AQ &R
Allevato Quail & Roy
BARRISTERS AND SOLICITORS

AQR file no. 19-045
Jim Quail
direct (604) 424-8633
email jquail@aqrlaw.ca

August 11, 2020

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC Canada V6Z 2N3

attention: Patrick Wruck, Commission Secretary

filed online

Dear Mr. Wruck:

Re: British Columbia Hydro and Power Authority F2020 to F2021 Revenue Requirements Application ~ Project No. 1598990
Exhibit A-38 – Request for Comments

These are the comments of the Movement of United Professionals (MoveUP) in response to the Commission's request in Exhibit A-38, regarding the impact of section 3 of Direction 8, including its impact in the context of a Commission order being made late in a test period.

MoveUP submits that the responses provided by BC Hydro in Exhibit B-60 are, in general, balanced and fair statements of the applicable legal principles. We agree that it may be useful to modify the general timing of Hydro's revenue requirements application cycle, and also that striving for efficiency in the regulatory process is desirable. On the latter point, however, MoveUP submits that the Commission should take the time that is necessary, through processes that are fully adequate and appropriate, to amass the record of evidence and argument that it considers necessary to carry out its mandate effectively and in the public interest. Efficiency is desirable but short-cuts may be seriously counterproductive. We agree with BC Hydro that the scale of the current proceeding reflects the fact that this was the first opportunity for a full-blown regulatory review of BC Hydro in a long time.

Beyond those general observations, our client's specific responses to the questions are as follows:

1. Given that it will likely be 17 to 18 months into the test period by the time the final decision is issued for this proceeding, does this timing limit the amount of expenditures that the Panel can disallow for recovery because section 3 of Direction

No. 8 requires the BCUC to "ensure" that the rates set for the test period "allow the authority to collect sufficient revenue in <u>each fiscal year</u> to enable the authority to achieve an annual rate of return on deemed equity that would yield a distributable surplus of $712 million"? [emphasis added]

In our submission, an excessively literal interpretation of section 3 could lead to an absurd result, where it would effectively negate the entire process of prudency review by the Commission: that is to say, if it were read to mean that regardless of the Authority's actual levels of expenditure, the Commission is duty-bound to ensure that BC Hydro retains sufficient revenues to satisfy the prescribed shareholder return, the regulator would be left with no jurisdiction to review those expenditures (including those already incurred at the time of the order setting rates) for prudency. This would negate the Commission's core statutory mandate to ensure that rates are just and reasonable.

With all respect, we submit that the Commission is "overthinking" the matter. We agree with BC Hydro's submissions to the effect that section 3 does not modify the regulatory task in a fundamental way. Its more narrow function is to stipulate that BC Hydro's right to an opportunity to earn a fair return is satisfied by an opportunity to earn $712 million annually.

The question may conflate the issues somewhat. Timing is not really relevant, legally-speaking, though it may have significant practical consequences. The Direction does not mean that the Commission must allow whatever BCH applies for, on theory it has to ensure there will be sufficient surplus revenue to deliver $712 million per annum to the shareholder. The process is that the Commission is to determine rates that should provide the necessary revenue to meet the prudent cost of delivering service plus $712 million.

BC Hydro has a right to the opportunity to earn that return after incurring the prudent costs of providing service to ratepayers through the test period. If Hydro has incurred imprudent expenses, or will do so over the remaining course of the test period, then it will place in jeopardy its real capacity to earn the stipulated return. That remains true regardless of the timing of the Commission's order approving rates for the test period.

2. Whether a final decision for this proceeding if issued earlier in the process would make a difference in the amount of expenditures that the Panel can disallow for recovery due to the requirement of section 3 of Direction No. 8.

No, for the reasons set out above, and the reasons provided by BC Hydro in Exhibit B-60.

3. Whether the timing of the decision is irrelevant, and the only consideration is that the approved level of expenditure and cost recovery would have provided the required return if it could have been implemented in a timely manner.

Yes, for the reasons set out above, and the reasons provided by BC Hydro in Exhibit B-60.

4. The common law notion of "regulatory compact" requires that a utility be provided with the opportunity to earn a reasonable return on invested capital. Is section 3 of Direction 8 simply a restatement of the regulatory compact, substituting a fixed return of $712 million for a "reasonable return," or does it afford BC Hydro some additional certainty regarding its return?

