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July 31, 2020

Sent via eFile

**NMRG PACA PROCESS COMPLAINT**  
**EXHIBIT A-3**

Mr. Fred J. Weisberg  
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Counsel to Net Metering Ratepayers Group  
and British Columbia Community Solar Coalition  
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North Vancouver, BC V7K 2B2  
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**Re: Net Metering Ratepayers Group and British Columbia Community Solar Coalition – Complaint Regarding BC Hydro’s Abuse of Process in Improper Comments on PACA Applications – Project No. 1599110 – Request for Reply Comment**

Dear Mr. Weisberg

In accordance with Order G-184-20 dated July 10, 2020, British Columbia Hydro and Power Authority provided comments on July 24, 2020 (Exhibit C1-1, copy attached) regarding the above complaint filed with the British Columbia Utilities Commission on June 15, 2020 by the Net Metering Ratepayers Group and the British Columbia Community Solar Coalition.

The British Columbia Utilities Commission hereby requests the Net Metering Ratepayers Group and British Columbia Community Solar Coalition to provide any reply comments by no later than **Friday, August 14, 2020**.

Sincerely,

*Original signed by:*

Marija Tresoglavic  
Acting Commission Secretary

HC/jo  
Enclosure

cc: British Columbia Hydro and Power Authority

**Fred James**

Chief Regulatory Officer

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July 24, 2020

Ms. Marija Tresoglavic  
Acting Commission Secretary and Manager  
Regulatory Support  
British Columbia Utilities Commission  
Suite 410, 900 Howe Street  
Vancouver, BC V6Z 2N3

Dear Ms. Tresoglavic:

**RE: Project No. 1599004**  
**British Columbia Utilities Commission (BCUC or Commission)**  
**British Columbia Hydro and Power Authority (BC Hydro)**  
**Application to amend Net Metering service Under RS1289**  
**Net Metering Ratepayers Group and British Columbia**  
**Community Solar Coalition Complaint Regarding BC Hydro's Abuse of**  
**Process and Improper Comments on PACA Applications**

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BC Hydro writes, in accordance with the BCUC Order No. G-184-20, to provide comments on the complaint (**Complaint**) filed with the BCUC on June 15, 2020 by the Net Metering Ratepayers Group (**NMRG**) and the British Columbia Community Solar Coalition (**BCCSC**), henceforth referred to as **NMRG/BCCSC**.

NMRG/BCCSC allege abuse of process by BC Hydro in our comments dated June 4, 2020 regarding Participant Assistance Cost Award (**PACA**) applications submitted to the Commission by NMRG/BCCSC in regard to costs incurred in the Application to Amend Net Metering Service under Rate Schedule 1289 proceeding (**Net Metering proceeding**).

In the Complaint, NMRG/BCCSC allege, among other things, that BC Hydro improperly used the comment process on PACA requests to make a "collateral attack" on NMRG/BCCSC's joint final argument in the Net Metering proceeding.

The relief sought by NMRG/BCCSC in respect of the Complaint is set forth in section 5 of the Complaint and includes requests for additional costs for the legal work required to defend NMRG/BCCSC's PACA requests, and "special costs" regarding the alleged impropriety of BC Hydro's comments.

## Response to Allegations by NMRG/BCCSC

BC Hydro submitted comments to the Commission on June 4, 2020 in relation to the PACA requests of NMRG/BCCSC. The Commission had, by email dated May 21, 2020, requested BC Hydro to comment on the PACA requests submitted by participants in the Net Metering proceeding, consistent with normal Commission practice.

BC Hydro's comments on the NMRG/BCCSC PACA requests do not amount to an abuse of process and are not in any way a "collateral attack" on the NMRG and BCCSC's joint final argument in the Net Metering proceeding.

BC Hydro's comments were directed to the fairness and reasonableness of NMRG/BCCSC's PACA requests as contemplated by the Commission's PACA Guidelines. In addition to comments regarding the disproportionate amount of PACA funding requested by NMRG/BCCSC, as compared to other PACA applicants for the Net Metering Proceeding, we made only the following comments:

- NMRG/BCCSC submitted a comparable number of IRs to BC Hydro in the proceeding as BCSEA, CEC and BCOAPO;
- a portion of NMRG/BCCSC's joint final argument dealt with matters BC Hydro considers as outside the scope of the application, and their final argument included a number of assertions of fact that were not supported by the record; and
- there appeared to be some overlap in activities performed by the representatives of NMRG and BCCSC.<sup>1</sup>

The NMRG/BCCSC Complaint dated June 15, 2020 takes issue with the second point above. Specifically, the NMRG/BCCSC Complaint says the following in section 1:

"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

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<sup>1</sup> BC Hydro comments on PACA requests dated June 4, 2020.

