



August 21, 2019

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

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

filed on-line

Dear Mesdames/Sirs:

**Re: British Columbia Hydro and Power Authority (BC Hydro)
Review of the Regulatory Oversight of Capital Expenditures and Projects
Project No. 1598877**

This is the final argument of MoveUP in this proceeding. Our client is the trade union that represents what might be characterized as the “inside” workforce of BC Hydro. These employees have a direct and vital interest in ensuring that the Authority’s capital projects and expenditures are sound, convey optimal value to ratepayers and the public, and help retain public support and confidence in the Crown utility. That support and confidence rest on reasonable rates and reliable service. Those foundations, in turn, rest on management decision-making that is sound, transparent and accountable, able to withstand rigorous scrutiny before the regulator.

Regulatory discipline and accountability have been a problem in recent years for BC Hydro’s capital investments. The utility is emerging from a prolonged period when many major decisions were made by government, rather than by the Authority and the Utilities Commission.

Hydro and the Commission are finally resuming a more normal mode of resource planning, and project approval and execution, and re-building a collaborative relationship based fundamentally on candor and pro-active information-sharing on Hydro’s part.

The level of candor has not been consistent. As Exhibit A-1 recites, this proceeding traces its origin to the December 15, 2015 complaint filed by Mr. Adrian Dix arising from the way

BC Hydro management approached regulatory oversight of its decision to move to an SAP-based IT architecture. The complaint alleged, and the Commission's Report confirmed, inadequate adherence by Hydro management to the reporting and accountability framework established by the regulator. The SAP capital project involved the expenditure of \$197,042,000, a sum vastly in excess of the relevant (and still applicable) threshold for rigorous pre-implementation review under sections 44.2 or 45 of the *Utilities Commission Act*.¹ Hydro management flew the project under the regulatory radar by inappropriately treating its various components as though they were discrete capital projects, slicing the entire project into morsels of less than \$20 million each², and failing to properly report escalating costs.

While the Commission did not conclude that Hydro management had been deliberately deceptive in its reporting of the SAP project, the Report identified several deficiencies in management's conduct and judgment.

It is important to note that the SAP deficiencies did not essentially flow from weaknesses in the Commission's capital reporting guidelines for Hydro, but rather from Hydro's misapplication of those guidelines. However, the entire scenario displayed a problem with management's perception of the utility's relationship with its regulator, including insufficient willingness to pro-actively share internal information.

There is an inherent asymmetry of information between utilities and their regulators. Open channels of communication, and Commission access to the informational "inner sanctum" to ensure that it is properly equipped to properly do its job, are essential to the relationship and are one of the prices that utilities must pay in return for their monopoly status.

The SAP proceeding spawned this more holistic review of the process for oversight of BC Hydro's capital expenditures and projects. It was flagged as a key aspect of restoring robust regulatory oversight in the *Phase 1 Final Report* of the Ministry of Energy, Mines and Resources Comprehensive Review of BC Hydro³:

The BCUC is currently reviewing its regulatory framework with respect how it provides oversight on BC Hydro's capital projects. BC Hydro is participating in this proceeding and a BCUC decision is expected in 2019. (*Report*, page 30)

¹ *British Columbia Hydro and Power Authority, Inquiry of Expenditures related to the adoption of the SAP Platform, British Columbia Utilities Commission Action on Complaint, Report*, September 7, 2018, p. 32

² *ibid* p 24

³ https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/electricity-alternative-energy/electricity/bc-hydro-review/final_report_desktop_bc_hydro_review_v04_feb12_237pm-r2.pdf

The government and the public it speaks for are looking to the Commission to construct a more effective regime to maintain a firm regulatory handle on BC Hydro's capital spending. The objectives should include improved transparency and accountability, a platform for the exercise of better judgment in capital-related decision-making, and a remedies for the failings that were laid bare in the SAP Inquiry. Above all, we need effective regulatory tools to evaluate Hydro's capital projects and spending.