An alternate way of looking at section 3 is that it displaces that element of the regulatory compact (which, as a common law construct, is entirely subservient to legislated rules). In effect, section 3 of the *Utilities Commission Act* empowers the Lieutenant Governor in Council to substitute its judgment for that of the Commission regarding matters arising under the Act, and in this instance it has exercised that power by substituting the stipulated return, in the place of the operation of section 60 (1) (b) (ii) of the Act.

That piece of the equation is filled in by the Direction, but the rest remains intact in the hands of the Commission and, subject to that modification, the setting of just and equitable rates according to its best judgment remains within its exclusive jurisdiction.

5. If, pursuant to the rates set by the BCUC, BC Hydro fails to collect sufficient revenue to achieve the stipulated distributable surplus amount, does that mean that ratepayers must pay the deficiency in the subsequent test period? Why or why not? Conversely, if BC Hydro achieves a distributable surplus that is greater than the stipulated amount pursuant to the rates set by the BCUC, does that mean that BC Hydro must refund to ratepayers the excess surplus in the subsequent test period? Why or why not?

MoveUP agrees with BC Hydro's submissions on this point, and adds the following comment:

Once again, we submit that the Commission may be "overthinking" here. As with any regulated utility, the Commission's role is to set rates that on the evidence and in its best judgment meet operating and capital requirements, plus an opportunity to achieve an allowed return on equity for the test period, and the utility lives with that result; except that in this case the allowed ROE is stipulated by the Direction.

The course of actual events, including the decisions and conduct of the utility, may place the full achievement of its allowed ROE out of reach, or may not. This is not really different from the risk at any time that Hydro itself may find it difficult to live within the rates set by the Commission. The utility is not legally bound to refund a revenue surplus to ratepayers at the conclusion of a test period, by way of any automatic adjustment process. Rate-setting is prospective and the place to address alleged over- or under-recovery is at the

subsequent rate hearing, and the Commission has the power to determine the extent to which a revenue surplus in one test period will be applied to reduce rates in the next.

6. Aside from the fact that BC Hydro's annual return on deemed equity is a fixed dollar amount, whether section 3 of Direction No. 8 changes how the BCUC can regulate and set rates for the test period for BC Hydro compared to an investor owned utility.

No, for the reasons stated above and the reasons provided by BC Hydro in Exhibit B-60.

7. Certain events initiated by the BCUC, in the course of "regulating… the authority" could potentially give rise to an expenditure in F2020 or F2021 that is not anticipated in the revenue requirement. Examples of this include: a BCUC directed audit or review; an unanticipated hearing ordered by the BCUC; or an Administrative Penalty. What consideration, if any, should be given to the expenditures that arise from such an event? Does section 3 of Direction 8 require the panel to consider these when setting rates? In the case of an administrative penalty, section 109.5 of the Utilities Commission Act (UCA) states: "In setting rates for a public utility, the commission must not allow the public utility to recover from persons who receive or may receive service from the public utility the costs of paying an administrative penalty imposed under this Part." Does this section of the UCA require a different approach to penalties than other expenditures when considering section 3 of Direction 8?

MoveUP submits that:

(a) the Commission is a regulator, not an augurer. It should apply its best judgment as to reasonably foreseeable risks and costs and take them into account in setting rates. There are mechanisms available to utilities and the Commission to address major unforeseen developments after they arise; and

(b) the scheme of the UCA is that administrative penalties are eaten by the shareholder, not the ratepayer. Direction 8 does not exempt BC Hydro from the imposition of administrative penalties generally, or from section 109.5 in particular. However, this is where the next section of the Act comes into play:

> **109.6** (1) An administrative penalty constitutes a debt payable to the government by the person on whom the penalty is imposed.

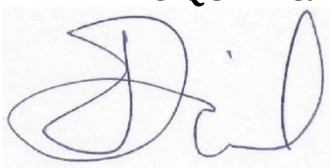
If an administrative penalty is imposed on BC Hydro, Hydro must withhold the sum from its dividend cheque to the government, and forward it, as a debt payment, to . . . *the government*. In the end result, in effect the public treasury must pay itself the penalty which

cannot be recovered from ratepayers. MoveUP leaves the question how this sleight of hand would be achieved to the government's accountants.

All of which is respectfully submitted.

Yours very truly,

ALLEVATO QUAIL & ROY



per **Jim Quail**
Barrister & Solicitor