Argument included a number of assertions of fact that were not supported by the evidence on record for the proceeding.” (emphasis added).”

[italics and boldface are in the Complaint]

BC Hydro acknowledges that the impugned comments, quoted above, refer to the NMRG/BCCSC's final argument and also to BC Hydro's reply argument in the proceeding. The references related to arguments in the Net Metering proceeding were not intended to bolster BC Hydro's position on the Net Metering application, nor did they do so.

While there may be some overlap between the PACA comments and matters addressed in arguments in the Net Metering proceeding, this is due to the fact that there is overlap between the issues before the Commission arising from PACA requests and the issues before the Commission in the underlying proceeding. For example,

- arguments in the underlying proceeding will often address the scope of issues in the proceeding, and
- the extent to which a PACA applicant spent time in the proceeding on out-of-scope matters, resulting in an inefficient participation or unnecessary lengthening of the proceeding, may be addressed in the PACA process.

The impugned comments on NMRG/BCCSC's PACA requests only noted that these interveners devoted a significant portion of their joint final argument to several matters BC Hydro considered to be outside the scope of the application; the comments did not add anything to BC Hydro's arguments in the Net Metering proceeding nor were they intended to.

BC Hydro has not objected to NMRG/BCCSC receiving PACA awards. We maintain that NMRG/BCCSC should be awarded reasonable PACA funding. Our comments were made in a good faith effort to assist the Commission in making a decision on the amount of PACA awards. As noted, our comments on the combined PACA request of NMRG/BCCSC suggested that the large amount of the request could be, in part, the result of NMRG/BCCSC spending time in the proceeding on extraneous matters.

BC Hydro notes also that in this case the applications for PACA were submitted to the BCUC and BC Hydro was requested to submit comments on those requests before the BCUC had issued its final order regarding the Net Metering application.<sup>2</sup> As a result of that timeline, PACA applicants made submissions to the BCUC in regards to the value and efficiency of their participation in the Net Metering proceeding, and BC Hydro submitted comments on the same matters, while the Panel was deliberating on the Application. All parties including BC Hydro made their submissions in accordance with

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<sup>2</sup> The final order and decision on the Net Metering Application was issued on June 23, 2020.

the process in place. Far from any suggestion of abuse of process, BC Hydro submitted its comments within the process established by the Commission for reviewing PACA requests.

NMRG/BCCSC have also alleged impropriety because BC Hydro's comments on the PACA requested were not presented according to each of the considerations set forth in section 4.3 of the PACA Guidelines (referenced for convenience below) and employed criteria not specifically identified in section 4.3.<sup>3</sup> BC Hydro responds that there is no obligation on the utility to submit comments on participant PACA requests in any particular form, nor to address every one of the considerations set forth in section 4.3 of the PACA Guidelines, or any one of them. The utility is at liberty to present its comments in any form and to address whichever of the section 4.3 considerations it considers appropriate.

The above submissions demonstrate that BC Hydro made its comments in good faith, in accordance with the Commission's process and timetable for BC Hydro to submit comments on the PACA requests, and there was no abuse of process.

With respect to allegation of a "collateral attack" on the NMRG and BCCSC's joint final argument in the Net Metering proceeding, describing BC Hydro's comments as a "collateral attack" is legally incorrect. There has been no collateral attack.

As it may assist the Commission in its consideration of the Complaint's allegations in relation to abuse of process and collateral attack, in the Appendix A to this submission we provide summary reviews of the meanings of these concepts.

### **Response to Relief Requested by NMRG/BCCSC**

In terms of relief sought, NMRG/BCCSC request the Commission to award the full amount of their PACA requests, and also award additional costs for legal work to defend NMRG/BCCSC's PACA requests and "special costs" regarding the alleged impropriety of BC Hydro's comments.

