

Fasken Martineau DuMoulin LLP  
Barristers and Solicitors  
Patent and Trade-mark Agents

550 Burrard Street, Suite 2900  
Vancouver, British Columbia V6C 0A3  
Canada

T +1 604 631 3131  
+1 866 635 3131  
F +1 604 631 3232  
fasken.com

August 1, 2019  
File No.: 301539.00016/15275

**Christopher R. Bystrom**  
Direct +1 604 631 4715  
Facsimile +1 604 632 4715  
cbystrom@fasken.com

**By Electronic Filing**

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

**Attention: Mr. Patrick Wruck,  
Commission Secretary and Manager, Regulatory Support**

Dear Sirs/ Mesdames:

**Re: British Columbia Hydro and Power Authority (BC Hydro)  
Review of the Regulatory Oversight of Capital Expenditures and Projects  
Project No. 1598877 - Final Argument / Book of Authorities**

In accordance with the Regulatory Timetable set out for this proceeding by Order G-63-19, we enclose for filing BC Hydro's Final Argument and a book of authorities, with the cases and textbook authority cited therein.

Yours truly,

**FASKEN MARTINEAU DuMOULIN LLP**

*[Original signed by Christopher Bystrom]*

Christopher R. Bystrom

CRB/jr  
Encl.

**British Columbia Utilities Commission**

**British Columbia Hydro and Power Authority Review of the  
Regulatory Oversight of Capital Expenditures and Projects ~  
Project No. 1598877**

**Final Argument  
of  
British Columbia Hydro and Power Authority**

**August 1, 2019**

# Table of Contents

PART ONE: INTRODUCTION AND OVERVIEW .....	5
A. Approval of 2018 Guidelines is the Appropriate Outcome of this Proceeding .....	5
B. Summary of Key Process Steps in the Proceeding .....	8
C. Summary Overview of BC Hydro’s Revised Proposal and 2018 Guidelines .....	11
(a) Background on BC Hydro’s Capital Investments .....	11
(b) Appropriate Scope of Review in Revenue Requirements Applications .....	12
(c) Guidelines for Major Project Applications .....	15
(d) Review of Capital Investments that are a Part of Programs .....	17
(e) Review of Projects Linked to Strategies, Plans and Studies .....	18
(f) Clarity on Compliance Reporting .....	19
(g) Form and Content of Revenue Requirements and Major Project Filings .....	20
(h) 2018 Guidelines will Facilitate the Continued Fair and Efficient Review of BC Hydro’s Capital Investments .....	20
D. Outline of Remainder of Submission .....	20
PART TWO: TOPICS RELATED TO BC HYDRO’S PROPOSED 2018 GUIDELINES .....	21
A. Nature and Benefits of Guidelines .....	23
B. Review of Capital Investments Prior to Implementation .....	26
(a) Major Project Filings are the Primary Way for the BCUC to Review Projects Prior to Implementation .....	27
(b) Revenue Requirements Applications are the Place to Review the Balance of Capital Investments .....	29
(c) Integrated Resource Plan Informs Review of Capital .....	32
C. Review of Projects After Implementation (Prudence) .....	34
D. Proposed Major Project Thresholds Reflect a Balanced Approach .....	38
(a) 2010 Guidelines a Suitable Foundation for Proposed Thresholds .....	38
(b) Proposed Major Projects Thresholds Align with BC Hydro’s Current Planning Processes, Increase Clarity and Ease of Use .....	39
(c) Proposed Thresholds will Continue to Capture Significant Projects .....	40
(d) Absolute Values for Thresholds are Beneficial .....	41

(e)	BCUC Can Direct that a CPCN is Required for Other Projects due to Public Interest Considerations .....	42
(f)	Definition of Extension is Broad and Consistent with UCA.....	43
(g)	Commitment to file 44.2 Applications Ensures All Major Projects will be Reviewed .....	44
E.	Enhancements to Content of Revenue Requirements Applications .....	45
F.	Guidelines Reflect Appropriate BCUC Review of Programs.....	47
(a)	Nature of Programs.....	48
(b)	BCUC Review of Programs of Projects .....	48
(c)	BCUC Review of Recurring Work Programs .....	50
(d)	CPCN-Like Review of Programs would not be Efficient or Effective .....	50
G.	Guidelines Reflect Appropriate BCUC Review of Projects Linked to Strategies, Plans and Studies.....	52
(a)	Nature of Strategies, Plans and Studies.....	52
(b)	Review of Projects Linked to Strategies, Plans and Studies.....	53
(c)	Requiring Approval of Strategies, Plans and Studies Would not be Appropriate.....	54
H.	Assessing the Adequacy of Consultation .....	56
I.	Guidelines Reflect Appropriate Review of Information Technology Capital .....	58
J.	Guidelines Provide Clarity on Role of the Annual Report .....	60
K.	Guidelines on Project Compliance Reports .....	61
(a)	Periodic Project Progress Reports.....	62
(b)	Project Final Report (or Project Completion and Evaluation Report (PCER)) .....	63
	PART THREE: CEC’S PROPOSAL SHOULD BE REJECTED .....	64
A.	Introduction to BC Hydro’s Rebuttal to CEC’s Proposal.....	64
B.	The BCUC’s Existing Regulatory Processes Already Facilitate Effective Oversight .....	66
(a)	Existing Processes Facilitate Effective Review .....	67
(b)	Existing Processes Facilitate Gathering of Information .....	68
(c)	Existing Processes Facilitate Review of Performance Information.....	69
(d)	Existing Processes Facilitate Prudence Reviews .....	69
(e)	Existing Processes Facilitate Early and Proactive Review .....	71
(f)	Increase in Regulatory Process Not Justified .....	72
C.	The CEC’s Proposal Would Interfere with BC Hydro’s Management of its Capital.....	76
(a)	CEC’s Proposal Aims to Put BCUC in the Seat of Management .....	76
(b)	CEC’s Proposal Interferes with Utility Management Contrary to Court of Appeal Decision ..	76

(c)	Cost-Effective is a Distinct Concept from Prudence .....	80
(d)	CEC’s Proposal is about Cost Control, which is a Function of Utility Management.....	81
D.	CEC’s Proposal Would Lead to Inferior Asset Management, Capital Planning And Capital Delivery Approaches. ....	83
(a)	BC Hydro’s has Well-Established and Well-Performing Practices for the Planning and Delivery of Capital Investments .....	84
(b)	The CEC’s Approach Would Result in Inferior Results .....	86
E.	CEC’s Proposal Should be Rejected.....	90
PART FOUR: CONCLUSION .....		91

## **PART ONE: INTRODUCTION AND OVERVIEW**

### **A. Approval of 2018 Guidelines is the Appropriate Outcome of this Proceeding**

1. In this proceeding, BC Hydro is seeking approval of the 2018 Capital Filing Guidelines (the “2018 Guidelines”) in Appendix B of its Revised Proposal.<sup>1</sup> At the outset of this proceeding, the BCUC identified that a potential outcome of this proceeding could be an approved set of capital filing guidelines for BC Hydro.<sup>2</sup> In BC Hydro’s submission, approval of a set of capital filing guidelines is indeed the appropriate outcome.

2. The size of BC Hydro’s capital portfolio, and the importance of proceeding with needed investments in a timely manner, underscores the need for efficient and effective regulatory oversight over BC Hydro’s capital investments. Over the past decade, BC Hydro has invested billions of dollars to safely provide reliable, affordable, clean electricity throughout B.C. BC Hydro’s electricity system was largely built in the 1960s, 1970s and 1980s, and B.C.’s population and economy continue to grow. BC Hydro expects to invest over \$2 billion annually over the next ten years to upgrade and maintain aging assets and build new infrastructure so that its customers continue to receive reliable and clean electricity. To ensure economic and social benefits for ratepayers, BC Hydro manages its capital portfolio with an emphasis on cost consciousness, respect for the environment and communities in which it operates, and strengthening its relationships with Indigenous communities.<sup>3</sup>

3. The BCUC currently oversees BC Hydro’s capital investments in a manner consistent with BC Hydro’s 2010 Capital Filing Guidelines (the “2010 Guidelines”). The 2010 Guidelines were created and filed in response to Direction 31 of the BCUC’s Decision concerning BC Hydro’s 2008 Long-Term Acquisition Plan.<sup>4</sup> BC Hydro held two workshops with interveners

---

<sup>1</sup> Exhibit B-7.

<sup>2</sup> Exhibit A-2, Appendix B, p. 1.

<sup>3</sup> Exhibit B-7, Revised Proposal, p. 1.

<sup>4</sup> Exhibit B-4, BCSEA IR 1.6.1.

related to the development of the 2010 Guidelines,<sup>5</sup> but there was no BCUC Order approving the 2010 Guidelines.<sup>6</sup>

4. BC Hydro's proposed 2018 Guidelines are designed to update, expand and replace the 2010 Guidelines. The 2018 Guidelines expand the scope of the 2010 Guidelines to reflect the review of capital spending through revenue requirements applications and compliance reporting, as well as update the major project filing thresholds to align with how BC Hydro plans and manages its capital investments today.<sup>7</sup> The 2018 Guidelines reflect the following for the efficient and effective oversight over BC Hydro's capital investments:

- **Effective Review of Capital Prior to and After Implementation:** The 2018 Guidelines contemplate that the BCUC can exercise oversight over capital investments prior to implementation through the review of major project filings (under section 44.2 or sections 45-46 of the *Utilities Commission Act* ("UCA")) and through revenue requirements applications when setting rates (under section 58-61 of the UCA). Together with the review of the Integrated Resource Plan ("IRP") under section 44.1 of the UCA, these processes provide ample opportunity for oversight over BC Hydro's capital investments in advance of implementation. This prospective review is coupled with the BCUC's power to review capital investments for prudence post implementation. Together, the prospective and retrospective review of capital investments in major project, revenue requirement and IRP proceedings gives the BCUC effective oversight over BC Hydro's capital investments.
- **Major Project Thresholds Capture Significant Projects:** The 2018 Guidelines set major project thresholds, including a lower threshold for Information Technology ("IT") projects, that indicate when a Certificate Public Convenience and Necessity ("CPCN") for significant extension projects is required. The thresholds

---

<sup>5</sup> Exhibit B-16, BCUC IR 2.18.1.

<sup>6</sup> Exhibit B-4, BCSEA IR 1.6.1.

<sup>7</sup> Exhibit B-7.

appropriately balance oversight and efficiency, while recognizing that the BCUC always retains discretion to direct that a CPCN is required for extension projects below the thresholds, such as projects that may have a significant public interest component.

- **Commitment to File 44.2 Applications Ensures All Major Projects will be Reviewed:** The 2018 Guidelines document BC Hydro's commitment to file for section 44.2 acceptance of non-extension projects that exceed the major project thresholds. This ensures that the BCUC conducts a detailed, public interest review of all projects above the thresholds.
- **Information in Revenue Requirements Applications will Facilitate Review:** The 2018 Guidelines document the key information on capital investments that BC Hydro is to provide in its revenue requirements applications. Combined with the opportunity through the information request process to gather more detailed information on specific issues and projects, the BCUC can be confident that it will have the information needed to conduct oversight over BC Hydro's capital investments through the revenue requirement process.
- **Compliance Reporting Will be Enhanced:** The 2018 Guidelines provide clarity on the timing and content of BC Hydro's Annual Reports and project-specific compliance reports to the BCUC.

5. The rationale for the proposed 2018 Guidelines is set out in detail in BC Hydro's Revised Proposal, an overview of which is provided in Part One, Section C below. BC Hydro submits that approval of the 2018 Guidelines will:

- Promote an effective and efficient review of BC Hydro's capital expenditures and projects;



- Clarify the nature of the BCUC’s oversight over BC Hydro’s capital expenditures and projects in revenue requirements applications, major project applications, and compliance reports;
- Provide guidance to BC Hydro with respect to the information required for revenue requirements applications, when a Certificate of Public Convenience and Necessity (“CPCN”) is required, and the timing of compliance reports; and
- Document BC Hydro’s commitment to file section 44.2 applications for major projects that are not extensions.

6. A draft of the Order sought by BC Hydro is included as Appendix F of BC Hydro’s Revised Proposal.<sup>8</sup>

## **B. Summary of Key Process Steps in the Proceeding**

7. In this section, BC Hydro provides an overview of the key process steps since the proceeding was established.

8. The BCUC established this proceeding in Order G-58-16 dated May 3, 2016, to review the regulatory oversight of BC Hydro’s capital expenditures and projects.<sup>9</sup> Seven parties registered as interveners in the proceeding: BC Sustainable Energy Association and Sierra Club (“BCSEA”); British Columbia Old Age Pensioners’ Organization et al (“BCOAPO”); Commercial Energy Consumers Association of British Columbia (“CEC”); the Movement of United Professionals (“MoveUP”); Clean Energy Association of BC (“CEBC”); Ilse Leis; and the Association of Major Power Customers of British Columbia (“AMPC”).

9. On May 10, 2016, the BCUC set out a proposed scope of the proceeding in Appendix B of Order G-63-16.<sup>10</sup> As set out in the scoping document, one possible outcome of this

---

<sup>8</sup> Exhibit B-7.

<sup>9</sup> Exhibit A-1.

<sup>10</sup> Exhibit A-2.

proceeding is BCUC-approved capital filing guidelines. The scoping document identifies four items within scope, as follows (and as further described in Appendix B of Order G-63-16):

- **Item 1:** The scope, timing, and process for the Commission's review of BC Hydro's capital expenditures and projects. This includes consideration of the appropriateness of such reviews as a component of various applications and filings BC Hydro makes with the Commission.
- **Item 2:** The appropriateness of BC Hydro's 2010 Capital Project Filing Guidelines for IT capital expenditures and projects or propose separate IT capital project filing guidelines.
- **Item 3:** The appropriateness of expenditure thresholds contained in BC Hydro's 2010 Capital Project Filing Guidelines.
- **Item 4:** The circumstances under which it is appropriate for BC Hydro to file an application pursuant to section 46(1) of the UCA versus section 44(2) of the UCA.

10. In Order G-174-16, dated November 30, 2016, the BCUC determined that the scope of the proceeding was to remain as outlined in Appendix B to Order G-63-16, subject to review at the next procedural conference. The BCUC notes at pages 2 of 4 of the Reasons for Decision that there was general consensus amongst the parties that the scope set out by the BCUC remains appropriate provided that it is flexible and parties can add to the scope, if warranted during the process.<sup>11</sup>

11. Pursuant to the regulatory process and timetable set by the BCUC in Order G-59-18, on April 3, 2018, BC Hydro filed its Initial Proposal and Proposed Capital Filing Guidelines with the BCUC.<sup>12</sup> In the Initial Proposal, BC Hydro addressed the items within the scope of the proceeding,<sup>13</sup> and made the case for a set of guidelines reflective of BC Hydro's capital

---

<sup>11</sup> Exhibit A-9.

<sup>12</sup> Exhibit A-10.

<sup>13</sup> BC Hydro included as Appendix A to the Initial Proposal a Table of Concordance, which identifies where in the proposal the issues raised in the scoping document are addressed.

investment and planning processes. The proposed guidelines expand the scope of BC Hydro's 2010 Guidelines to reflect the review of capital spending through revenue requirements applications and compliance reporting, and update the major project filing thresholds to align with how BC Hydro plans and manages its capital investments today.<sup>14</sup>

12. On April 24, 2018, BC Hydro received technical and clarifying questions from the BCUC and interveners, and provided responses to those questions on May 18, 2018.<sup>15</sup>

13. On May 23, 2018, BC Hydro led a transcribed workshop ("Workshop") to explain and provide further clarity on the proposed 2018 Guidelines and to get feedback from the BCUC and interveners on the Initial Proposal and the content of the 2018 Guidelines.<sup>16</sup> Appendix G of Exhibit B-7 provides a summary of the questions and topics raised in the Workshop. On June 1, 2018, BC Hydro filed: (i) the undertaking request from the Workshop to provide the number and description of additional projects that would be subject to a major project filing at lower thresholds; and (ii) the Capital Investment Guide and Corporate Risk Matrix (both of which were requested by the CEC).<sup>17</sup>

14. On June 13, 2018, BC Hydro filed its Revised Proposal, replacing the Initial Proposal. BC Hydro considered the topics raised in both the technical and clarifying questions received from the BCUC and interveners and at the Workshop. BC Hydro made a number of changes to its filing to reflect the feedback it received.<sup>18</sup> BC Hydro also filed a blacklined version of the proposal, which was marked Exhibit B-7-1. In the Revised Proposal, BC Hydro set out its request for approval of the 2018 Guidelines.

15. On November 5, 2018, the CEC filed intervenor evidence prepared by Mr. David Craig<sup>19</sup> and Mr. Scott Thomson.<sup>20</sup> The CEC's evidence set out what it believes is the appropriate information the BCUC needs to oversee BC Hydro's capital investments, and proposed an

---

<sup>14</sup> Exhibit B-3.

<sup>15</sup> Exhibit B-4 and Exhibit B-4-1.

<sup>16</sup> Exhibit B-5; Transcript Vol. 2.

<sup>17</sup> Exhibit B-6.

<sup>18</sup> For examples of these changes, see: Exhibit B-7, Revised Proposal, section 1.3.

<sup>19</sup> Exhibit C3-10.

<sup>20</sup> Exhibit C3-11.

Annual Capital Report where this information would be filed. On December 10, 2018, the CEC submitted its responses to information requests from the BCUC, BC Hydro and interveners.<sup>21</sup>

16. On February 15, 2019, BC Hydro filed Rebuttal Evidence,<sup>22</sup> including evidence of Dr. Carpenter and Dr. Brown of the Brattle Group.<sup>23</sup> In its Rebuttal Evidence, BC Hydro explained its position that the CEC's proposed information requirements and Annual Capital Report is not needed, would interfere with management of the utility, and would lead to inferior capital management outcomes.

17. On July 4, 2019, BC Hydro responded to information requests on both its Revised Proposal and its Rebuttal Evidence.<sup>24</sup>

18. The evidentiary record produced through the above process steps has developed the topics within the scope of the proceeding and brought into focus key issues for the BCUC's consideration. BC Hydro submits that the evidentiary record supports its case for the proposed 2018 Guidelines.

### **C. Summary Overview of BC Hydro's Revised Proposal and 2018 Guidelines**

19. BC Hydro's Revised Proposal addresses the scope items identified in the scoping order and sets out BC Hydro's rationale for its 2018 Guidelines. A summary overview of BC Hydro's Revised Proposal is provided below, while a more detailed discussion of topics of interest during the proceeding follows in Part Two of this Final Submission.

#### **(a) Background on BC Hydro's Capital Investments**

20. Sections 2 and 3 of BC Hydro's Revised Proposal describe the nature of BC Hydro's capital investments, BC Hydro's internal oversight structure, and the ways in which the BCUC currently oversees BC Hydro's capital expenditures. As described in the Revised Proposal, the

---

<sup>21</sup> Exhibits C3-13 to C3-17.

<sup>22</sup> Exhibit B-15.

<sup>23</sup> Exhibit B-15-1.

<sup>24</sup> Exhibit B-16.

key mechanisms available to the BCUC under the UCA for the oversight of BC Hydro's capital investments are:

- CPCN proceedings under sections 45 and 46 of the UCA to consider whether a project is in the public interest;
- Proceedings under section 44.2 of the UCA to consider an application for acceptance of capital expenditures for a project;
- Revenue requirements proceedings under sections 58-61 of the UCA to set BC Hydro's rates; and
- Compliance filings, including BC Hydro's Annual Report to the BCUC.

21. The above proceedings and filings are the mechanisms under the UCA for the BCUC to exercise efficient and effective oversight over BC Hydro's capital investments. BC Hydro's 2018 Guidelines are therefore built around these processes.

**(b) Appropriate Scope of Review in Revenue Requirements Applications**

22. Section 4 of the Revised Proposal outlines BC Hydro's views on the appropriate scope of BCUC review of BC Hydro's capital spending in a revenue requirements proceeding. Specifically, BC Hydro describes the appropriate scope of review for each of the four categories of projects identified by the BCUC in the scoping order, with rationale. While these areas have been discussed in detail in the Revised Proposal and responses to information requests, a summary is as follows:

- **Projects With a CPCN, Expenditure Schedule or Legislated Exemption: BCUC Can Assess Project Execution.** A determination that the project is in the public interest under either section 44.2 or by the granting of a CPCN under sections 45-46 of the UCA demonstrates that there is a need for the project, and the issuance of a CPCN explicitly authorizes BC Hydro to proceed with the project. Therefore, for projects with such approval or acceptance, the question of need

should not be reviewed again in a subsequent revenue requirements application. A legislated exemption prohibits the BCUC from assessing public interest, so the same consideration applies. Project execution, on the other hand, is a matter within the purview of a revenue requirements application. BC Hydro anticipates that the BCUC will review the forecast expenditures and capital additions in the test period in the context of the initial forecast approved for the project. A review of the prudence of capital investments should generally occur only after the project is complete and in service when final project costs and outcomes are known. Waiting until the project is complete to perform this review is fair to both BC Hydro and ratepayers, as only then will project costs and outcomes will be known.<sup>25</sup>

- **Projects Underway Without Prior Approval from the BCUC or a Legislative Exemption: BCUC Can Assess Need, Alternatives and Implementation.** Since the project need, alternatives, and justification have not yet been reviewed for this category of projects, the BCUC may inquire into these matters in a revenue requirements application. While the execution of the project to date could potentially be reviewable, a review of the prudence of capital expenditures should generally occur only after the project is in service once final project costs and outcomes are known.<sup>26</sup>
- **Future Projects Meeting Criteria for CPCN or Section 44.2 Proceeding: Avoid Redundant Reviews in Revenue Requirements Proceeding.** The BCUC will review project need, alternatives, and forecast costs, and the public interest generally, in the CPCN or section 44.2 proceeding. It is in the interests of ratepayers, the BCUC and BC Hydro to avoid, to the extent possible, regulatory inefficiency associated with a redundant review in a revenue requirements

---

<sup>25</sup> Exhibit B-7, pp. 25-26.

<sup>26</sup> Exhibit B-7, p. 27.

proceeding. Addressing these issues in the CPCN or section 44.2 proceeding also avoids the potential for conflicting or inconsistent BCUC determinations.<sup>27</sup>

- **Future Projects that do not Trigger a CPCN or Expenditure Schedule: BCUC Can Assess Need in Revenue Requirements Proceeding.** BC Hydro is proposing the scope of review in a revenue requirements proceeding should include consideration of forecast capital expenditures and additions in the test period, and exclude future projects for which there are no forecast expenditures or additions in the test period. For those projects with forecast expenditures or additions in the test period, the scope of review may include examination of project need and alternatives, and the reasonableness of the forecast. In light of the fact that revenue requirements applications are focused on a particular test period, the BCUC should limit its review to projects for which there are forecast capital expenditures or capital additions in the test period. BC Hydro presents information regarding both forecast capital expenditures and capital additions in revenue requirements applications, and will continue to do so. However, BC Hydro believes that the BCUC should focus its review only on capital additions, as the purpose of the revenue requirements application is to set rates, and only the forecast additions affect BC Hydro's revenue requirements in the test period.<sup>28</sup>

23. Overall, BC Hydro proposes that the BCUC can use revenue requirements applications to review significant components of BC Hydro's capital investments. *The above is reflected in sections 3, 4 and 5 of BC Hydro's proposed 2018 Guidelines.*

24. The BCUC's review of BC Hydro's capital investments in a revenue requirements application is addressed further in Part Two, sections B(b), C and E, of this Final Submission.

