

14 August 2020

**VIA E-FILING**

Marija Tresoglavic  
Acting Commission Secretary  
BC Utilities Commission  
6th Floor 900 Howe Street  
Vancouver, BC V6Z 2N3



Reply to: Leigha Worth  
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Our File: 7500.120

Dear Ms. Tresoglavic:

**Re: British Columbia Hydro and Power Authority F2020 to F2021 Revenue Requirements Application ~ Project No. 1598990**

Please note that Ms. Mis and I continue to act on behalf of the residential ratepayer and BCUC intervener group known in this regulatory proceeding as BCOAPO. In accordance with the instructions from the Commission in A-38, we file this one submission on behalf of BCOAPO et al. in response to the July 15, 2020 questions posed by this Commission Panel (Exhibit A-38) and the submissions requested by the Panel on July 6, 2020 (Exhibit A-37).

**BCOAPO's SUBMISSIONS REGARDING EXHIBIT A-37**

As stated above, this portion of our submission is offered in response to the Commission's July 6<sup>th</sup> request for submissions on the following four questions relating to BC Hydro's next RRA:

- 1. Forgoing a full cost of service review for F2022. This would provide enough time for BC Hydro to prepare a comprehensive, timely application for F2023.**

Our clients strongly support BC Hydro's recent return to full cost of service regulation after what was, in our submission, an overly long hiatus. That does not mean that our clients are not willing to entertain a departure from that norm when circumstances warrant it.

While we would not expect, in the normal course, for a subsequent RRA process to take nearly as long as this one has. It is our view that the extra time we have spent in this RRA hearing will pay dividends in the next RRA review: we have kicked the utility's tires thoroughly here and that will serve to limit the need to delve into those same issues or limit the necessary detail and scope of some lines of inquiry. Because we are at this stage of the regulatory process so far into the test period with a decision not yet forthcoming, BCOAPO recognizes the need to bow to reality and consider supporting some limited departure from normal practice in order to allow for a necessary reset.

The suggestion in A-37, that BCH's F2022 not be subject to a full cost of service review makes sense but for us, the devil is in the details. We are content to provide some preliminary comments on those details in answer to question 2.

**2. Rates for F2022 - the “Gap Year” - can be set, upon application by BC Hydro, based on some other mechanism, such as an inflation factor applied to F2020 rates or costs.**

Having had the benefit of reviewing BC Hydro’s submission on this point before drafting our response, we are in a position to minimize our submissions on this point somewhat by agreeing with the utility’s position that, while an inflation escalator might be appropriate to set some aspects of its rates, those situations are limited as many of the changes in its costs are not tied to inflation. Our clients are not at all comfortable with the prospect of a utility of this size having its entire revenue requirement set on the basis of values not tied to the forecast changes in their actual costs, even with the availability in some cases of deferral accounts to lessen the impact of an improperly calibrated revenue requirement. This represents too great a risk to the utility and its ratepayers in the absence of compelling evidence that it is both necessary and the only option reasonably available.

We are instead supporting BC Hydro’s hybrid solution: a limited cost of service approach focusing on incremental requirements to ensure they are calibrated properly, leaving the remainder of its costs to be calculated by an escalator tied to a value normally linked to its forecast growth (or contraction) provided there is sufficient evidence of a relationship between the proposed escalator and the activity it is being applied to. In our submission, BC Hydro’s compromise facilitates interested parties engaging in a far simpler regulatory review than would otherwise be the case while diminishing the risks to the utility and its stakeholders.

**3. Depending upon the outcome of the Performance Based Ratemaking (PBR) process, F2023 could serve as the base year for future PBR years. If so, an application for the specifics of the PBR rate setting mechanism for future years (i.e. F2024 onward) could be filed separately from the F2023 RRA.**

BCOAPO has, in our many COVID-related submissions this spring and summer, already commented on the myriad of ways this pandemic has and continues to cause our province, industries, and residents significant economic uncertainties and instability. Our submission in response to question 3 not only acknowledges this obvious fact but takes into consideration our evolving understanding of what the future might hold. After a brief, shining moment when reputable epidemiological experts were saying that, while nothing was guaranteed, there was a good chance we would have a vaccine in a year or so things changed. Now, the expert are being far more conservative, instead saying a fully effective vaccine is, on the balance of probabilities, farther away than 1 year in the future and that we cannot even necessarily expect a fully effective vaccine if at all. The science is changing from one day to the next but there does seem to be a significant school of thought that COVID’s features make it a prime candidate to become a continuing fact of life, like the flu. So, we could be free of this plague in less than a year. Or protected somewhat from its worst depredations in that same timeframe. Or it could take much longer to find a safe and effective (either wholly or partially) vaccine. Or we could be at the threshold of an entirely new human experience where our population is subject to repeated waves of infection.

We just do not know and therein lies the issue at the heart of our response to this question.

We, like CEC, submit that “...PBR base years should be generally reflective of ‘average’ costs and expenditures, and the PBR itself is most appropriate when stable and similar circumstances are anticipated over the term and can be directly related to the base year.” (Exhibit C9-18, page

7) and at this point we have no degree of comfort in the necessary assumption that F2023 is far enough out, particularly given how long ahead of time BCH must prepare its application, that it will be anything close to stable or representative of the conditions we might expect over the course of a PBR.