With respect to the NMRG/BCCSC's request for award of the full amount of their PACA requests, BC Hydro's comments on the amount of the original PACA requests are contained in the June 4, 2020 submission.

With respect to the NMRG/BCCSC's requests for additional costs and special costs, such cost awards are not warranted as discussed below. First we provide a detailed summary of the Commission's PACA scheme in relation to determining the amount of a participant's cost award.

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<sup>3</sup> NMRG/BCCSC submission to the BCUC dated June 11, 2020 at pp. 3-4.

## **PACA Scheme**

The Commission's PACA Guidelines are established, by Order No. G-97-17, pursuant to section 118 of the *Utilities Commission Act (UCA)*.

Section 118(1) of the *UCA* provides as follows:

### **Participant costs**

**118** (1) The commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.

The following provisions of the PACA Guidelines are relevant to determining the amount of a participant's cost award and also to NMRG/BCCSC's requests for additional and special costs.

### **2.0 Cost award availability**

2.1 The Commission may award costs for participation in a proceeding under section 118 of the *Utilities Commission Act*.

2.3 The Commission may award costs for work completed after a proceeding is initiated and until the Commission issues a final order.

### **4.0 Criteria for a cost award**

4.1 For all proceedings for which a cost award is available, the Commission may determine the number of funding days, subject to a funding cap if established for the proceeding. The number of funding days represents typical funding for participation that meets the expectations of the Commission as determined by the criteria in Section 4.3.

4.3 In determining the amount of a participant's cost award, the Commission will consider the following:

- (a) Has the participant contributed to a better understanding by the Commission of the issues in the proceeding?
- (b) To what degree will the participant be affected by the outcome of the proceeding?
- (c) Are the costs incurred by the participant fair and reasonable?
- (d) Has the participant joined with other groups with similar interests to reduce costs?

(e) Has the participant made reasonable efforts to avoid conduct that would unnecessarily lengthen the duration of the proceeding, such as ensuring participation was not unduly repetitive?

(f) The funding day calculation for funding in accordance with Sections 4.1 and 4.2, if one is provided.

(g) Any other matters which the Commission determines appropriate in the circumstances.

The following points summarise the PACA scheme as it relates to the criteria for awarding PACA and the scope of costs covered by awards, and therefore also to a request for additional PACA funding and/or special costs for alleged reprehensible conduct:

- PACA is payment for “all or part of the costs of another participant in the proceeding” (*UCA*, s. 118(1), underlining added);
- Costs may be awarded “for work completed” within the time period “after a proceeding is initiated and until the Commission issues a final order” (*PACA Guidelines*, s. 2.3, underlining added); and
- The considerations articulated in s. 4.3 of the *PACA Guidelines* for determining the amount of a participant’s cost award are focused on the PACA applicant’s effectiveness<sup>4</sup>, efficiency<sup>5</sup> and conduct<sup>6</sup> in the proceeding.

While section 4.3(g) of the *PACA Guidelines* provides that in determining the amount of a cost award, the Commission may also consider “any other matters which the Commission determines appropriate in the circumstances”, there is no suggestion in the legislation or *PACA Guidelines* that a PACA award could be increased, in excess of the participant’s claimed costs for work completed during the underlying proceeding, on the basis of another participant’s conduct outside the underlying proceeding in the PACA comment process.

### **Request for Additional Costs and Special Costs**

NMRG/BCCSC request the Commission to award additional costs for the legal work required to defend NMRG/BCCSC’s PACA requests and “special costs” regarding the alleged impropriety of BC Hydro’s comments.

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<sup>4</sup> *PACA Guidelines*, s. 4.3, paragraphs (a) and (b).

<sup>5</sup> *PACA Guidelines*, s. 4.3, paragraphs (c) and (d).

<sup>6</sup> *PACA Guidelines*, s. 4.3, paragraph (e).

BC Hydro believes the requests for additional and special costs are unwarranted and should be denied.

