



AQR file no. 21-004
Jim Quail
direct (604) 424-8633
email jquail@aqrlaw.ca

April 4, 2021

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

Attention: Mr. Patrick Wruck, Commission Secretary

filed online

Dear Mr. Wruck:

Re: British Columbia Hydro and Power Authority (“BC Hydro”) Fiscal 2022 Revenue Requirements Application

This is the final argument of MoveUP in this proceeding.

The issues significantly at play in this Application are very limited for a BC Hydro rate hearing, this being a “gap year” proceeding (following the 2020-21 RRA hearing, the first full-scale Hydro RRA in many years) with a streamlined process to enable an earlier filing-date for a more substantial cycle that will begin in fiscal 2023. Much of the focus in this Application has been devoted to a handful of issues, and most of these involve relatively few new developments:

- Impacts of the COVID-19 pandemic
- Load forecast – mainly about which “COVID-19 scenario” to rely upon
- Cost of Energy – based on the 2020-21 RRA record
- Operating Cost – mainly devoted to identified areas of “controllable” cost
- Capital – with minor new expenditures and additions
- Regulatory Accounts – where Hydro proposes to resume using the DARR Table Mechanism
- Cost of Capital – with Hydro proposing the use of a placeholder pending anticipated proceedings
- OATT – unchanged

- DSM – proposing continuity, treading water pending the IRP
- Electrification – mainly focused on the EV program.

There is little here that is new.

We will address our brief comments chiefly to the impacts of the pandemic, the main areas of higher controllable operating cost, and the interesting question that has been raised whether Hydro's proposal to recover costs for EV stations that came into operation prior to June 22, 2020 would entail legally impermissible retroactivity.

COVID-19 Pandemic and Load Forecasting

It is trite to say that the pandemic and its associated emergency measures and economic impacts have injected a large measure of uncertainty into all efforts at forecasting (which is a difficult art at the best of times). All projections into the coming period are necessarily provisional in this context. Efforts at greater refinement of forecasts of load and other relevant factors might bring the appearance of enhanced accuracy, but not realistically deliver more reliable estimations.

In this context, BC Hydro's COVID-19 Scenario A, and associated analysis justifying its adoption as the basis for forecasting revenues, are reasonable and should be approved by the Commission.

Controllable Operating Costs

All of the principal identified drivers behind increased controllable operating cost address critical needs. None are truly discretionary in their nature, though of course their scale and execution are subject to managerial judgment. They are Mandatory Reliability Standards compliance costs, enhanced vegetation management, enhanced cybersecurity, and increased training of employees within the IBEW bargaining unit (which is offset by a reduction in the apprenticeship program).

No participant in these proceedings questioned the wisdom of incremental resources being devoted to these areas, though potential alternative strategies for enhanced vegetation management were canvassed. BC Hydro has presented strong justifications for each of them, and for the most part they require little further comment.

However, we have one recommendation with respect to cybersecurity and BC Hydro's vulnerability to cyber-attacks. Hydro subsidiary Powertech Labs recently found itself at the receiving end of an attack, discussed in the Review Session at Transcript pages 176 to 178.

This vulnerability is a matter of great concern to everyone in British Columbia; it is a matter of particular concern to MoveUP, because the personal information of its members employed at Powertech was compromised.

As of the date of the Review Session, the consequences of this incident had not yet been fully resolved:

[Mr. O'Riley:] It's been an opportunity to put in action our incident response plan and we've been working BC Hydro very closely with Powertech to respond to the incident. We've got our external contacted expert, our breach coach helping us, and we are focused on the forensic identification of what happened. I think we are well along the path there.

We are looking at assessing the risk of restarting various systems and returning to normal operation and we're well along there as well, and we're dealing with the impacts of the information that was taken, and consequences for the business and there's some impacts with third party customers with BC Hydro and with individuals, personal information.

[Transcript page 177-178]

Mr. O'Riley commented at page 178, "it's been quite an experience and just a real cautionary tale about the hazards that we face in this world today."

MoveUP submits that (if this has not already been arranged between Hydro and the Commission) it would be useful to approach this incident as a learning experience to the fullest extent possible. We recommend that the Commission ask BC Hydro to provide a detailed confidential report on this attack, how it arose, how it was detected and responded to, how future attacks can be avoided, and the lessons to be learned from it.

Retrospectivity and Charging Station Cost Recovery

We submit that BC Hydro's argument on this point is correct in law.

Even if the proposed recovery *were* to be regarded as having retrospective effect, the presumption against retrospectivity concerns measures that are punitive or confiscatory in nature: it is fundamentally unjust to punish someone for an act that was lawful at the time when it was committed. That is not the situation here.

Furthermore, this is only a presumption. In Canada, governments can validly enact measures with retrospective impacts, except to the extent that section 11 of the *Canadian Charter of Rights and Freedoms* prohibits specific forms of retroactivity in criminal prosecutions.

Retroactive measures are not a novel phenomenon. By way of illustration, a very current explicit example which is vastly more far-reaching than the proposed EV station recovery is the *COVID-19 Related Measures Act*, Bill 19 in the 2020 British Columbia legislative session. It provides the framework for many of the rules we are all living under in the face of the pandemic:

Powers of Lieutenant Governor in Council in declared state of emergency

10.1 (1) After a declaration of a state of emergency is made under section 9 (1), and for the duration of the state of emergency, the Lieutenant Governor in Council may, subject to this section, make regulations as follows to prevent, respond to or alleviate the effects of an emergency or a disaster:

- (a) making an exception to an enactment;
- (b) establishing limits on the application of an enactment;
- (c) establishing powers, duties, functions or obligations that apply in place of or in addition to an enactment;
- (d) establishing conditions in relation to anything done or established under paragraphs (a) to (c).

(2) Without limiting subsection (1) and subject to this section, the Lieutenant Governor in Council may make regulations as follows to prevent, respond to or alleviate the effects of an emergency or a disaster:

- (a) suspending the application of a provision that establishes a limitation period or a period of time within which a proceeding or process must be commenced or a step must be taken in a proceeding or process;
- (b) setting out a replacement limitation period or period of time for one suspended under paragraph (a) of this subsection;
- (c) authorizing an issuer of a permit, licence or other authorization to modify the conditions of a permit, licence or other authorization or to add or remove conditions of a permit, licence or other authorization;
- (d) authorizing a person, tribunal or other body that has a statutory power of decision to waive, suspend or extend a mandatory time period relating to the exercise of that power.

...

(8) A regulation under subsection (1) or (2) may be made retroactive to a specified date that is not earlier than the date of the relevant declaration of a state of emergency and, if made retroactive, is deemed to have come into force on the specified date.

[emphasis added]

For all of the reasons provided by BC Hydro's able legal argument, we submit that there is no cause to doubt the lawfulness of the proposed EV station recovery. It is in the public interest that it proceed.

Conclusion

We submit that the Commission should provide the relief sought by BC Hydro in this Application in all respects, preparing the ground for a meatier RRA to be filed this summer.

All of which is respectfully submitted.

Yours very truly,

ALLEVATO QUAIL & ROY

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

per **Jim Quail**
Barrister & Solicitor