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June 2, 2017

Sent via email

Tannis Braithwaite
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Re: BCOAPO Application for Reconsideration and Variance of Order G-5-17 in the matter of the British Columbia Hydro and Power Authority 2015 Rate Design Application - Final Order with Reasons for Decision

Dear Ms. Braithwaite:

Further to your February 24, 2017 filing of the above noted application, please find enclosed British Columbia Utilities Commission Order G-87-17 with reasons for decision.

Original signed by:

Patrick Wruck
Commission Secretary

/kn
Enclosure



ORDER NUMBER
G-87-17

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

BCOAPO Application for Reconsideration and Variance of Order G-5-17
in the matter of the British Columbia Hydro and Power Authority 2015 Rate Design Application

BEFORE:

D. M. Morton, Commissioner/Panel Chair
D. A. Cote, Commissioner
K. A. Keilty, Commissioner

on June 2, 2017

ORDER

WHEREAS:

- A. On January 20, 2017, the British Columbia Utilities Commission (Commission) issued Order G-5-17 and the accompanying Decision in the matter of the British Columbia Hydro and Power Authority (BC Hydro) 2015 Rate Design Application (RDA Decision);
- B. On February 17, 2017, British Columbia Old Age Pensioners' Organization, Disability Alliance BC, Council of Senior Citizens' Organizations of BC, Tenant Resource and Advisory Centre, Active Support Against Poverty, Together Against Poverty Society and the BC Poverty Reduction Coalition (collectively, BCOAPO) filed an application for reconsideration and variance of paragraphs 14, 16 and 17 (as it relates to the late payment charges) contained within Order G-5-17. (BCOAPO Application for Reconsideration) The Application for Reconsideration is made pursuant to section 99 of the *Utilities Commission Act* (UCA);
- C. By letter dated February 24, 2017, the Commission established phase one of the reconsideration process for the BCOAPO Application for Reconsideration and invited submissions from BC Hydro and all Registered Interveners in the BC Hydro 2015 Rate Design Application proceeding that address specific questions on whether the threshold for reconsideration has been met;
- D. The Commission received submissions from British Columbia Sustainable Energy Association and the Sierra Club of British Columbia (BCSEA), Commercial Energy Consumers Association of British Columbia (CEC), FortisBC Energy Inc. and FortisBC Inc. (collectively, FEI), BC Hydro and Movement of United Professionals (MoveUP) and a reply submission from BCOAPO; and
- E. The Commission has reviewed the BCOAPO Application for Reconsideration and the phase one submissions and considers that the BCOAPO Application for Reconsideration should be denied.

NOW THEREFORE pursuant to section 99 of the *Utilities Commission Act*, and for the reasons attached as Appendix A to this order, the British Columbia Utilities Commission denies the BCOAPO application for reconsideration and variance of paragraphs 14, 16 and 17 (as it relates to the late payment charges) contained within Order G-5-17.

DATED at the City of Vancouver, in the Province of British Columbia, this 2nd day of June 2017.

BY ORDER

Original signed by:

D. M. Morton
Commissioner/Panel Chair

Attachment

BCOAPO Application for Reconsideration and Variance of Order G-5-17
in the matter of the British Columbia Hydro and Power Authority 2015 Rate Design Application

REASONS FOR DECISION

1.0 BCOAPO Application for Reconsideration

On January 20, 2017, the British Columbia Utilities Commission (Commission) issued Order G-5-17 and the accompanying Decision in the matter of the British Columbia Hydro and Power Authority (BC Hydro) 2015 Rate Design Application (RDA Decision).

On February 17, 2017, British Columbia Old Age Pensioners' Organization, Disability Alliance BC, Council of Senior Citizens' Organizations of BC, Tenant Resource and Advisory Centre, Active Support Against Poverty, Together Against Poverty Society and the BC Poverty Reduction Coalition (collectively, BCOAPO) filed an application for reconsideration and variance of paragraphs 14, 16 and 17 (as it relates to the late payment charges) contained within Order G-5-17. (BCOAPO Application for Reconsideration) The Application for Reconsideration is made pursuant to section 99 of the *Utilities Commission Act* (UCA). The relevant sections of Order G-5-17 read as follows:

14. British Columbia Old Age Pensioners' Organization et al.'s (BCOAPO) request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is denied.
16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are denied.
17. BCOAPO's proposal to exempt low-income customers from late payment charges [is] denied.

BCOAPO states that the "grounds on which this reconsideration application is based are that the Commission erred in law in finding sections 23, 38, and 58 to 61 of the UCA do not provide the Commission with jurisdiction to order low-income rates." The specific errors are that the Commission erred in law and in fact:

1. in artificially bifurcating its analysis on undue discrimination into personal characteristics and a "cost of service rationale";
2. as a result of (a), failing to consider socioeconomic evidence relevant to the determination of undue discrimination;
3. in applying the wrong test to its interpretation of sections 23, 38, and 58 to 61 of the UCA;
4. in finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates; and
5. misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions.¹

BCOAPO seeks the following variance to paragraphs 14, 16 and 17 of Order G-5-17:

¹ Exhibit B-1, p. 2.