While the SAP Inquiry Report identified a number of deficiencies in the way management approached and carried out the SAP project, it remains crucial that revised guidelines observe the proper division of authority and responsibility as between BC Hydro's Board and management, on one hand, and the Commission, on the other. The role of the regulator when it comes to capital is essentially a passive one. It is management's job to direct the utility's internal planning and decision-making. The Commission acts as a screen that filters out imprudent projects and prevents the recovery from ratepayers of imprudent expenditures. It makes sure that the Authority is on track to fulfil its vital public role and is responding effectively to emerging and foreseeable public needs.

BC regulatory participants make frequent reference to the 1996 judgment of our Court of Appeal in *BC Hydro v BC Utilities Commission* 20 BCLR 3d 106. While it remains a leading authority on the extent and nature of the jurisdiction of the Commission, we must bear in mind its limitations.

First, the decision is now nearly a quarter of a century old. Even in its own time, it was a conservative analysis. Oversight of resource planning has since become an integral dimension of utility regulation. We have been moving steadily away from the narrower *Railway Act* origins of modern regulatory regimes.

Second, and more directly pertinent, the BC legislature amended the *Utilities Commission Act* to nullify the actual outcome in *BC Hydro v BCUC* by inserting s. 44.1. This amendment conferred explicit jurisdiction on the Commission to review resource planning by regulated utilities, and made it clear that the role of the regulator includes holding management accountable for the way it plans how to meet projected needs and demands.

This modification of the Commission's home statute provides a more nuanced and muscular regime than the Court of Appeal described. Important aspects of the planning role of utility management were brought within the purview of the Commission, and in the case of BC Hydro are currently being repatriated from government back to the BCUC.

Our point is that the line between the roles of utility management and the regulator is not as simple as *BC Hydro v BCUC* suggests. However, the statutory role of the Commission in relation to utility resource planning does not extend to usurping the role

and obligation of Hydro management to manage the Authority, its plant and systems, and its operations. It is about holding them accountable in the performance of that role and obligation.

The remedy for the poor managerial judgment identified in the SAP Inquiry Report is not for the Commission to substitute its own judgment and tell management how to do its job. It is to shine a brighter light on Hydro's massive capital programs, and reinforce its accountability to the public.

Regulating BC Hydro's Capital Expenditures and Projects

Hydro's status as a provincial Crown corporation complicates this terrain considerably. Unwise capital decisions may flow from inadequate management performance, or may flow from ill-advised interventions from government.

The public expects a high degree of accountability, on one hand, attached to the Authority as a publicly-owned resource. On the other hand, because Hydro is both a product and to some extent an instrument of government policy, governments insert themselves between the Authority and its regulator to varying degrees, to an extent that is absent in the case of privately-owned utilities, particularly in relation to rates and to large-scale capital projects. (A simple comparison of the volume of special directions concerning Hydro and ICBC, compared with other entities and matters within the Commission's jurisdiction, illustrates this point.) The role of government as shareholder and its forays into the selection and approval of BC Hydro projects adds a dimension of opacity to the Authority's capital programs.

Intervener groups have felt profound frustration and dissatisfaction over the years when government has circumvented the open public forum of the BCUC and imposed major decisions on BC Hydro that have driven up Hydro rates and yielded little value or benefit to customers. Some of these decisions have involved large capital projects: the Northwest Transmission Project is a prime "white elephant" mandated by government which was a highly dubious candidate for approval had it been subjected to the Commission's CPCN hearing process.

Even the best conceivable Commission guidelines and oversight mechanisms can be of little direct avail against ill-advised decisions about BC Hydro that emanate from Victoria and are mandated by way of legislation or special directions under the UCA. On the other hand, the maintenance of a robust independent regulatory forum that enjoys public confidence, and that shines the light of day on the "black box" of the utility's internal planning processes, can provide a bulwark against arbitrary and improvident interventions from the political sphere.

