

**WEISBERG LAW**  
C O R P O R A T I O N

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June 15, 2020

**E-filed**

British Columbia Utilities Commission  
6th floor, 900 Howe Street  
Vancouver, BC V6Z 2N3  
Attention: Ms. Marija Tresoglavic  
Commission Secretary and Manager, Regulatory Services

Dear Ms. Tresoglavic:

**Re: British Columbia Hydro and Power Authority  
Application to Amend Net Metering Service under Rate Schedule 1289 ~  
Project No. 1599004  
Net Metering Ratepayers Group  
And  
British Columbia Community Solar Coalition  
Complaint Regarding BC Hydro's Abuse of Process in  
Improper Comments on PACA Applications**

We are writing on behalf of our clients the Net Metering Ratepayers Group (NMRG) and British Columbia Community Solar Coalition (BCCSC) to make a complaint regarding BC Hydro's letter to the BCUC dated June 4, 2020. While that letter purported to provide comments "on cost award applications" as provided for by Section 14.2.4 of the BCUC Participant Assistance/Cost Award Guidelines (*PACA Guidelines*), BC Hydro instead used that right of comment to make improper collateral attacks on NMRG's and BCCSC's joint Final Argument. BC Hydro's exclusive right to reply in that respect expired on March 26, 2020 when it filed its Reply Argument in accordance with the Regulatory Timetable set out in BCUC Order G-293-19 appended to Exhibit A-16.

The purpose of "...the party being asked to pay..." to provide comments regarding potential PACA awards is discussed in detail in the NMRG's June 11, 2020 submissions replying to BC Hydro's June 4, 2020 comments so it is unnecessary to repeat that discussion here.

## 1. **BC HYDRO'S IMPROPER COMMENTS**

BC Hydro's specific comments that are the subject of this complaint are as follows:

“An Intervener's Final Argument is also helpful in summarizing the issues identified by a respective Intervener in evidence, and the positions they may take on those issues. Regarding the *Final Argument submitted by NMRG/BCCSC*, BC Hydro *notes that a portion of their final argument dealt with issues outside the scope of the Application. Examples include potential future government policy with regards to the role, benefits and cost recovery of renewable energy supply, the potential role of the net metering program in BC Hydro's long term resource supply options, and system operational issues such as the concept of “islanding” to achieve system reliability.* In addition, as stated in BC Hydro's Reply Argument, the NMRG/BCCSC Final Argument included a number of assertions of fact that were not supported by the evidence on record for the proceeding.” (emphasis added)

Those comments were completely improper and a clear abuse of process for a number of reasons discussed below.

### 1.1 **BC Hydro Alleges Five or More Issues Out of Scope**

BC Hydro is alleging that a portion of NMRG's and BCCSC's joint Final Argument (NMRG/BCCSC Argument) was out of scope in addressing five or more issues including:

- a. potential future government policy with regards to the role, benefits and cost recovery of renewable energy supply;
- b. potential role of the net metering program in BC Hydro's long term resource supply options;
- c. system operational issues (other than “islanding”<sup>1</sup>);
- d. the concept of “islanding” to achieve system reliability; and
- e. whatever other issues BC Hydro suggests by introducing its list with the phrase “Examples include...”, which insinuates there are other examples that are not stated.

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<sup>1</sup> By referring to system operation issues – plural – it is very clear that BC Hydro implies there were one or more operational issues *in addition* to “islanding”.

NMRG and BCCSC Letter to BCUC  
Complaint Regarding BC Hydro's Improper  
Comments on PACA Applications  
Amend Net Metering Service Proceeding  
June 15, 2020

It's quite straightforward to examine the record in the proceeding for verification of BC Hydro's scope allegations. As they pertain exclusively to NMRG/BCCSC Argument it narrows the necessary search to only filings made after Intervener Final Arguments were due. Just one filing in the proceeding was made after Interveners completed their filings. Accordingly, a review of BC Hydro's Reply Argument should readily provide detail and clarification of exactly what portion of NMRG/BCCSC Argument offended scope limitations and related to the specific issues listed in the quote above.

We have searched BC Hydro's Reply Argument for all mentions of "out of scope" and "scope". Fairness requires that we acknowledge that "scope" is indeed discussed.

However, "out of scope" is never mentioned in BC Hydro's Reply Argument. The *single* mention of "scope" is found not in the body of BC Hydro's Reply Argument, but in a footnote. Specifically, footnote 10 on page 4 of the document stating:

"It is also relevant that BC Hydro's procurement policies will be within the *scope* of BC Hydro's 2021 Integrated Resource Plan application." (emphasis added).