14. BCOAPO's request to establish an essential services usage block (ESUB) rate for qualified low-income ratepayers is granted.

16. BCOAPO's proposals to amend the Electric Tariff to exempt low-income customers from the minimum reconnection charge and account charge and to waive security deposits for low-income customers are granted.

17. BCOAPO's proposal to exempt low-income customers from late payment charges is granted and the proposal to ban the use of external credit scores is denied.²

2.0 Phase One Reconsideration Process

The Commission's process for addressing reconsideration applications is to proceed in two phases. The first phase is a preliminary examination in which the application is assessed in light of some or all of the following questions:

- a. Should there be a reconsideration by the Commission?
- b. If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?
- c. If there is to be reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?

After the first phase evidence has been received, the Commission generally applies the following criteria to determine whether or not a reasonable basis exists for reconsideration:

- a. the Commission has made an error in fact or law;
- b. there has been a fundamental change in circumstances or facts since the Decision;
- c. a basic principle had not been raised in the original proceedings; or
- d. a new principle has arisen as a result of the Decision.

In addition, the Commission will exercise its discretion to reconsider, in other situations, wherever it deems there to be just cause.

This Reconsideration Application is based on errors of law and fact with respect to the Commission's jurisdiction. In such circumstances, the Commission applies the following criteria to determine whether the reconsideration application should proceed to the second phase to be considered on its merits:

- a. the claim of error is substantiated on a prima facie basis; and
- b. the error has material implications.

By letter dated February 24, 2017, the Commission established phase one of the reconsideration process for the BCOAPO Application for Reconsideration and invited submissions from BC Hydro and all Registered Interveners in the BC Hydro 2015 Rate Design Application proceeding. The Commission received submissions from BC Sustainable Energy Association and the Sierra Club of British Columbia (BCSEA), Commercial Energy Consumers

² Exhibit B-1, p. 2.

Association of British Columbia (CEC), FortisBC Energy Inc. and FortisBC Inc. (collectively, FEI), BC Hydro and Movement of United Professionals (MoveUP) and a reply submission from BCOAPO.

The BCOAPO Application for Reconsideration and the submissions filed by the parties relating to the questions outlined in the Commission's February 24, 2017 phase one procedural letter are summarized below.

2.1 BCOAPO Application for Reconsideration

2.1.1 Claim of Errors

In its Application for Reconsideration, BCOAPO submits that the Commission made the following errors of law:

1. Artificially bifurcating the analysis on undue discrimination into personal characteristics and a "cost of service rationale"³

BCOAPO submits that "the Commission erred in failing to consider together the three rationales [ability to pay, cost reflectivity and efficiency] that BCOAPO argued collectively provide the Commission with jurisdiction to make distinctions between customers based on income, and in so doing, applied the wrong test in assessing whether the proposed discrimination is 'undue'."

BCOAPO submits that the "Commission begins its analysis of its jurisdiction to order BC Hydro to implement BCOAPO's low-income proposals by rejecting [the] argument that ability to pay should be considered together with 'non-status justifications' in a holistic and integrative rate-setting analysis". BCOAPO submits that the Commission's analysis improperly bifurcated the three interrelated factors into two categories: personal characteristics (or ability to pay) and cost of service factors (cost reflectivity and efficiency). The Commission then went on to separately consider whether the non-status justifications (i.e. cost of service reasons) were independently sufficient to justify discrimination in rates.

BCOAPO argues that all three contributing factors must be examined in concert, in a balancing exercise. It states that the "weight of each factor needs to be added to the other two factors to determine collectively the three justifications for discrimination can overcome the appellation of 'undue discrimination'."

BCOAPO submits that while cost of service may be the starting point of the Commission's jurisdiction, the Commission has the discretion to consider factors in addition to the cost of service, such as ability to pay.

2. Failing to consider socioeconomic evidence relevant to the determination of undue discrimination⁴

BCOAPO submits that because the Commission considered affordability in isolation and determined that it did not have jurisdiction to order discrimination in rates based solely on the personal characteristics of the customer, it failed to consider the socio-economic evidence regarding energy poverty.

BCOAPO states that "[s]pecifically, the Commission erred in not considering the weight of BCOAPO's affordability argument in light of the evidence on the breadth and depth of poverty experienced by BC Hydro's customers. Such evidence goes to the weight to be afforded to BCOAPO's affordability argument, which is one of the three interrelated factors going to whether the discrimination is undue."

³ Exhibit B-1, pp. 4-5.

⁴ Exhibit B-1, pp. 5-6.

3. Misinterpreting and misapplying sections 23, 38, and 58 to 61 of the UCA⁵

BCOAPO submits that the “only statutory restrictions on the Commission's jurisdiction with respect to rates are set out in sections 59 to 61 of the UCA. In a nutshell, the statutory restrictions prohibit the Commission from ordering rates that are ‘unjust, unreasonable, unduly discriminatory or unduly preferential’. There is no statutory restriction limiting the Commission's consideration of ‘just and reasonable’ to cost of service factors.”