BC Hydro's position on the request for additional costs is supported by a previous BCUC decision where the Commission has denied additional PACA funding in relation to a participant's efforts to defend their PACA application and also denied additional funding in relation to alleged impropriety of comments on PACA requests. BC Hydro refers the Commission to the Order No. F-10-19 Decision regarding the Commercial Energy Consumers Association of British Columbia (**CEC**) PACA application with respect to the Creative Energy Vancouver Platforms Inc.'s Application for a Certificate of Public Convenience and Necessity for Beatty-Expo Plants and Reorganization. In its reasons for the decision, the Commission stated at page 6:

As noted, the CEC has also requested they be granted an additional day of PACA funding for its consultant and its legal counsel in recognition of the time it claims was spent on the costs of its defense of its PACA Application. The Panel notes that Section 2.3 of the PACA Guidelines explicitly states that "the Commission may award costs for work completed after a proceeding is initiated and until the Commission issues a final order." Thus, the CEC's request is outside of the PACA Guidelines. While these are guidelines and exceptions could be made, the Panel is not persuaded they are warranted in this instance. In our view the utility has the right to question PACA applications and the relevance of the work done. In the rare circumstances where this occurs, it is the responsibility of the intervener to address the concerns that have been raised in a fulsome manner and because this is a billing matter, there is no justification to claim costs for doing so.

The Panel notes that the CEC has described the position taken by Creative Energy as an "aggressive attempted deterrent" potentially resulting in a negative impact on intervener participation. The Panel does not agree. BCUC, not the utility, is the final arbiter on such matters. As such it is up to the Panel to provide direction on matters related to participation and PACA in a fair and consistent manner.

In that case, the Commission denied PACA funding for the efforts of the participant to defend its PACA application, finding that the utility has the right to question PACA applications and it is the responsibility of the PACA applicant to address any concerns that have been raised in a fulsome manner. Also, viewing defense of a PACA application as a "billing matter" the Commission found that there is no justification to claim costs for doing so. The Commission also denied any relief associated with alleged impropriety of the utility's comments, noting that the utility has the right to question PACA applications and that the Commission, not the utility, is the arbiter on PACA awards.

July 24, 2020  
Ms. Marija Tresoglavic  
Acting Commission Secretary and Manager  
Regulatory Support  
British Columbia Utilities Commission  
Application to amend Net Metering service Under RS1289  
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Community Solar Coalition Complaint Regarding BC Hydro's Abuse of Process and  
Improper Comments on PACA Applications

As it may assist the Commission in its consideration of the Complaint's suggestion of "special costs", in Appendix A to this submission we provide a summary review of the meaning of "special costs" and the circumstances when the courts will consider awarding special costs.

BC Hydro reiterates its submission above that there has been no abuse of process that could warrant consideration of special costs.

For further information, please contact Chris Sandve at 604-974-4641 or by email at [bchydroregulatorygroup@bchydro.com](mailto:bchydroregulatorygroup@bchydro.com).

Yours sincerely,



Fred James  
Chief Regulatory Officer

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Enclosure

## “Collateral Attack”

A collateral attack is “an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment”: *Quinn v. British Columbia*, 2018 BCCA 320 at para. 76, citing *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594 at 599, as cited in *Garland v. Consumers’ Gas Co.*, 2004 SCC 25 at para. 71.

In *Garland v. Consumer’s Gas Co.* at para. 72, the Supreme Court of Canada identified the following hallmarks of a collateral attack case: “the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum.”

None of those hallmarks are present here. Clearly there is no Commission Order being challenged at all, let alone in another forum.

## Abuse of Process

The doctrine of abuse of process is a very broad and flexible mechanism to enable judges to prevent abuses of the court’s process. Citing the often-referenced authority of *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35, in *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5, the BCCA described the doctrine of “abuse of process” as follows:

[22] The doctrine of abuse of process is a very broad and flexible mechanism to enable judges to prevent abuses of the court’s process. In *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63](#), [2003] 3 S.C.R. 77, at para. [35](#), the Supreme Court of Canada adopted descriptions of the concept of abuse of process as proceedings “unfair to the point that they are contrary to the interest of justice” and “oppressive treatment”.

[23] The concept of abuse of process is used in a variety of contexts. For example, in *Toronto (City) v. C.U.P.E., Local 79*, it was used to prevent an attempt to relitigate an issue which

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had already been adjudicated upon in circumstances where the requirements of the doctrine of issue estoppel had not been met. ...

A review of “abuse of process” cases did not identify anything analogous to the allegations made by NMRG/BCCSC.