***Clearly, that one little, solitary mention of "scope" has nothing whatsoever to do with "out of scope" OR any Final Argument OR NMRG OR BCCSC.***

### **1.2 BC Hydro Reply Argument Was the ONLY Proper Procedural Opportunity to Address Specifics of NMRG/BCCSC Argument**

It's important to recognize the importance of an Applicant's right to file Reply Argument in a BCUC proceeding. It is notable because it is a unique right that is not provided to any Interveners.

To the extent that BC Hydro wished to contend that any part of NMRG/BCCSC Argument was out of scope in the proceeding, its Reply Argument was the only proper procedural opportunity it had to do so. BC Hydro raised no concern whatsoever regarding the scope of NMRG/BCCSC Argument – and did not even mention the concept.

Instead, BC Hydro later chose to attack NMRG/BCCSC Argument in a limited step in the PACA process. Further, it did so while the BCUC is still presumably actively considering all of the filings in the proceeding – that of course must include NMRG/BCCSC Argument.

NMRG and BCCSC Letter to BCUC  
Complaint Regarding BC Hydro's Improper  
Comments on PACA Applications  
Amend Net Metering Service Proceeding  
June 15, 2020

### **1.3 BC Hydro's Scope Allegations Are Patently False**

BC Hydro has already implicitly acknowledged that there is *zero truth* to its allegations that NMRG/BCCSC Argument was out of scope in five or more respects. That is established by the fact that BC Hydro made no such allegation in its Reply Argument signed by its long-time and experienced external legal counsel.

Had there been a proper basis to suggest that "a portion of" NMRG/BCCSC Argument was out of scope, we have no doubt that external legal counsel would have brought it to BC Hydro's attention. Any suggestion that external legal counsel would have overlooked that five or more separate issues discussed in NMRG/BCCSC Argument were out of scope is untenable. It simply would not happen.

One can therefore reasonably assume that BC Hydro's Reply Argument did *not* raise any objections to issues being out of scope because NMRG/BCCSC Argument did *not* raise any such concerns.

### **1.4 BC Hydro's Scope Allegations Are an Impermissible Collateral Attack on NMRG/BCCSC Argument**

Whatever legitimate concerns BC Hydro may have held regarding NMRG/BCCSC Argument, the only time and place to properly raise them was in its Reply Argument. The March 26, 2020 filing deadline is long past, and with it went BC Hydro's opportunity to raise *any* such concerns.

It is indefensible for BC Hydro to now suggest *in its comments on the PACA Applications* that five or more distinct issues addressed in NMRG/BCCSC Argument were out of scope.

The only proper way to attempt to do that in comments on the PACA Applications would be to quote or specifically reference its own statements in its Reply Argument. That of course is impossible because no such statements were made in that document.

It's very clear that BC Hydro, or any BCUC-regulated party, making an adversarial challenge to Interveners' submissions in the context of PACA comments is extremely dangerous ground. The BCUC must take great care to actively denounce and deter comments that fall well outside of the Section 4.3 mandatory criteria in the PACA Guidelines, lack any merit, and create very extreme financial and other prejudice for Interveners.

NMRG and BCCSC Letter to BCUC  
Complaint Regarding BC Hydro's Improper  
Comments on PACA Applications  
Amend Net Metering Service Proceeding  
June 15, 2020

BC Hydro properly and wisely chosen not to make any suggestion in its Reply Argument that NMRG/BCCSC Argument was out of scope in any respect. ***It is imperative that the BCUC recognize and address the quoted portion of BC Hydro's thinly disguised "comments on PACA Applications" as an improper collateral attack on NMRG/BCCSC Argument.***

### **1.5 BC Hydro's Attack Creates Irreparable Prejudice Against BOTH NMRG and BCCSC**

Raising false scope allegations now, months after the Argument phase of the proceeding closed and while the Panel is still actively deliberating, creates irreparable prejudice to ***both*** NMRG and BCCSC in three different respects.

First, the allegations create prejudice to ***NMRG's*** PACA claim for very obvious reasons. BC Hydro used the false assertions of out of scope arguments as part of its deeply flawed rationale supporting its express request for an unspecified "downward adjustment" of NMRG's PACA claim.

Second, the allegations create prejudice to ***BCCSC's*** PACA claim for less obvious reasons. BC Hydro did ***not*** request a reduction of BCCSC's PACA claim. However, the comments in regard to the supposedly out of scope portion of NMRG and ***BCCSC's*** Final Argument have the clear potential to incline the BCUC to value that document much less as a contribution to the proceeding and specifically to the BCUC's understanding of the issues. Even if the BCUC does not act on that, as we hope it won't, the false allegations create the distinct possibility that the BCUC might have been persuaded to reduce BCCSC's PACA claim notwithstanding that BC Hydro did not make that specific request.

