C28-6, p.11.

¹⁹ For example, Exhibit C24-19, paras.148-149, 164-168.

²⁰ See section 3 of the Electrical Safety Regulation, at

http://www.bclaws.ca/civix/document/id/complete/statreg/100_2004#section3.

2.9 EVCS by BC Hydro and FBC

BCSEA-SCBC endorse their submissions in their final argument regarding how the Commission should approach EV charging services provided by BC Hydro and FBC.²¹

In response to the other interveners' final arguments, BCSEA-SCBC commend to the Inquiry Panel two particular passages. First, with reference to the existing fully-regulated public utilities, ChargePoint states:

“Public utility investment in EVCS does not depend upon whether or not the Commission regulates EVCS services as a public utility. Each utility’s investment into EVCS is the proper subject of utility-specific mandates and applications to the Commission. That would include whether utility’s investment and pricing practices are inappropriately affecting the development of the EV market, are an appropriate use of ratepayer funds, and the justification for and effects of any cross-subsidies. ChargePoint believes that utilities should be allowed to invest in charging infrastructure, particularly in underserved or disadvantaged areas, so long as those investments support a competitive market, enable customer choice in charging equipment and services, and support grid benefits.”²²

Second, MEMPR states:

“27. MEMPR supports the straw man framework statement with respect to entities that are otherwise public utilities, i.e., that they may apply for Commission approval to provide regulated EV charging services. As noted in our evidence submission, MEMPR supports a role for public utilities in “kick-starting” the market for EV charging services.

28. Until the EV charging market is further developed, MEMPR’s view is that EV charging stations should be included in a public utility’s regulated rate base. This view is consistent with the approach taken in other jurisdictions, including California, Hawaii, New York and Washington State.”²³

3.0 Conclusion

BCSEA-SCBC appreciate this opportunity to contribute to the Inquiry Panel’s deliberations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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²¹ Exhibit C6-14, pp.7-8, paras.14-17; pp.38-41.

²² ChargePoint, Exhibit C25-10, p.11, footnote removed.

²³ Exhibit C19-10, footnotes removed.