## Special Costs in Court

In the court context, the applicable court will have rules that govern assessment of costs in an action. For example, under the BC Supreme Court Rules, the general rule is that the amount of costs is based on the tariff set out in Appendix B of the Supreme Court Rules, plus disbursements.<sup>1</sup> The amount of costs typically does not cover the successful party’s actual legal fees.

Occasionally, if there has been reprehensible conduct in the course of the action, such as fraud, the court may order that “special costs” be paid to the successful party. Special costs are higher and approximate actual legal fees.<sup>2</sup>

The awarding of special costs is discretionary – even where the court has found a party engaged in abuse of process – it is only justified in exceptional circumstances. Whether conduct is such that it attracts special costs depends on the particular facts of each case; however, the B.C. courts have determined that special costs are only to be awarded in circumstances where there is evidence of improper motive, abuse of the court’s process, misleading the court, and/or persistent breaches of the rules of professional conduct and the rules of court that prejudiced the applicant.

The best summary of when the court will award special costs for abuse of its process is in *Glover v. Leakey*, 2017 BCSC 1287, as follows.

[20] In *Fullerton v. Matsqui* (1992), 74 B.C.L.R. (2d) 311 (B.C.C.A.) Cumming, J.A. on behalf of the majority, considered

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<sup>1</sup> <https://www.supremecourtbc.ca/sites/default/files/web/Costs-in-Supreme-Court.pdf>

<sup>2</sup> *Ibid.*

whether special costs should be ordered against a defendant who engaged in misconduct during the proceedings, by presenting evidence calculated to mislead the trial judge and jury.

[21] The court found that special costs were appropriate on the basis that the court must disassociate itself from some misconduct (at para. 23):

Special costs, or solicitor-and-client costs are therefore awarded when a court seeks to dissociate itself from some misconduct. Because the court is expressing its disapproval, the award must go beyond mere indemnity and enters the realm of punishment.

[22] In *Garcia v. Crestbrook Forest industries Ltd.* (1994), 1994 CanLII 2570 (BC CA), 9 B.C.L.R. (3d) 242 (B.C.C.A) Mr. Justice Lambert, writing for the court, determined that the threshold for awarding special costs is “reprehensible” conduct. In order to introduce clarity into the law of special costs by synthesizing the different variations on the standard of special costs award into a single standard, that of reprehensible conduct, he stated at para. 17:

[I]t is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible...the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[23] Lambert, J.A. recognized that the meaning of reprehensible conduct was quite broad. Thus, an order for special costs can only be justified in circumstances that are exceptional. He continued at paras. 23 and 25:

23 However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs...Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings

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themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

...

25 If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive, is in my opinion a combination which may well amount to reprehensible conduct sufficient to require an award of special costs.

[24] At paragraph 33, Lambert, J.A. determined that it is not necessary for the court to infer that a party had an improper motive in determining if special costs should be ordered against that party:

33 It is possible that an inference could be drawn ...that this appeal was brought for an improper motive, namely, to ensure, through the expense of the proceedings, that Mr. Garcia did not receive net compensation greater than Crestbrook would have been prepared to pay without proceedings, even though he was, in law, entitled to the higher amount which he would have been prepared to accept before trial. But I do not propose to draw that inference. The factors that I have mentioned, in combination with each other, constitute, in themselves, circumstances in connection with this appeal which are reprehensible in the sense of deserving reproof.

[underlining added]

[25] I reviewed the authorities in respect of special costs in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, [2013 BCSC 1352](#).

[26] I commented on *Garcia* at para. 37:

...*Garcia* emphasizes that the purpose of a special costs award is to chastise a litigant. By rebuking reprehensible conduct, the court punishes bad behaviour and deters it. It also serves to distance the court from the conduct at issue.

[27] I summarized the principles in the consideration of special costs at para. 73:

73 I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[underlining added]

[28] In *Hollander v. Mooney*, [2017 BCCA 238](#), Madam Justice MacKenzie, for the court, stated at para. 79: "Conduct that is an abuse of process is, by its nature, reprehensible and deserving of rebuke."

[29] However, whether conduct of a party is deserving of rebuke by an award of special costs depends upon the particular facts of each case, even where an abuse of process is

found. It is up to the court's discretion to award special costs; it is not automatic.

If the allegations made by NMRG/BCCSC were made in BC Supreme Court, BC Hydro's comments on the PACA request clearly would not amount to conduct deserving of the rebuke of an award of special costs against it.