Third, the allegations create prejudice to NMRG and BCCSC in the Net Metering proceeding. The ***BCUC presumably won't act on the basis of BC Hydro's demonstrably false allegations – but BC Hydro clearly intended that the BCUC would be influenced by its June 4, 2020 submissions.*** The comments can't be separated from the BCUC's deliberations in the proceeding – and ***the outcome obviously could be changed if the BCUC disregarded five or more areas of NMRG/BCCSC Argument based on the untruthful charges made by BC Hydro.***

### **1.6 Scope Allegations Constitute Improper Amendment of BC Hydro Reply Argument**

In light of BC Hydro's scope allegations directly contradicting its Reply Argument, the comments must be seen as an improper attempt to make a major amendment. Coming more than 2 ½ months after its Reply Argument was due and filed, and now presented

NMRG and BCCSC Letter to BCUC  
Complaint Regarding BC Hydro's Improper  
Comments on PACA Applications  
Amend Net Metering Service Proceeding  
June 15, 2020

under the guise of comments on the NMRG and BCCSC PACA Application, the untruthful assertions regarding scope offend BCUC Order G-293-19 (i.e. the date set in the Regulatory Timetable for filing Reply Argument) as well as Section 14.2.4 of the *PACA Guidelines*.

***BC Hydro has no inherent right to amend or modify its Reply Argument, has not sought BCUC's leave to do so, and further certainly has no right to attempt to do so in the context of the PACA process.***

### **1.7 Misrepresenting the Proper Scope**

BC Hydro's above-quoted comments also significantly misstate the proper scope of the proceeding. Any objection along those lines should have been cast as out of scope ***in the proceeding***, rather than in "the scope ***of the Application***" as BC Hydro has suggested. The latter never definitively defines the former. Neither the BCUC, nor other regulatory tribunals including the Canada Energy Regulator, consider an Application to provide the sole basis to establish the scope of a proceeding. Energy regulators frequently invite submissions from all parties before issuing specific guidance on the scope of a proceeding, which the BCUC notably did not do in this proceeding.

### **1.8 No Adequate Reference to Out of Scope Issues**

BC Hydro alludes to "a portion<sup>2</sup> of their [NMRG/BCCSC] Final Argument" that supposedly addresses out of scope issues yet fails to identify or reference any specific sentences, paragraphs or pages that contain the offending passages.

## **2. ABUSE OF PROCESS**

BC Hydro's utterly false and consequential allegations that five or more issues in NMRG/BCCSC Argument were out of scope amount to a clear abuse of process.

In [Behn v. Moulton Contracting Ltd.](#), 2013 SCC 26, both the British Columbia Supreme Court and Court of Appeal held that the impugned defences were an abuse of process, before the Supreme Court of Canada (the Court) heard the case and expanded the doctrine of abuse of process. "The Court confirmed that abuse of process has its roots in the

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<sup>2</sup> It must be noted in this context that BC Hydro alludes to "a portion" – singular. From that one must assume there are not different parts of NMRG/BCCSC Argument that supposedly stray into issues outside the scope of the proceeding.

NMRG and BCCSC Letter to BCUC  
Complaint Regarding BC Hydro's Improper  
Comments on PACA Applications  
Amend Net Metering Service Proceeding  
June 15, 2020

inherent and residual discretion of judges to prevent abuse of the court's process."<sup>3</sup> The Court reiterated prior findings that the doctrine of abuse of process:

“...engages the inherent power of the court to prevent misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.”<sup>4</sup>

In the matter now before the BCUC, BC Hydro's intentional collateral attack on NMRG and BCCSC through demonstrably untrue allegations made in a completely improper manner is clearly an abuse of process. Specifically, BC Hydro's conduct offends the BCUC's *Rules of Practice and Procedure* and *PACA Guidelines*.

Permitting that attack to stand would be manifestly unfair to NMRG and BCCSC, but also to Interveners in future BCUC proceedings, by creating very significant prejudice to their joint Final Argument as well as their respective PACA claims. BC Hydro's conduct in this regard has been the antithesis of the very *participant assistance* concept that is the foundational principle underlying PACA.