These Proceedings

BC Hydro filed its Initial Proposals on April 3, 2018. They may be fairly characterized as modest and incremental adjustments to the 2010 Guidelines. After receiving input from stakeholders in an information workshop and responding to information requests, on June 13 Hydro filed its Revised Proposals.

On November 5, 2018, the Commercial Energy Consumers of BC filed an alternative proposal which is a dramatic departure from the 2010 Guidelines and from Hydro's current proposals, both conceptually and in its structure and content. It calls for far more rigorous, extensive, objective and quantitative scrutiny and evaluation of capital projects.

The format of these proceedings has not facilitated a constructive "cross-pollination" that might have extracted what is most useful from each approach and built an optimized final result. On its part, BC Hydro devoted significant resources to discrediting the CEC proposals and did not display much willingness to bridge the distance between them.

The format of these proceedings, following a relatively static "set-piece" model of written filings and responses, has not been of great assistance to interveners looking for the optimal outcome. The record is one of ships passing in the night.

This leaves participants facing a binary choice between two self-contained packages with relatively little potential for useful approaches and ideas in the one to be incorporated into the other. In retrospect, a negotiated settlement process may have been useful in this matter, as a mechanism for the Commission staff, Hydro and interveners to craft a more nuanced "best-fit" consensus document that might better satisfy the objectives of diverse parties. It is not clear that the differences between the parties were capable of being bridged through negotiation but, looking back, it may have been worthwhile giving an NSP a try.

If the only real choice that we are left with is between Hydro's package or CEC's (each potentially subject to refinements and tweaks), there is little practical contest. The asymmetry of information we discussed earlier between the utility and its regulator pales in comparison with the knowledge gap between the utility and an intervener. CEC's proposals cannot be viewed as a ready-made solution that can simply be tweaked, adopted and activated.

In a sense, this proceeding remains incomplete. What is still missing is a process to help the Commission, Hydro and interveners to process the competing visions for capital oversight.

The CEC Proposal

The CEC Proposal does not treat the 2010 Guidelines as its starting-point. It presents a comprehensive, ground-up reconceptualization of the nature and extent of the Commission's process for BC Hydro capital oversight. It is based on an extensive, quantitatively-grounded set of matrices for regulatory review of Hydro's capital plans, programs and expenditures, and sets "cost-effectiveness" as an over-arching criterion for project evaluation.

Our general characterization is that the CEC Proposal would have the Commission direct its gaze much farther upstream, as one might put it, into Hydro's capital decision-making process. It presses well beyond the evaluation of the outputs of management's work, and would lay Hydro's internal decision-making bare on the public record in many respects.

MoveUP wishes to acknowledge the motivations and careful work that CEC has brought to bear. Capturing the evaluation of complex capital projects through a quantitative matrix is an interesting and challenging concept. However, it inevitably suffers from the limits to an intervener's resources and capacities. We have taken it more as suggestive of a potential approach than a fully-developed final product. As we discussed above, these proceedings have not provided a forum to explore where that approach might lead, given the necessary resources and attention.

MoveUP has reservations about reducing the evaluation of Hydro capital projects to a system of quantitative scoring. While more elements of the evaluation process may be amenable to quantitative analysis than is currently the practice, there are important limits. Sound capital project planning can involve a host of subjective, value-laden judgment calls concerning the social good, environmental imperatives, and core values like reconciliation with First Nations.

The public interest, and the effective superintendence of the province's main electricity provider, engage more nuanced and inescapably subjective considerations of policy and the general welfare than can be captured in the manner proposed by CEC. That does not mean that a more extensive application of quantitative grading may not be a useful idea, but rather that such an approach would need to be tempered to a considerable extent with space to consider more subjective factors.

In this respect, we agree with BC Hydro's observation on point, in its Final Argument:

89. BC Hydro, however, does not consider that it is feasible to develop a set of standardized criteria that would indicate the magnitude of potential public interest issues associated with a given project.

