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British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC, V6Z 2N3
Attn: Patrick Wruck, Commission Secretary
By email: commission.secretary@bcuc.com

Dear Sir:

Re: BCUC Proposed New Rules of Practice and Procedure for Reconsideration Applications

I am writing in response to your August 8, 2018 letter to stakeholders inviting comments and feedback on draft rules of practice and procedure for filing and hearing reconsideration applications. I am counsel for the B.C. Sustainable Energy Association and Sierra Club B.C. in BCUC proceedings. The following comments are my own.

The first section sets out my interpretation of the key changes proposed. The second section provides comments. The third section addresses the consequences of the proposed change in the definition of “interested party” (unrelated to the reconsideration framework.)

A. Key Changes

The draft wording would accomplish the following key changes:

1. The rules governing reconsideration applications are located within the BCUC Rules of Practice and Procedure, rather than a guideline document.
 2. The reconsideration procedure is changed from a two-step procedure to a single step procedure. The first step (*prima facie* case) is replaced by authority in the BCUC to summarily dismiss the reconsideration application without further process on the grounds that it fails to establish, on its face, any reasonable grounds for reconsideration of the decision.
 3. The available grounds for reconsideration are reworded. ‘New principle’ and ‘just cause’ are dropped.
 4. Standing to apply for reconsideration is changed. Under the existing guidelines, an application for reconsideration could be made by the utility or an intervener in the original proceeding. In the draft rules, an application may (only) be made by a person who is “directly affected” by the decision, which is a narrower test for standing than the test to be an intervener.
 5. A person who was not an intervener or the applicant in the original proceeding must apply for and obtain the BCUC’s leave to apply for reconsideration.
 6. As in the current guidelines and practice, interveners in the original proceeding are given notice that a reconsideration application will proceed to a hearing. However, unlike the
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current approach, persons wishing to intervene in the reconsideration proceeding must request intervener status under the rules governing standing.

7. The proposed framework eliminates the requirement to show “the error has significant material implications.”

B. Comments

1. Relocation to the Rules. I support the objective of moving the guidelines for reconsideration into the Rules of Practice and Procedure.

2. Single step procedure. I support the objective of moving to a single step procedure. This would be more efficient than the current two-step procedure.

3. Grounds for reconsideration. I respectfully disagree with the proposal to eliminate ‘new principle’ and ‘just cause’ as grounds for reconsideration.

In my view, the ‘new principle’ ground is an important basis for reconsideration. My understanding is that a distinguishing feature of the ‘new principle’ ground is that the alleged error regarding a determination in the original decision arises within a context that is broader than the original proceeding itself. This might be because the determination as worded is alleged to have applicability and consequences in situations beyond those that were at issue in the original proceeding. Perhaps the alleged broader consequences were not considered by the original panel, or parties that are potentially impacted had not had notice and were not participants in the original proceeding. I think these are grounds for reconsideration that should be open to the reconsideration panel to examine.

Regarding the ‘just cause’ ground for reconsideration, I see this as a ‘catch-all’ category that a reconsideration panel could find useful in a situation where it found the other grounds for reconsideration not to be suitable. In my view, the purpose of identifying potential grounds for reconsideration is to require the applicant to focus its argument(s), not to impose a new or additional substantive limit on the reconsideration panel’s authority.

In the new rules, I recommend including in the grounds for reconsideration “a new principle has arisen as a result of the decision,” and “discretion to reconsider where there is just cause to do so.”

Regarding proposed Rule 26.06 (a), “the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision,” I take it that the intention is that an error of jurisdiction includes denial of a fair hearing. However, I agree with the August 16, 2018 submission of Allevato Quail & Roy¹ that it would be desirable to add a specific ground along the lines of “the applicant for reconsideration was denied a fair hearing in the original proceeding.”

4. Test for standing to apply for reconsideration. I respectfully disagree with the proposal to introduce a “directly affected” test for standing to apply for reconsideration. In the proposed reconsideration framework, I recommend changing the test for standing to apply for reconsideration to be the same as the test for standing to intervene. And, I recommend including a provision that interveners in the original proceeding are considered to have standing to

¹ http://www.bcuc.com/Documents/Other/2018/DOC_52234_2018-16-08_AQR-Comment.pdf

intervene. In the previous BCUC reconsideration applications that I am aware of, the application was made by the original applicant or an intervener in the original proceeding. I don't think that efficiency would be served by requiring an intervener in the original proceeding to have to provide evidence and argument in support of a "directly affected" standing test as an additional component of an application for reconsideration. In my view, it would be more efficient for the reconsideration panel to focus its adjudication on the merits (or lack thereof) of the reconsideration application itself, rather than on the nexus between the reconsideration applicant and the impugned decision.

5. Leave to apply for reconsideration where the would-be applicant was not the applicant or an intervener in the original proceeding. I agree that the reconsideration framework should contemplate the possibility of a reconsideration application by a party that had not participated in the original proceeding. A requirement to obtain leave would not be unreasonable.

6. Intervention in a reconsideration proceeding. In my view, an intervener in the original proceeding should be routinely allowed to participate as an intervener in the reconsideration proceeding. I am not aware of any problems arising from the current practice in which interveners in the original proceeding are automatically allowed to intervene in the reconsideration proceeding. Requiring interveners in the original proceeding to make a new application to intervene in the reconsideration proceeding would seem to be an unnecessary administrative burden for interveners, BCUC staff, and the BCUC panel that would have to approve the requests to intervene.

7. "Significant material implications." I support the proposal to drop this criterion. This criterion is ambiguous. Sometimes "material" has been interpreted as meaning 'important.' Other times "material" has been interpreted as meaning 'physical' or 'financial' as distinct from 'legal' or 'policy.'

Also, the "significant material implications" criterion has been invoked – unreasonably, in my respectful submission – in support of a decision to deny an application for reconsideration of a cost award decision. In Letter No. L-29-07,² the Commission Panel rejected at the *prima facie* stage a request for reconsideration of a decision to issue a cost award in an amount some \$42,000 less than the amount requested under the PACA Guidelines. The Commission Panel said that an alleged error in the denial of a cost award does not have "significant material implications." The reconsideration panel states:

"The Commission Panel also finds that the alleged error in the denial of the cost award does not have significant material implications. An Intervenor's participation in a proceeding should not be premised on the assumption that it is entitled to a discretionary cost award." [underline added]

In the case of Letter No. L-29-07, the panel had already concluded that the claim of error had not been substantiated on a *prima facie* basis, and so the statement that an error in a cost award does not have "significant material implications" was unnecessary to the result. This illustrates that eliminating the "significant material implications" criterion would not curtail the Commission's authority to deny a reconsideration request. However, the concept implied by the panel in Letter

² <https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/116263/index.do>

No. L-29-07 that an intervener applicant for a cost award would have no access to a reconsideration remedy even if a decision to deny a cost award was tainted by an error of fact or law otherwise warranting reconsideration is, I submit, unreasonable and an unlawful fettering of the Commission's authority under s.99 of the UCA to reconsider a cost award decision. Removing the ambiguous "significant material implications" criterion would prevent this problem from arising in the future, at no cost to the Commission's authority to determine reconsideration applications on their merits.

C. Definition of "interested party"

An addition observation stems from the proposed change to the definition of "interested party" to limit an interested party to receiving automatic notification of filings. I have no objection to the proposed change. However, I note that Rule 13 allows information requests to be made to a s.3(m) "party," which includes an interested party. Presumably, the intention of the narrower role for an interested party would not include being required to respond to information requests.

D. Conclusion

Thank you for this opportunity to provide input.

Yours truly,

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