

STIRLING LLP

Suite 1460 | 701 West Georgia Street
PO Box 10156 LCD Pacific Centre
Vancouver, BC V7Y 1E4

t. [604.674.3818](tel:604.674.3818)
f. [604.674.3819](tel:604.674.3819)



David A. Austin
d: 604.674.3824
daustin@stirlingllp.com

August 14, 2020

VIA EMAIL

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

Attention: Ms. Marija Tresoglavic, Acting Commission Secretary and Manager Regulatory Support

Dear Ms. Tresoglavic:

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

We are writing on behalf of the Clean Energy Association of B.C. ("CEABC") and its answers to the questions that the B.C. Utilities Commission ("BCUC") has posed in Exhibit A- 38 are set out below. These answers should be read in the context of the following observations:

- a) The CEABC assumes that any disallowance of an amount of an expenditure or the imposition of a penalty is the result of unsatisfactory management decision making. The proliferation of more than 30 deferral and regulatory accounts, with balances exceeding \$4 billion in deferred expenditures, has muffled an objective evaluation of management decisions in key areas of BC Hydro's ("BCH") operations. Deficiencies are smoothed out for ratemaking purposes. It is not clear to the CEABC how any disallowance or penalty is going to have a material impact on improving management decision making.
- b) If an expenditure is disallowed and it falls within the ambit of a deferral or regulatory account, any recording of the relevant amount will have to be unwound. The key word is "recording". If it is has not been recorded then the disallowed expenditure will have the same status as any other similar expenditure. CEABC has not found any case law that would prevent an unwinding of an expenditure and assumes the BCUC has the necessary authority to make this determination. Given the unique proliferation of BCH deferral and regulatory accounts as compared to utilities in other jurisdictions, it is not surprising the topic of deferral accounts has received little judicial review¹.
- c) CEABC's preference is that the BCUC provide guidance to BCH about expenditures and management practices. There has not been a thorough review of these expenditures and management practices for over a decade, during which time annual review requirements have risen to over \$5.3 billion and the balances in the deferral and regulatory accounts

¹ In BC Hydro vs Terasen Gas, 2004 BCCA 346, the operation of a deferral account was considered by the Courts but not in relation to a disallowance of an expenditure.

have risen from \$250 million at the beginning of F2008 to over \$4.8 billion at the end of F2019. BCH would benefit far more from guidance than from disallowances or penalties. If the next major Revenue Requirements application reveals that this guidance has not had the desired effect, then the imposition of penalties or disallowances should be reconsidered. CEABC's response to BCUC question 7 contains its views on penalties.

- d) As noted in the CEABC Final Argument, while BCH should pay attention to its expenditures, it should pay at least equal attention to increasing revenue through domestic electricity sales, which would also reduce provincial greenhouse gas emissions. Load has been flat while expenditures have been increasing and dumping any surplus electricity into the spot markets will not solve the problem.
- e) Given the most recent disclosures about the geotechnical and budgetary problems facing BCH because of its ill-advised decision to proceed with the construction of Site C, BCH faces a very uncertain financial future. The regulatory process has to become proactive and far less reactive by considering matters within a test period that can ameliorate material problems in future test periods.

CEABC Responses to BCUC Questions

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 each fiscal year 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]**

As noted by others including BCH, MoveUP and the B.C. Sustainable Energy Association the use of the word “ensure” does not guarantee a distributable surplus of \$712 million but gives BCH a reasonable opportunity to earn this amount. The establishment of deferral and regulatory accounts adds support to the concept that the \$712 million amount is a moving, and not a fixed, target. With respect to some of these accounts, deficits and surplus are carried forward with the expectation that they will eventually balance each other out in future test periods.

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.**

It has no impact whatsoever in the context that the distributable surplus of \$712 million is not guaranteed. BCH is given a reasonable opportunity to earn it, albeit as noted by BCH the window of opportunity to make any required adjustments narrows as the amount of time remaining in a test period declines.

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, and please see the CEABC's response to question #2. The CEABC agrees with BCH's assessment that BCH's return to full regulation caused an increase in the length of the regulatory review period. In addition, it is possible to reduce this amount of time when a regular cycle of proceedings is established. However, the CEABC wishes to add this outcome will

depend on the maintenance of a certain level of normality in BCH's business. For example, by directives or other means, BCH's shareholder could materially alter this normality or it could be altered by the financial impacts of Site C.

CEABC agrees with MoveUP's view that "Efficiency is desirable but short-cuts may be seriously counter-productive."

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?**

It is a restatement of the regulatory compact as modified by the substitution of a return of \$712 million and does not afford BCH some additional certainty.

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 believes 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?**

It depends on whether the positive or negative miss in revenue is the subject of a deferral or regulatory account. If the account provides for the carry forward of deficits and surpluses and it does not balance out over time, ratepayers will be required to pay or receive the accrued differences in later test periods.

For positive or negative misses in revenue that aren't otherwise related to a deferral or regulatory account, BCH is not required to refund or collect them in future test periods. This decision is at the discretion of the BCUC.

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.**

Subject to the CEABC's comments about deferral and regulatory accounts, there is no difference. Each has a reasonable opportunity to earn their respective return.

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?**

Material expenditures resulting from events initiated by the BCUC and not anticipated in a revenue requirement application can be dealt with on an ad hoc basis by BCH. For example by

making a supplemental application to the BCUC. Non-material expenditures can be dealt with in the same manner that BCH normally uses to manage increases or decreases in revenue and expenditures. By making adjustments as the conditions change e.g. increasing or decreasing expenditures without crippling the operation of the business or attempting to increase revenues.

The use of administrative penalties is a matter of substance and not form. As noted by MoveUP, the penalty accrues to the Government. The money moves from the shareholder side of the Government pocket to the penalty collection side of the same Government pocket.

All of which is respectfully submitted.

Yours truly,

STIRLING LLP on behalf of the Clean Energy Association of B.C.



per David A. Austin*

**a Law Corporation*

DAA/rr