***Unless BC Hydro's impugned conduct is denounced and subject to a very significant financial deterrent (i.e. Additional and Special Costs), Interveners will have little reason to believe that this or future PACA processes will be conducted fairly. That outcome would directly affect Interveners, particularly new ad hoc groups, by creating unacceptable and unquantifiable risks to the already uncertain PACA funding required to make their participation possible. Those circumstances would very likely result in bringing the administration of justice into disrepute.***

### 3. EFFICIENT PROCESS

NMRG and BCCSC readily acknowledge that these submissions, which follow four days after their June 11, 2020 submissions, are not expressly provided for in the PACA Guidelines. However, the BCUC's *Rules* provide more than sufficient authority to accept these submissions in the rather exceptional circumstances.

Alternatively, NMRG and BCCSC would be well within their rights to request that this complaint be addressed in a new and separate proceeding. That is not their preference, as doing so would entail more time, effort and expense for all parties. The BCUC now possesses all the facts and submissions necessary to make its determinations and can do so most efficiently and expeditiously within its PACA deliberations and Order.

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<sup>3</sup> *Coulda, Shoulda? The SCC Expands the Abuse of Process Doctrine in Behn v. Moulton Contracting Ltd.*, Kosta Kalogiros, <https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/coulda-shoulda-scc-expands-abuse-process-doctrine-behn-v-moulton-contracting-ltd>

<sup>4</sup> *Ibid.*

**4. ADDITIONAL COSTS**

NMRG and BCSC have incurred additional costs arising from the need to have their joint Legal Counsel address BC Hydro's improper scope comments, the relationship to its Reply Argument, the abuse of process in the manner that was attempted and the appropriate process and relief to address that conduct. In light of the seriousness of an allegation of abuse of process, these submissions necessarily took additional time to carefully consider and prepare.

Additional Costs are calculated as follows:

Legal fees for 0.7 days X \$2,800 = \$1,960.00

Days		Daily Rate	GST	PST	Row Total
Proceeding	0.7	\$2,800	\$98.00	\$137.20	\$2,195.20
Preparation	N/A				\$0.00
Column Total	0.7				
Total ADDITIONAL COSTS FOR THESE SUBMISSIONS Funding Requested					\$2,195.20

**5. RELIEF SOUGHT**

In addition to or modification of the relief sought in NMRG and BCCSC's June 11, 2002 submissions, NMRG and BCCSC respectfully ask the BCUC to grant the following relief:

1. Specifically address the additional errors, omissions, misrepresentations and falsehoods related to the scope allegations contained in BC Hydro's June 4, 2020 letter and described above, in the pending PACA Order;
2. Award the full amount \$42,109 claimed by BCCSC and award the full amount \$137,006 claimed by NMRG, recognizing that almost all of BC Hydro's comments regarding NMRG's and BCCSC's PACA claims were false, misleading, inaccurate inappropriate or improper;
3. In light of the impropriety and abuse of process created by BC Hydro's false scope allegations and the significant lasting prejudice to both NMRG, BCCSC, their joint Legal Counsel and respective Case Managers, approve the full amounts of

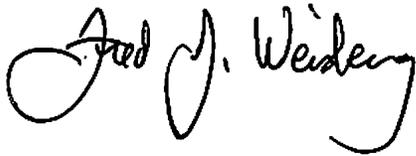
NMRG and BCCSC Letter to BCUC  
Complaint Regarding BC Hydro's Improper  
Comments on PACA Applications  
Amend Net Metering Service Proceeding  
June 15, 2020

NMRG's and BCCSC's PACA claims, Additional Costs and Special Costs expeditiously and without further process;<sup>5</sup>

4. Award Additional Costs for the legal work reflected in the above submissions and made necessary by BC Hydro's false scope allegations as they relate to its Reply Argument, requiring both NMRG and BCCSC to rebut, disprove and establish the impropriety of such comments, calculated as shown in the discussion above, in the amount of \$2,195.20; and
5. Award Special Costs as requested in NMRG and BCCSC's June 11, 2020 submissions, recognizing the additional discussion above regarding the impropriety of BC Hydro's false scope allegations, which if acted upon by the BCUC would be likely to reduce NMRG's and BCCSC's PACA claims resulting in significant financial harm to NMRG, BCCSC, their joint Legal Counsel and respective Case Managers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Yours truly,



Fred J. Weisberg  
Weisberg Law Corporation  
Counsel to  
Net Metering Ratepayers Group (NMRG)  
And  
British Columbia Community Solar Coalition (BCCSC)

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<sup>5</sup> The normal and expected process at this point in the proceeding and the PACA process would neither contemplate nor provide for any further procedural steps before PACA awards are determined.