

**Application for Reconsideration of
British Columbia Utilities Commission Decision and Order G-186-13
by Mr. John Hurd**

**Comments of the Director for Electoral Area “D”
of the Regional District of Central Kootenay**

Background

- 1 On September 25, 2013, the B.C. government enacted *Direction No. 4* to the British Columbia Utilities Commission (“the Commission”), concerning the implementation of the British Columbia Hydro and Power Authority (“B.C. Hydro”) “meter choices” program.
Direction No. 4, B.C. Reg. 203/2012 (July 23, 2013)
- 1 On October 7, 2013, B.C. Hydro filed an Application for Approval of Charges, which is the subject of this proceeding.
Exh. B-1 - Application for Approval of Charges Related to Meter Choices Program (October 7, 2013)
- 1 On October 9, 2013, the Commission issued an Order granting advanced approval, pursuant to *Direction No. 4*, of, *inter alia*, the new tariff items and conditions related to the Meter Choices program effective October 25, 2013.
BCUC Decision and Order G-166-13 (October 9, 2013)
- 1 On October 11, 2013, the Commission issued an Order establishing interim fees for participation in the program and a regulatory timetable for the B.C. Hydro Application.
BCUC Decision and Order G-167-13 (October 9, 2013)
- 1 On November 18, 2013, the Commission issued an Order amending the regulatory timetable for the B.C. Hydro Application.
BCUC Decision and Order G-186-13 (October 9, 2013)

Issues

- 1 Area “D” agrees with and adopts the BCPSO submission of February 14, 2014, paras. 7 - 14, to the effect that the Order for which Mr. Hurd seeks reconsideration must be, with all respect, Order G-167-13, and not Order G-186-13.
- 1 Area “D” suggests that the grounds for Mr. Hurd’s application may be restated that the Commission erred in law, contrary to s. 75 of the *Utilities Commission Act* (“the Act”) in setting the interim rates without allowing B.C. Hydro customers whose interests stood to be affected by that decision an opportunity to be heard.
Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 75
- 1 Area “D” supports Mr. Hurd’s application and submits that there should be a reconsideration of the Commission’s decision to set interim charges for the “Meter

Choices” program.

Argument

- 1 In Area “D” ’s concurrent final Submissions in this proceeding, Area “D” questioned the constitutionality of s.3(3) and related sections 3(4) and 4(2) of *Direction No. 4* as being outside the realm of the powers of Lieutenant Governor in Council to direct the Commission under s. 3(1) of the *Act*.
- 1 Area “D” incorporates its argument on that point from those Submissions into the application at hand. Area “D” submits that a constitutional question has arisen as to the propriety of *Direction No. 4* and its applicability to the Commission, calling into question the Commission’s Orders G-166-13 and G-167-13, and reiterates its request that the Commission consider exercising its power, under s. 104 of the *Act*, to seek the opinion of the B.C. Court of Appeal on a question of law by way of stated case.
- 1 Area “D” submits that s. 3(3) and related ss. 3(4) and 4(2) of *Direction No. 4* , and all arising therefrom, is *ultra vires*, which includes the direction that the Commission must not order re-installation of “legacy” meters.
- 1 Even to the extent *Direction No. 4* might be perceived as effective, Area “D” submits that *Direction No. 4* included no requirement that the Commission set any interim fee or rate for the Meter Choices program.
- 1 Area “D” acknowledges that the Commission has the power to make interim orders. Area “D” agrees with Mr. Hurd, however, that, under the circumstances, the Commission erred in acceding to B.C. Hydro’s request that the Commission issue a premature order establishing interim charges for the “Meter Choices” program without providing the customers affected with the opportunity to submit evidence and make submissions.
- 1 Mr. Hurd invokes s. 75 of the *Act*, which states that “the Commission must make its decision on the merits and justice of the case . . .”. In failing to allow affected customers the opportunity to make submissions, the Commission restricted the evidence available to it, and made any decision on the merits impossible.
- 1 Further, the Federal Court of Appeal has stated: “Probably no principle is more fundamental to administrative law at common law than that of *audi alteram partem*, a rule of natural justice that parties be given adequate notice and opportunity to be heard . . .”.
Canadian Transit Co. v. Canada (Public Service Staff Relations Board) (1989), 99 N.R. 330, at 334, [1989] 3 F.C. 611 (Q.L.), at para. 16
- 1 Area “D” agrees with the BCSP’s submission that the Commission’s failure to provide affected B.C. Hydro customers with an opportunity to be heard prior to making its determination violates the rules of procedural fairness and natural justice. The Commission is required to exercise its discretion in accordance with common law

principles and, in making of paras. 6 and 7 of Order G-167-13, the Commission failed to do so.

1 Area “D” also incorporates from its final Submission in this proceeding its argument on the applicability of the *Charter* to the Commission and B.C. Hydro.

1 “If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.”

Andrews v. Law Society of British Columbia, 1989 CanLII 2 (S.C.C.); [1989] 1 S.C.R. 143; 56 D.L.R. (4th) 1; [1989] 2 W.W.R. 289; 25 C.C.E.L. 255; 36 C.R.R. 193; 10 C.H.R.R. 5719; 34 B.C.L.R. (2d) 273

1 Area “D” submits that the smart-meter dissidents, of whom Mr. Hurd is one, comprise an identifiable group of persons upon which B.C. Hydro has imposed significant penalties not imposed on the remainder of B.C. Hydro’s customers.

1 Further, the *Utilities Commission Act* states:

“(1) A public utility must not make, demand or receive

(a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or

(b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.

(2) A public utility must not

(a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, . . .”

Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 59

1 Area “D” submits that s. 59 is bolstered and underscored by the Commission’s duty under the *Charter* to avoid discriminatory and prejudicial rate structures and “cost recovery” charges.

1 Area “D” agrees with Mr. Hurd that B.C. Hydro’s “Management of Objections to Smart-Meters” policies describe a ruthless war of attrition, the most recent assault being the preemptive imposition through Order G-167-13 of punitive fees to thin the ranks of those customers objecting to smart-meters, and, as Mr. Hurd describes, thereby increase the burdens on the remainder.

1 Area “D” agrees with the Citizens for Safe Technology Society in portions of its final Submissions in this proceeding concerning “Inflated cost for retention of legacy meters” (part “A”), “Exclusion Costs”(part “B”) - concerning the narrowing of the opt-out customer pool and the consequent driving up of remaining per-premises costs, and part “G” (Deterrence and punishment not legitimate bases for recovery).

Conclusion

- 1 The *prima facie* criterion for an error of law is a low threshold, which merely requires the existence of an "arguable case" or a "serious question to be tried". Area "D" submits that a *prima facie* case exists for the Commission to reconsider Order G-167-13.

- 1 Given that s. 3(3) and related ss. 3(4) and 4(2) of *Direction No. 4* are most likely *ultra vires*, Area "D" submits that it is within the Commission's power to order the return of "Legacy" meters to customers who have been unjustly deprived of them, whether through involuntary removal, or the coercion of preemptive charges. Any potential unrolling of Order G-167-13 would have substantial material implications for all B.C. Hydro customers who objected to smart-meters.

- 1 Area "D" believes that the threshold for reconsideration is met. Area "D" further submits that any reconsideration should be open to new evidence, and Area "D" further submits that such reconsideration is appropriately limited to the issues raised by Mr. Hurd, or related thereto, including applicability of the *Charter*.

All of which is respectfully submitted,
Andy Shadrack
Director Area D
Regional District Central Kootenay