BCOAPO submits that both sections 23 and 38 of the UCA contain broadly worded "catch-all" provisions that “provide the Commission with a broad mandate to do a fulsome analysis to determine what orders are necessary and advisable for the public interest and to ensure utilities are providing a service that is ‘adequate, safe, efficient, just and reasonable.’” BCOAPO submits that it did not argue that these sections provide explicit jurisdiction to set low-income rates; but rather, that those sections inform the Commission's rate approval authority.

BCOAPO also submits that “the Commission did not consider [sections] 23 and 38 of the UCA harmoniously with the scheme of the Act, the object of the Act, and the intention of, in this case, the provincial legislature. Instead, it drew conclusions based on a ‘plain reading’ of sections 23 and 38, divorced from the context of the broader statute of which those sections are part. In so doing, the Commission applied only the first piece of Driedger’s approach to statutory interpretation. Although the [RDA] Decision states that sections 23 and 38 should be interpreted ‘harmoniously within the scheme of the Act’ (p. 54) the Commission fails to conduct such an analysis.”

BCOAPO submits that the Commission erred by unnecessarily limiting the broad authority granted by sections 23 and 38. As a result, the Commission failed to examine the rate-setting provisions in sections 58-61 of the UCA in the context of the broader authority granted by sections 23 and 38. In so doing, “the Commission unreasonably limited the scope of [sections] 59-61 to cost of service considerations.”

BCOAPO also states that similarly “the Commission unnecessarily limited its broad authority under section 60(1)(b.1) to set rates using ‘any mechanism, formula or other method of setting the rate that it considers advisable’”. BCOAPO submits that there is nothing in the language of the UCA that precludes the Commission from considering income and ability to pay as part of its "mechanism, formula, or other method."

BCOAPO also submits that the Commission's broad authority under section 60(1)(b.1) is expressly excluded from the requirement set out in section 5(c) and (d) of *Special Direction No. 7* which require that the Commission must otherwise ensure that BC Hydro's domestic service is provided on a cost of service basis.

4. Finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates⁶

BCOAPO submits that it provided reference to statements made in the legislature by the Honourable Robert H. McClelland underscoring the Commission's public interest function when the UCA was introduced for second reading. However, the Commission said on page 65 of the 2015 RDA Decision that it could “find no evidence that included in government energy policy is an intention to provide low-income rates”⁷. BCOAPO submits that “it is not a question of whether the legislature intends to provide low-income rates per se; but rather, a question of whether the legislature intended the Commission’s regulatory powers to be broad enough to approve such rates where necessary for the public interest.”

⁵ Exhibit B-1, pp. 6-8.

⁶ Exhibit B-1, p. 8-9.

⁷ British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 65.

BCOAPO also submits that the Commission erred by accepting “as evidence of legislative intent the legislature’s refusal, on three occasions, to pass proposed amendments to the Act to explicitly provide the Commission with the authority to create a low-income rate.” BCOAPO submits the Commission erred in law in relying on a private member’s bill never adopted by the legislature to interpret the state of the law, and in finding that section 37 of the *Interpretation Act* does not apply to preclude such reliance.

5. Misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions⁸

BCOAPO notes that the Panel found similarities between the UCA and Ontario legislation are insufficient for the decisions in Ontario to provide guidance in the present case. On the other hand, the Panel found sufficient similarities between the UCA and Nova Scotia legislation for the decisions from Nova Scotia to provide guidance.

BCOAPO submits that finding Nova Scotia’s legislation (and relevant decisions made under it) directly applicable to the issue of the Commission’s jurisdiction under the UCA reveals “an error in statutory interpretation”, considering that the wording in the Nova Scotia legislation is “much stricter” than the UCA. BCOAPO submits that the UCA “does not contain an absolute requirement that rates always be charged equally to all persons under substantially similar circumstances and conditions in respect of service of the same description” as required by the Nova Scotia legislation. In addition, the Commission failed to look at Nova Scotia’s provision that is comparable to section 59(2) of the UCA in the context of the broad authority granted to the Commission by sections 23 and 38 of the UCA.

BCOAPO submits that the Ontario and Manitoba legislation, “with their broad authority to conduct contextual analysis in rate setting and approval, are more directly applicable to the Commission’s jurisdiction under the UCA.”

Finally, BCOAPO submits that the “Commission should not have ascribed the weight it did to the tribunal decisions in Alberta and New Brunswick.” BCOAPO submits those decisions have “significantly less precedential value than the Ontario Superior Court of Justice decision which was confirmed by the Ontario Court of Appeal.”

BCOAPO submits that the alleged errors led to the finding that the Commission does not have the jurisdiction to consider low-income proposals, which in turn “had the material impact that these proposals were rejected by the Commission without any adequate analysis of their desirability as a public interest objective.”

BCOAPO relies on its submissions above in its reply to the submissions of those parties who oppose the application for reconsideration as set out in the next part of this decision.

2.1.2 Material Implications

BCOAPO submits that the material impact on BC Hydro’s low-income customers from the rejection of the low-income proposals is severe and the low-income customers “will continue to face difficult choices with respect to which bills to pay and disconnections for their ultimate inability to pay.”⁹

2.2 Other Parties’ Phase One Submissions

BCSEA and MoveUP both support a reconsideration of paragraphs 14, 16 and 17 (as it relates to late payment charges) of Order G-5-17 on the grounds that the claim of error is substantiated on a *prima facie* basis and the

⁸ Exhibit B-1, pp. 8-9.