---

<sup>27</sup> Exhibit B-7, pp. 28-19.

<sup>28</sup> Exhibit B-7, pp. 30-31.

**(c) Guidelines for Major Project Applications**

25. Section 5 of the Revised Proposal addresses when a CPCN should be required for extensions, and when the BCUC should review major projects in advance of implementation. BC Hydro's proposal is for the largest projects by category to be reviewed separately, with the majority of the capital portfolio still being considered in the context of revenue requirements proceedings. The rationale for BC Hydro's proposed guidelines on this topic is summarized below:

- The 2010 Guidelines are working well, and are capturing BC Hydro's most significant capital projects for review by the BCUC. Under the 2018 Guidelines, the major project thresholds have been realigned to be more consistent with how BC Hydro plans and executes its projects and programs. The major difference is the change in thresholds for Distribution projects. In the 2010 Guidelines, Distribution projects (excluding substation distribution assets), had a separate threshold of \$50 million. Under the 2018 Guidelines, Distribution projects fall under the general category of Power System projects. Including all power system projects under one threshold will make it easier to apply thresholds for projects involving work on the transmission and distribution systems. This change also aligns better with how the system is managed and planned as asset management for the generation, transmission and distribution systems are now the responsibility of a single business unit. The proposed changes will leave the overall number of total projected major project applications similar to the number projected under the 2010 Guidelines.<sup>29</sup> In BC Hydro's view, the \$100 million threshold for Power System projects, \$50 million for Building projects, and \$20 million for IT projects represents the right balance between appropriate oversight of BC Hydro's capital projects and regulatory and cost efficiency. *The proposed thresholds are set out in sections 9 and 10 of 2018 Guidelines.*

---

<sup>29</sup> Exhibit B-7, pp. 38-43.



- BC Hydro is proposing to continue with the meaning of “extension” in the 2010 Guidelines, which defines the scope of projects potentially subject to a CPCN. BC Hydro’s proposal is that an “extension” in effect means a capital expenditure that expands the service area or capacity of a utility plant or system. This is consistent with the plain meaning of the word “extension” and its use in the UCA, the origins of the CPCN requirement, as well as the BCUC’s use of the term in its 2015 Thermal Energy Systems Regulatory Framework Guidelines.<sup>30</sup> *This is reflected in sections 11 and 12 of the 2018 Guidelines.*
- BC Hydro is committed to filing expenditure schedule applications for all non-extension projects that exceed the major project thresholds. This will allow the BCUC to undertake a separate public interest review of any project over the applicable threshold proposed by BC Hydro, irrespective of how the term “extension” is interpreted. BC Hydro will generally provide the same information as requested in the 2015 CPCN Application Guidelines and the 2010 First Nations Information Filing Guidelines for expenditure schedule applications.<sup>31</sup> *This is reflected in section 13 of the 2018 Guidelines.*
- BC Hydro will also file a CPCN application for approval of a public utility plant or system required to serve a new service area that is not an extension of BC Hydro’s existing system, regardless of the cost of the project.<sup>32</sup> *This is reflected in section 14 of the 2018 Guidelines.*

26. BC Hydro’s proposed major project thresholds are discussed further in Part Two, Section 4 of this Final Submission.

---

<sup>30</sup> Exhibit B-7, pp. 32-33.

<sup>31</sup> Exhibit B-7, p. 45.

<sup>32</sup> Exhibit B-7, Appendix B, section 14.

**(d) Review of Capital Investments that are a Part of Programs**

27. Section 6 of the Revised Proposal provides clarity on programs and addresses the appropriate mechanism for the BCUC's review of programs. In summary:

- **Program of Projects:** As this type of program consists of individual, separate projects, the projects within programs are best reviewed individually in revenue requirements proceedings or as part of a CPCN or expenditure schedule application, if they exceed the major project threshold. The program strategy programs will be included in any discussion of individual projects in a revenue requirements proceeding or as part of a CPCN or expenditure schedule filing. A Program of Projects, which groups projects together based on common business drivers and/or technical characteristics, is generally not considered to be a single project because Programs of Projects are often flexible in scope and are planned to evolve as required. In addition, because the various projects within the program may be at different stages with different levels of project definition (for example different levels of cost estimating accuracy), there may be limited ability to meet minimum filing requirements required for an effective review of all projects in the program. Some Programs of Projects are established only to achieve delivery efficiencies, and in some cases the drivers and justifications for projects within program are quite different.<sup>33</sup> *BC Hydro will indicate which projects are part of a Program of Projects, as reflected in section 6(j) of the 2018 Guidelines. Section 5 of the 2018 Guidelines would apply to projects below the major project thresholds, while sections 3, 4, 11 and 13 would apply to projects above a threshold.*
- **Recurring Capital Programs:** Work Programs and Acquisitions, irrespective of forecast cost, are best reviewed in a revenue requirements application. Recurring capital programs comprise low complexity work and are recurring in nature. These programs often involve work on assets that are put into service in

---

<sup>33</sup> Exhibit B-7, pp. 46 and 49.

the same year as the expenditure is made. A revenue requirements proceeding is the most efficient way to review these types of programs.<sup>34</sup> *This is reflected in section 8 of the 2018 Guidelines.*

28. The BCUC's regulatory oversight of programs is discussed further in Part Two, section F of this Final Submission.

**(e) Review of Projects Linked to Strategies, Plans and Studies**

29. Section 7 of the Revised Proposal defines a regulatory practice for the review of projects that are linked to strategies, plans, and studies. *As reflected in section 6 of the 2018 Guidelines,* BC Hydro proposes to provide the following in a revenue requirements application:<sup>35</sup>

- BC Hydro will show which projects or programs listed in Appendix I of its revenue requirements applications are linked to strategies, plans and studies; and
- BC Hydro will provide, in a new Appendix to its revenue requirements applications, summary descriptions of the strategies, plans and studies that are linked to the projects in Appendix I. BC Hydro will also provide a copy of the most recent Technology Strategy and 5-Year Plan.

30. The above information will allow for an efficient and effective review of projects linked to strategies, plans, and studies in revenue requirements applications. The summaries of the strategies, plans or studies will provide context with which to understand the issues or system needs being addressed and the resulting solutions.<sup>36</sup>

31. The BCUC's regulatory oversight of projects linked to strategies, plans and studies is discussed further in Part Two, section G of this Final Submission.

---

<sup>34</sup> Exhibit B-7, pp. 47, 48 and 50.

<sup>35</sup> Exhibit B-7, p. 54.

<sup>36</sup> Exhibit B-7, p. 55.

**(f) Clarity on Compliance Reporting**

32. Section 8 of the Revised Proposal addresses updates to its Annual Report to the BCUC and proposed changes to project specific compliance filings.

33. BC Hydro will continue to provide the Annual Report in a form required by the BCUC. BC Hydro has improved the presentation of its financial schedules to align with the information presented in the revenue requirements application, and BC Hydro will continue to look for opportunities to improve the presentation of the Annual Report in discussion with BCUC staff.<sup>37</sup>

34. BC Hydro will continue to make project specific compliance filings with the BCUC in the manner and form of previous project specific compliance reports or in a manner or form directed to by the BCUC. BC Hydro is proposing some changes to improve consistency in the timing of project specific compliance reports:<sup>38</sup>

- BC Hydro proposes to continue to file semi-annual project progress reports for most capital projects meeting the criteria for CPCN or section 44.2 applications. Semi-annual progress reporting would allow for reasonable progress to be made on project scope between reports. Semi-annual reports will be more likely to have relevant and updated information with each new report compared to quarterly reports. BC Hydro will request to file only annual project progress reports if it is deemed appropriate given the project's schedule. BC Hydro does not support quarterly progress reporting.
- BC Hydro is proposing a more definitive deadline for submitting the Project Final Report (also referred to as the Project Completion and Evaluation Report ("PECR")) than the deadlines commonly outlined in the BCUC's Order granting a CPCN or accepting capital expenditures. BC Hydro proposes to file the Project Final Report with the BCUC three months after it is approved by BC Hydro's Board of Directors. This milestone is clearer and more aligned with BC Hydro's

---

<sup>37</sup> Exhibit B-7, pp. 56-7.

<sup>38</sup> Exhibit B-7, pp. 57-59.

governance practices. This milestone is met when a summary of the PCER, which is required for all major projects, is reviewed by the BC Hydro Board of Directors and the report is available for wider distribution

35. *The above is reflected in sections 15 to 19 of the 2018 Guidelines.*

36. BC Hydro's Annual Report to the BCUC and project compliance reports are discussed further in Part Two, sections J and K of this Final Submission.

**(g) Form and Content of Revenue Requirements and Major Project Filings**

37. Section 9 of the Revised Proposal covers other matters related to the form and content of revenue requirements, CPCN, and related section 44.2 filings, including adopting a standardized naming convention for projects and programs and the provision of additional information in revenue requirements applications to facilitate the review of projects. BC Hydro filed this information in its Fiscal 2020 to Fiscal 2021 Revenue Requirements Application (the "F20-F21 RRA"). *The proposed additional information to be filed is reflected in sections 6 and 7 of the 2018 Guidelines.*

38. The content of BC Hydro's revenue requirements applications is discussed further in Part Two, section E of this Final Submission.

**(h) 2018 Guidelines will Facilitate the Continued Fair and Efficient Review of BC Hydro's Capital Investments**

39. BC Hydro submits that its 2018 Guidelines, as set out and explained in the Revised Proposal, will provide for the continued fair and efficient BCUC review of BC Hydro's capital expenditures going forward. As such, BC Hydro submits that the approval of the 2018 Guidelines is the appropriate outcome of this proceeding.

**D. Outline of Remainder of Submission**

40. The remainder of this Final Submission is organized as follows. In Part Two, BC Hydro will address the main topics covered in the proceeding related to the BCUC's oversight over BC

Hydro's capital investments and BC Hydro's proposed 2018 Guidelines. In Part Three, BC Hydro responds to the evidence filed by the CEC and explains why the CEC's proposal should not be accepted. Part Four concludes this Final Submission.

## **PART TWO: TOPICS RELATED TO BC HYDRO'S PROPOSED 2018 GUIDELINES**

41. In this Part of the Final Submission, BC Hydro addresses the issues raised by the BCUC and interveners with respect to its proposed 2018 Guidelines. These issues are as follows:

- **Nature and Benefits of Guidelines:** In this section, BC Hydro discusses the nature of guidelines and how the proposed 2018 Guidelines will be beneficial to the regulatory process.
- **Review of Capital Investments Prior to Implementation:** In this section, BC Hydro discusses the ways that the BCUC exercises oversight over capital investments in advance of implementation, including through review of projects in revenue requirements applications and major project filings.
- **Review of Projects After Implementation:** In this section, BC Hydro discusses how the BCUC can review the prudence of completed capital investments. BC Hydro referred to this as a review of project implementation in its Revised Proposal, but it can also include review of project need if a project has not been previously approved or accepted by the BCUC, or if a change in circumstances has occurred.
- **Major Project Thresholds:** In this section, BC Hydro discusses its proposed major project thresholds. BC Hydro also addresses its view that qualitative public interest criteria are difficult to incorporate into quantitative thresholds, but that the BCUC can exercise its discretion to require a CPCN for public interest reasons. Finally, BC Hydro also sets out its broad definition of "extension" and its commitment to filing section 44.2 application for major projects that do not meet that definition.

- **Content of Revenue Requirements Filings:** In this section, BC Hydro describes the general outline of information it intends to file in revenue requirements applications, including enhancements that it has implemented in the F2020-F2021 RRA and other enhancements it has committed to in this proceeding. BC Hydro also proposes to set the materiality thresholds in consultation with the BCUC prior to each revenue requirements application filing.
- **Programs:** In this section, BC Hydro describes the ways that the BCUC can exercise oversight over capital investments that are a part of programs.
- **Strategies, Plans and Studies:** In this section, BC Hydro describes the ways that the BCUC can exercise oversight over capital investments linked to strategies, plans and studies.
- **Information Technology Capital:** In this section, BC Hydro describes why specific guidelines are not needed for Information Technology (“IT”) capital. BC Hydro describes how the proposed 2018 Guidelines would allow BC Hydro to file section 44.2 applications in two phases if appropriate, and that BC Hydro has lower materiality thresholds in revenue requirements applications and a lower major project threshold to ensure the BCUC can review material IT projects.
- **Assessing the Adequacy of Consultation:** In this section, BC Hydro describes its duty to consult and how the BCUC’s oversight includes assessing the adequacy of consultation in major project filings, but not in revenue requirements applications.
- **Role of the Annual Report:** In this section, BC Hydro discusses the role of the Annual Report filed with the BCUC and the refinements it has made to make it more relevant and informative.

- **Project Compliance Reports:** In this section, BC Hydro describes how it proposes to report on major projects, noting that the BCUC can always direct increased reporting if the circumstances warrant.

#### A. Nature and Benefits of Guidelines

42. The BCUC has the implicit authority to issue guidelines under the UCA and has done so on numerous occasions.<sup>39</sup> The BCUC's existing guidelines are helpful to the BCUC, utilities and other parties to BCUC proceedings as a guide to what the BCUC expects and how the BCUC will exercise its discretion under the UCA. In *Practice and Procedure Before Administrative Tribunals*, the authors comment on the jurisdiction to issue guidelines and the nature of guidelines, as follows:<sup>40</sup>

In my view, every federal and provincial agency has the authority to issue policy guidelines, although few agencies do so. Where administrative agencies issue guidelines, they should do so publicly in clear, understandable terms.

Sometimes, the power to issue guidelines is not clearly set out in the legislation, but may be implied. See *Re Capital Cities Communication Inc. and CRTC* where the tribunal issued a policy statement which it subsequently followed before a case was heard. The court held that the legislation implicitly authorized the development and publication of policy statements, provided that the CRTC did not thereby fetter its discretion. Contrasted to that decision is that of the Ontario Court of Appeal in *Re Hopedale Dev. Ltd. and Oakville*. In that case, the OMB [Ontario Municipal Board] was found to have fettered its discretion by establishing a policy in advance of hearing a case and then treating that policy as binding on it. The two decisions are quite consistent.

Guidelines or policy statements are guidelines only. They can arise out of generic or policy hearings where an agency may invite, upon published notice, submissions from interested parties. The guidelines can be adopted without a hearing, but are better accepted if they follow a well publicized and attended hearing such as in the *Capital Cities* case outlined above. The policy statements are not binding on the agency and therefore do not fetter its discretion. The

---

<sup>39</sup> The BCUC's guidelines are posted online at the following: <https://www.bcuc.com/resources/guidelines.html>.

<sup>40</sup> Robert W. Macaulay, James L.H. Sprague & Lorne Lossin, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Thomson Reuters, 2018), at 3.2(d), pp. 3-27 to 3-28. [see Book of Authorities, Tab 3]



statements can be departed from at will, but can be accepted or adopted in a decision as long as the evidence in the case is heard and weighed first.

43. Consistent with the above text book authority, the BCUC has implicit authority to issue guidelines and indeed has exercised that authority in numerous cases (as exhibited by the various guidelines of the BCUC).<sup>41</sup> Also consistent with the above discussion, BC Hydro's proposed 2018 Guidelines, if approved, would be guidelines only. This means that the BCUC could deviate from the 2018 Guidelines and that guidelines "do not bind the Commission in the exercise of its jurisdiction".<sup>42</sup> The statutory authority afforded to the BCUC under the UCA cannot be restricted by approving BC Hydro's 2018 Guidelines as the BCUC cannot fetter its discretion and cannot restrict itself from considering specific circumstances in reaching a determination.

44. The Supreme Court of Canada ("SCC") explained the non-binding nature of guidelines in *Maple Lodge Farms v. Government of Canada*, as follows:<sup>43</sup>

It is clear, then, in my view, that the Minister has been accorded a discretion under s. 8 of the Act. The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; . . ." does not fetter the exercise of that discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:

The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his

---

<sup>41</sup> See, for example, the 2015 CPCN Guidelines and 2003 Resource Planning Guidelines. Online: <https://www.bcuc.com/resources/guidelines.html>

<sup>42</sup> Exhibit B-7, Revised Proposal, Appendix B, para. 2; Exhibit B-16, BCUC IR 2.17.2.

<sup>43</sup> [1982] 2 S.C.R. 2, 1982 CanLII 24 (SCC). [see Book of Authorities, Tab 2]

discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* 1964 CanLII 196 (ON CA), [1965] 1 O.R. 259).

[Emphasis added.]

45. As indicated above, although not binding, guidelines are nonetheless beneficial. For utilities, who are typically the applicants before the BCUC, guidelines are particularly helpful to know in general terms what the policy and practice of the BCUC is and what is expected to be included in applications. Further, as concluded in the Independent Review of the British Columbia Utilities Commission Final Report, guidelines are “generally useful, effective, and particularly helpful to those new to the Commission.”<sup>44</sup>

46. The authors of *Practice and Procedure Before Administrative Tribunals* also note the benefit of guidelines to the tribunal itself:<sup>45</sup>

Legislative schemes often involve the application of a great deal of discretionary decision-making by agencies where the agency has a choice to determine what may be appropriate in specific circumstances, often in areas of opinion where there is no clear absolute answer.

Guidelines can assist in consistent decision-making by providing an easily accessible source of thinking and advice to agency decision-makers wherever located that keeps them advised of the agency thinking respecting policy or legal interpretation. Such guidelines can provide the decision-makers with starting points in their thinking respecting individual cases.

The value of guidelines respecting consistency is that they expose decision-makers to well-considered views of general application which can serve as starting points in the decision-maker's deliberations. But they should not be end points as well. They cannot be treated as rules — unless there is valid legislative

---

<sup>44</sup> Exhibit B-16, BCUC IR 2.17.2.1.

<sup>45</sup> Robert W. Macaulay, James L.H. Sprague & Lorne Lossin, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Thomson Reuters, 2018), at 6.5A(iv), p. 6-56.

direction to do so. Decision-makers cannot fetter their discretion or judgment by [blindly] and automatically following guidelines to the exclusion of their own deliberations or consideration of the particular circumstances of the specific case before them.

47. In short, guidelines can be used by decision-makers as a tool to promote effective and fair administration. By enhancing the quality of decision-making, guidelines have the potential to promote certainty and reduce inconsistencies. For example, the establishment of major project thresholds enhances certainty by allowing BC Hydro to account for the time and resources required for the preparation of a CPCN application when determining the schedule and cost estimate for a project.<sup>46</sup> As BC Hydro's 2018 Guidelines are non-binding, the BCUC is not restricted from requiring a CPCN application for particular projects below the established thresholds and BC Hydro may elect to make such an application where significant public interest issues are identified.<sup>47</sup>

48. Therefore, BC Hydro submits that approval of the 2018 Guidelines will be beneficial, by providing clarity and guidance to BC Hydro and interveners and the BCUC itself with respect to the BCUC's oversight over BC Hydro's capital investments.

## **B. Review of Capital Investments Prior to Implementation**

49. A key theme of this proceeding is how the BCUC can review BC Hydro's capital investments prior to implementation.<sup>48</sup> In this section, BC Hydro describes the ways in which the BCUC can exercise such oversight in an efficient and effective manner, as reflected in the proposed 2018 Guidelines. The key points are as follows:

- Major project filings (either CPCN or section 44.2 applications) provide the primary means for the BCUC to review projects prior to implementation. It is efficient and effective for the BCUC to set major project thresholds as the

---

<sup>46</sup> Exhibit B-16, BCUC IR 2.17.2.1.

<sup>47</sup> Exhibit B-16, BCUC IR 2.17.6 and 2.17.7.

<sup>48</sup> This type of review has been characterized in IRs as "before significant dollars have been spent". There will, however, always be dollars spent before a project is reviewed. BC Hydro must incur costs to define a project to a sufficient degree before the BCUC and interveners can consider it in a meaningful way: see Exhibit B-4, BCOAPO 1.19.1.

thresholds single out the projects that are most significant and will have the largest impact on rates for detailed public interest review. The BCUC can also direct that a CPCN will be required for any extension project below the thresholds, including those that it determines have a significant public interest component.

- The remainder of BC Hydro's capital investments (those that do not meet the major project thresholds) can be reviewed in revenue requirements applications for the purpose of setting rates. It is efficient and effective for the BCUC to set materiality thresholds for the presentation of capital investment information to focus its review on investments that could have a material impact on rates.
- BC Hydro files Annual Reports with the BCUC which will identify extension projects (above the materiality threshold) that have arisen since the last revenue requirements application. This will give the BCUC the opportunity to direct that a CPCN be filed for such projects if warranted.
- The review of BC Hydro's IRP provides a process for the BCUC to consider BC Hydro's resource strategies and inputs into growth capital investments, such as the load forecast. The IRP can inform the BCUC's review of capital investments in major project and revenue requirements applications.

50. BC Hydro submits that the above processes provide the necessary foundation for the BCUC to review capital investments prior to implementation.

**(a) Major Project Filings are the Primary Way for the BCUC to Review Projects Prior to Implementation**

51. The primary mechanism which the BCUC has to review projects on a prospective basis is through major project filings (i.e., BC Hydro's CPCN and section 44.2 applications). In these applications, the BCUC reviews project need, alternatives, cost, schedule, risk, consultation, etc. of the projects and determines whether the project is in the public interest. The BCUC has

approved guidelines which govern the information that utilities are expected to file in CPCN applications, which BC Hydro also follows for its section 44.2 applications.

52. Dr. Brown and Dr. Carpenter’s description of the role of regulators like the BCUC includes the review of projects, as follows:<sup>49</sup>

Regulators also often have a role in approving certain projects before they are implemented. The utility may identify that new capacity will be needed in future—for example, a constraint on the network, or a declining margin between peak demand and peak supply. There may be more than one option for delivering the needed new capacity, where the options have different characteristics. For example, one project might be more expensive but have more favourable environmental characteristics. The regulator may have a role in evaluating alternatives to a proposed project as part of the approval process before the project is implemented.

53. In B.C., the role of the BCUC is set out in section 44.2 and sections 45-46 of the UCA. Through these sections, BC Hydro files applications for approval or acceptance of its major project applications. The proceedings which consider these applications are usually detailed and complex, involve numerous interveners and are resource intensive for the parties involved. In short, in BC Hydro’s major project applications, the BCUC conducts a detailed and in-depth review of the proposed projects.

54. In BC Hydro’s submission it is reasonable and appropriate for the BCUC to limit this detailed and in-depth public interest review of projects to significant projects, as is currently the BCUC’s practice. The BCUC’s 2015 CPCN Guidelines reflect this, stating: “In order to evaluate whether a public utility should apply for a CPCN for a specific extension to a utility plant or system and therefore whether to make an order pursuant to section 45(5), the Commission needs to be aware of planned extensions that are significant.” Given that it is not practicable to require a CPCN for all projects, focusing on significant projects is reasonable as these are the projects that will have the most impact on the public and rates. Therefore, and as discussed further below, BC Hydro has proposed major project thresholds that strike the

---

<sup>49</sup> Exhibit B-15-1, p. 6.

appropriate balance between oversight of BC Hydro's capital projects and regulatory and cost efficiency.

**(b) Revenue Requirements Applications are the Place to Review the Balance of Capital Investments**

55. For those projects that are not the subject of a major project application because they do not meet a major project filing threshold, or have not otherwise been directed by the BCUC to require a CPCN, revenue requirements applications provide an avenue for the BCUC to review and test BC Hydro's planned capital additions and expenditures. The scope of this review is discussed in section 4 of the Revised Proposal, as summarized in Part One, section C(b) of this Final Submission. The paragraphs below discuss the key topics related to the prospective review of capital investments in a revenue requirements proceeding.