Instead, in deference to the level and scope of uncertainties we are currently operating under, including whether a PBR is at all appropriate for BCH, our position is that we should forgo discussion on this detail until a later date.

- 4. In a cost of service regime, if it is considered in the interests of regulatory efficiency and if it doesn't cause material delay in the filing of the F2023 RRA, the F2023 RRA could be combined with one or more additional test years – i.e. F2023–F2024 or even F2023–F2025.**

BCOAPO does not see any reason why the RRA test period could not be 2 or even 3 years in a continuing cost of service regulation scheme, *provided the evidence shows BC Hydro's application manages the risks associated with the length of the test period properly.*

However, because we are still dealing with this RRA and have yet to see what the results of BCH's F2022 RRA will be, it seems premature to deal with this issue now. Instead, we again suggest that we forgo further discussion on this issue until a later date.

#### **BCOAPO'S SUBMISSIONS REGARDING EXHIBIT A-38**

- 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]**

BCOAPO again agrees with BC Hydro's position. We submit that section 3 of Direction No. 8 should be interpreted within the broader scheme of the *Utilities Commission Act*, the common law and the regulatory compact. Doing so yields an interpretation that the utility is to be given *the opportunity* to earn a fair return but that this return, whether a specific figure or not, is not guaranteed. Further supporting this balanced approach is the fact that reading this provision of Direction 8 as an absolute requirement could conceivably yield a perverse result in some circumstances. Our clients do not accept that our legislators intended that the Commission could be obliged to facilitate a certain minimum return on deemed equity based on evidence that clearly demonstrates the utility or its actors are acting in a fraudulent, imprudent, or otherwise unsupportable manner

As such, it is BCOAPO's view that section 3 of Direction No. 8 does not limit the Commission's authority to review expenditures and to disallow recovery of unreasonable or imprudent costs no matter when in the test years a decision is ultimately made whether that yields a distributable surplus of \$712M or not. As long as the opportunity for that return is there, then we submit this condition is satisfied.

- 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.**

For the reasons outlined above, we submit that section 3 of Direction No. 8 does not limit the Commission's authority to disallow recovery of expenditures regardless of the timing of the Commission's final decision. In the absence of anything in the statutes, regulations, or applicable directions, we do not see any limit to the amount of expenditures that can then be disallowed.

Although the Commission's statutory mandate to review BC Hydro's forecast revenue requirements is the same irrespective of how much of the test period may have passed, BCOAPO agrees with BC Hydro that a decision coming late in the test period may have certain unavoidable practical consequences. BCOAPO supports BC Hydro's submission that earlier filing dates for revenue requirements applications and more expeditious proceedings could avoid those negative practical implications of a decision coming late in a test period. However, this cannot be the only factor considered when determining the timing of filings or whether the Commission should disallow recovery for certain expenses.

- 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.**

We agree with BC Hydro's response to questions 2 and 3: the law is generally applied in the same manner regardless of the timing of the decision despite the potential practical challenges associated with a decision coming late in the test period.

- 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?**

BCOAPO's response to this question is that the referenced section only requires the BCUC to provide BC Hydro a reasonable opportunity to earn a return of \$712 million in each year of the Test Period, not an unqualified guarantee. This section specifies that \$712 million is deemed to be a fair return that could satisfy BC Hydro's right to an opportunity to earn a reasonable return but a legal interpretation of this section as outlined above does not afford BC Hydro a guarantee of that return.

- 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?**

As regulatory practitioners, we are familiar with the caselaw cited by BC Hydro in its submission on this point that prohibits retroactive ratemaking, *namely ATCO Gas & Pipelines Ltd. v. Alberta*

(*Energy & Utilities Board*), 2006 SCC 4. We agree that ATCO, as relied upon by BC Hydro, accurately reflects the current state of the law on that one point.

BCOAPO agrees with BC Hydro that, should the utility fall short of its target return despite rates having been set to allow it the opportunity to achieve that result, the utility cannot then go back to ratepayers and collect that shortfall.

**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.**

BCOAPO submits that, aside from the fact section 3 of Direction No. 8 requires the BCUC to provide BC Hydro a reasonable opportunity to earn a return of \$712 million in each year of the test period, the BCUC has the same power to regulate and set rates for BC Hydro as it would when dealing with an investor-owned utility.

**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?**

BCOAPO agrees with BC Hydro’s response to question 7, that Section 3 of Direction No. 8 should not affect the BCUC’s approach in the examples listed in this question. BCOAPO’s position is that, when addressing major unforeseen costs or administrative penalties, the BCUC should apply the established legal rules and principles.

In the specific case of administrative penalties, we adopt the submissions of MoveUP: penalties ordered against a utility cannot then be recovered from ratepayers. However, as MoveUp correctly noted in their response, the effect of section 109.6 of the UCA is that if an administrative penalty is imposed on BC Hydro the government must pay itself.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sincerely,  
**BC PUBLIC INTEREST ADVOCACY CENTRE**

*Original on file signed by:*

Leigha Worth

*Original on file signed by:*

Irina Mis

Executive Director | General Counsel

Staff Lawyer