⁹ Exhibit B-1, pp. 9-10.

errors have material implications.¹⁰ BCSEA endorse BCOAPO's submissions regarding the alleged errors and MoveUP adopts the submissions from BCOAPO and BCSEA regarding the alleged errors and the material impact of those errors.

CEC, FEI and BC Hydro do not support a reconsideration of paragraphs 14, 16 and 17 (as it relates to late payment charges) on the basis that BCOAPO has not established a *prima facie* basis for the alleged errors.¹¹ BC Hydro also submits that "any such error if substantiated would not have significant material implications."

BC Hydro submits that most of the BCOAPO Application for Reconsideration restates arguments made during the BC Hydro 2015 RDA proceeding rather than identifying alleged errors and notes that "[r]econsideration applications should not be opportunities to re-argue issues which were fully argued and which the Commission considered but did not accept."¹²

2.2.1 Claim of Errors

The phase one submissions regarding whether the Commission should order a reconsideration of Order G-5-17 are summarized below in relation to the specific errors alleged in the BCOAPO Application for Reconsideration.

1. Artificially bifurcating the analysis on undue discrimination into personal characteristics and a "cost of service rationale"

BCSEA submits that the Commission's finding that it does not have the jurisdiction to approve low-income rates in the absence of an economic or a cost of service basis reason is "circular and unreasonable because that was the same proposition that the panel took as the starting point of its analysis".¹³

FEI refers to BCOAPO's Final Submission dated September 26, 2016, its Responding Argument dated October 11, 2016 and its Reply Argument dated October 24, 2016, all filed in the BC Hydro 2015 RDA proceeding. FEI states that BCOAPO asserted three "regulatory justifications" for the establishment of an ESUB rate for low-income customers: (i) improved cost reflectivity; (ii) improved efficiency of collections; and (iii) bill affordability. FEI also states that separately, and as a threshold issue, BCOAPO also argued that the Commission has jurisdiction to order programs targeted at low-income residential ratepayers without any reliance on the regulatory justifications now included in its jurisdictional argument.¹⁴

FEI submits that the Commission's determination on jurisdiction "is consistent with the form in which BCOAPO previously presented its argument" and "[m]ore importantly, after determining that it does not have jurisdiction to order rates or programs based only on customers' ability to pay, the Commission went on to consider and rejected BCOAPO's position that cost reflectivity and efficiency in collections justified the establishment of an ESUB rate."¹⁵

FEI submits that "the Commission was correct to treat BCOAPO's 'ability to pay' rationale for the ESUB rate and other low-income proposals as a threshold issue of jurisdiction." FEI further submits that if "the UCA does not grant the Commission authority to set rates based on the personal characteristics of customers and their ability to pay for utility services, then clearly the Commission should not consider affordability justifications and

¹⁰ Exhibit C1-1, p. 5; Exhibit C5-1, p. 2.

¹¹ Exhibit C2-1, p. 2, Exhibit C3-1, p. 1, Exhibit C4-1, p. 1.

¹² Exhibit C4-1, p. 3.

¹³ Exhibit C1-1, p. 5.

¹⁴ Exhibit C3-1, p. 2.

¹⁵ Exhibit C3-1, p. 2.

associated economic evidence for the purposes of determining whether to order the implementation of the ESUB rate and other low-income programs.”¹⁶

BC Hydro submits that BCOAPO provided no legal basis:

- for the proposition that its “holistic” analysis is both correct and preferred to the analysis that the Commission did undertake;
- upon which the Commission could conclude, as a matter of law, that a consideration that by itself is not legally relevant in a rate-setting context (ability to pay) becomes relevant when it is considered “holistically” with other legally relevant factors (cost reflectivity and efficiency); and
- for the proposition that the analysis the Commission did perform with respect to the review of its jurisdiction was incorrect.¹⁷

BC Hydro also submits that the Commission began its “jurisdictional analysis by, correctly, considering whether it has the jurisdiction to determine and set low-income rates in the absence of a cost of service (i.e. cost reflectivity and/or efficiency) rationale. After performing this analysis, the Commission then [went] on to consider the specific low-income proposals put forward by the BCOAPO in the RDA proceeding to determine whether they have a regulatory justification.”¹⁸

Finally, BC Hydro submits that “the Commission concluded, based on its interpretation of the UCA, that it does not have jurisdiction to approve a low-income rate in the absence of a cost reflectivity or efficiency reason.” BC Hydro states: “BCOAPO’s proposed ‘holistic’ analysis would have the Commission afford weight to a factor – affordability - that it does not have the jurisdiction to consider and that is legally not relevant regardless of how it might be weighed vis-a-vis other legally relevant factors.”¹⁹

2. Failing to consider socioeconomic evidence relevant to the determination of undue discrimination

BCSEA submits that the original Panel erred in finding that low-income rates are unduly discriminatory without weighing the socioeconomic evidence.²⁰