***Revenue Requirements Applications Provide Sufficient Information to Review Capital Investments***

56. BC Hydro revenue requirements applications provide sufficient information and opportunity for the BCUC to review BC Hydro's capital investments. If the BCUC wishes to review a project or program in a revenue requirements application, the information provided in Chapter 6 and Appendices I, J and K (and other related appendices) in BC Hydro's revenue requirements applications, supplemented as necessary through information obtained through information requests, should be adequate for the BCUC to conduct that review for the purposes of setting rates during the test period. BC Hydro's F20-F21 RRA, as filed during this proceeding, demonstrates the comprehensiveness of the information filed in support of BC Hydro's capital investments, as well as BC Hydro's efforts to improve the quality of its filing in response to directions or concerns raised in previous revenue requirements proceedings, the Workshop in this proceeding and the information requests received from the BCUC and interveners.<sup>50</sup>

---

<sup>50</sup> BC Hydro's Fiscal 2020-2021 Revenue Requirements and Rates Application, Chapter 1, Section 1.5.

### ***Setting Materiality Thresholds is a Reasonable Practice***

57. BC Hydro's presentation of its capital investments in its revenue requirements applications is reasonably limited by materiality thresholds.<sup>51</sup> This practice was explained by BC Hydro as follows:<sup>52</sup>

BC Hydro and the Commission typically meet in advance of a revenue requirements application filing to discuss and mutually agree to any materiality thresholds for capital information to be provided in the revenue requirements application. The materiality threshold should result in an appropriate level of detail and amount of information regarding the capital plan, such that it can support an efficient review by the Commission and Interveners, and inform further questioning if required, without providing immaterial, unnecessary or excessive detail.

58. BC Hydro proposes to continue the practice of working with the BCUC prior to revenue requirements applications to set materiality thresholds for the presentation of its capital information. As BC Hydro has hundreds of projects ongoing at any one time, it is reasonable for the BCUC to focus its oversight efforts on projects that will have a material impact on rates during the test period.<sup>53</sup> The BCUC takes a similar approach to its review of other components of a utility's revenue requirements, such as operating costs. BC Hydro believes this is reflective of the BCUC's current and past practices and is a reasonable and efficient approach.

### ***Focus Should be on Capital Additions Rather than Expenditures***

59. To promote regulatory efficiency and fairness, it is appropriate for the BCUC to focus on capital additions rather than capital expenditures in revenue requirements proceedings.<sup>54</sup> BC Hydro summed up the reasons for this in response to BCUC IR 2.36.4, as follows:<sup>55</sup>

- Projects that are not forecast to enter service in a test period may be early in their lifecycle and any information on the projects may be preliminary. The

---

<sup>51</sup> All of the materiality thresholds are set out in Exhibit B-16, BCOAPO IR 2.43.2.

<sup>52</sup> Exhibit B-4, CEC IR 1.9.1.

<sup>53</sup> Exhibit B-16, BCUC IR 2.24.4.

<sup>54</sup> Exhibit B-7, Revised Proposal, p. 31.

<sup>55</sup> Exhibit B-16; see also Exhibit B-4, BCOAPO IR 1.14.1 and CEC IR 1.14.3..

BCUC's review of such project may therefore be based on information that is incomplete or likely to change. As a result, any comments from the BCUC on such a project may provide limited value;

- As forecast capital expenditures in one test period will become forecast capital additions in subsequent test periods, reviewing capital expenditures would result in redundant reviews and regulatory inefficiency; and
- Reviewing capital expenditures does not aid the BCUC in setting rates as capital expenditures do not directly impact rates. Reviewing capital expenditures would divert focus and attention from issues that are relevant to the setting of rates in the test period.

60. Therefore, it is efficient and consistent with the BCUC's rate setting role to focus on the review on capital additions in revenue requirements proceedings.

#### ***Amortization of Capital Additions Regulatory Account***

61. While BC Hydro's revenue requirements applications provide the opportunity to review capital investments, it is not always necessary for the BCUC to engage in a detailed review of forecast projects over a test period. This is particularly the case for BC Hydro given the continuation of the approved Amortization of Capital Additions Regulatory Account, which ensures customers only pay for actual capital additions. Dr. Brown and Dr. Carpenter thus commented on the nature of the BCUC's review of capital when setting rates as follows:<sup>56</sup>

In some jurisdictions authorized revenues (and therefore rates) reflect anticipated future capital expenditures, and there are infrequent and prospective true-ups for differences between anticipated and actual capital expenditures. This contrasts with the regime that applies to BC Hydro, where authorized revenues and rates are trued up retrospectively at every test period for differences between anticipated and actual capital expenditures. In these other jurisdictions regulators are likely to be concerned with the level of anticipated capital expenditure because they are prospectively incorporated into

---

<sup>56</sup> Exhibit B-15-1, p. 6.



rates. Typically, these regulators are concerned that the level of capital expenditure corresponds to what is reasonably anticipated and is not biased upwards, since actual expenditure below anticipated levels accrue to the utility as additional return over and above the authorized rate of return. These regulators are concerned that rates should reflect only the capital expenditure that is reasonably anticipated to be spent.

62. The Amortization of Capital Additions Regulatory Account can therefore relieve the need to test BC Hydro's forecast of capital additions, as they will be completely trued up in the subsequent test period. The origins of and reasons for BC Hydro's Capital Additions Variance Regulatory Account are discussed in Chapter 7, Section 7.8.2, of BC Hydro's F20-F21 RRA. In short, the Amortization of Capital Additions Regulatory Account protects both the shareholder or customers from windfall gains or losses due to variances from forecast capital additions, and ensures that customers only pay for actual capital additions.

**(c) Integrated Resource Plan Informs Review of Capital**

63. The BCUC's oversight over BC Hydro's capital investments prior to implementation is also informed by its review of BC Hydro's IRP or long-term resource plan as referred to under section 44.1 of the UCA. As described by Dr. Brown and Dr. Carpenter, the role of regulators like the BCUC often includes the review of an IRP:<sup>57</sup>

Regulators often have a role in relation to longer term strategic plans. For example, a utility may have identified a long-term need to replace aging generation resources, and it may have choices over the type of replacement capacity to procure. Some stakeholders might advocate procuring coal capacity because coal is expected to be cheap; others may advocate gas-fired capacity because emissions are lower; while still others might advocate a mix of renewables and other resources. Consideration of such strategic options typically takes place in an IRP process. The IRP process is focused on long-term strategy and does not usually result in approval of specific projects. Rather, subsequent project approval processes may include testing how proposed projects contribute to or are consistent with the approved IRP.

---

<sup>57</sup> Exhibit B-15-1, pp. 5-6.

64. BC Hydro explained in its Rebuttal Evidence that, as an outcome of the Comprehensive Review, the Government of B.C. tabled legislation to update BC Hydro's regulatory framework so that section 44.1 of the UCA applies to BC Hydro.<sup>58</sup> These legislative amendments have now been enacted.<sup>59</sup> This means that, going forward, BC Hydro's IRP will be reviewed and approved by the BCUC.

65. The IRP is BC Hydro's long-term strategy for the integrated power system at the system-wide scale, and identifies actions to be undertaken in the first few years to fulfill this long-term strategy.<sup>60</sup> BC Hydro described the relevance of the IRP to its capital investments in its Rebuttal Evidence as follows:<sup>61</sup>

Through the IRP development process, we develop high level long term strategies and specific near term actions related to meeting the electricity needs of the province. During the process, we compare a range of options to meet electricity needs and develop the most cost effective course of actions by performing analysis at the portfolio level and trading off options in a decision framework. Examples of the options compared include demand side management, construction or extension of facilities, and new or renewed electricity purchase agreements with power producers. The IRP is developed considering our goals as well as the uncertainties in our operating environment. The IRP provides context and informs lower levels of planning and capital decision making.

66. The filing of the IRP will therefore enhance the BCUC's oversight of the drivers of capital expenditures, including the Load Forecast, and the Load Resource Balance which may identify growth related investment requirements on the power system.<sup>62</sup> Further, a subset of actions recommended in an IRP will be included as capital expenditures in BC Hydro's capital plan. For example, these could include new generation projects, transmission upgrades or new

---

<sup>58</sup> Exhibit B-15, pp. 6-7.

<sup>59</sup> Bill 19, the *Energy Statutes Amendment Act, 2019*, received Royal Assent on May 16, 2019. See Exhibit B-16, BCSEA IR 2.17.1 for a description of the amendments.

<sup>60</sup> Exhibit B-16, BCUC IR 2.39.2.1.

<sup>61</sup> Exhibit B-15, p. 49.

<sup>62</sup> Exhibit B-16, BCUC IR 2.39.1. and 2.39.1.1.

transmission to ensure future system needs will be met.<sup>63</sup> The IRP will therefore inform the BCUC's review of such projects.<sup>64</sup>

67. In summary, the BCUC's review of the IRP will provide a forum for the BCUC to review and consider BC Hydro's long-term resource plans, which will give the BCUC oversight over key strategic decisions of BC Hydro and will inform the BCUC's oversight over BC Hydro's capital investments

### **C. Review of Projects After Implementation (Prudence)**

68. A key power of the BCUC in exercising oversight over BC Hydro's capital investments is the setting of just and reasonable rates, which excludes imprudent expenditures. In their evidence, Dr. Brown and Dr. Carpenter of the Brattle Group explain that the role of regulators such the BCUC is to ensure rates are just and reasonable, which would not include recovery of costs that were imprudently incurred.<sup>65</sup>

A key role of energy regulators is to ensure that rates charged for utility service are just and reasonable. As part of ensuring that rates are just and reasonable, regulators want to make sure that utilities do not recover in rates the costs of investments that were unrelated to providing utility service or which were unnecessary or wasteful. Such investments would be judged imprudent. Imprudent capital expenditure is not consistent with just and reasonable rates, so regulators will review capital expenditure incurred before authorizing the corresponding capital additions to be included in rate base. This is an after-the-fact review focused on the prudence standard. While prudence reviews take place after a decision has been implemented, they are necessarily forward-looking in the sense that they should use only information available to the utility at the time decisions were taken.

---

<sup>63</sup> Exhibit B-16, BCUC IR 2.39.2.1.

<sup>64</sup> Also see Exhibit B-16, BCUC IR 2.39.3 and MoveUP IR 2.5.1.

<sup>65</sup> Exhibit B-16, CEC Expert Witness IR 2.6.2; Exhibit B-15-1, p. 5.

69. The BCUC itself has described this role, for example, in its August 16, 2006 Reasons for Decision on an Application by Pacific Northern Gas Ltd for Approval of 2006 Rates (Order G-99-06), as follows:<sup>66</sup>

However, although PNG is unique, it is and has been regulated by the Commission under the Act on a traditional cost of service basis. What this means is that this utility, which is a virtual monopoly provider of natural gas in its service area, is permitted under the Act to recover the reasonable and prudent costs of providing its services in exchange for the obligation to provide safe and reliable service. One of the regulator's tasks, therefore, is to balance the need for the Utility to recover its reasonable and prudent costs with the need to ensure that ratepayers are charged fair and reasonable rates. Rates charged to customers are based on costs incurred by the utility to provide service. If the Commission finds certain costs to be imprudent or unreasonable, it will disallow such expenditures and reduce proposed rates accordingly. [Emphasis added.]

70. Putting it positively, the BCUC also stated: "The Commission Panel considers, therefore, that it is required, by virtue of sections 59 and 60 of the Act to allow the utility to recover its reasonable and prudent cost of service, to be determined on the basis of its 2006 RRA and the evidence adduced in this proceeding."<sup>67</sup>

71. Dr. Brown and Dr. Carpenter explain further the nature of imprudent expenditures as follows:

Costs are only imprudently incurred if they result from management decisions that were unreasonable in light of what was known (or should have been known) at the time of the decision.<sup>68</sup>

...

First a prudence review should be strictly forward looking and should not make use of hindsight. Second, opportunities to reduce costs are often not without risk. Therefore it is rarely possible to say with certainty that an alternative implementation would have reduced costs. The prudence standard recognizes

---

<sup>66</sup> BCUC Reasons for Decision, dated August 16, 2006, p. 23. Online: [https://www.bcuc.com/Documents/Proceedings/2006/DOC\\_12354\\_G-99-06\\_PNG\\_2006RR\\_Reasons.pdf](https://www.bcuc.com/Documents/Proceedings/2006/DOC_12354_G-99-06_PNG_2006RR_Reasons.pdf).

<sup>67</sup> BCUC Reasons for Decision, p. 24.

<sup>68</sup> Exhibit B-15-1, p. 11.

that utility management has significant discretion provided that it acts in good faith.<sup>69</sup>

...

For example, the Federal Energy Regulatory Commission examined the prudence standard in a 1985 decision concerning recovery of costs for a cancelled nuclear power plant. The FERC reviewed relevant precedent and said: “The adjectives used in the cases in discussing imprudent costs—“extravagant,” “unnecessary,” “inefficient,” “improvident,” etc.—all describe rather than define imprudence.....Consistent with the cases discussed herein, we reiterate that managers of a utility have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time. We note that while in hindsight it may be clear that a management decision was wrong, our task is to review the prudence of the utility's actions and the costs resulting therefrom based on the particular circumstances existing either at the time the challenged costs were actually incurred, or the time the utility became committed to incur those expenses.” (FERC, Opinion No. 231, Docket No. ER82-703-000, Issued April 11, 1985, p. 5).<sup>70</sup>

72. In summary, imprudent expenditures are expenditures which a reasonable utility management would not have made, in the circumstances and taking into account the information available to management at the time.<sup>71</sup> Dr. Carpenter and Dr. Brown’s description of the prudence review process is consistent with the process endorsed by the BCUC in the past.<sup>72</sup>

73. BC Hydro considers a prudence review to be a retrospective review of project execution. A prudence review can also be a review of project need, where the BCUC has not previously

---

<sup>69</sup> Exhibit B-15-1, p. 11.

<sup>70</sup> Exhibit B-15-1, p. 11, footnote 5.

<sup>71</sup> Exhibit B-16, CEC Expert Witness IR 2.3.2.

<sup>72</sup> See, for example, BCUC Reasons for Decision, BC Hydro F2009 and F2010 Revenue Requirements, dated March 13, 2009, p. 38. Online: [https://www.b cuc.com/Documents/Proceedings/2009/DOC\\_21286\\_BCH-2009RR\\_WEB.pdf](https://www.b cuc.com/Documents/Proceedings/2009/DOC_21286_BCH-2009RR_WEB.pdf).

approved the need for a project<sup>73</sup> or could consider if a project is still needed if there has been a material change in circumstance.<sup>74</sup> Specifically, if the BCUC has assessed the need for a project in a revenue requirements application based only on early and limited information, BC Hydro considers that the BCUC may determine that the scope of prudence review may include need in addition to project execution.<sup>75</sup>

74. As BC Hydro has indicated in its Revised Proposal, BC Hydro believes that a prudence review is best undertaken after project completion, when final costs and outcomes are known. After project completion, a prudence review could occur in a revenue requirements proceeding or in a specific process designed for that purpose.<sup>76</sup> BC Hydro submits that the BCUC should determine the appropriate forum for a prudence review based on the circumstances at the time.

75. The impact of the BCUC's power to review for prudence is in the incentives it creates, rather than in a record of disallowed expenditures. As stated by the Brattle Group:<sup>77</sup>

Dr. Brown and Dr. Carpenter consider that prudence disallowances are rare, in part because the financial consequences of a disallowance create an incentive to act prudently.

76. Consistent with the above, BC Hydro does not expect to have expenditures disallowed due to a prudence review. This is because the BCUC's power to review for prudence creates a strong incentive for BC Hydro to act prudently<sup>78</sup> and BC Hydro has adopted robust governance processes to prudently manage its capital planning and delivery processes.<sup>79</sup>

---

<sup>73</sup> Exhibit B-16, BCUC IR 2.24.3 and 2.44.2.

<sup>74</sup> Exhibit B-4, BCOAPO IR 1.9.1; Exhibit B-16, BCOAPO IR 2.41.1.

<sup>75</sup> Exhibit B-16, BCUC IR 2.24.3 and 2.44.2.

<sup>76</sup> Exhibit B-4, BCUC IR 1.9.2; Exhibit B-16, BCUC IR 2.21.1.

<sup>77</sup> Exhibit B-16, BCUC IR 2.44.2.1.

<sup>78</sup> Exhibit B-15, p. 16.

<sup>79</sup> Described in Chapter 6 of the F20-F21 RRA; see also Exhibit B-16, BCOAPO IR 2.33.1.

#### **D. Proposed Major Project Thresholds Reflect a Balanced Approach**

77. BC Hydro proposes major project thresholds that strike the appropriate balance between oversight of BC Hydro's capital projects and regulatory and cost efficiency.<sup>80</sup> BC Hydro's major project thresholds determine which projects will be filed as major projects and are therefore subject to detailed public interest review prior to implementation. BC Hydro proposed threshold levels and categories in the 2018 Guidelines are as follows:

1. \$100 million threshold for Power System projects;
2. \$50 million threshold for Buildings; and
3. \$20 million for Information Technology projects.

78. In the sections below, BC Hydro discusses the proposed major project thresholds and related topics raised over the course of the proceeding.

#### **(a) 2010 Guidelines a Suitable Foundation for Proposed Thresholds**

79. BC Hydro's proposed thresholds are based on the 2010 Guidelines, which BC Hydro considers to be a suitable foundation for the 2018 Guidelines. The major project thresholds in the 2010 Guidelines have captured BC Hydro's complex projects and/or projects with significant public interest issues,<sup>81</sup> and BC Hydro has not received any feedback that the thresholds in the 2010 Guidelines have been inappropriate.<sup>82</sup> A number of factors led to the development of the 2010 Guidelines including: (i) capturing larger and more complex projects; (ii) promoting regulatory efficiency; and (iii) the delineation of thresholds between project types.<sup>83</sup> BC Hydro continues to believe these factors are appropriate and are reflected in the 2018 Guidelines.

---

<sup>80</sup> Exhibit B-16, BCUC IR 2.18.8.1.

<sup>81</sup> Exhibit B-7, Revised Proposal, p. 38.

<sup>82</sup> Exhibit B-16, BCUC IR 2.18.1.

<sup>83</sup> Exhibit B-16, BCUC IR 2.18.1.

**(b) Proposed Major Projects Thresholds Align with BC Hydro’s Current Planning Processes, Increase Clarity and Ease of Use**

80. The 2018 Guidelines include two key changes compared to the 2010 Guidelines. These are:

- While the 2010 Guidelines had separate categories for Generation, Transmission or Distribution, BC Hydro’s 2018 Guidelines group all Generation, Transmission or Distribution projects under the general category of Power System projects (with a \$100 million threshold). This change reflects how BC Hydro manages its capital today, as these types of projects are now the responsibility of a single business unit.<sup>84</sup>
- Under the 2010 Guidelines, Distribution projects had a separate \$50 million threshold. This lower threshold was deemed to be appropriate as these projects tended to be smaller, and have lower complexity and lower costs.<sup>85</sup> The bundling of Distribution into the category of Power System projects in the 2018 Guidelines reflects the practical reality that larger complex projects involving distribution assets also often involve significant work on the transmission system.<sup>86</sup> By using the general Power System category, it will be easier to apply thresholds for projects involving work on the both transmission and distribution systems. This change also aligns better with how the system is managed and planned as asset management for the transmission and distribution systems are now the responsibility of a single business unit.<sup>87</sup> Finally, as a practical matter, BC Hydro has no planned “outside the fence” distribution projects (i.e. with no transmission component) that are over \$50 million.<sup>88</sup> Retaining a \$50 million

---

<sup>84</sup> Exhibit B-7, Revised Proposal, p. 38.

<sup>85</sup> Exhibit B-4, CEC IR 1.16.1; Exhibit B-16, BCUC IR 2.18.1.1.

<sup>86</sup> Larger more complex projects on the power system may include investments on both the Transmission and Distribution system, including substation distribution assets and “outside of the fence” distribution assets. Including all power systems projects under one threshold will make it easier to apply thresholds for these types of mixed asset projects: see Exhibit B-4, CEC IR 1.16.3.

<sup>87</sup> Exhibit B-7, Revised Proposal, p. 39; Exhibit B-16, BCUC IR 2.18.3.2.

<sup>88</sup> Exhibit B-7, Revised Proposal, page 40; Exhibit B-16, BCUC IR 2.18.3.2.



threshold for distribution projects will therefore not increase the level of oversight.

81. In summary, the modifications reflected in the 2018 Guidelines align the major project thresholds with BC Hydro's current planning processes, increase clarity and ease of use.

**(c) Proposed Thresholds will Continue to Capture Significant Projects**

82. Like the 2010 Guidelines, which have effectively captured BC Hydro's most significant capital projects for review by the BCUC, the proposed 2018 Guidelines will strike the appropriate balance between oversight of BC Hydro's capital projects and regulatory and cost efficiency.<sup>89</sup> Based on current forecast capital expenditures and proposed major project thresholds, BC Hydro anticipates filing 23 CPCN or section 44.2 applications over the next decade.<sup>90</sup> Proceeding with the proposed thresholds would result in the BCUC reviewing approximately 20 to 30 per cent of BC Hydro's annual non-exempt capital expenditures over the next ten-year period. In addition, the BCUC maintains the ability to require CPCNs for extension projects below the thresholds, such as for projects that the BCUC deems have a significant public interest component.<sup>91</sup>

83. BC Hydro estimated the number of projects that would be subject to a major project application at thresholds half the amount proposed in the 2018 Guidelines.<sup>92</sup> The total number of projects would increase from 23 to 50 over the next decade.<sup>93</sup> In BC Hydro's view, reducing the proposed thresholds by half would not improve the balance between oversight and efficiency, but would instead: (i) slow down the approvals and implementation for the additional major projects that would need to be filed; (ii) add to regulatory burden; and (iii) increase the cost of regulation resulting from the added hearings.<sup>94</sup>

---

<sup>89</sup> Exhibit B-4, BCUC IR 1.5.1; Exhibit B-16, BCUC IR 2.18.8.1.

<sup>90</sup> Exhibit B-7, Revised Proposal, p. 40.

<sup>91</sup> Exhibit B-16, BCUC IR 2.17.6.

<sup>92</sup> Exhibit B-4, BCUC IR 1.5.1.

<sup>93</sup> BC Hydro would also require additional support resources, including Environmental, Indigenous Relations, Stakeholder Engagement, Legal and Commercial Management resources to support the increased regulatory workload: see Exhibit B-16, BCUC IR 2.18.8.

<sup>94</sup> Exhibit B-16, BCUC IR 2.18.8.1.

84. In BC Hydro's view, the 2010 Guidelines are a suitable foundation to base the 2018 Guidelines upon and the proposed \$100 million threshold for Power System projects, \$50 million for Building projects, and \$20 million for Information Technology projects represents the right balance between appropriate oversight of BC Hydro's capital projects and regulatory and cost efficiency.

**(d) Absolute Values for Thresholds are Beneficial**

85. BC Hydro has considered and rejected alternative threshold measures that use a percentage of annual capital expenditures or capital additions instead of absolute values.<sup>95</sup> Shifting to a percentage-based threshold would create a number of negative consequences that do not arise with the use of absolute values. In particular, reliance on a measurement that is relative to capital spending would make it difficult to forecast which projects would be subjected to review. Such uncertainty would be exacerbated in years where significant major projects or capital investments were captured in the capital spend amounts (e.g., Site C Project; Waneta two-thirds Investment Acquisition).<sup>96</sup> Similarly, without a set of prescribed absolute values reflecting categories of capital, it is possible that low risk, low complexity capital expenditures that have minimal public interest impacts would be subject to review.<sup>97</sup> Such a result would require BC Hydro to expend additional resources and would not appreciably improve the BCUC's oversight function.