We appreciate CEC's response to this concern, set out in its response to MoveUP IR 2.1, in Ex. C3-14:

The CEC does not in any way suggest that every last issue in this case of community values may need to be measured and evaluated in regard to cost-effectiveness. Priorities regarding important issues will need to govern improvement of the Commission's oversight information.

However, in our view these dimensions of Hydro's mandate and planning should not be treated as tangential add-ons to the Commission's project and expenditure review methodologies. If the CEC approach is going to find a significant space in the oversight mechanism, it still needs work. These proceedings have not led there.

A more difficult question is the extent to which, at a conceptual level, CEC's proposal entices the Commission to overstep the bounds of its mandate as regulator, and intrude too deeply into the domain of utility management.

The principal vehicle for Commission oversight of BC Hydro's planning as a work-in-progress is section 44.1, Integrated Resource Planning. The Court of Appeal regarded IRP as an intrusion into the domain of utility management, but as we discussed above, the legislature determined that it is an appropriate intrusion. With s. 44.1, the UCA viewed as a coherent whole provides a more proactive mandate to the Commission than the 1996 ruling indicated.

It is important to maintain the distinction between proper information-collection and oversight, which at least nominally is what CEC proposes, and dictating how management decisions will be made. This is a difficult question because the nature and format of the questions that are asked by the regulator can tend to drive the underlying management decision-making process. The oversight mechanism is not a neutral factor in relation to the utility's internal activity. An evaluation template can tend to distort management's planning processes, and insert the Commission indirectly into the planning role. Drawing an analogy from the realm of public education, standardized testing tends to drive curriculum. What you measure is what you do, as the adage goes.

Lapses of judgment and of compliance by management are not remedied by inviting the Commission and interveners into the boardroom. Guidelines and expectations should be clear, and there should be extensive transparency of information, but the rules should not invite the regulator and other participants to second-guess management's decision-making *processes* - as opposed to their *output*.

BC Hydro Final Argument's provides this characterization of the CEC proposal on that score:

187. . . . Mr. Craig's proposal is therefore not limited to seeking oversight information, but seeks to redefine the standard by which BC Hydro's capital is judged and to direct BC Hydro management on how it should be managing its capital portfolio. Mr. Craig's proposal would therefore interfere with BC Hydro's management in a way that Mr. Craig admits is not within the jurisdiction of the Commission.

The CEC proposal does not entail the BCUC directing how Hydro should manage its capital portfolio, but any evolution of that proposal into an implemented regime would need to carefully maintain a bright line between the roles of the Commission and utility management.

BC Hydro's Revised Proposal

MoveUP submits that the Revised Proposal is a substantial improvement upon the 2010 Guidelines, and that the enhanced transparency that it would provide should help avoid future deviations like the SAP migration project. It may not go as far as the union and other interveners would like, but nevertheless it represents a degree of progress and, if faced with a binary choice between this and the CEC Proposal, as off-the-rack propositions, MoveUP submits that the only real choice is this one. However, we submit that this should remain an evolving story and the Commission should continue to explore ways to improve its capacity to oversee Hydro's capital projects and expenditures.

We will not catalogue and comment on all of its provisions, but focus on a selection of issues that we consider particularly significant.

Expenditure Thresholds

MoveUP agrees with BC Hydro's Final Argument on the role of expenditure thresholds:

87. BC Hydro believes that the use of expenditure thresholds is the most appropriate way to determine which extensions should require a CPCN application, as project cost is an important public interest consideration under the BCUC's jurisdiction and is generally a reasonable proxy for the level of public interest concern. However, the BCUC has the discretion to direct that a CPCN is required for any extension project, such as those it deems have a significant public interest component.

MoveUP submits that the thresholds proposed by BC Hydro are reasonable.

Programs of Projects

Hydro's Initial Proposal, Exhibit B-3, described "programs of projects" as follows:

A Program of Projects is a group of related projects with common business drivers and or technical characteristics which are managed in a coordinated way to deliver a common business requirement or achieve delivery efficiencies by sharing teams, resources, and information technology environments. The projects are managed together to reduce risk and achieve benefits not available if managed individually.