BC Hydro submits that “[t]his argument is directly connected to the one preceding” and that BCOAPO's analysis “would have the Commission afford weight to a factor – affordability – that it does not have jurisdiction to consider.” BC Hydro further submits that “BCOAPO provide no legal basis on which to support its argument that the socioeconomic evidence it put forward should give greater weight to the affordability factor as a consideration... affordability is either a relevant consideration or not and the significance of the issue does not elevate it as a factor if, as the Commission concluded, it is a lawfully irrelevant consideration in ratemaking.”²¹

3. Misinterpreting and misapplying sections 23, 38, and 58 to 61 of the UCA

BCSEA submits that the Commission erred in its statutory interpretation of the UCA and whether it provides the jurisdiction to approve a low-income rate and, specifically the Commission failed to apply the modern approach.²² In addition, BCSEA states that the error is not only the use of the phrase “plain meaning” but also

¹⁶ Exhibit C3-1, p. 3.

¹⁷ Exhibit C4-1, pp. 3-4.

¹⁸ Exhibit C4-1, p. 4.

¹⁹ Ibid.

²⁰ Exhibit C1-1, pp. 5-6.

²¹ Exhibit C4-1, p. 5.

²² Exhibit C1-1, p. 5.

the Commission's interpretation of sections 23 and 38 of the UCA with no reference to the context of the complete UCA.²³

CEC submits that the "Commission's reasoning on interpreting sections 23, 38 and 58 to 61 of the UCA were reasonable and the Commission provided sound conclusions supported by the law and the evidence".²⁴

FEI submits that BCOAPO recognized, in its Final Submission dated September 26, 2016,²⁵ that the Commission cannot exceed the powers granted to it in the UCA, and that whether the Commission has a particular power is determined using the two-stage framework described in ATCO²⁶; i.e., jurisdiction is derived either from (i) an express grant from the UCA (explicit powers) or (ii) jurisdiction by necessary implication (implicit powers). FEI submits BCOAPO then argued that the wording of sections 23 and 38 and the Commission's public interest function "give the Commission the express jurisdiction to consider proposed low-income programs, subject to [s]ections 59 and 60 of the UCA."²⁷

FEI notes that because BCOAPO previously relied on sections 23 and 38 "as providing a source of 'express jurisdiction', it was incumbent on the Commission to specifically consider whether those provisions could support the grant of jurisdiction being asserted." FEI submits that BCOAPO is being inconsistent to now claim that the Commission erred in doing so.²⁸

FEI submits that the BCOAPO Application for Reconsideration is "effectively a concession that the only potential source of the required jurisdiction to establish the ESUB rate and other low-income proposals is the jurisdiction by necessary implication doctrine" and goes on to list the following reasons that the jurisdiction BCOAPO maintains can't be based on implicit power:

- Sections 23 and 38 are "broadly drafted" and only address the issue of service and not the issue of rate setting;
- The Supreme Court of Canada held in ATCO²⁹ that in order to impute jurisdiction to a regulatory body by necessary implication in such circumstances "there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature". Here, the Commission has no such legislatively prescribed objects and there is no evidence demonstrating that the imputed jurisdiction is a "practical necessity" for its functioning;
- The jurisdiction that is sought to be implied is contrary to both the established interpretation of the UCA's rate setting provisions and the "common law standards regarding the duty on public utilities having practical monopolies to 'treat all residential customers alike' in the supply of services."³⁰

FEI also submits that "BCOAPO's statutory interpretation analysis ignores the clear terms of [section] 59 which prohibit rate discrimination or preference and further provide that a public utility must not 'extend to any person a form of agreement, rule, facility or privilege, unless the agreement, rule, facility or privilege is regularly

²³ Exhibit C1-1, p. 6.

²⁴ Exhibit C2-1, p. 2.

²⁵ British Columbia Power and Hydro Authority 2015 Rate Design Application, BCOAPO Final Argument.

²⁶ ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4, para. 38.

²⁷ Exhibit C3-1, p. 3.

²⁸ Exhibit C3-1, p. 4.

²⁹ ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4, para. 77.

³⁰ Exhibit C3-1, pp. 4-5.

and uniformly extended to all persons under substantially similar circumstances and conditions for the service of the same description’.”³¹

BC Hydro notes that each of the arguments in the BCOAPO Application for Reconsideration related to sections 23, 38 and 59-61 of the UCA were put forward in the BC Hydro 2015 RDA proceeding and “disagreement with the Commission’s findings should not be a sufficient basis upon which to allow a reconsideration application in the absence of a demonstrable *prima facie* error.” BC Hydro goes on to submit that regardless, “the Commission correctly interpreted the specific provisions of the UCA within the context of the legislative framework and engaged in a statutory interpretation analysis consistent with Driedger’s modern approach.”³²

BC Hydro submits that the Commission's RDA Decision, “when read as a whole, identifies the following: the Commission reviewed the UCA to determine whether it had explicit jurisdiction to approve low-income rates, it also reviewed the express and implied powers of the UCA. The Commission reviewed each of the provisions against this backdrop and in relation to each other. Finally, it conducted an exhaustive review of Hansard extracts to determine legislative intent, if any.”³³