86. Therefore, BC Hydro's major project thresholds in the proposed 2018 Guidelines are based on absolute values in order to maintain clear and consistent thresholds. These thresholds capture the most significant capital projects and allow BC Hydro to properly plan for future major project applications.<sup>98</sup>

---

<sup>95</sup> Exhibit B-16, BCUC IR 2.18.4.

<sup>96</sup> Exhibit B-16, BCUC IR 2.18.4.1.

<sup>97</sup> Exhibit B-16, BCUC IR 2.18.4.1.

<sup>98</sup> Exhibit B-16, BCUC IR 2.18.4.1.

**(e) BCUC Can Direct that a CPCN is Required for Other Projects due to Public Interest Considerations**

87. BC Hydro believes that the use of expenditure thresholds is the most appropriate way to determine which extensions should require a CPCN application, as project cost is an important public interest consideration under the BCUC's jurisdiction and is generally a reasonable proxy for the level of public interest concern<sup>99</sup> However, the BCUC has the discretion to direct that a CPCN is required for any extension project, such as those it deems have a significant public interest component.<sup>100</sup>

88. As facilitated by the 2018 Guidelines, the BCUC will have sufficient information at an early enough stage to determine if the filing of a CPCN application is warranted:

- In a revenue requirements filing, BC Hydro will present information on projects with capital expenditures or additions above the relevant materiality thresholds in Chapter 6 and Appendices I, J, and K for the test period. Projects over \$20 million would appear in Appendix J, which are the projects that would most likely be subject of a direction to file a CPCN application. While any public interest matters can be explored in the IR process, BC Hydro could add to its revenue requirements application a qualitative discussion of potential public interest issues for each capital project in Identification phase or later that meet the Appendix J threshold in a revenue requirements application, including potential impacts to the environment, First Nations, and communities/other stakeholders.<sup>101</sup>
- In BC Hydro's Annual Report to the BCUC, BC Hydro will provide visibility into extension projects that have been identified since the previous revenue requirements filing.<sup>102</sup>

---

<sup>99</sup> Exhibit B-16, BCUC IR 2.19.2.

<sup>100</sup> Exhibit B-16, BCUC IR 2.17.6.

<sup>101</sup> Exhibit B-16, BCUC IR 2.19.3 and 2.19.4.

<sup>102</sup> Exhibit B-16, 2.19.4 and 2.31.1.

89. BC Hydro, however, does not consider that it is feasible to develop a set of standardized criteria that would indicate the magnitude of potential public interest issues associated with a given project. Each project is evaluated from a fresh perspective, and project issues, risks or impacts may change over time as the project progresses.<sup>103</sup> Moreover, public interest criteria have not been developed for other utilities in B.C. For example, both FortisBC Inc. and FortisBC Energy Inc. have only dollar thresholds for their CPCN criteria.<sup>104</sup> Therefore, BC Hydro submits that any consideration of public interest factors should be based on a qualitative assessment.

90. In summary, while the major project expenditure thresholds in the 2018 Guidelines will capture significant projects, the BCUC retains the discretion to direct a CPCN filing for extension projects due to public interest considerations, which can be evaluated based on the information in BC Hydro's revenue requirements applications and Annual Reports.

**(f) Definition of Extension is Broad and Consistent with UCA**

91. As part of the 2018 Guidelines, BC Hydro proposes that an "extension" be interpreted in a manner consistent with the 2010 Guidelines.

92. The UCA does not define the term "extension", but its plain meaning and use in the UCA suggests that it refers to the expansion of the geographic extent or capacity of a utility plant or system.<sup>105</sup> Consistent with this, as part of its 2015 Thermal Energy Systems Regulatory Framework Guidelines, the BCUC endorsed the concept of "extension" as follows: "An extension is a capital addition to the system of a material dollar amount to provide additional capacity to meet increased demand."<sup>106</sup> This interpretation is consistent with BC Hydro's proposal and reflects the historical origins of the CPCN requirement.<sup>107</sup>

---

<sup>103</sup> Exhibit B-16, BCUC 2.19.3.

<sup>104</sup> Order G-120-15, dated July 22, 2015. Online:

[https://www.bcuc.com/Documents/Proceedings/2015/DOC\\_44209\\_07-22-2015\\_G-120-15-PBRCapitalExclusion-ReasonsforDecision.pdf](https://www.bcuc.com/Documents/Proceedings/2015/DOC_44209_07-22-2015_G-120-15-PBRCapitalExclusion-ReasonsforDecision.pdf).

<sup>105</sup> Exhibit B-7, Revised Proposal, p. 32.

<sup>106</sup> Order G-27-15, dated March 2, 2015. Online:

[http://www.bcuc.com/Documents/Guidelines/2015/DOC\\_42213\\_TES-Guidelines.pdf](http://www.bcuc.com/Documents/Guidelines/2015/DOC_42213_TES-Guidelines.pdf).

<sup>107</sup> This includes guarding against harmful competition among utilities in the same geographic area and protecting the public from wasteful expenditures with two utilities serving the same area: see Exhibit B-7, Revised Proposal, p. 33.

93. Therefore, in the proposed 2018 Guidelines, extension projects may include: facility end-of-life replacement projects (as opposed to individual component(s) that have reached end-of-life); new projects designed to serve incremental energy and/or peak load growth; and refurbishment projects that are not undertaken to serve incremental load growth, but through efficiencies result in additional MWs and/or GWhs/year on a planning basis.<sup>108</sup> In BC Hydro's view, no IT capital projects would meet the definition of extension of a utility plant or system as it would not be a project initiated to expand the geographic scope of the utility plant or system.<sup>109</sup>

94. BC Hydro submits that its interpretation of the term "extension" is as broad as reasonably possible, while remaining consistent with the context and wording of the UCA and the BCUC's own interpretation.

**(g) Commitment to file 44.2 Applications Ensures All Major Projects will be Reviewed**

95. Regardless of the definition of "extension", in practice the BCUC will review all projects above the major project thresholds as BC Hydro commits in its 2018 Guidelines to filing section 44.2 applications for capital expenditures associated with major projects that are not extensions.<sup>110</sup>

96. Under section 44.2 of the UCA, the BCUC can accept capital expenditures as being in the public interest. Having accepted the expenditures for a project as being in the public interest, BC Hydro has assurance that the BCUC has considered and approved of the need for the project and BC Hydro's chosen alternative to address that need. While recovery of costs in rates is always subject to prudence review by the BCUC, if BC Hydro completes the project as approved, then the risk of an adverse prudence finding is significantly reduced.

---

<sup>108</sup> Exhibit B-7, Revised Proposal, Appendix B, pp. 3-4.

<sup>109</sup> Exhibit B-4, BCOAPO IR 1.20.3.

<sup>110</sup> Exhibit B-7, Revised Proposal, p. 33.

97. BC Hydro's commitment to file section 44.2 applications provides the BCUC with an effective mechanism through which it can oversee BC Hydro's capital investments that are not extensions.

#### **E. Enhancements to Content of Revenue Requirements Applications**

98. As discussed in BC Hydro's Revised Proposal, the 2018 Guidelines set out the types of additional information that BC Hydro intends to file in future revenue requirements applications.<sup>111</sup> This additional information, which relates to both projects and programs, was selected in response to the scope of the proceeding (as outlined in Appendix B to Order G-63-16) and is intended to facilitate the effective review of projects in revenue requirements proceedings and promote efficiency by consolidating key project information. In BC Hydro's view, this additional information will enhance the utility of future revenue requirements applications for the BCUC and ensure that the BCUC is adequately informed with respect to BC Hydro's capital investments.

99. BC Hydro's F20-F21 RRA includes information consistent with the 2018 Guidelines. For example, Appendix I (column W) to BC Hydro's F20-F21 RRA indicates which projects are linked to a given strategy, plan or study and Appendix K includes summaries of these strategies, plans or studies. Taken as a whole, BC Hydro considers that the F20-F21 RRA is comprehensive and provides the BCUC with the appropriate level of detail in order to assess BC Hydro's capital investments.

100. In response to the second round of information requests in this proceeding, BC Hydro considered a number of requests for additional information to be filed regarding its capital investments as part of future revenue requirements applications or its existing compliance reporting. BC Hydro is amenable to filing additional information as follows:<sup>112</sup>

- (a) In future revenue requirement applications, BC Hydro could include:

---

<sup>111</sup> Exhibit B-7, Revised Proposal, p. 63 and Appendix B, p. 2.

<sup>112</sup> BC Hydro also indicated it is posting public versions of its Annual Reports and project-specific compliance reports on its website: see Exhibit B-16, BCSEA IR 2.15.2.

- Information on the category of capital investments (mandatory investment, committed investment and investment to be prioritized) for individual projects listed in Appendix I.<sup>113</sup>
  - A qualitative discussion of potential public interest matters with regard to the environment, First Nations, and communities / stakeholders for capital projects in Identification phase or later that meet the Appendix J threshold.<sup>114</sup>
  - The actual or forecasted construction start dates for capital projects in Implementation phase that meet the Appendix J threshold.<sup>115</sup>
  - The final, actual cost for completed capital projects and programs above a materiality threshold.<sup>116</sup>
- (b) BC Hydro's Annual Reports to the BCUC will include an updated list of extensions above the materiality threshold.<sup>117</sup> Inclusion of this list in the Annual Report will fulfill the annual requirement of section 45(6) of the UCA.
- (c) In periodic progress reports, BC Hydro will notify the BCUC on changes to project baselines (e.g., cost and schedule) approved by BC Hydro's Board of Directors.<sup>118</sup>

101. After the BCUC has issued its Decision in this proceeding and subject to the BCUC's direction, BC Hydro is amenable to filing an updated version of the 2018 Guidelines to incorporate the above additional information.

102. BC Hydro is conscious that providing more information in a revenue requirements application is not always practicable or beneficial to the BCUC, and may therefore serve to

---

<sup>113</sup> Exhibit B-16, BCOAPO IR 2.34.1.2.

<sup>114</sup> Exhibit B-16, BCUC IR 2.19.3 and 2.19.4.

<sup>115</sup> Exhibit B-16, BCUC IR 2.27.3.

<sup>116</sup> Exhibit B-16, BCUC 2.36.1 to 2.36.2.

<sup>117</sup> Exhibit B-16, BCUC IR 2.31.1, BCOAPO IR 2.32.3 and BCOAPO IR 2.32.4

<sup>118</sup> Exhibit B-16, 2.35.2.1.

unnecessarily complicate the proceeding as a whole. Therefore, BC Hydro sought to avoid adding or agreeing to add information to its revenue requirements applications unless it was needed given the fact that the information provided in BC Hydro's revenue requirements applications is already voluminous.<sup>119</sup> In BC Hydro's view, the information it has committed to provide as part of future revenue requirements applications is comprehensive and will facilitate an efficient and effective review.

103. While the revenue requirements application provides significant information on capital investments, the information request process is the appropriate mechanism for obtaining additional information on specific issues and/or investments. Examples of the type of information on specific issues or investments that is best provided in response to information requests include: information on the total forecast cost variance of individual projects;<sup>120</sup> and additional documentation on asset health to justify specific capital investments (e.g. technical information such as engineering reports and condition assessments).<sup>121</sup>

104. Overall, BC Hydro believes it is striking the right balance between filing sufficient and fulsome information in its revenue requirements application to enable the BCUC's review, while keeping the revenue requirements application at a reasonable volume and level of detail. If the BCUC requires additional information relating to a specific project or program, it will be made available on request.<sup>122</sup>

## **F. Guidelines Reflect Appropriate BCUC Review of Programs**

105. BC Hydro's 2018 Guidelines facilitate effective and efficient review of capital investments that may be part of a program. As discussed below, BC Hydro will identify programs in its revenue requirements applications so that the BCUC can review the associated capital investments.

---

<sup>119</sup> Exhibit B-16, BCUC IR 2.32.3.

<sup>120</sup> Exhibit B-16, BCOAPO IR 2.40.1

<sup>121</sup> Exhibit B-16, BCUC IR 2.25.1.1.

<sup>122</sup> Exhibit B-16, BCUC IR 2.26.3.



**(a) Nature of Programs**

106. BC Hydro's programs can be broadly characterized as either: (1) Program of Projects; or (2) Recurring Capital Programs.

107. A Program of Projects is a group of related projects with common business drivers and/or technical characteristics which are managed together to reduce risk and achieve efficiencies. By sharing teams, resources and IT environments, Programs of Projects are managed in a coordinated way to achieve delivery efficiencies or deliver a common business requirement.<sup>123</sup> The review of Programs of Projects is discussed in detail below.

108. BC Hydro has a similar rationale for creating Recurring Capital Programs, which includes Work Programs and Acquisitions. Work Programs involve repeatable work units (generally recurring annually) that are grouped to deliver aggregate benefit and usually involve highly standardized high volume and low complexity asset replacements or system improvements. Examples of Work Programs include: the Wood Pole Replacement, IT application enhancements and hardware sustainment, Fleet Vehicle Capital Replacement, and Insulator Replacement programs.<sup>124</sup>

109. Acquisitions are one-time and recurring annual purchases that represent about 10 per cent of the IT capital expenditures/plan. Examples include purchases of data network equipment, data centre equipment, user access tokens, business software licenses, enterprise application licenses, personal computers, and mobile phones.<sup>125</sup> Recurring programs are described in Chapter 6 of BC Hydro's revenue requirements applications.

**(b) BCUC Review of Programs of Projects**

110. The review of Programs of Projects should be undertaken at the project level in a revenue requirements application or through a major project filing when a project exceeds the

---

<sup>123</sup> Exhibit B-7, Revised Proposal, p. 46.

<sup>124</sup> Exhibit B-7, Revised Proposal, pp. 47-48.

<sup>125</sup> Exhibit B-7, Revised Proposal, p. 48

major project threshold.<sup>126</sup> This is appropriate as each project within a Program of Projects delivers individual benefits, is justified on its own merits, and therefore, has a discrete business justification amenable to review by the BCUC, which an overarching program may lack.<sup>127</sup> Even if the total cost of a program may approach or exceed the major project threshold, projects within a Program of Projects have discrete business justifications and should be reviewed or approved (where the appropriate major project threshold is met) on an individual basis consistent with BC Hydro's internal financial approval process.<sup>128</sup>

111. To facilitate review of projects within programs, BC Hydro will identify in Appendix I of revenue requirements applications projects above the materiality limit that are anticipated to be delivered as part of Programs of Projects, and where available will provide a summary of the program strategy for all identified Programs of Projects.<sup>129</sup>

112. This approach allows the BCUC to exercise its oversight role with respect to addressing concerns with a particular program. The identification of those projects that are expected to be delivered as part of a Program of Projects (in Appendix I) provides the BCUC with increased visibility into how BC Hydro is grouping projects into a program to achieve delivery efficiency.<sup>130</sup> The BCUC will be able to review program strategies that have projects in the test period. If there are concerns, the projects associated with a program can be reviewed on a retrospective basis through a prudence review, or on a forecast basis in a revenue requirements application (or, if applicable, a major projects application).<sup>131</sup> The BCUC therefore has several regulatory tools at its disposal, supported by an appropriate level of information in Appendices I and J, to oversee BC Hydro's capital expenditures associated with a Program of Projects.

---

<sup>126</sup> Exhibit B-7, Revised Proposal, p. 48.

<sup>127</sup> Exhibit B-16, BCUC IR 2.38.1.3.

<sup>128</sup> Exhibit B-16, BCUC IR 2.38.4.

<sup>129</sup> Exhibit B-7, Revised Proposal, p. 48. Exhibit B-16, BCUC IR 2.38.1.

<sup>130</sup> Exhibit B-16, BCUC IR 2.38.1.1.

<sup>131</sup> Exhibit B-16, BCUC IR 2.38.1.3.

**(c) BCUC Review of Recurring Work Programs**

113. The BCUC's review of recurring work programs is best done in a revenue requirements application, through the review of program spending over the test period.<sup>132</sup> BC Hydro presents information on its recurring work programs in Chapter 6 of its revenue requirements applications,<sup>133</sup> so that forecast spending over the test period is transparent and can be reviewed. The BC Hydro approval processes for recurring capital programs are streamlined as they comprise low-complexity work and are recurring in nature. These programs often involve work on assets that are put into service in the same year as the expenditure is made.<sup>134</sup> Therefore, a revenue requirements proceeding is the most efficient and effective way to review recurring work programs.

**(d) CPCN-Like Review of Programs would not be Efficient or Effective**

114. A CPCN-like review of Programs of Projects or recurring work programs at the program level would not be efficient or effective for a number of reasons, as discussed below.

115. Programs of Projects should not be subject to a CPCN-like review at the program level for three key reasons. First, a CPCN-like review would be inconsistent with the underlying purpose of Programs of Projects, which is to create project delivery efficiencies. Programs of Projects are comprised of various projects that: (i) can be placed into operation independently and have standalone benefits (i.e., not predicated on one another); (ii) may be completed and placed into service at different times; and (iii) can be cancelled, deferred or have their timetables amended. New projects may be added to a Program of Projects because the scope of a given program is not set at a given point in time.<sup>135</sup> A project, on the other hand, has a fixed scope by definition.<sup>136</sup> Consistent with BC Hydro's Management and Accounting Policies and

---

<sup>132</sup> Exhibit B-7, p. 50.

<sup>133</sup> Exhibit B-16, BCUC IR 2.28.2.

<sup>134</sup> Exhibit B-7, p. 50.

<sup>135</sup> Exhibit B-16, BCUC IR 2.38.1.1.

<sup>136</sup> Exhibit B-7, Revised Proposal, p. 49.

Procedures (“MAPP”), related expenditures are not separated into multiple projects if they are dependent on one another for benefits.<sup>137</sup>

116. Second, the composition of a Program of Projects does not indicate a BC Hydro financial decision.<sup>138</sup> Indeed, the total forecast cost of a program is often uncertain and subject to change, reflecting a program’s inherently flexible scope, long duration and that programs are subject to reprioritization over time.<sup>139</sup>

117. Third, projects in a program will typically be at different phases of project lifecycle (with different levels of scope, cost and schedule definition), making the satisfaction of the minimum filing requirements impractical or impossible. Advancing work on projects in earlier phases of their project lifecycle in order to satisfy these filing requirements would compromise the timely and efficient delivery of those works. Even where program funding and project costs can be captured in a single staged funding approval (i.e., a collection of projects which are considered low risk and repeatable), BC Hydro does not consider such projects collectively as a single project within a program. Rather, like other programs, these projects could be funded separately and have standalone benefits. Their approval in one business case promotes efficiency and ultimately results in overall savings to BC Hydro’s customers.<sup>140</sup> Reviewing the entire cost of a Program of Projects is therefore not useful to the BCUC and would be logistically impractical and an inefficient use of resources.

118. BC Hydro explained why it would also not be appropriate to conduct a CPCN-like review for recurring work programs, as follows:<sup>141</sup>

Recurring work programs as described in BC Hydro’s Revised Proposal are standardized high volume and low complexity asset replacements. It would not be feasible to undertake a separate CPCN type review of the program because these programs are expected to recur on an ongoing basis with individual work units defined across the province on an annual basis.

---

<sup>137</sup> Exhibit B-16, BCUC IR 2.38.6.

<sup>138</sup> Exhibit B-16, BCUC IR 2.38.1.3.

<sup>139</sup> Exhibit B-16, BCUC IR 2.38.1.2; Exhibit B-16, BCUC IR 2.38.3.2.

<sup>140</sup> Exhibit B-16, BCUC IR 2.38.4.

<sup>141</sup> Exhibit B-16, BCUC IR 2.38.5.

Further, this type of review is not warranted because the work program is in fact a collection of low risk, repeatable work units. By their definition these low risk repeatable work units have only one viable alternative (typically like for like replacement) and will not present significant impacts on customers, First Nations or stakeholders. BC Hydro's program management practices ensure that we engage communities, First Nations, and other stakeholders as part of the delivery of our recurring capital programs.

119. For these reasons, and consistent with current practice, a revenue requirements application remains the most appropriate way to review recurring work programs.

120. In summary, BC Hydro submits that its proposed 2018 Guidelines properly reflect the efficient and effective review of BC Hydro's capital investments that are a part of programs.

**G. Guidelines Reflect Appropriate BCUC Review of Projects Linked to Strategies, Plans and Studies**

121. BC Hydro's proposed 2018 Guidelines facilitate the review of projects linked to strategies, plans and studies. As discussed below, BCUC oversight should be exercised at the project level if there are concerns with a particular strategy, plan or study.

**(a) Nature of Strategies, Plans and Studies**

122. BC Hydro plans to continue to make significant capital investments over the next decade which will enable it to replace aging assets, invest in growth and improve safety outcomes.<sup>142</sup> In order to promote the effective investment in the power system and other infrastructure, BC Hydro's power system strategies, plans and studies identify system needs and risks, thereby allowing the coordination and optimization of the long-term system development in response to those needs. This includes the development and selection of solutions to address system needs that have been identified, which are prioritized annually as part of BC Hydro's Ten Year Capital Forecast planning process ("Capital Forecast").<sup>143</sup> The Capital Forecast outlines capital investments in line with BC Hydro's mission to safely provide reliable, affordable and clean

---

<sup>142</sup> Exhibit B-7, Revised Proposal, pp. 7 and 51.

<sup>143</sup> Exhibit B-7, Revised Proposal, p. 51.

electricity throughout British Columbia. Taking this system-wide view allows BC Hydro to manage the development of the system while ensuring future system performance is maintained and anticipated load growth is accounted for.

123. Similarly, each year, BC Hydro's IT business unit prepares a rolling Technology Strategy and 5-Year Plan that outlines the IT capital investment proposed to meet its business objectives.<sup>144</sup> Like BC Hydro's power system strategies, plans and studies, the primary purpose of the Technology Strategy and 5-Year Plan is to document identifiable information technology needs and risks, along with their potential responses. Given the accelerated pace of technological development, and in order to maintain currency with changing technologies and opportunities, the portfolio is reviewed monthly and updated based on emergent needs, increased knowledge of potential net benefits, and available resources.<sup>145</sup>

#### **(b) Review of Projects Linked to Strategies, Plans and Studies**

124. BC Hydro's 2018 Guidelines facilitate an appropriate review of strategies, plans and studies in the context of projects linked to such strategies, plans or studies. As part of its 2018 Guidelines, BC Hydro proposes to indicate in revenue requirements applications what strategies, plans, or studies a project is linked to (e.g., Appendix I to the F20-F2021 RRA), and to provide summaries of the identified strategies, plans, or studies (e.g., Appendix K to the F2020-F21 RRA).<sup>146</sup> This approach will facilitate an efficient and effective review of a project's need and provide greater transparency into projects related under a strategy, plan or study. The summaries will provide the context with which to understand the issues or system needs being addressed and the resulting solutions.<sup>147</sup> As necessary, BC Hydro will continue to provide strategies, plans, or studies to support the project need and justification in major project applications.<sup>148</sup>

---

<sup>144</sup> The Technology Strategy and 5-Year Plan discusses strategic initiatives and drivers, foundational investments required to reduce risk, increase resilience and enable business initiatives, maturity of emerging technologies, and resource constraints that will influence the choice of capital investments: see Exhibit B-7, Revised Proposal, p. 53.