One might characterize the approach taken by Hydro management in the SAP fiasco as inappropriately treating that project as a "program of projects" – a collection of relatively small-scale, discrete projects. Making explicit provision for reporting about *bona fide* programs of this nature is a significant improvement over the 2010 Guidelines. The remaining task is to ensure that the rules and definitions are clear enough to ensure that multifarious undertakings that are properly characterized and understood as comprising single projects are properly channeled to s. 44.2 and 45, and not disaggregated into Programs for less rigorous and integrated review.

MoveUP is one of the participants that raised concerns about the original treatment of programs of projects in the initial proposal. The union was pleased to see Hydro respond by amending this section in the Revised Proposal. Hydro summarized those changes at page 2 of the B-7 covering letter:

In particular, in response to the number of clarifying questions on Programs of Projects, BC Hydro has made changes to the proposal to clarify how BC Hydro manages and approves Programs of Projects, and improve visibility into projects managed as part of a Program of Projects in revenue requirements applications. BC Hydro has included the following information in the Filing:

- BC Hydro has attached as Appendix H, the Program Management Practice which describes in greater detail the various types of programs, the program lifecycle, and program management processes;
- BC Hydro has further explained that unlike projects that have a fixed scope, Programs of Projects are often flexible in scope and managed and planned to allow them to evolve over time. This distinction makes it challenging to treat Programs of Projects similar to individual Projects;
- BC Hydro has provided a fuller description of the funding approval approaches;

- BC Hydro has included in the 2018 Guidelines that projects that are part of Programs of Projects, and above the materiality limit, will be identified in Appendix I of revenue requirements applications; and
- BC Hydro has indicated that a program strategy, which is developed in the Identification Phase and includes the program’s description, objectives, scope, schedule, and risk and mitigation strategies, as well as cost estimates if available, will be provided in revenue requirements applications for any Program of Projects identified in Appendix I.

BC Hydro also notes the following in its Final Argument:

110. The review of Programs of Projects should be undertaken at the project level in a revenue requirements application or through a major project filing when a project exceeds the major project threshold.

112 The BCUC will be able to review program strategies that have projects in the test period. If there are concerns, the projects associated with a program can be reviewed on a retrospective basis through a prudence review, or on a forecast basis in a revenue requirements application (or, if applicable, a major projects application)

This is one of the most important issues in these proceedings and MoveUP is satisfied that BC Hydro has incorporated useful refinements to avoid inappropriate project disaggregation for oversight purposes.

We suggest that BC Hydro’s decisions to categorize projects as components of programs slated for less stringent review than their aggregate cost would indicate should be subject to Commission approval.

MoveUP asks the Commission to ensure that the assurances that Hydro has provided, including those in paragraphs 110 and 112 of its Final Argument, are explicitly incorporated into its Decision.

Prospective Review – The Problem with Expenditure Schedules

Section 44.2 of the *Utilities Commission Act* is ostensibly intended to provide an explicit mechanism for review and approval of capital projects that are not “extensions” within the meaning of section 45. It is not a masterpiece of legislative drafting. It leaves utilities and their regulator with potential problems arising from the limited scope of the approval that is available. All that a favourable decision under 44.2 provides is *approval of expenditures*. It does not, on its face, entail approval of the *capital project underlying a*

proposed expenditure. That approval is inferential only. While this may appear to be a matter of semantics, and the Commission and utilities all tend to treat s. 44.2 as a CPCN-like project-approval provision, in practice it leaves a hole that could produce real difficulties.

Another difficulty is that, because a s. 44.2 approval is, on its face, only the approval of the expenditures stipulated in an application, it does not authorize any escalated cost above the amount set out in the Commission's order. The actual cost of a project is subject to retrospective review, particularly in revenue requirements proceedings. What is actually added to the regulatory toolkit by a prospective (and ultimately inconclusive) approval of expenditures that are disembodied from their underlying projects is unclear. MoveUP has never understood why the government of the day chose to insert s. 44.2 into the Act rather than amend and broaden the scope of s. 45 to include non-extension types of projects.