BC Hydro also submits that the “Commission noted that there is no evidence to indicate that [sections] 23 and 38 had ever been interpreted in such a way as to inform the ratemaking powers of the Commission and that the rate-setting provisions of the UCA are founded on characteristics of service.”³⁴

4. Finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates.

MoveUP submits that the Commission's acceptance of the 2008, 2014, and 2016 Private Members Bills introduced by MLA John Horgan as evidence of legislative intent is another error made by the Commission. MoveUP states that it “is only in the face of other evidence of legislative intent that a failed amendment attempt can form part of the basis upon which legislative intent can be found, otherwise a failed Private Members Bill or Bills could be used to redefine the law and legislative intent.”³⁵

In addition, MoveUP states that “any determination of legislative intent requires a fulsome and often time intensive examination of any number of sources including, but not limited to, a picture of how the legislation has evolved over time, Hansard and committee discussions about it, government policy papers, and reports from law commissions or Commissions of Inquiry.” MoveUP submits that the original Panel erred in basing its determination on legislative intent only on “one small sliver of the possible bodies of information available.”³⁶

FEI submits that the Commission “committed no error” in considering the legislatures’ refusal on three separate occasions to pass proposed amendments to the UCA regarding low-income rates.³⁷ FEI cites the majority decision of Rothstein J. in *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 SCR 489 where evidence of broadcasters' lobbying efforts in the lead-up to enactment of a provision in the *Copyright Act*:

Notwithstanding successive amendments to the *Copyright Act*, Parliament has not amended section 21 in the fashion requested by the broadcasters. Parliament's silence is not necessarily

³¹ Exhibit C3-1, p. 5

³² Exhibit C4-1, p. 6.

³³ Exhibit C4-1, p. 7.

³⁴ Ibid.

³⁵ Exhibit C5-1, p. 2.

³⁶ Exhibit C5-1, pp. 2-3.

³⁷ Exhibit C3-1, p. 5.

determinative of legislative intention. However, in the context of repeated urging from broadcasters, Parliament's silence strongly suggests that it is Parliament's intention to maintain the balance struck by [section] 21.³⁸

BC Hydro argues that, with respect to the Commission's consideration of Hansard extracts "[t]he fact that the Commission does not find certain evidence persuasive does not support a *prima facie* conclusion that the Commission erred in law." With respect to the private member's bills, BC Hydro submits that BCOAPO "are mischaracterizing the Commission's use and consideration of the evidence when it argues that the Commission 'rel[ie]d] on the private member's bill never adopted by the legislature.' Nowhere in the 2015 RDA Decision did the Commission rely on the evidence that the legislature had not adopted private member's bills to interpret the state of the law. The Commission acknowledged that the failure of the legislature to pass the bills was background and supported the Commission's view that the legislature had expressly turned down low-income amendments in the past."³⁹

5. Misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions

With respect to BCOAPO's submission that the *Ontario Energy Board Act* and Manitoba's *Public Utilities Board Act* are more directly applicable to the UCA, FEI submits that "[t]he Reconsideration Application does not raise any reason to doubt the correctness of the reasons given by the Commission in the RDA Decision that the legislation in those jurisdictions is not sufficiently similar to the UCA."⁴⁰ With respect to BCOAPO's submissions regarding Nova Scotia's *Public Utilities Act*, FEI submits that "the distinctions between the Nova Scotia legislation and the UCA, if any, are *de minimus* and should not have prevented the Commission from taking some guidance from an appellate court in another jurisdiction on a comparable jurisdictional issue."⁴¹

BC Hydro submits that "the Commission 'examined in detail' relevant case law provided by the various parties in argument in an effort to determine whether the rulings of other jurisdictions could 'be helpful in providing guidance to the Commission.' BC Hydro notes that the 'Commission explicitly stated that it is 'not bound by decisions in other jurisdictions'."⁴²

BC Hydro submits that "the fact that the Commission does not find evidence persuasive does not constitute an error of law" and further states that the legislation in other jurisdictions "merely provided directional guidance" to the Commission.⁴³

2.2.2 Material Implications

In its letter dated February 24, 2017, the Commission requested that, for any alleged error in fact or law, the phase one submissions provide support that the error has significant material implications.

BCSEA submits that the errors have "significant financial and quality of life consequences for qualified low-income customers of BC Hydro."⁴⁴ BC Hydro submits that the errors do not have significant material implications, given that "the disputed orders do not turn on those alleged errors." BC Hydro goes on to state that "regardless of the Commission's determinations with respect to its jurisdiction to order low-income rates,

³⁸ Exhibit C3-1, p. 6.

³⁹ Exhibit C4-1, p. 8.

⁴⁰ Exhibit C3-1, p. 6.

⁴¹ Exhibit C3-1, p. 7.

⁴² Exhibit C4-1, p. 9.

⁴³ Exhibit C4-1, p. 9.