<sup>145</sup> Exhibit B-7, Revised Proposal, p. 53.

<sup>146</sup> Exhibit B-7, Revised Proposal, p. 54.

<sup>147</sup> Exhibit B-7, Revised Proposal, p. 55.

<sup>148</sup> Exhibit B-7, Revised Proposal, p. 54.

125. The above approach will facilitate oversight over BC Hydro's capital projects associated with a given strategy, plan or study. If the Commission is concerned about a specific BC Hydro strategy, then it can review the projects associated with the strategy on a retrospective basis through a prudence review, or on a forecast basis in a revenue requirements application or, if applicable, a major project application.<sup>149</sup> For example:<sup>150</sup>

...in the Fiscal 2020 to Fiscal 2021 Revenue Requirements Application, Appendix K – Attachment 1, page 1, BC Hydro describes the Campbell River Systems Engineering Assessment. As shown in the index at the beginning of Appendix K, there are several projects associated with this strategy. If the BCUC had concerns with BC Hydro's strategy, the BCUC could inquire into the projects associated with the strategy over the test period. The BCUC would therefore be able to consider whether the project expenditures arising from the strategy over the test period were reasonable or direct that a CPCN be required for any associated extension projects.

126. The BCUC therefore has several ways by which it can exercise oversight over BC Hydro's projects linked to strategies, plans or studies, and these are reflected in the 2018 Guidelines.

**(c) Requiring Approval of Strategies, Plans and Studies Would not be Appropriate**

127. A requirement that BC Hydro file strategies, plans or studies for approval would not be feasible or consistent with the UCA.

128. First, BC Hydro's strategies, plans, and studies do not represent financial decisions and do not contain the type of information conducive to BCUC approval. BC Hydro's strategies, plans, and studies typically do not include cost-benefit analysis and are instead primarily a vehicle for identifying potential solutions, which are subject to changing needs and emerging risks. This type of analysis is typically done as part of the development and approval of individual programs and projects.<sup>151</sup> Strategies are also not themselves drivers of capital investment, but rather, a method through which BC Hydro outlines responses to those

---

<sup>149</sup> Exhibit B-16, BCUC IR 2.38.7.

<sup>150</sup> Exhibit B-16, BCUC IR 2.38.7.

<sup>151</sup> Exhibit B-16, CEC IR 2.8.6.

drivers.<sup>152</sup> Identified responses (solutions) are not necessarily addressed as recommended in a strategy. This is often due to financial and resource constraints. Similarly, BC Hydro does not obtain internal financial approval when preparing strategies; nor are strategies intended to represent financial commitments or obligations.<sup>153</sup>

129. For example, strategies such as those provided in Appendix K of BC Hydro's F20-F21 RRA provide high level asset management strategies with respect to asset classes (e.g., circuit breakers). These asset classes may contain large populations of individual assets. The strategies include information on the asset demographics such as age, performance and condition as well as risks associated with this asset class. They also identify potential alternatives such as the acquisition of new assets, replacement or refurbishment of existing assets, decommissioning assets and/or purchasing spares based on asset management and engineering principles; however, they do not identify specific investments.<sup>154</sup>

130. Second, the UCA does not require the filing of strategies, plans or studies. There is no section of the UCA under which BC Hydro could file such a document for approval (with the exception of the IRP under Section 44.1). Consistent with the framework of the UCA, Dr. Brown and Dr. Carpenter of the Brattle Group consider that it is not part of the BCUC's role to evaluate whether a given strategy is the "best strategy available" or whether a strategy would optimize value to BC Hydro's customers and the public interest.<sup>155</sup> Ultimately, other than the IRP, BC Hydro does not believe it is the role of the BCUC to approve BC Hydro's strategies, plans or studies.<sup>156</sup> Instead, as outlined above, strategies, plans and studies can be used to inform the BCUC's oversight over BC Hydro's capital investments at the project level.

---

<sup>152</sup> Exhibit B-16, CEC IR 2.8.2.

<sup>153</sup> Exhibit B-16, BCUC IR 2.38.7.

<sup>154</sup> Exhibit B-16, CEC IR 2.8.5.

<sup>155</sup> Exhibit B-16, CEC Expert Witness IR 2.4.4.

<sup>156</sup> Exhibit B-16, BCUC IR 2.38.7.



## H. Assessing the Adequacy of Consultation

131. The BCUC's oversight of BC Hydro's capital investments includes the assessment of the adequacy of consultation in major project applications, but not in revenue requirements applications.

132. Section 35 of the *Constitution Act, 1982* protects Aboriginal and treaty rights of the Aboriginal peoples of Canada. As a result of this protection, the Crown has a duty to consult with Aboriginal people and, where applicable when the Crown has knowledge of those Aboriginal rights, whether asserted or established, and contemplates conduct that may adversely affect those rights.<sup>157</sup>

133. As a Crown corporation, BC Hydro must uphold the honour of the Crown in dealing with First Nations. Where the duty to consult is triggered, it is BC Hydro's practice to undertake engagement to look for opportunities to incorporate Aboriginal interests, concerns and perspectives. This engagement process continues as a project proceeds and more specific interests and impacts are identified.<sup>158</sup> Consistent with the duty itself, BC Hydro engages with First Nations regardless of whether a CPCN or a section 44.2 filing under the UCA is required for a project.

134. If the duty to consult is triggered with respect to a project that requires a CPCN or expenditure schedule approval, BC Hydro's identification, strength of claim assessment and resulting consultation/planned accommodation with First Nations is a factor, among many, the BCUC may consider in reaching a determination with respect to the project's public interest. The same cannot be said in the context of a revenue requirements proceeding.<sup>159</sup> BC Hydro explained why it would not be appropriate for the BCUC to assess the adequacy of consultation on projects in the context of a revenue requirements proceeding, as follows:<sup>160</sup>

BC Hydro believes that it is appropriate for the BCUC to assess the adequacy of consultation on projects when determining whether to grant a CPCN or

---

<sup>157</sup> Exhibit B-7, Revised Proposal, p. 45; Exhibit B-4, BCOAPO IR 1.26.1.

<sup>158</sup> Exhibit B-4, BCUC IR 1.8.1.

<sup>159</sup> Exhibit B-16, BCUC IR 2.29.1.

<sup>160</sup> Exhibit B-16, BCUC IR 2.29.1.

determining if an expenditure schedule for a project is in the public interest. However, it would not be appropriate for the BCUC to assess the adequacy of consultation on projects in BC Hydro's revenue requirements proceedings because the setting of rates for a test period is too peripheral to whether any particular project will proceed.

The task before the BCUC in a revenue requirements proceeding is to set BC Hydro's rates over the test period as indicated in sections 58 to 61 of the Utilities Commission Act. For instance, section 58(1) states that the "commission may...after a hearing, determine the just, reasonable and sufficient rates to be observed and in force", while section 58(2) states that "[i]f the commission makes a determination under subsection (1), it must, by order, set the rates."

Given that the underlying purpose of a revenue requirements proceeding is to set rates, BC Hydro presents evidence, amongst other things, of its forecast capital additions in order to establish a forecast of depreciation, interest, etc., that are included in BC Hydro's revenue requirements over the test period. In setting BC Hydro's rates, the BCUC is generally determining the revenue requirements over a test period based on a number of factors, including the reasonableness of proposed capital additions. Although BC Hydro's ability to recover its overall costs in rates may be at risk, BC Hydro is not seeking approval to proceed with any particular project. BC Hydro's decision process for a particular project is independent of the rate setting process.

This contrasts with a determination to grant a CPCN or approve an expenditure schedule, both of which are project-related approval processes which consider the need and justification for projects. If the duty to consult is triggered with respect to a project that requires a CPCN or expenditure schedule approval, BC Hydro's identification, strength of claim assessment and resulting consultation/planned accommodation with First Nations is a factor, among many, the BCUC may consider in reaching a determination. The same cannot be said if this information were included in a revenue requirements proceeding which serves a rate setting purpose.

135. In short, the setting of rates is too peripheral to whether a project will proceed to trigger an assessment of the adequacy of consultation.

136. In addition to the assessment of adequacy of consultation in a CPCN or expenditure schedule proceeding, an assessment of the adequacy of consultation for a project may also

occur in other forums, including in other regulatory processes, such as an environmental assessment, statutory decisions associated with the issuance of permits by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, or in a court proceeding. Moreover, whether or not a project undergoes regulatory review by the BCUC or any other regulator, First Nations have legal remedies in court if the duty to consult is not fulfilled.<sup>161</sup>

137. In summary, BC Hydro's submission that the BCUC should review the adequacy of consultation in major project applications, but not in revenue requirements proceedings, is consistent with the BCUC's current practice and obligations as a regulator of BC Hydro.

#### **I. Guidelines Reflect Appropriate Review of Information Technology Capital**

138. BC Hydro's proposed 2018 Guidelines facilitate an effective and efficient review of IT capital. IT projects can be the subject of review in revenue requirements applications and major project applications, as well BC Hydro Annual Report and other compliance filings, just like other projects, as contemplated in the 2018 Guidelines.

139. A key difference of IT projects compared to Power System projects is the fact that IT assets generally have a shorter asset life and so have a greater, relative, near term impact on rates.<sup>162</sup> To accommodate for this difference, and as discussed in section 5.4 of the Revised Proposal, BC Hydro's 2018 Guidelines include a separate and lower major project threshold of \$20 million for IT projects.

140. Prior to the introduction of the 2010 Guidelines, the CPCN threshold for all BC Hydro projects was \$50 million. Following consultation internally and with interveners leading to the 2010 Guidelines, it was determined that the \$50 million threshold was too high for what were then referred to as "Information Technology and Telecommunications" ("IT&T") projects. As such, BC Hydro created a different asset category for IT&T projects with a \$20 million

---

<sup>161</sup> Exhibit B-4, BCUC IR 1.8.1 and BCOAPO IR 1.26.2.

<sup>162</sup> Exhibit B-16, BCUC IR 2.37.1.

threshold.<sup>163</sup> The threshold for IT projects in the 2018 Guidelines remains set at \$20 million, which is appropriate and will continue to capture significant IT projects.<sup>164</sup>

141. BC Hydro IT projects also have a lower materiality threshold for Appendix I of revenue requirements applications. In Appendix I of BC Hydro's F20-F21 RRA, the materiality threshold for IT Projects is \$2 million, which is lower than the \$5 million threshold used for other projects.<sup>165</sup> The materiality threshold of \$2 million for information filed in Appendix I is appropriate. Appendix I of the F20-F21 RRA listed 30 projects and programs, accounting for two thirds of the total Information Technology capital additions. The number of listed projects and programs, compared to total test period capital additions, is comparable to that of Generation and Transmission projects.<sup>166</sup> While BC Hydro considers IT projects smaller than \$2 million not to be material enough to warrant review in detail, BC Hydro's IT capital portfolio is also described as a whole in Chapter 6 of BC Hydro's revenue requirements applications.

142. BC Hydro adopted a \$20 million materiality threshold for Appendix J in a revenue requirements application. While BC Hydro believes this is reasonable, BC Hydro is open to reducing the threshold for the projects in Appendix J in a revenue requirements application from \$20 million to \$10 million for IT projects.<sup>167</sup> This would provide a lower threshold for IT project consistent with the lower thresholds in other instances.

143. The proposed 2018 Guidelines are broad enough to allow for a two-phase section 44.2 application for IT projects, as was used for the first times for BC Hydro's Supply Chain Applications Project.<sup>168</sup> While major project applications are generally filed in a single phase proceeding towards or near the end of Definition Phase,<sup>169</sup> BC Hydro may, where appropriate, obtain BCUC acceptance through a two-phase regulatory process for IT projects.<sup>170</sup> One attribute that BC Hydro would consider when determining whether to use a two-phase process

---

<sup>163</sup> Exhibit B-16, BCUC IR 2.37.2.

<sup>164</sup> Exhibit B-7, Revised Proposal, p. 44.

<sup>165</sup> Exhibit B-16, BCUC IR 2.37.3.

<sup>166</sup> Exhibit B-16, BCUC IR 2.37.3.

<sup>167</sup> Exhibit B-16, BCUC IR 2.37.3.

<sup>168</sup> Exhibit B-16, BCUC IR 2.37.8.

<sup>169</sup> In single phase proceedings BC Hydro seeks approval of the total forecasted cost of the project.

<sup>170</sup> Exhibit B-4, BCUC IR 1.7.1.

of this kind is if a significant proportion of the project's expenditures are undertaken in the Definition Phase.<sup>171</sup> This would be most likely to occur for IT projects. Whereas, on average, approximately 4 per cent of a major project's capital expenditures is undertaken in the Definition Phase and earlier, the Definition Phase and earlier costs for IT projects are typically in the range of 20 per cent to 40 per cent of the overall total expected cost of the project.<sup>172</sup>

144. BC Hydro therefore submits that its 2018 Guidelines facilitate the effective and efficient review of IT capital, and a separate set of guidelines for IT projects are not required.

#### **J. Guidelines Provide Clarity on Role of the Annual Report**

145. BC Hydro's 2018 Guidelines provide clarity and guidance on the role of BC Hydro's Annual Report to the BCUC.

146. The Annual Report is filed within four months of the end of BC Hydro's fiscal year.<sup>173</sup> In order to increase transparency and accessibility, from January 1, 2019 the Annual Report will also be available to the public on BC Hydro's external website.<sup>174</sup>

147. BC Hydro has been working with the BCUC to improve the information in its Annual Report. In fiscal 2017 BC Hydro worked with the BCUC to add to section 6 of the Annual Report a comparison between planned and actual capital expenditures at the end of the reporting period/fiscal year (in line with format provided in the Fiscal 2017 – Fiscal 2019 Revenue Requirements Application). Annual capital expenditures and additions plan to actual cost variance explanations by main asset category are also provided.<sup>175</sup>

148. BC Hydro has taken a number of additional steps intended to make the Annual Report more relevant and informative to the BCUC. This includes improving the presentation of its financial schedules.<sup>176</sup> The changes made to the format and content of certain sections of BC

---

<sup>171</sup> Exhibit B-4, BCUC IR 1.7.1; Exhibit B-16, BCUC IR 2.37.6.

<sup>172</sup> Exhibit B-4, BCUC IR 1.7.1; Exhibit B-16, BCUC IR 2.37.6.

<sup>173</sup> Exhibit B-16, BCOAPO IR 2.32.1.

<sup>174</sup> Exhibit B-16, BCOAPO IR 2.42.1.

<sup>175</sup> Exhibit B-7, Revised Proposal, pp. 56-57 and Appendix B, p. 4.

<sup>176</sup> Exhibit B-7, Revised Proposal, p. 57.

Hydro's Annual Report provides better comparability of the actual results to the revenue requirements plan.<sup>177</sup> BC Hydro intends to continue to look for opportunities to refine and improve the presentation of the Annual Report in discussion with BCUC staff.<sup>178</sup>

149. BC Hydro's approach to the preparation of the Annual Report is consistent with the requirements of section 45(6) of the UCA. While BC Hydro does not consider it practical to provide updates to Appendices I and J from a revenue requirements application on an annual basis, in order to fulfill the requirements of section 45(6), BC Hydro will provide a list of extensions over the materiality limit in the Annual Report. This includes extension projects that are identified in years between revenue requirements applications.<sup>179</sup>

150. BC Hydro does not believe the Annual Report is an appropriate avenue to include project outcomes. As explained in BC Hydro's response to BCUC IR 1.14.2, the Annual Report does not lead to any BCUC decision on rates, a CPCN, or expenditure schedule. It will also duplicate existing avenues where project outcomes are better assessed, such as in revenue requirements applications and in project progress and final reports.

151. Therefore, BC Hydro submits that its proposed 2018 Guidelines related to the Annual Report are reasonable and meet the requirements of the UCA.

#### **K. Guidelines on Project Compliance Reports**

152. The 2018 Guidelines also provide guidance on project compliance reports. Project-specific compliance reports are an important mechanism through which the BCUC can oversee BC Hydro's capital investments. BC Hydro's 2018 Guidelines do not alter the manner and form of project-specific compliance filings. BC Hydro considers the form of report most commonly directed by the BCUC to be an effective means of providing the BCUC with timely updates on a project's progress, and changes to the project's schedule and costs. The sections below address BC Hydro's specific proposals related to project progress and final reports

---

<sup>177</sup> Exhibit B-16, BCSEA IR 2.16.4.

<sup>178</sup> Exhibit B-7, Revised Proposal, p. 57.

<sup>179</sup> Exhibit B-16, BCUC IR 2.31.1; Exhibit B-16, BCOAPO IR 2.32.3.

**(a) Periodic Project Progress Reports**

153. BC Hydro proposes to continue to file semi-annual project progress reports for most capital projects meeting the criteria for CPCN or section 44.2 applications. Semi-annual progress reporting strikes the appropriate timing balance by allowing reasonable progress to be made on project scope between reports, while recognizing that capital projects often have larger scopes and extended schedules.<sup>180</sup> In BC Hydro's view, establishing prescribed timelines for project progress reports is desirable and promotes regulatory certainty that is absent with schedules established by the BCUC on a project-by-project basis.

154. BC Hydro does not support quarterly reporting as there is typically not enough time between quarterly reports for consequential cost or schedule changes to be reflected or a reasonable amount of activities to be completed and reported on.<sup>181</sup> Within the past five years, BC Hydro has only been directed by the BCUC to file quarterly progress reports for two projects.<sup>182</sup> BC Hydro considers the value of quarterly reporting compared to semi-annual or annual reporting to be minimal.<sup>183</sup>

155. In some cases, annual project progress reports may be more appropriate given a project's schedule. For example, annual project progress reports may be appropriate for a few projects with work occurring in one or two adjacent construction seasons in a single year. If BC Hydro deems an annual project progress report to be appropriate for a particular project, it proposes to advise the BCUC in its application for approval or acceptance of the project.<sup>184</sup>

156. BC Hydro recognizes that the BCUC always retains discretion to order more frequent reporting. However, BC Hydro submits that the timing for progress reports in the 2018 Guidelines represents a reasonable approach that should be applied to most, if not all, projects.

---

<sup>180</sup> Exhibit B-7, Revised Proposal, p. 58.

<sup>181</sup> Exhibit B-7, Revised Proposal, p. 58.

<sup>182</sup> These projects include: (1) Interior to Lower Mainland (ILM) Project; and (2) Smart Metering and Infrastructure Program: see Exhibit B-16, BCUC IR 2.32.1. BC Hydro also voluntarily files quarterly reports for the Site C project.

<sup>183</sup> Exhibit B-16, BCUC IR 2.32.1.

<sup>184</sup> Exhibit B-7, Revised Proposal, p. 58.

**(b) Project Final Report (or Project Completion and Evaluation Report (PCER))**

157. With respect to the Project Final Report or PCER, BC Hydro's 2018 Guidelines add a filing deadline that is clearer and more aligned with BC Hydro's governance practices. More specifically, BC Hydro proposes to file the Project Final Report with the BCUC three months after it is reviewed by the BC Hydro Board of Directors.<sup>185</sup>

158. A set deadline for submitting the PCER is more definitive than the deadlines commonly outlined in the BCUC's Order granting a CPCN or accepting capital expenditures. In BC Hydro's view, the BCUC's current practice, which most commonly uses the terms "substantial completion", "project close", or "end of project", precipitates unnecessary ambiguity and variation between projects.<sup>186</sup> Further, the BCUC's current practice does not account for practical difficulties in completing a Project Final Report as directed and, as a result, BC Hydro has had to request a number of filing extensions. For example, outstanding contractual issues that need to be resolved before a final accounting of project costs and a final assessment of the project's benefits can be completed. A delay in this regard prevents the timely submission of the PCER.<sup>187</sup> The proposal to file the PCER with the BCUC three months after it is reviewed by the BC Hydro Board of Directors will clarify expectations and better align internal and external reporting requirements.

159. BC Hydro will continue to provide project progress reports in a form and manner agreed to with the BCUC until the PCER is submitted.<sup>188</sup> It has generally been BC Hydro's practice to report on the status and expected timing of a project's PCER in the project progress reports as substantial completion approaches for major project's approved or accepted by the BCUC.<sup>189</sup>

160. BC Hydro submits that its 2018 Guidelines will improve BC Hydro's project-specific compliance reports and are reasonable and appropriate.

---

<sup>185</sup> Exhibit B-7, Revised Proposal, p. 58.

<sup>186</sup> Exhibit B-7, Revised Proposal, pp. 58-59.

<sup>187</sup> Exhibit B-7, Revised Proposal, p. 59.

<sup>188</sup> Exhibit B-7, Revised Proposal, p. 58; see also Exhibit B-16, BCUC 2.33.1.

<sup>189</sup> Exhibit B-16, BCUC IR 2.33.1.



### **PART THREE: CEC'S PROPOSAL SHOULD BE REJECTED**

#### **A. Introduction to BC Hydro's Rebuttal to CEC's Proposal**

161. In BC Hydro's submission, the CEC's proposal<sup>190</sup> illustrates the legal and practical limits on the BCUC's oversight over BC Hydro's capital investments. The CEC's proposal seeks to involve the BCUC in the management of BC Hydro by prescribing detailed information filing requirements and performance metrics that would, in effect, dictate how BC Hydro should manage its capital. As the CEC recognizes, the B.C. Court of Appeal has stated that the UCA does not give the BCUC the jurisdiction to direct the manner in which the directors of a public utility manage its affairs.<sup>191</sup> Further, on a practical level, it would not be reasonable for the BCUC to attempt to manage a utility's affairs (directly or indirectly) as it would require the duplication of the utility's resources, which would be inefficient. In BC Hydro's respectful submission, there is a clear role for BC Hydro to manage the utility and for the BCUC to exercise oversight over BC Hydro. It is integral to the regulatory structure put in place by the legislature that these roles remain separate and distinct. This Part of the Argument explores the above themes in more detail, explaining why the CEC's proposal should not be accepted by the BCUC.

162. To assist in evaluating and responding to the CEC's evidence, BC Hydro retained Dr. Paul R. Carpenter and Dr. Toby Brown of the Brattle Group. The evidence of Dr. Carpenter and Dr. Brown addresses whether the evidence filed by the CEC appropriately characterizes the objectives and role of the Commission with respect to the oversight of capital expenditures and projects, and provides their assessment of the CEC's framework for assessing the cost-effectiveness of BC Hydro's capital drivers, strategies and plans through an annual reporting process.<sup>192</sup>

---

<sup>190</sup> Exhibit C3-10.

<sup>191</sup> *BC Hydro v. British Columbia Utilities Commission*, 20 BCLR 3d 106. [see Book of Authorities, Tab 1]

<sup>192</sup> Exhibit B-15-1.

163. The resumes of Dr. Carpenter and Dr. Brown are attached to their evidence, filed as Exhibit B-15-1. Dr. Carpenter and Dr. Brown also summarize their qualifications on pages 1-2 of their report, as follows:<sup>193</sup>

Dr. Paul Carpenter is an economist specializing in the fields of industrial organization, finance and energy and regulatory economics. He received a Ph.D. in Applied Economics and an M.S. in Management from the Massachusetts Institute of Technology, and a B.A. in Economics from Stanford University, and has been involved in research and consulting on the economics and regulation of the natural gas, oil and electric utility industries in North America and abroad for over thirty-five years. He has frequently testified before federal and state regulatory commissions, in federal court and before the U.S. Congress, on issues of pricing, competition and regulatory policy in these industries. Outside of North America, he has advised governments and regulatory bodies on the structure and performance of their natural gas markets and on the reform of their regulatory regimes. These assignments have included testimony before the U.K. Monopolies and Mergers Commission and the Australian Competition Tribunal, and advice to the European Commission and to governments of and regulators in, Greece, Ireland, the Netherlands, New Zealand and Australia. In Canada, he has testified before the National Energy Board and several provincial regulatory bodies on the subject of business risk and its relationship to the cost of capital for natural gas pipelines and distributors. He testified before the Alberta Utilities Commission in both of its generic Performance Based Ratemaking proceedings. Further details of his educational and professional background, as well as a listing of publications, are provided in his resume appended to this evidence as Attachment 1.