Although at page 7 of BC Hydro's Final Argument, for example, it says that the "2018 Guidelines document BC Hydro's commitment to file for *section 44.2 acceptance of non-extension projects* that exceed the major project thresholds" [italics added], it appears to more directly acknowledge the limited scope of a s. 44.2 approval and merely inferential nature of its project-approval mechanism, at page 44:

96. Having accepted the expenditures for a project as being in the public interest, BC Hydro has assurance that the BCUC has considered and approved of the need for the project and BC Hydro's chosen alternative to address that need. While recovery of costs in rates is always subject to prudence review by the BCUC, if BC Hydro completes the project as approved, then the risk of an adverse prudence finding is significantly reduced.

After-the-fact review of expenditures for prudence are a weak instrument. Hydro's Final Argument sets out the Authority's views on point:

76. Consistent with the above, BC Hydro does not expect to have expenditures disallowed due to a prudence review. This is because the BCUC's power to review for prudence creates a strong incentive for BC Hydro to act prudently⁷⁸ and BC Hydro has adopted robust governance processes to prudently manage its capital planning and delivery processes.

One might question the efficacy of a mechanism that is almost never invoked as a means of discouraging imprudent management – like a traffic rule that drivers know is never enforced. In any event, this underscores the need to ensure that the review of ongoing and completed capital expenditures in revenue requirements hearings has a full set of teeth. It must be grounded in unrestricted disclosure of information, and not be shielded

behind the reverse-onus that applied to retrospective prudency reviews prior to the Supreme Court of Canada decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)* [2015] SCC 45.

It is important that the scope of review in revenue requirements proceedings not be unduly constrained. The Commission should maintain reasonable latitude in the scope of those proceedings and avoid rigidity in determining what dimensions of Hydro's capital expenditures may be up for examination, and not hold ongoing projects out-of-scope until it is too late to correct the problem.

Revenue Requirements – Information to be Filed

MoveUP acknowledges the commitments that Hydro has made to enhance the content of its Revenue Requirements applications, and in particular the additional matters that it has agreed to incorporate in response to requests from interveners, set out at paragraph 100 (a) of its Final Argument:

- Information on the category of capital investments (mandatory investment, committed investment and investment to be prioritized) for individual projects listed in Appendix I.
- A qualitative discussion of potential public interest matters with regard to the environment, First Nations, and communities / stakeholders for capital projects in Identification phase or later that meet the Appendix J threshold.
- The actual or forecasted construction start dates for capital projects in Implementation phase that meet the Appendix J threshold.
- The final, actual cost for completed capital projects and programs above a materiality threshold

These commitments should be incorporated into the Commission's decision.

Conclusion

MoveUP submits that Hydro's Revised Proposal marks an improvement on the 2010 Guidelines and on recent practice. The union trusts that the impact of the SAP Inquiry has been thoroughly felt within management ranks and that the Commission and interveners can expect more wholehearted compliance with not only the letter, but also the intent and spirit of these and the other regulatory rules and principles that are the foundation for BC Hydro's accountability to its ratepayers and to the public at large.

As we discussed above, in MoveUP's view the hearing process has been imperfect in relation to the subject-matter. It has not helped the parties to realize further improvements to the guidelines which might have flowed from a more dynamic process that facilitated cross-pollination between BC Hydro's and CEC's approaches and obtained greater benefit from CEC's extensive analysis.

Nevertheless the union believes that the proceeding has yielded substantial improvements to the oversight of BC Hydro's capital projects and expenditures. However, this should all remain a work in progress.

All of which is respectfully submitted.

ALLEVATO QUAIL & ROY

A handwritten signature in blue ink, appearing to read "Jim Quail", written in a cursive style.

per **Jim Quail**
Barrister & Solicitor