⁴⁴ Exhibit C1-1, p. 7.

the affordability pillar of BCOAPO's regulatory justifications would not have been established and the requested low-income rates would not have been ordered."⁴⁵

2.2.3 Whether the Commission should hear new evidence and should new parties be given the opportunity to present evidence, if there is to be a reconsideration of Order G-5-17

There were no parties that participated in phase one of the reconsideration process that supported new evidence or the opportunity for new parties to present evidence.

2.2.4 Whether a Commission reconsideration of Order G-5-17 should focus on the items from the BCOAPO Application for Reconsideration, a subset of these items, or additional items

BCSEA submits that the reconsideration process should focus on the items from the BCOAPO Application for Reconsideration. FEI and BC Hydro submit that, if the Commission orders a reconsideration of Order G-5-17, it should only focus on those items from the Application that have met the required criteria for reconsideration.

3.0 Commission Determination

For the reasons set out below, the Panel determines that there is no need to proceed to phase two of the reconsideration process. The Panel is not persuaded by the arguments of BCOAPO, or the interveners supporting its position, that the claims of error have been substantiated on a *prima facie* basis. Therefore, there is no need to consider whether the claims of error have material implications. **BCOAPO's request for reconsideration is denied.**

1. Artificially bifurcating the analysis on undue discrimination into personal characteristics and a "cost of service rationale"

The Panel considers several submissions made by BCOAPO in its Final Argument in the RDA proceeding to be relevant here. On page 32 of its Final Argument, BCOAPO submitted that the Commission has the express jurisdiction and implied powers to order implementation of low-income programs. The starting point of the analysis required an examination of the grammatical and ordinary meaning of the relevant sections of the UCA. The next step was to apply a contextual and purposive analysis.⁴⁶

BCOAPO further submitted on page 32 of its Final Argument that read together contextually, sections 23 and 38 give the Commission the express jurisdiction to ensure public utilities are providing services in the public interest, as well as to consider the public interest in making orders and regulations. More specifically, the consideration of the public interest, in conjunction with Commission's powers to ensure, *inter alia*, the "convenience... of the public", "service of the public", adequate [service]" and "efficient [service]" give the Commission the express jurisdiction to consider low-income programs subject to sections 59 and 60 of the UCA.

⁴⁵ Exhibit C4-1, pp. 9-10.

⁴⁶ British Columbia Power and Hydro Authority 2015 Rate Design Application, BCOAPO Final Argument, p. 32.

Finally, BCOAPO also submitted on page 33 in its Final Argument that when read together, sections 59-60 ground the Commission's rate setting jurisdiction in a traditional cost of service analysis while also giving the Commission discretion to consider other factors, such as ability to pay and efficiency.⁴⁷

The Panel is not persuaded that any *prima facie* error was made by the Commission in its analysis of sections 23, 38 and 59-60 of the UCA. In its RDA Decision, the Commission agreed with BC Hydro that is empowered to do only those things – including setting rates – that it is expressly authorized to do by the UCA, or which are necessarily implied by the UCA.⁴⁸

The Commission noted that there are no words regarding customers' financial circumstances or incomes and expressions to that effect in the rate-making sections of the UCA are conspicuously absent⁴⁹. With regard to sections 23 and 38, the Commission concluded that a plain reading of those sections did not support the view that they provide jurisdiction to set low-income rates regardless of those sections' public interest provisions. There is no reference to the characteristics of the ratepayer or no requirement to consider the economic status of a ratepayer. Those sections address the issues of service and general supervision. They do not address rate-making.⁵⁰

The Panel also wishes to make an additional point. Section 1 of the UCA contains definitions for "rate" and "service". Those definitions apply throughout the UCA. "Service" is defined in terms of use and accommodation, a product or commodity, or the plant, equipment, apparatus, etc. However, "rate" is defined in terms of the charge or compensation of a public utility. The definitions apply to different concepts. While sections 23 and 38 address general supervisory powers and service, these concepts are distinct from rate setting.

The RDA Decision also addressed whether jurisdiction by necessary implication applies to an analysis of sections 23 and 38 in the context of setting low-income rates. The RDA Decision states that the doctrine of necessary implication requires a statutory objective of implementing low-income rates and there is no evidence that low-income rates are a statutory objective.⁵¹

BCOAPO acknowledged there is no explicit provision in the UCA setting out the objectives, but it can be inferred from sections 23 and 38.⁵² While the RDA Decision referred to this as a circular argument,⁵³ the Panel fails to see how sections that are not concerned with rate setting can be the basis for necessarily implying a power into the specific rate setting provisions which does not contain any such "public interest" provisions. The Panel also notes that there are many other provisions in the UCA that contain references to public interest that do not affect rate setting principles. The Panel is of the view that the legislation expressly requires the public interest to be taken into consideration when considering some provisions while others do not. The flaw in the argument of BCOAPO is that it is conflating public interest provisions related to service and general supervision with express rate-setting provisions contained in sections 59-60 of the UCA.

2. Failing to consider socioeconomic evidence relevant to the determination of undue discrimination

The Panel agrees with BC Hydro's submission on this issue. BCOAPO is asking the Commission to consider a factor - affordability – that it does not have jurisdiction to consider. In finding that, in the absence of a cost of

⁴⁷ British Columbia Power and Hydro Authority 2015 Rate Design Application, BCOAPO Final Argument, pp. 32-33.