Dr. Toby Brown specializes in the regulation and economics of the gas and electricity sectors. He has over fifteen years of experience across the U.S., Canada, the UK and Australia, primarily consulting for pipelines, utilities, and regulators, together with four years at Ofgem, the energy regulator in Great Britain. He has particular expertise in the application of incentive-based regulation in the energy sector, and has testified in regulatory reform proceedings in Alberta and Hawai'i. Dr. Brown's consulting experience includes analysing business risk in pipeline rate cases, assessing the economic impacts of alternative regulatory frameworks and competitive structures in the energy sector, and advising on regulatory best practices based on experience in

---

<sup>193</sup> Exhibit B-15-1, pp. 1-2.

different jurisdictions worldwide. Dr. Brown also provides litigation support in a wide range of areas, including damages estimations, competition assessments, gas contract arbitrations, and utility and pipeline rate cases. He holds a D.Phil. in chemistry from the University of Oxford. Dr. Brown's resume is appended to this evidence as Attachment 2.

164. BC Hydro submits that Dr. Carpenter and Dr. Brown are eminently qualified to opine on the questions posed to them and provide an independent, expert view of the role of regulators such as the BCUC in overseeing the capital investments of a utility like BC Hydro.

165. BC Hydro's Rebuttal Evidence,<sup>194</sup> including the evidence of the Brattle Group, responds in detail to the CEC's evidence. In this Final Submission, BC Hydro focusses on the following key points:

- The BCUC's existing regulatory processes already facilitate effective oversight over BC Hydro's capital expenditures and projects consistent with the processes in the UCA.
- The CEC's proposal would interfere with BC Hydro's management of its capital expenditures and projects in contravention of the Court of Appeal's decision in *BC Hydro v. British Columbia Utilities Commission*, 20 BCLR 3d 106.
- Compared to BC Hydro asset management practices which are performing well and have been endorsed by third parties, the CEC's proposal would lead to inferior asset management, capital planning and capital delivery approaches.

166. Each of the above is addressed below.

## **B. The BCUC's Existing Regulatory Processes Already Facilitate Effective Oversight**

167. Contrary to the claims made by the CEC,<sup>195</sup> an Annual Capital Report is not required for the BCUC to effectively carry out its oversight over BC Hydro. The BCUC's existing regulatory

---

<sup>194</sup> Exhibit B-15 and B-15-1.

<sup>195</sup> Exhibit C3-10, para. 453.

processes already facilitate effective oversight over BC Hydro's capital expenditures and projects using the processes contemplated in the UCA. BC Hydro submits that the CEC has not identified any compelling reason for its proposed filing requirements.

**(a) Existing Processes Facilitate Effective Review**

168. As explained in BC Hydro's Rebuttal Evidence, BC Hydro's proposed 2018 Guidelines reflect the regulatory processes contemplated under the UCA and employed by the BCUC in exercising oversight over the capital investments of BC Hydro and other utilities in B.C. These processes have been in place for many years. The BCUC exercises oversight through the review and approval of long term resource plans, revenue requirements and major project applications, project specific compliance reports, as well as through inquiries into specific issues. This is a sound approach that has been commonly employed in the industry. In BC Hydro's view, the BCUC has exercised, and can continue to exercise effective oversight over capital investments through the regulatory processes it has customarily used to oversee utilities in B.C. There is no need to institute a new annual filing requirement to ensure effective oversight by the BCUC.<sup>196</sup>

169. Dr. Brown and Dr. Carpenter also find that the CEC has not identified anything missing from the BCUC's current processes. Dr. Brown and Dr. Carpenter state:

We have reviewed the evidence of Mr. Craig, as well as responses to information requests concerning Mr. Craig's evidence. We have not found in his evidence a clear articulation of what is currently missing from BC Hydro's proposed information filings, nor a clear explanation of how the Commission would make use of any additional information that Mr. Craig recommends be provided in Commission decision-making.<sup>197</sup>

...

We have not reviewed the Commission's approach to the various processes described above in order to form a view of how well they meet the objectives of those processes (RRA, CPCN, Section 44.2, Annual Report and IRP), but if Mr.

---

<sup>196</sup> Exhibit B-15, pp. 5-6.

<sup>197</sup> Exhibit B-15-1, p. 4.

Craig's characterisations of them is accurate, we do not consider that this constitutes identified problems to which the appropriate solution is an additional annual filing requirement focused on "beginning stages". For example, if the current IRP is out-of-date, the solution might be to update the IRP. The RRA does not need to look at longer time-frames because major projects are subject to a separate approval process, and because rates are trued up to reflect actual capital expenditure. Under current procedures, all of BC Hydro's capital expenditures can be reviewed for prudence, and the Commission can direct BC Hydro to exclude imprudent sums from cost-recovery in rates.<sup>198</sup>

170. In short, the BCUC's existing processes are sufficient and allow the BCUC to exercise its oversight function as contemplated under the UCA.

**(b) Existing Processes Facilitate Gathering of Information**

171. The BCUC's existing processes as contemplated in the 2018 Guidelines and the UCA facilitate the gathering of information on BC Hydro's capital investments. Therefore, contrary to the CEC's claims,<sup>199</sup> the CEC's proposed Annual Capital Report is not required for the gathering of additional information. BC Hydro already files extensive information with the BCUC in various applications and filings, and the BCUC's existing processes provide ample opportunity for information gathering. BC Hydro states in its Rebuttal Evidence:<sup>200</sup>

First, we engage with Commission staff to develop applications that meet the Commission's information needs or align applications with Commission approved guidelines. Second, if we were to file an application that was materially deficient, the Commission could reject the application and require us to refile an adequate application. Third, the information request process used by the Commission provides the opportunity for further information to be requested and provided after the initial application is filed. Fourth, the Commission may also direct us to provide certain information to the Commission in the future if, when making its Decision, it is dissatisfied with the level of information filed. Finally, the Commission can ultimately choose not to grant the requested approval if we have not provided sufficient evidence to justify our requests.

---

<sup>198</sup> Exhibit B-15-1, pp. 14-15.

<sup>199</sup> Exhibit C-3-10, para. 366; see also Exhibit C-3-13, CEC Response to BCUC IR 1.1, p. 2.

<sup>200</sup> Exhibit B-15, p. 8.

Therefore, there is no need to institute an additional process to provide information to the Commission.

172. In short, the BCUC has sufficient ability to gather information through its existing processes.

**(c) Existing Processes Facilitate Review of Performance Information**

173. The BCUC's existing processes as contemplated in the 2018 Guidelines and the UCA facilitate the review of BC Hydro's performance information. The CEC's proposed annual capital filing is therefore not needed to be a repository for performance information over time, as suggested by Mr. Thomson.<sup>201</sup> BC Hydro already collects performance information, which is primarily benchmarked through BC Hydro's Service Plan.<sup>202</sup> The BC Hydro Service Plan is a three-year plan with strategies, performance measures and targets, aligned with the objectives in the B.C. Government's Mandate Letter to BC Hydro. The BC Hydro Service Plan is prepared under the direction of the BC Hydro's Board of Directors in accordance with the *Budget Transparency and Accountability Act*. The Board is accountable for the contents of the plan, including what has been included in the plan and how it has been reported.<sup>203</sup> BC Hydro reports on its performance in its Service Plan Report, which is filed in its revenue requirements application.<sup>204</sup> Further information on performance metrics can always be requested through the information request process in a proceeding. For example, in response to CEC IR 2.4.3 in this proceeding, BC Hydro provided the performance metrics in the Service Plan over the past 10 years.<sup>205</sup> There is therefore no need to collect performance information through a separate filing.

**(d) Existing Processes Facilitate Prudence Reviews**

174. As discussed in Part Two above, the BCUC's oversight includes the power to review capital investments for prudence, which creates a strong incentive for BC Hydro to manage its

---

<sup>201</sup> Exhibit C3-15, CEC Response to CEACBC IR 4.3, p. 10.

<sup>202</sup> Exhibit B-15, p. 9.

<sup>203</sup> Exhibit B-16, CEC IR 2.4.2.

<sup>204</sup> Exhibit B-16, CEC IR 2.20.4.

<sup>205</sup> Exhibit B-16, CEC IR 2.4.3.

capital investments prudently. Mr. Craig claims that his proposal is needed because the BCUC's ability to deny expenditures at the time of a revenue requirements application is constrained as it can result in "wasted" spending by BC Hydro. Mr. Thomson's similarly claims that it is "too late" to deny expenditures once they have been made. BC Hydro explained why this position is incorrect in its Rebuttal Evidence, as follows:<sup>206</sup>

First, at the time of the RRA, the Commission can make determinations with respect to whether projects are in the public interest before significant dollars have been spent. In any RRA, and indeed at any time, we have hundreds of projects in various stages of the project lifecycle, from early planning stages to the final implementation phase. If the Commission believes it is warranted, in a revenue requirements application it can inquire into the public interest of projects that are in their early stages, before significant dollars are spent. Further, the Commission can order BC Hydro to file a Certificate of Public Convenience and Necessity (CPCN) for extension projects, and can set the thresholds for major projects applications, which provides the opportunity to review projects in detail.

Second, by its nature, the prudence standard is always applied to dollars that have already been spent. It would be contrary to the Commission's obligations under the UCA to suggest that it is "too late" for the Commission to disallow costs if they have already been incurred. For both Crown and investor owned utilities, the Commission is charged with approving rates that are just and reasonable. Allowing the recovery of imprudent expenditures in rates is inconsistent with that standard.

Third, the application of the prudence standard by disallowing expenditures creates an incentive for the utility to act prudently to avoid the disallowance of costs in the future. The prudence standard creates incentives for BC Hydro, just as it does for an investor owned utility. We have a strong incentive to avoid the disallowance of expenditures by the Commission because the disallowed expenditures will impact the income statement of the shareholder. Our shareholder, the B.C. Government, budgets based on a planned return from BC Hydro and does not expect to have to pay for costs found to be imprudent by the Commission. Having its return from BC Hydro reduced can impact the B.C. Government's ability to meet its budget, and any resulting impacts on taxpayers could have political consequences. Our Board of Directors is answerable to the

---

<sup>206</sup> Exhibit B-15, pp. 15-16.

B.C. Government, and the Board of Directors oversees the management of BC Hydro. We can confirm that we have a strong incentive to avoid disallowances of expenditures.

175. BC Hydro therefore submits that the application of the prudence standard is and remains an important part of the BCUC's oversight role over BC Hydro.

**(e) Existing Processes Facilitate Early and Proactive Review**

176. As discussed in Part Two above, the BCUC's existing processes as contemplated in the 2018 Guidelines and the UCA already facilitate review of capital investments prior to implementation. Adding an annual information filing would not give the BCUC any opportunity to make "earlier" or more "proactive" decisions as contended by the CEC.<sup>207</sup> BC Hydro explained as follows in its Rebuttal Evidence:<sup>208</sup>

First, the addition of an annual information filing does not change the fact that at any one time we will have a significant number of strategies and plans, and hundreds of projects and programs in various stages of their lifecycle. This is the case in a revenue requirements application, and would be the case for CEC's proposed annual filing. Filing annually will not give the Commission any "earlier" look at strategies, plans, projects, or programs, but would at best give the Commission more frequent looks. At worst, Mr. Craig's annual filing would produce a summary of data in which any single investment cannot be easily understood or evaluated.

Second, the ability to make "earlier" or more "proactive decisions" on plans, strategies, projects and programs would be similar to that in revenue requirements applications. Specifically, any attempt to make decisions at an earlier planning stage will be limited by the level of information available at these early planning stages. Because engineering work has not begun or has not progressed very far, cost estimates for projects and programs in early stages, if available at all, are highly uncertain. Details on available alternatives, stakeholder engagement, First Nations consultation, environmental impacts and other factors relevant to a cost effectiveness determination may be uncertain and only available at a high level or not available at all.

---

<sup>207</sup> Exhibit C3-10, para. 94; Exhibit C3-15, CEC Response to CEABC IR 2.2, p. 5.

<sup>208</sup> Exhibit B-15, pp. 17-18.



Because information on projects and programs takes time and cost to develop, BC Hydro does not give internal approval for the full funding of a project in the early stage, but instead approves its projects and programs in phases as they develop. We would not expect the Commission to approve projects and programs at early stages based on the limited information available at that time. For example, we would not be able to satisfy the Commission's CPCN Guidelines based on the information available in the Identification Phase of a project.

Any early assessment of a strategy, plan, project or program will therefore always be subject to the later assessment of projects or programs when the information is available to assess the need, alternatives, costs, benefits, stakeholder and First Nation impacts, and all the other factors relevant to a cost effectiveness determination.

177. Therefore, BC Hydro submits that the annual filing proposed by the CEC would not provide any improvement to the BCUC's oversight over BC Hydro's capital spending.

**(f) Increase in Regulatory Process Not Justified**

178. Given the existing processes utilized by the BCUC as contemplated in the 2018 Guidelines, BC Hydro submits that the CEC has not justified the need for the significant increase in regulatory process it proposes. A review of the CEC's evidence and responses to information requests shows that the CEC envisions a significant increase in the amount of information filed regularly with the BCUC, as well as an annual regulatory process. For instance, the CEC describes its proposed additional filing requirements in the following ways:

- "The CEC believes the Commission's oversight should require information from BC Hydro on an ongoing basis to allow assessment of the whole capital management structure, as well as its various components."<sup>209</sup>
- "The CEC proposed in Part I a set of metrics be developed to assess the full range of the CMS and that these metrics be assessed on an ongoing basis to test the

---

<sup>209</sup> Exhibit C3-10, para. 100.

overall validity and effectiveness of BC Hydro's capital spending systems, and promote ongoing improvement over time."<sup>210</sup>

- "The CEC submits that an understanding and assessment of the validity of BC Hydro's capital planning and planning processes is of such significance as to warrant a substantial and independent review, at a period which precedes the RRA."<sup>211</sup>
- The CEC proposes that the content of the annual filing include: "(1) specific reports on main drivers of capital expenditures, being load forecast information, asset condition, performance and life expectancy information, safety and security risk profile information, and stakeholder interest information. (2) Any strategy papers that are relevant to how BC Hydro manages response to the drivers. (3) capital plan information with regard to the portfolio of capital expenditures and investments required for the portfolio of assets being managed, which can progressively develop to include cost-effectiveness information, as developed in stages..., along with the cost information. (4) Business case information using sampling to identify potential issue efficiently and effectively and then specific case filing where the Commission, through oversight, believes closer examination should be made. (5) Project completion reports, and post-implementation reporting for tracking benefit realization accountability in support Commission decision making in its approval processes."<sup>212</sup>
- The development of a "continuous process building a permanent repository of capital oversight information which can be used to inform any of the BCUC's approval processes". This would involve each major driver of capital

---

<sup>210</sup> Exhibit C3-10, para. 103.

<sup>211</sup> Exhibit C3-10, para. 177.

<sup>212</sup> C3-13, CEC Response to BCUC IR 1.1, p. 2.

expenditures to have a regularly updated set of information supporting the forecast needs.<sup>213</sup>

- Quantitative metrics about assets, their lives, their duty cycles and modes of failure to better inform and enable the Commission to be more effective in its decision-making approval roles.<sup>214</sup>
- “The CEC believes that the LRB filings should be improved such that the load resource balance available to review in any filing for Commission approval has been updated annually at the same time the forecast is updated and all filed as part of the Annual Capital Information updated.”<sup>215</sup>
- “The CEC would recommend adding to the content of the Annual Report of Commission such additional information as to enable a review of the important drivers of capital and the strategy papers BC Hydro has developed that are a basis for capital expenditures and the capital plan information with respect to the prospective portfolio of capital expenditure and investment requirements and BC Hydro’s capital assets.”<sup>216</sup>
- “The CEC believes the Commission should have project-specific compliance reports for all conditions set for a project, which may need monitoring throughout the project life cycle to ensure prudent implementation. If prudent implementation is not carried out when the Commission has highlighted a prudency risk then BC Hydro would be at risk for failure to recover some portion of the costs of the project.”<sup>217</sup>
- CEC proposes that there be no materiality thresholds for Annual Capital Reports: “it would represent better oversight if the whole portfolio of capital below the

---

<sup>213</sup> C3-13, CEC Response to BCUC IR 1.1.1, pp. 2-3 and 7.1.1, p. 34.

<sup>214</sup> C3-13, CEC Response to BCUC IR 2.2, pp. 12-16.

<sup>215</sup> C3-13, CEC Response to BCUC IR 3.1, pp. 22.

<sup>216</sup> C3-13, CEC Response to BCUC IR 6.4, p. 32.

<sup>217</sup> Exhibit C3-13, CEC Response to BCUC IR 12.2, p. 53.

threshold were presented to the Commission analytically providing both the costs and the benefits such that the cost effectiveness of this capital may receive oversight and so that the Commission's regulatory role can focus attention on improving the cost-effectiveness of these capital expenditures and investments."<sup>218</sup>

179. In BC Hydro's submission the CEC's proposal does not offer the potential benefits to justify this significant increase in information filed and regulatory process.<sup>219</sup> In BC Hydro's view, the volume of information filed with the BCUC in support of its applications is already significant and presents challenges for all parties to manage. The CEC's apparent premise that doubling up on the filing of information and regulatory process will lead to benefits is not substantiated. There is in fact no evidence that the CEC's proposal (or one like it) is used in any other jurisdiction or will achieve any savings for customers.<sup>220</sup> To the contrary, in BC Hydro's submission, the CEC's proposal is certain to result in an increase in costs for customers, an increase in system risk, and could delay the implementation of BC Hydro's capital plan with highly uncertain benefits, if any.

180. BC Hydro also submits that when information is filed outside the context of an application seeking an approval or other need for decision or determination, it has little value and creates inefficiencies and confusion. BC Hydro's proposed 2018 Guidelines are built around the processes used by the BCUC and the approvals that the BCUC may grant under the UCA (e.g., the granting of a CPCN, acceptance of an expenditure schedule, or setting of rates). When an application is filed for a specific approval, the scope of information needed by the BCUC flows from the approval sought and the BCUC has a particular decision to make, which focusses the proceeding on what is relevant and material. In contrast, where there is a mere information filing, there is no clear end point or decision to be made, which makes any review of the information challenging due to a lack of focus and purpose. For example, the filing of a strategy in a CPCN application to provide context for approval of major project is helpful and

---

<sup>218</sup> Exhibit C3-13, CEC Response to BCUC IR 13.2, p. 56.

<sup>219</sup> Exhibit B-15, pp. 19-21.

<sup>220</sup> Exhibit B-15, pp. 20-21, and Exhibit B-15-1, p. 17.

can assist the BCUC come to a determination as to whether a project is in the public interest. However, the filing of all of BC Hydro's strategic documents on an annual basis, when no approval is being sought, is a fruitless exercise.

181. Therefore, in BC Hydro's submission, the CEC's proposal is not needed. The BCUC's existing processes reflect a standard approach and have been proven to provide effective oversight over capital investments, and there is no demonstrable benefit or need to add the CEC's proposed Annual Capital Report.

### **C. The CEC's Proposal Would Interfere with BC Hydro's Management of its Capital**

#### **(a) CEC's Proposal Aims to Put BCUC in the Seat of Management**

182. In BC Hydro's respectful submission, the CEC's proposal blurs the distinction between management and regulator by requiring the creation and filing of an extensive amount of information designed to give the BCUC control over how BC Hydro manages its capital, including by determining detailed performance metrics by which the utility would be compelled to satisfy. A fundamental flaw of this approach is that it would interfere with management of the utility contrary to the ruling B.C. Court of Appeal, and would require the BCUC to duplicate the resources already at the utility, which would be inefficient and impractical. The sections below explain in more detail how the CEC's proposal suffers from this fatal flaw.

#### **(b) CEC's Proposal Interferes with Utility Management Contrary to Court of Appeal Decision**

183. BC Hydro's submits that the focus of the CEC's evidence is to allow the BCUC to determine how BC Hydro should manage its capital investments. While BC Hydro obviously agrees that how it manages its capital program is important, this is a management function, not a function of the BCUC.

184. In *BC Hydro v. British Columbia Utilities Commission*, 20 BCLR 3d 106, the B.C. Court of Appeal clearly states that the BCUC's jurisdiction does not extend to the management of the utility. Goldie J.A. states at paras. 56 and 58:

It is only under s.112 of the Utilities Act that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

...

Taken as a whole the Utilities Act, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.

185. The above case was applied in 2004 by the B.C. Supreme Court in *Office and Professional Employees' Int'l Union et al v. B.C. Hydro et al*, 2004 BCSC 422. The Court held that the BCUC did not have jurisdiction over BC Hydro's outsourcing of certain services to Accenture. The Court concluded at para. 63:

The choice to out-source these services to Accenture was a management decision. As such, it fell within the purview of B.C. Hydro's directors, and did not attract the jurisdiction of the Utilities Commission: *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, supra at paras. 55-58.

186. Following these authorities, Mr. Craig acknowledges the limits on the BCUC's jurisdiction, stating: "The Commission cannot seek to direct the management decision making process at BC Hydro."<sup>221</sup> Mr. Craig also states:<sup>222</sup>

The Court of Appeal decision in regard to the BC Hydro and Power Authority Board's responsibility to manage the company and its planning is clear and has influenced the CEC to avoid recommending that the Commission create any process which would attempt to insert Commission or other party led decision making into BC Hydro's management of the Utility.

187. The CEC, however, fails to confine its proposal only to seeking Commission oversight information. BC Hydro's Rebuttal Evidence explains as follows:<sup>223</sup>

Mr. Craig's proposal does not confine itself to seeking oversight information. The effect of the proposal would be to direct utility management processes, which

---

<sup>221</sup> Exhibit C3-14, MoveUP IR 1.2.

<sup>222</sup> Exhibit C3-14, MoveUP IR 1.1.

<sup>223</sup> Exhibit B-15, pp. 22-24 (Q12/A12).

Mr. Craig has stated the Commission cannot do. Three key indicators that Mr. Craig's proposal inappropriately interferes with utility management are as follows:

- Mr. Craig's proposal would replace the well accepted prudence standard with his own conception of "cost effectiveness." Mr. Craig's concept of "cost effectiveness" is not based on industry standards nor is it in line with either the Commission's or BC Hydro's use of the term, but is a new concept to govern how BC Hydro should manage its capital plan. Mr. Craig uses his concept of cost effectiveness to seek to determine how the utility's capital plans should be evaluated, which capital projects and programs should proceed, which expenditures may be imprudent, and how rates should be set. For example, on page 6 of Exhibit C3-13, in response to BCUC IR 1.1.2, Mr. Craig says that the Commission could disallow costs if BC Hydro fails to take an action that would be more "cost effective" as Mr. Craig's understands the term;
- Mr. Craig's framework and information requirements do not seek to simply gather available information, but force the utility to create new information that is in line with Mr. Craig's approach to managing capital according to "cost effectiveness". For example, in response to BCUC IR 1.1.2, Mr. Craig refers to a Commission "standard" for information requirements and states that "the nature of the cost effectiveness information that will best service Commission needs is as yet a work in progress." It is clear that Mr. Craig is not proposing information gathering, but is proposing that the Commission should direct what information should be created by the utility as part of its management decision making process, and that this information must be in line with his governing concept of "cost effectiveness"; and
- Mr. Craig's framework and information requirements not only prescribe what information should be created by utility management, but would impose a process whereby the Commission (and presumably interveners such as the CEC) would continually improve this information over time resulting in improvements in the "cost effectiveness" of BC Hydro's capital plan. Mr. Craig refers to the Commission "encouraging BC Hydro to do better", but it is clear that this encouragement would be by way of directives from the Commission. Mr. Craig refers to the "[r]efining of standards, criteria, strategies and practices" and the Commission

ordering “prospectively set formulas and methods”. Mr. Craig also states that the disallowance of recovery of costs could be threatened if BC Hydro fails to comply.