⁴⁸ British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 53.

⁴⁹ Ibid.

⁵⁰ Ibid., p. 54.

⁵¹ Ibid.

⁵² Ibid., p. 51.

⁵³ Ibid., p. 54.

service justification, the Commission has no jurisdiction to make distinctions between customers based on income and that BCOAPO failed to make a persuasive argument that low-income customers can be differentiated on the basis of the costs to service them, the socioeconomic evidence is otherwise not relevant to the issue of the Commission's jurisdiction.

3. Misinterpreting and misapplying sections 23, 38, and 58 to 61 of the UCA

The Panel disagrees with BCOAPO's assertion that the Commission misinterpreted and misapplied sections 23, 38, and 58 to 61 of the UCA. The Commission drew its conclusions regarding those sections on a plain reading of those sections and also within the context of the legislative framework as explained above and in its RDA Decision.

For example, regarding BCOAPO's assertion that section 60(1)(b.1) confers broad authority to set rates using "any mechanism, formula or other method of setting the rate that it considers advisable,"⁵⁴ the Commission instead considered the statutory intent of that subsection finding that the intent was to eliminate a bias against utility energy conservation investments and encourage performance based regulation and not to provide a jurisdictional basis for low-income rates.⁵⁵ These findings also address BCOAPO's argument regarding *Special Direction No. 7*.⁵⁶

Further, the Panel agrees with FEI's submission that BCOAPO's statutory interpretation analysis ignores the clear terms of section 59 which prohibit rate discrimination or preference and further provide that a "public utility" must not "extend to any person a form of agreement, rule, facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for the service of the same description." The Panel notes that the underlined provision in section 59(2)(b) above relates to provision of service under substantially similar circumstances and conditions and is not to be interpreted to mean that persons under substantially similar circumstances and conditions (with regard to affordability) can be offered service of the same description at a different rate. This is made clear by the provisions of section 59(4)(c) which provides that it is a question of fact, of which the Commission is the sole judge whether a service is offered or provided under substantially similar circumstances and conditions.

Further there is nothing in the context of the legislative framework to link the rate-setting provisions in sections 58-61 to the broader authority granted by sections 23 and 38, and BCOAPO failed to provide any persuasive evidence to support its assertion that there is such a link. Therefore the Panel disagrees that by not doing so unreasonably limited the scope of sections 59-61 to cost of service considerations.

4. Finding a lack of legislative intent to provide the Commission with jurisdiction to order low-income rates

BCOAPO provided no persuasive evidence in the original proceeding of legislative intent to provide the Commission with jurisdiction to order low-income rates. Further, no new evidence of this intent is provided in its reconsideration request. In the absence of explicit jurisdiction, or jurisdiction by necessary implication, granted in the UCA and of persuasive evidence of legislative intent to provide that jurisdiction, the Commission rightly concluded that there is no such jurisdiction.

We agree with BC Hydro's analysis that the Commission did not rely on the evidence that the legislature had not adopted private member's bills to interpret the state of the law, and this fact was "background and supported the Commission's view that the legislature had expressly turned down low-income amendments in the past."⁵⁷

⁵⁴ Exhibit B-1, p. 7.

⁵⁵ British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 66.

⁵⁶ Ibid., p. 60.

⁵⁷ Exhibit C4-1, p. 8.

In the RDA Decision, the Commission found that it was not precluded from considering the handling of proposed bills by the British Columbia Legislature as *guidance* in determining legislative intent.⁵⁸

Further, BCOAPO argues that “it is not a question of whether the legislature intends to provide low-income rates per se; but rather, a question of whether the legislature intended the Commission’s regulatory powers to be broad enough to approve such rates where necessary for the public interest.”⁵⁹ The Commission found and this Panel agrees that there is no basis to conclude from the UCA, Hansard or otherwise that the legislature intended that the Commission's powers were broad enough to approve low-income rates where necessary for the public interest.

5. Misconstruing the regulatory regimes and relevant decisions in other Canadian jurisdictions

The Commission expressly stated that it would examine how statutes similar to the UCA have been interpreted by the courts and commissions in other jurisdictions. It noted that while it was not bound by decisions in other jurisdictions, the decisions could be helpful in providing guidance if the cases were sufficiently similar. The Commission stated it would review the cases to determine whether they have application and provide direction for this jurisdiction.⁶⁰

The Commission explained in the RDA Decision why it was of the view that some of the cited cases did not provide useful guidance while others did provide guidance. Those cases that the Commission decided did not provide useful guidance were based on the difference in the statutory provisions in other jurisdictions compared to British Columbia.

The Panel agrees with BC Hydro that finding evidence to be not persuasive does not constitute an error in law. Further, the Commission explicitly stated that the legislation in other jurisdictions provided “directional guidance” to the Commission.⁶¹

⁵⁸ British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 66.

⁵⁹ Exhibit B-1, p. 8.

⁶⁰ British Columbia Power and Hydro Authority 2015 Rate Design Application, Decision, p. 67.

⁶¹ *Ibid.*, p. 79.