Mr. Craig’s proposal is therefore not limited to seeking oversight information, but seeks to redefine the standard by which BC Hydro’s capital is judged and to direct BC Hydro management on how it should be managing its capital portfolio. Mr. Craig’s proposal would therefore interfere with BC Hydro’s management in a way that Mr. Craig admits is not within the jurisdiction of the Commission.

188. Further to the above, Mr. Craig’s proposal is similar in key respects to the directives of the BCUC declared unenforceable by the Court of Appeal in *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, 1996 CanLII 3048 (BC CA). The similarities are illustrated in the following table:

<b>Directions Declared Unenforceable by Court of Appeal</b>	<b>Proposal of CEC</b>
Were claimed to be no more than enforcement of information gathering power (paras. 19 and 54)	Claimed to be confined to gathering information (Exhibit C3-14, response to MoveUP IR 1.1.2)
Were claimed to be justified on basis that planning process is enhanced by participation of interest groups (para. 21)	Justified on basis that BCUC’s oversight “could be substantially enhanced with effective review of the earlier stages of the capital management processes and comprehensive understanding of the contextual elements” (Exhibit C3-10, para. 94)
Were claimed to be justified on basis that regulatory control at planning stage is required to avoid disallowing substantial incurred expenditures at rate review stage (para. 39)	Justified on basis that oversight of planning is required to avoid disallowing incurred expenditures in revenue requirement proceedings (Exhibit C3-10, para. 92)
Required the creation of information (para. 41)	Requires creation of information (Exhibit C3-10, pages 13-19, 22-28, 31-36, 39-44, 47-52)
Is specific to the planning phase of the utility’s response to its statutory mandate (para. 55)	Focused on “the review of the earlier stages of the capital management processes” (Exhibit C3-10, para. 94) and “assessment of the validity of BC Hydro’s capital planning and planning processes” (Exhibit C3-



	10, para. 177)
Directs when and how factors are to be taken into account in BC Hydro's planning processes (para. 36)	Directs when and how factors are to be taken into account in BC Hydro capital planning and management (Exhibit C3-10, Part I)
Punishable on default (para. 25)	Punishable on default by disallowance of costs (Exhibit C3-13, BCUC IR 1.1.2, p. 6)

189. BC Hydro submits that the CEC's proposal is in clear contravention of the rule set down by the Court of Appeal and would inappropriately interfere with the management of BC Hydro. As such, the CEC's proposal should be rejected.

**(c) Cost-Effective is a Distinct Concept from Prudence**

190. In BC Hydro's submission, the CEC's pervasive use of the familiar concept of "cost-effectiveness" conflates several related ideas and concepts, which clouds the issues. BC Hydro submits the following:

- Cost-effective is not the same as least cost.<sup>224</sup> When assessing projects in a major project application, the BCUC determines whether the project is in the public interest. A key determination in this regard may be whether the project is cost effective, in the sense of being the best alternative to meet the need for the project. The most cost-effective alternative may not be the least cost one, as it may achieve benefits that warrant the higher costs.
- Cost-effective is not the same as prudent.<sup>225</sup> The prudence standard is one of reasonableness.<sup>226</sup> When determining the prudence of past capital expenditure, the BCUC considers whether management decisions were reasonable based on what was known, or should have been known, at the time (i.e., without the

<sup>224</sup> Exhibit B-15-1, pp. 8-11.

<sup>225</sup> Exhibit B-16, BCUC IR 2.35.1 and CEC Expert Witness IR 2.4.5.

<sup>226</sup> Exhibit B-16, CEC Expert Witness IR 2.4.5.

benefit of hindsight). As stated by Dr. Brown and Dr. Carpenter: “The prudence standard is one of reasonableness, not one of optimization.”<sup>227</sup>

191. By conflating the concepts of cost effectiveness and prudence, the CEC effectively claims that the BCUC’s role is to determine on a prospective basis what is prudent based on a quantitative cost-effectiveness calculation applied to capital cost drivers and strategies and plans. Thus, if BC Hydro chooses a capital management strategy that is not as cost effective on the chosen set of metrics, then the CEC can claim that it is not prudent and BC Hydro’s costs should not be recovered in rates. The effect of this proposal is to place the BCUC in the seat of management, determining which performance metrics are important and which strategies and plans should be pursued. In short, the CEC’s proposal is for the BCUC to direct the affairs of the utility based on predetermined cost-effectiveness metrics. In BC Hydro’s submission, this is not permissible.

**(d) CEC’s Proposal is about Cost Control, which is a Function of Utility Management**

192. In BC Hydro’s submission, the CEC has confused the roles of the BCUC and BC Hydro. Dr. Brown and Dr. Carpenter describe how the BCUC’s role with respect to capital includes setting BC Hydro rates, approving major projects prior to implementation, and reviewing capital spending for prudence.<sup>228</sup> (Much of this evidence has been cited above, so will not be repeated here.) Dr. Brown and Dr. Carpenter explain how the CEC’s evidence appears to be focussed on cost control:

**Q13. When “cost-effective” and related terms are used in Mr. Craig’s evidence, what is implied by those terms?**

A13. It appears that when “cost-effective” is used in Mr. Craig’s evidence, the term sometimes means “cost-effective” as the Commission uses the term in CPCN proceedings, and sometimes the term means “cost control”. For example, Mr. Craig’s evidence states “The CEC provides in Part I of the evidence a set of templates for quantitatively representing BC Hydro’s cost-effectiveness in managing and planning capital expenditures and investments.” “Planning” of

---

<sup>227</sup> Exhibit B-16, CEC Expert Witness IR 2.4.5.

<sup>228</sup> Exhibit B-15-1, pp. 5-6.

capital expenditures could include both cost-effectiveness and cost control, but “managing” capital expenditures seems to focus on cost control. Furthermore, Mr. Craig’s recommendations are for ongoing annual filings across the utility as a whole, whereas cost-effectiveness is focused on options and a choice between specific projects. In addition, in response to an information request about cost-effectiveness of capital investments, the CEC said:

The Commission’s oversight of the costs and importantly the benefits of these expenditures can lead to improvements of BC Hydro’s cost-effectiveness. Over 10 years the total capital expenditures may involve over \$220 billion. If the oversight of the BC Hydro cost-effectiveness results in a 1% improvement on \$10 billion of expenditures this could be worth \$100 million of benefit for each 1% or \$10 billion to which it may be applicable. The benefit potential for ratepayers of improved Commission oversight could be \$10s of millions.

In the quoted extract the CEC makes clear that it is talking about the benefit to ratepayers of controlling costs rather than cost-effectiveness as that term is used in Commission proceedings to approve major projects. Existing processes already provide for the approval of the most cost-effective major projects and for imprudent costs to be excluded from recovery in rates. Success in controlling costs would benefit ratepayers, but this is a function of utility management.<sup>229</sup>

...

**Q19. In your view, is it helpful “to build the Commission’s own understanding of the cost-effectiveness of BC Hydro’s management of its capital expenditures and investments”, as the CEC suggests?**

In our view, the CEC’s suggestion appears to be about cost control, not cost-effectiveness as that term is used by the Commission. The CEC’s suggestion is not helpful because the CEC has not explained what Commission process or decision-making would be informed by such understanding. The Commission already has the ability to review BC Hydro capital expenditures for prudence. The Commission already assesses cost-effectiveness at the project approval stage, for major projects. We understand that BC Hydro makes an application for Commission approval for projects above a size threshold, prior to implementing

---

<sup>229</sup> Exhibit B-15-1, pp. 9-10.

the proposed projects. This allows the Commission to focus its limited resources on assessing larger projects.<sup>230</sup>

...

**Q25. Would an annual reporting process improve cost control of project implementation?**

A25. Not in our opinion. Cost control is properly the function of utility management. It would not be efficient or effective for the Commission to second-guess management decisions on project implementation. To be effective in this role, the Commission would need to effectively duplicate the staff expertise that already resides in the utility. This would be inefficient. Moreover, Commission involvement in project implementation could result in biases, such as avoiding innovation in favour of established technology or processes.<sup>231</sup>

193. Dr. Carpenter and Dr. Brown put it succinctly in their evidence as follows:<sup>232</sup>

... despite the CEC's stated policy view that its proposals should not interfere with BC Hydro's management processes, the information collection procedure and Commission assessment of "BC Hydro's management of its capital expenditures" that CEC is recommending appears intended to do just that.

194. Therefore, consistent with the conclusions of BC Hydro described above, it is also the view of Dr. Carpenter and Dr. Brown that the CEC's proposal appears to be intended to interfere with BC Hydro's management processes.

**D. CEC's Proposal Would Lead to Inferior Asset Management, Capital Planning And Capital Delivery Approaches.**

195. In section 4 of its Rebuttal Evidence, BC Hydro explains why Mr. Craig's proposal would lead to inferior asset management, capital planning and capital delivery approaches. In this section of the Final Submission, BC Hydro makes the following points:

---

<sup>230</sup> Exhibit B-15-1, p. 12.

<sup>231</sup> Exhibit B-15-1, p. 15.

<sup>232</sup> Exhibit B-15-1, p. 12.

- BC Hydro's well-established and well-performing practices for the planning and delivery of capital investments have recently been recognized and endorsed by independent bodies;
- Mr. Craig's proposed approach will not: ensure that BCUC oversight is more effective; does not provide more structure to ensure that our investment drivers, strategies, plans, and studies are more comprehensively addressed; and does not evaluate the cost effectiveness of our capital investments.

**(a) BC Hydro's has Well-Established and Well-Performing Practices for the Planning and Delivery of Capital Investments**

196. BC Hydro explains in its Rebuttal Evidence that the CEC's approach is not aligned with industry standards or BC Hydro's mature asset management practices which have been endorsed by third parties:<sup>233</sup>

Mr. Craig's proposed framework does not appear to be aligned with industry standards and is inferior to our own asset management practices. Our asset management practices are mature as evidenced by the recent Office of the Auditor General of B.C. audit of our practices. We have developed asset management frameworks for the system which are aligned with asset management standards including Publicly Available Specification 55 (commonly referred to as PAS 55) and ISO 55000. The alignment with asset management standards used by our utility industry peers allows us to participate in industry wide benchmarking and other performance improvement activities.

We are committed to continuous improvement. Improvements to our processes will be detailed in the Fiscal 2020 to Fiscal 2021 RRA. For example, over the past several years, we implemented the PPM practices described above, and a lessons learned procedure to identify opportunities to improve the delivery and outcomes of future projects. These lessons learned generally result in recommendations to alter a practice or procedure, address a knowledge gap or improve project delivery tools. Lessons learned are documented throughout the project lifecycle and a lessons learned meeting is conducted prior to a project being placed into service. Consistent with our practice, we will continue to assess

---

<sup>233</sup> Exhibit B-15, pp. 28-31.

and make improvements to our capital planning and delivery processes going forward.

Our well established and well performing practices for the planning and delivery of capital investments have recently been recognized and endorsed by the following independent bodies:

- **Office of the Auditor General of B.C.** - In December 2018, the Office of the Auditor General of B.C. released an independent audit of Capital Asset Management in BC Hydro. The audit found that BC Hydro's capital asset management systems and practices reached a generally advanced level of maturity. On page 17 of the report the Auditor General stated: "BC Hydro has a generally advanced level of maturity in asset management. Its success in this regard is a result of concerted effort over several years by a set of skilled professionals focused on ensuring that a reliable source of electrical power will be supported by a mature asset management practice." The Auditor General also commented: "I am pleased to say that because BC Hydro is managing its assets well, we made no recommendations in this audit."
- **Claudia M. Baca Project Management Consultant** - In 2016, BC Hydro completed its second Organizational Project Management Maturity Model (**OPM3**) Assessment. The Assessment standards are designed by the Project Management Institute and the review was conducted by an independent project management consultant. BC Hydro received the highest score among approximately 50 participating organizations from around the world. BC Hydro received a score of 91 per cent, which represents a significant increase in maturity from its first assessment in 2010. The OPM3 Assessment Report is included as Appendix A;
- **Project Management Institute** - Also in 2016, BC Hydro received the Project Management Office (**PMO**) of the Year Award from the Project Management Institute, recognizing superior organizational project management capabilities. The Project Management Institute's November 10, 2016 press release states:

"The PMO of the Year Award honors a PMO that has demonstrated superior organizational project management abilities by adding value to its organization through its support of successful strategic initiatives. The

award recognizes a PMO that has established a vision for value delivery and has had a positive and clear impact on business results.”

- **PricewaterhouseCoopers (PwC)** - PwC conducted an audit of BC Hydro’s Information Technology (IT) Planning and Project Delivery. PwC gave BC Hydro a “G” rating, indicating that only minor issues and impacts were identified. The summary of the key findings of the audit were as follows:
  - The Technology group has established effective processes to manage investment planning and project delivery which include a robust project delivery framework, a strong Project Management Office and defined processes to evaluate and prioritize capital investments; and
  - Key improvement opportunities include developing a benefits realization process and incorporating resource capacity constraints into the capital investment prioritization process.

197. In contrast to BC Hydro’s mature asset management practices, there is no evidence that the CEC’s approach is aligned with any industry standard approach, has been used in other jurisdictions, or has been endorsed by any third parties.

**(b) The CEC’s Approach Would Result in Inferior Results**

198. A key part of the CEC’s evidence is the spreadsheets or templates that the CEC proposes as information requirements to ensure that the BCUC’s oversight is more effective and to evaluate cost effectiveness.<sup>234</sup> BC Hydro’s Rebuttal Evidence explained why the CEC’s proposed templates:

- will not ensure that BCUC oversight is more effective;
- will not provide more structure to ensure that investment drivers, strategies, plans, and studies are more comprehensively addressed; and
- do not evaluate the cost effectiveness of our capital investments.

---

<sup>234</sup> See, for example, Exhibit C3-10, Part C, p. 10 ff.

199. Table 2 of BC Hydro's Rebuttal Evidence, reproduced below, summarizes BC Hydro's assessment of the effectiveness, structure, and feasibility of Mr. Craig's proposed templates.

**Table 1 Assessment of CEC's Proposed Templates**

Capital Investment Type	Assessment of CEC's Proposed Templates		
	Effectiveness	Structure	Feasibility
<b>Power Systems: Generation Transmission Distribution Dam Safety</b>	<ul style="list-style-type: none"> <li>Mr. Craig's proposed templates are summarized at a high-level, based on system averages and risk percentages, and would neither provide information to assess the cost effectiveness of our capital investments nor ensure effective commission oversight.</li> <li>Given the size and complexity of our capital investment portfolio, a collection of spreadsheets will not allow for optimization of the overall portfolio and the decisions and the complex trade-offs we make to keep the integrated system operating safely and reliably. Furthermore,</li> </ul>	<ul style="list-style-type: none"> <li>As discussed in A17, we develop strategies, plans, and studies to document the identification of system needs and risks along with potential responses to allow us to coordinate and optimize the development of the system.</li> <li>Proposed solutions are often selected to address multiple system needs, and must be coordinated to maintain the integrity of the electric system. The templates split the capital portfolio into multiple single-driver views and fail to recognize that an integrated approach to planning is important to</li> </ul>	<ul style="list-style-type: none"> <li>It is not feasible for BC Hydro to provide the data in the form proposed by Mr. Craig nor is it feasible to use it in the way Mr. Craig suggests given the size and complexity of our capital portfolio and the challenges of planning and operating an integrated system.</li> <li>Our value-based decision making approach<sup>235</sup> will employ a technology tool with the capability to calculate benefits, determine investment inter-dependences, manage the relationships between assets and investments, and prioritize and optimize based on value and cost.</li> </ul>

<sup>235</sup> The implementation of the value-based framework is subject to approval of Implementation phase funding. Please see Exhibit B-16, BCUC IR 2.35.3.



Capital Investment Type	Assessment of CEC's Proposed Templates		
	Effectiveness	Structure	Feasibility
	relative investment cost effectiveness should be evaluated within the context of the overall portfolio and across BC Hydro instead of the siloed approach proposed by Mr. Craig.	preventing a sub-optimal overall capital portfolio.	
<b>Properties</b>	<ul style="list-style-type: none"> <li>Mr. Craig's proposed templates will not provide information to assess cost effectiveness currently or over time. Knowing the unit cost or benefit of a project does not necessarily lead to an understanding of its cost effectiveness.</li> <li>Focusing on a per benefit or costs without consideration of the type of project or the project drivers may lead to the unintended consequence of focusing on a short-term lowest cost objective as opposed to the benefits and cost over the long term</li> </ul>	<ul style="list-style-type: none"> <li>We find the proposed templates to be vague and not useful in assessing the Properties' capital portfolio. As noted in section 7.3 of the Revised Proposal filed as Exhibit B-7, all of Properties capital investments are considered sustaining investments and result in the replacement of existing end of life assets. As such, specific capital strategies are not required.</li> </ul>	<ul style="list-style-type: none"> <li>Much of the template is not applicable to Properties' projects or would take significant effort to collect without any clear benefit: <ul style="list-style-type: none"> <li>"Growth / Supply" and "Security Risk" are not applicable.</li> <li>For "Life Extension" and "Performance Sustainment" each facility has a mix of assets with different ages, conditions, and remaining life; and the performance of individual assets is considered when assessing the need for replacement.</li> <li>The main safety risk is seismic risk and the primary stakeholders are internal employees and building occupants.</li> </ul> </li> </ul>

Capital Investment Type	Assessment of CEC's Proposed Templates		
	Effectiveness	Structure	Feasibility
<b>Fleet</b>	<ul style="list-style-type: none"> <li>Mr. Craig's proposed templates would not be effective at evaluating the cost effectiveness of the Fleet capital portfolio or the programs represented in the portfolio. Developing a program to use Mr. Craig's condition assessments would be costly and will not necessarily reduce major component failures such as engines or transmissions.</li> </ul>	<ul style="list-style-type: none"> <li>Mr. Craig's proposed templates will not be useful in assessing Fleet asset strategies as the measures and terms are not well-defined and differ from fleet management best practices.</li> <li>We currently use fleet best practices to determine the age, mileage, and maintenance cost. We are doubtful of the proposed templates efficacy in understanding and managing Fleet capital portfolio or its drivers.</li> </ul>	<ul style="list-style-type: none"> <li>The templates are not feasible as we do not currently have some of these metrics and attempting to forecast them would be very challenging. For example, the "Stakeholder Concerns" or "Risk Exposure" templates.</li> <li>It is also challenging to reasonably forecast changes in fuel efficiency over a ten year period due to factors such as technological advancements.</li> </ul>
<b>Information Technology</b>	<ul style="list-style-type: none"> <li>Using Mr. Craig's templates will present difficulties in gathering cost and benefit data and establishing meaningful matching of costs and benefits (optimizing the portfolio). This will reduce cost effectiveness.</li> <li>The difficulty of attempting what Mr. Craig proposes</li> </ul>	<ul style="list-style-type: none"> <li>We use a portfolio management approach for capital planning. The objective of our portfolio management approach is to allocate resources to business change initiatives that contribute most to BC Hydro's strategic objectives, even when funding or short-term priorities change,</li> </ul>	<ul style="list-style-type: none"> <li>The proposed templates may not provide the desired results and may be impractical to implement. We do not have ready access to all the information needed to complete the templates as proposed and also do not have all benefit information tracked for all investments given the challenges of tracking and measuring effort benefits.</li> </ul>

Capital Investment Type	Assessment of CEC's Proposed Templates		
	Effectiveness	Structure	Feasibility
	may be much greater than he suggests. Tracking costs by investment driver and strategy is feasible, but assessing investment benefits and matching them to costs would be very onerous, and difficult to present in a clear and understandable way.	and are achievable within limited resources and limited ability to change. Mr. Craig's templates do not lend themselves to such an approach.	

200. The CEC's attempts to show the potential benefits of its approach in response to information requests are inaccurate. Pages 41 to 48 of BC Hydro's Rebuttal Evidence discusses a number of errors and misunderstandings. In particular, BC Hydro's Rebuttal Evidence at pages 44 to 48 illustrates why there is not a benchmark or index by which one could measure cost effectiveness of investments over time.

201. BC Hydro's Rebuttal Evidence, as well as Chapter 6 of its F20-F221 RRA, demonstrates that BC Hydro has been continually improving its asset management practices and that BC Hydro has been performing well as measured by the metrics in its Service Plan. BC Hydro submits that there is no compelling reason to believe that the CEC's approach would or could improve BC Hydro's performance.

#### **E. CEC's Proposal Should be Rejected**

202. BC Hydro submits that for the reasons outlined above and discussed in its Rebuttal Evidence, the CEC's proposal should be rejected.

#### PART FOUR: CONCLUSION

203. BC Hydro submits that the BCUC should approve the proposed 2018 Guidelines to promote an effective and efficient review of BC Hydro's capital expenditures and projects, and to clarify the nature of the BCUC's oversight over BC Hydro's capital expenditures and projects in revenue requirements applications, major project applications, and compliance reports. The 2018 Guidelines will provide guidance to BC Hydro with respect to the information required for revenue requirements applications, when a CPCN is required, and the timing of compliance reports, and will document BC Hydro's commitment to file section 44.2 applications for major projects that are not extensions. As such, BC Hydro recommends the proposed 2018 Guidelines for approval.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 1, 2019

***[original signed by Chris Bystrom]***

Chris Bystrom  
Counsel for BC Hydro

Dated: August 1, 2019

***[original signed by Niall Rand]***

Niall Rand  
Counsel for BC Hydro

# **Review of the Regulatory Oversight of Capital Expenditures and Projects (Project No. 1598877) – Final Argument**

## **BC Hydro Book of Authorities**

### **Index**

#### **CASE LAW**

1. *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission et al*, [1996] 1996 CanLII 3048 (BCCA)
2. *Maple Lodge Farms Limited v. Government of Canada and the Minister of Economic Development et al*, [1982] 2 SCR 2, 1982 CanLII 24 (SCC)

#### **SECONDARY MATERIALS**

3. Macauley & Sprague, *Practice and Procedure Before Administrative Tribunals*, s. 3.2(d) (extract) and s. 6.5A (extract)

*Court of Appeal for British Columbia*

IN THE MATTER OF THE UTILITIES COMMISSION ACT  
S.B.C. 1980, C.60 AS AMENDED AND IN THE MATTER  
OF AN APPLICATION BY BRITISH COLUMBIA HYDRO  
AND POWER AUTHORITY TO AMEND ITS ELECTRIC  
TARIFF RATE SCHEDULES (THE "APPLICATION")

BETWEEN:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

APPLICANT  
(APPELLANT)

AND:

THE BRITISH COLUMBIA UTILITIES COMMISSION,  
BRITISH COLUMBIA ENERGY COALITION, CONSUMER'S  
ASSOCIATION OF CANADA (B.C. BRANCH) ET AL,  
COUNCIL OF FOREST INDUSTRIES, WEST KOOTENAY  
POWER LTD., B.C. GAS UTILITY LTD., ISCA  
MANAGEMENT LTD., and RICK BERRY

RESPONDENTS

Before: The Honourable Mr. Justice Goldie  
The Honourable Madam Justice Prowse  
The Honourable Madam Justice Newbury

Chris Sanderson, J. Christian and  
A.M. Dobson-Mack

Counsel for the Appellant

Mark M. Moseley

Counsel for the Respondent  
The British Columbia Utilities Commission

Carol Reardon

Counsel for the Respondent  
Intervenor, British Columbia Energy Coalition

Michael P. Doherty

Counsel for the Respondent  
Intervenor, Consumer's Association of Canada  
(B.C. Branch) et al

D.W. Bursey

Counsel for the Respondent  
Intervenor, Council of Forest Industries et al

Place and Date of Hearing: Vancouver, British Columbia  
February 15, 1996

Place and Date of Judgment: Vancouver, British Columbia  
February 23, 1996

Written Reasons by:

The Honourable Mr. Justice Goldie

Concurred in by:

The Honourable Madam Justice Prowse

The Honourable Madam Justice Newbury

# *Court of Appeal for British Columbia*

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

v.

THE BRITISH COLUMBIA UTILITIES COMMISSION, BRITISH COLUMBIA ENERGY COALITION, CONSUMER'S ASSOCIATION OF CANADA (B.C. BRANCH) ET AL, COUNCIL OF FOREST INDUSTRIES, WEST KOOTENAY POWER LTD., B.C. GAS UTILITY LTD., ISCA MANAGEMENT LTD., and RICK BERRY

## **Reasons for Judgment of Mr. Justice Goldie:**

1           This is an appeal, by leave, from Order G-89-94 of the British Columbia Utilities Commission (the "Commission") with reasons for the decision attached. I refer to these reasons as the "Decision" and to Order G-89-94 as the "Order".

2           After a public hearing the Commission released the Decision on 24 November 1994. Notice of an application for leave to appeal to this Court was filed by B.C. Hydro on 22 December 1994. Leave was granted 15 December 1995, the day the application was heard. The delay occurred when the Commission acceded to B.C. Hydro's application that it reconsider the Order and Decision. The reasons denying reconsideration were released on 17 October 1995. These proceedings accounted for much of the delay between the filing of the notice of application for leave to appeal and the granting of leave.



3           The issue, as stated by the appellant British Columbia Hydro and Power Authority ("B.C. Hydro"), is whether the Commission exceeded its jurisdiction in respect of certain directions in the Decision given the force of a Commission order. While it is common ground the standard of review in respect of jurisdiction is that the Commission must be correct in its interpretation of its constituent statute, the respondents contend the Commission acted within its jurisdiction and the appeal should be dismissed as no palpable and overriding error has been demonstrated that would permit this Court's intervention.

Background - General

4           B.C. Hydro is a publicly owned utility generating, transmitting and distributing electrical energy. With few exceptions its service area is province wide. Its rates are subject to approval by the Commission under the provisions of the *Utilities Commission Act*, S.B.C. 1980, c. 60 as amended (the "*Utilities Act*"). Under s.3.1 of the *Utilities Act* the Lieutenant Governor in Council may issue a direction to the Commission specifying the factors, criteria and guidelines the Commission is to observe in respect of B.C. Hydro. Such a direction, Special Direction No. 8, was in force at the time material to this appeal.

5           By virtue of the *Hydro and Power Authority Act*, R.S.B.C. 1979, c. 188 as amended (the "*Authority Act*"), B.C. Hydro is for all its purposes an agent of the Queen in Right of the Province; is deemed to have been granted an energy operation certificate for the purposes of the *Utilities Act* in respect of its works existing on 11 September 1980; and is not bound by any statute or statutory provision of the Province except what is made applicable to it by Order in Council. The Minister of Finance is its fiscal agent. The *Utilities Act* is among those ordered to be applicable to B.C. Hydro except sections dealing with one aspect of reserve funds; one enforcement provision and those requiring Commission approval of security issues and property disposition.

6           Section 5 of the *Authority Act* provides that the directors of B.C. Hydro, appointed by the Lieutenant Governor in Council, shall manage its affairs. The powers of B.C. Hydro include the generation, manufacture, distribution and supply of power and the development of power sites and power plants. The exercise of these powers is subject to the approval of the Lieutenant Governor in Council. A further distinction between B.C. Hydro and investor-owned utilities is that B.C. Hydro's sole "shareholder" and not its directors determines when and in what amounts "dividends" will be paid.

7 Under s-s.4 of s.141 of the *Utilities Act*, which came into force 11  
September 1980, the rates of B.C. Hydro then in effect became its  
lawful, enforceable and collectible rates.

8 Prior to 30 June 1995 Part 2 of the *Utilities Act* provided an  
approval process of generating and transmission facilities by the  
Lieutenant Governor in Council which could, at the latter's  
discretion, bypass the Commission. In this event the Commission  
might be called upon to approve rates reflecting the capital costs  
of large scale projects without the opportunity to pass upon the  
adequacy of the information justifying the construction of such  
projects as contemplated by the requirement under s.51(1) of the  
*Utilities Act* requiring a certificate of public convenience and  
necessity prior to embarking upon construction. This provision is  
of some importance and I set it out here:

51. (1) Except as otherwise provided, no person shall,  
after this section comes into force, begin the  
construction or operation of a public utility plant or  
system, or an extension of either, without first  
obtaining from the commission a certificate that public  
convenience and necessity require or will require the  
construction or operation.

9 This prospect has been removed by amendments, primarily to  
Part 2 of the *Utilities Act*, and with it any justification for concern  
over multi million dollar additions to the property devoted to  
public service without prior regulatory scrutiny.

Background - "Integrated Resource Plan Guidelines"

10           In February, 1993 the Commission issued a 12-page document, to which I will refer as the "Guidelines", entitled "Integrated Resource Planning ("IRP") Guidelines". The following is the Definition section of the Guidelines:

**II     DEFINITION**

IRP is a utility planning process which requires consideration of all known resources for meeting the demand for a utility's product, including those which focus on traditional supply sources and those which focus on conservation and the management of demand<sup>1</sup>. The process results in the selection of that mix of resources which yields the preferred<sup>2</sup> outcome of expected impacts and risks for society over the long run. The IRP process plays a role in defining and assessing costs, as these can be expected to include not just costs and benefits as they appear in the market but also other monetizable and non-monetizable social and environmental effects. The IRP process is associated with efforts to augment traditional regulatory review of completed utility plans with cooperative mechanisms of consensus seeking in the preparation and evaluation of utility plans. The IRP process also provides a framework that helps to focus public hearings on utility rates and energy project applications.

1       Referred to as Demand-Side Management (DSM)

2       The term "preferred" is chosen to imply that society has used some process to elicit social preferences in selecting among energy resource options. Unfortunately, there is rarely agreement on the best process for eliciting social preferences. Candidate processes in a democracy include public ownership with direction from cabinet or a ministry, regulation by a public tribunal, referendum, and various alternate dispute resolution methods (e.g. consensus seeking stakeholder collaboratives).

11 In the Purpose section the Commission stated the Guidelines were:

... intended to provide general guidance regarding BCUC expectations of the process and methods utilities follow in developing an IRP. It is expected that the general rather than detailed nature of the proposed guidelines will allow utilities to formulate plans which reflect their specific circumstances.

12 The Commission's identification of the objectives of this process was stated in these words:

1. Identification of the objectives of the plan

Objectives include but are not limited to: adequate and reliable service; economic efficiency; preservation of the financial integrity of the utility; equal consideration of DSM and supply resources; minimization of risks; consideration of environmental impacts; consideration of other social principles of ratemaking<sup>3</sup>, coherency with government regulations and stated policies.

Footnote 3 provides in part:

... The general implication is that because of social and environmental objectives, the rates charged by utilities may be allowed to diverge from those that would result from a rate determination based exclusively on financial least cost. The social principles to be addressed may be identified by the utility, intervenors, or government.

13 In Part III of the Guidelines defining the relationship between regulated utilities and the Commission under the Integrated Resource Plan Process the following sentences occur:

IRP does not change the fundamental regulatory relationship between the utilities and the BCUC. Thus IRP guidelines issued by the BCUC do not mandate a specific outcome to the planning process nor do they mandate specific investment decisions. ... Under IRP,

utility management continues to have full responsibility for making decisions and for accepting the consequences of those decisions. ... Consistency with IRP guidelines and the filed IRP plan will be an additional factor that the BCUC will consider in judging the prudence of investments and rate applications, although inconsistency may be warranted by changed circumstances or new evidence.

14 We are not called upon to determine whether the Guidelines, as defined above, are an appropriate exercise of the Commission's regulatory powers under the *Utilities Act* nor is there an appeal from any part of the Order disposing of B.C. Hydro's application to vary its rates.

15 What is objected to is the manner in which the Commission has purported to give the Guidelines the force of a Commission order. It is convenient at this point to set out the substantive part of Order G-89-94:

**NOW THEREFORE** the Commission, for reasons stated in the Decision, orders as follows;

1. The applied for 2.8 percent increase in rates is denied and the interim increase authorized by Order No. G-18-94 effective April 1, 1994 is to be refunded, with interest calculated at the average prime rate of the principal bank with which B.C. Hydro conducts its business. B.C. Hydro is to provide the Commission with a detailed reconciliation schedule verifying the refund.
2. Rate design changes required by the Decision are to be implemented.
3. An Integrated Resource Plan and Action Plan are to be filed for approval by June 30, 1995.

4. The Commission will accept, subject to timely filing by B.C. Hydro, amended Electric Tariff Rate Schedules which conform to the terms of the Commission's Decision. B.C. Hydro will provide all customers, by way of an information notice and media publication, with the Executive Summary of the Commission's Decision.

- 4.(sic)B.C. Hydro will comply with all other directions contained in the Decision accompanying this Order.

(emphasis added)

16 I shall refer to the directions identified in the last paragraph as the "Directions". And it is paragraph 4 (sic) of the Order that is in issue here. Counsel for B.C. Hydro says there are 15 Directions related to the Guidelines covered by this paragraph.

17 The principal relief sought, as stated in B.C. Hydro's factum, includes a declaration "... that the IRP related aspects of Order G-89-94 and of the November Decision are void and of no effect".

18 In my view, the Direction best illustrating the issue raised by B.C. Hydro is that which requires it to establish what is called a collaborative committee (the "Committee") together with those Directions determining the part this Committee is to play in B.C. Hydro's performance of its statutory obligation under s.44 of the *Utilities Act* to provide service to the public.

Discussion

19           Mr. Moseley on behalf of the Commission asserted it was doing no more than obtaining information it was entitled to, in a format it could by law determine, all at a time it was authorized to stipulate.

20           There can be little doubt, from the nature of B.C. Hydro's business, the magnitude of financial resources required and the variety of other resources directly or indirectly committed or affected that virtually every person in the Province will have an interest in the management of that business.

21           The Direction in question follows a finding that B.C. Hydro had not complied with the Guidelines "... which require an explicit decision-making process which includes public involvement." B.C. Hydro had in place a public consultation program but this was considered inadequate as being "after the fact" rather than participatory in the planning process. The membership of the Committee was determined by the Commission, apparently on the principle that the planning process is enhanced by the participation of interest groups. This appears from the following observation in the Decision:

Determination of the appropriate trade-offs between resources requires that the values the public attaches to these costs and benefits must be determined and factored into the decision in an explicit and transparent way.



The Commission has made it clear that such values are best determined through the direct participation of representative interest groups.

Exclusive reliance on the B.C. Hydro staff, managers and Board of Directors for resource selection is also unacceptable for another reason. A closed, in-house process has the appearance of, and real potential for, bias in decision making that favors the interests of the bureaucracy within the Utility.

The Committee as constituted following the Order and Decision consisted of two representatives of B.C. Hydro and 11 representing a variety of interests. Each of the 11 spoke for his or her group. Some were regional, others represented classes of customers. One or two represented people who wished to do business with B.C. Hydro.

- 22           Seven Directions state in detail what B.C. Hydro is to provide the Committee. One includes the following:

Finally, the Commission directs B.C. Hydro to institute with the IRP consultative committee a multi-attribute trade-off analysis for the purposes of portfolio development and selection.

This process is defined in the Commission's glossary of terms:

**Multi-Attribute Analysis** - A method which allows for comparison of options in terms of all attributes which are of relevance to the decision maker(s). In IRP, common attributes are financial cost, environmental impact, social impact and risk.

- 23           This requires B.C. Hydro to appraise future projects which it may never implement because of, for instance, financial constraints

imposed by the Minister of Finance or by virtue of a special direction under s.3.1 of the *Utilities Act*.

24           There is evidence supporting the following assertion in the appellant's factum:

The bulk of the IRP Directives can be characterized as requiring BCH to put BCH's resource planning initiatives and analyses to the Consultative Committee and be guided by the views and information provided by the members of the Consultative Committee in undertaking its resource planning responsibilities.

25           It cannot be seriously questioned that the Commission requires compliance with its Guidelines: at p.66 of the reasons the Commission concludes a direction denying recovery of a portion of B.C. Hydro's Resource Planning Unit expenditures with these words:

Should the Utility continue to fail to implement the Commission's directions respecting IRP, the Commission will consider the circumstances and may invoke its powers under Part 9 of the Act.

26           Part 9 of the *Utilities Act*, to which I will later refer, includes a list of offences under the *Utilities Act*.

27           B.C. Hydro filed with the Commission on 8 November 1996 what it called its integrated electricity plan which it asserted complied with the Directions in the Decision. The Commission has ordered a public hearing into the integrated electricity plan in February 1996.

28 I restate the question before us. It is whether there is statutory authority for the Commission's imposition of the Guidelines to the extent required by the relevant Directions in the Decision on what is essentially an internal process for which the directors of B.C. Hydro have the ultimate responsibility, both in respect of the process and for the selection of the product of the process.

29 Mr. Sanderson's first point on behalf of B.C. Hydro is that nowhere in the *Utilities Act* is reference made to planning. In answer, Mr. Mosely referred us to s.51(3) which requires a public utility to file annually with the Commission a statement in a prescribed form "... of the extensions to its facilities that it plans to construct". This describes a result at the conclusion of the relevant planning process. In the context of s.51(2) it refers to the construction of facilities for which separate certificates of public convenience and necessity may not be required.

30 In my view, s.51(3) has little relevance to the case at bar. It appears B.C. Hydro routinely files the statement referred to. The amounts in question may be in the aggregate substantial but one would expect many of the expenditures for individual components would not be, as they would relate to the routine reinforcement of transformation and distribution facilities required to meet load growth or to maintain the reliability and adequacy of service.

31           Section 28 of the *Utilities Act* is also relied upon by the respondents. In full, it provides:

**General supervision of public utilities**

28. (1) The commission has general supervision of all public utilities and may make orders about equipment, appliances, safety devices, extension of works or systems, filing of rate schedules, reporting and other matters it considers necessary or advisable for the safety, convenience or service of the public or for the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.

(2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

32           Two observations can be made of this section: the first is that the class of matters referred to in s-s.(1) relates to the existing service provided the public as distinct from future service. The second is that s-s.(2) also refers to present service, that is to say, the conduct of operations in relation to the public. Neither of these subsections refers to the utility's plans for the future.

33           Section 29 of the *Utilities Act* has some relevance to the contention that the IRP process comprises in one bundle the exercise of individual powers granted the Commission. It directs the Commission to make examinations and conduct inquiries necessary to keep itself informed about, amongst other things, the conduct of

public utility business. It does not authorize the Commission to direct how that business is conducted.

34           The Commission is supplied with B.C. Hydro's load forecasts as is apparent from its comments in the Decision. These dictate the response a utility must make to meet its statutory obligation to provide service as well as to maintain compliance with the terms of existing certificates of public convenience and necessity. It is within this part of the process that the Commission has decided, in its words, to make the IRP the "... driving force behind the establishment of a utility action plan approved by senior management."

35           It appears reasonable to assume the purpose of the Guidelines is to look beyond a simplistic view of utility planning as one limited to selecting the resources needed to meet anticipated demand and in doing so, to reject an equally simplistic view of regulation as ensuring that service is provided at the least cost to the consumer. It has been evident for some years now that environmental considerations are important in the formulation of the opinion represented by the phrase "public convenience and necessity". To the same effect, conservation and management of energy use is now recognized in what is known as demand side management. The wisdom of all this does not appear to be an issue.

36           The Commission's order directs when and how these factors are to be taken into account in the sequence of B.C. Hydro's planning processes.

37           The Commission in its factum asserts the IRP process is designed to accomplish two objectives:

1.   It provides information to the Commission as to the resource selection choice being made by a utility; and
2.   Following a review of the IRP plan for the Commission "... it provides guidance to utility management in the form of an advance indication as to the approach the Commission is likely to apply when it subsequently assesses the prudence of the expenditures made by the utility."

38           It will be noted the first objective refers to choices being made while the second refers to expenditures already made.

39           This dichotomy between present planning and past expenditures is said by the Commission to require regulatory control at the planning stage to avoid the dilemma of disallowing substantial incurred expenditures at the rate review stage. The examples given by the Commission in its reconsideration reasons were a nuclear plant and a large hydro electric dam.

40           Section 51 of the *Utilities Act* avoids this Hobson's choice. It does so by requiring a certificate of public convenience and necessity before the utility begins construction. It is not suggested the Commission has been demonstrably ineffectual in discharging its responsibilities at the certification stage.

41           Other provisions in the Act relied upon by the Commission are as follows:

1.   Section 49 which requires a utility to furnish information to the Commission and answer its questions. This does not require that the utility create information for the purpose of a consultative committee nor to respond to the requests of a consultative committee - both of which have been directed by the Commission.
2.   Sections 64-66 which deal with the Commission's jurisdiction over rates. To the extent these are relevant I have dealt with them in my comment on s.51 of the *Utilities Act*.

42           I am of the view no section of the *Utilities Act* expressly enables the Commission to impose by order its chosen form of controlling planning at the stage selected by it.

43 In this I rely upon the literal meaning of each of the sections in the Act which have appeared to me to have any relevant significance.

44 These are, however, to be construed in relation to the *Utilities Act* as a whole. I refer to what Mr. Justice Beetz said in *UES, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088 as the initial stage in a pragmatic or functional analysis:

At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

45 The premise of such an analysis is that it focuses on jurisdiction: did the legislature intend the question in issue to be answered by the courts or by the tribunal? It is a matter of statutory interpretation with the emphasis on purpose.

46 In this light the *Utilities Act* is a current example of the means adopted in North America, firstly in the United States, to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition. The grant of monopoly through certification of public convenience and necessity was accompanied by the correlative



burden on the monopoly of supplying service at approved rates to all within the area from which competition was excluded.

47           It is self-evident this process cannot be undertaken on a day to day basis by legislature or government. Hence, the creation of public utilities commissions. In the United States a constitutionally acceptable formula was evolved to protect the grantee of a certificate of public convenience and necessity from rates so low they constituted piece-meal confiscation of property without due compensation. The form this took was adopted in Canada. A brief historical sketch, relevant to this province, is found in the concurring judgment of Mr. Justice Locke in *British Columbia Electric Railway Co. Ltd. v. The Public Utilities Commission*, [1960] S.C.R. 837 at 842-845. The *Utilities Act* contains many expressions linking it with its legislative antecedents.

48           The certification process is at the heart of the regulatory function delegated to the Commission by the legislature. In *Memorial Gardens Association Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353 Mr. Justice Abbott, after referring to the American origin of the phrase, said at 357:

As this Court held in the *Union Gas* case, *supra*, the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative

discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

49           The other function the legislature has entrusted to the regulatory tribunal is the supervision of the utility's use of property dedicated to service as a result of the certification process. Unless so certified, or exempted from certification by the Commission, such property is not part of the appraised value of the utility company under s.62(1) which is the basis for fixing a rate under s.66. In respect of such property the supervisory powers of the Commission, principally found in Part 3 of the *Utilities Act*, enable it to oversee the statutory obligation in s.44 to furnish service imposed upon every public utility, namely:

44. Every public utility shall maintain its property and equipment in a condition to enable it to furnish, and it shall furnish, a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

50           It is not without some significance that the Commission found in the Decision the following:

From the evidence, the Commission recognizes that B.C. Hydro is generally maintaining a safe, secure and highly reliable generation, transmission and distribution service. Given this high level of reliability, the Commission has focused on cost control as an issue at this time.

51           The *Utilities Act* runs to over 140 sections. The administration of the jurisdiction conferred upon the Commission is amply delineated by express terms. There is no need to imply terms for this purpose.

52           I have already described the reason for the existence of the tribunal. The expertise or skills of its members vary. Experience has demonstrated skills associated with accounting, economics, finance and engineering have been frequently utilized. Unlike labour relations tribunals where past experience in the field of labour relations is a virtual prerequisite, past experience in the regulatory field is not necessary. A similar observation may be made with respect to securities commissions. Both labour relations tribunals and securities commissions are expressly conferred with policy making powers. None such are conferred on the Commission.

53           In considering the nature of the problem before the tribunal I will first deal with the *Utilities Act* as a law of general application. I will then consider whether the provisions of the *Utilities Act* which relate only to B.C. Hydro affect my conclusions.

54           I earlier referred to the characterization of the issue. Counsel for the Commission contended it merely related to the enforcement of the information gathering power conferred on the Commission.

55 I am unable to agree with that characterization as in my opinion the IRP process is specific to the planning phase of the utility's response to its statutory obligations and its enforcement by order is an exercise of management as it relates neither to the certification process as such nor to the supervision of the utility's use of its property devoted to the provision of service.

56 It is only under s.112 of the *Utilities Act* that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

57 One of the primary responsibilities and functions of the directors of a corporation is the formulation of plans for its future. In the case of a public utility these plans must of necessity extend many years into the future and be constantly revised to meet changing conditions. In the case at bar the effect of the Commission's directions is to place a group, whose interests are disparate, in a superior position in the sequence of planning and to require the directors to justify a deviation from the product of the IRP process in the exercise of their responsibilities.

58           Taken as a whole the *Utilities Act*, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.

59           When the *Utilities Act* is examined in light of the provisions applicable to B.C. Hydro alone, this conclusion is reinforced. I have mentioned s.3.1. This authorizes the Lieutenant Governor in Council to issue a direction to the Commission specifying "factors, criteria and guidelines" to be used or not used by the Commission in regulating and fixing rates for B.C. Hydro. There is no comparable mandatory power conferred on the Commission to issue such directions to B.C. Hydro. From my examination of the *Utilities Act* this is the only reference to guidelines. A further important exclusion from the jurisdiction of the Commission is its approval of the issue of securities under s.57. Moreover, under s.59 B.C. Hydro may dispose of its property without obtaining the Commission's approval.

60           I have mentioned sanctions and the Commission's threat to resort to Part 9 of the *Utilities Act*. Part 9 lists as an offence on the part of individual officers, directors and managers of utility in the failure to comply with a Commission order.

61           Tested in terms of general principles I am of the view the observations of the Ontario Court of Appeal in *Ainsley Financial Corporation et al v. Ontario Securities Commission et al* (1994), 21 O.R. (3d) 104, (Ont.C.A.) are relevant. In that case the Ontario Securities Commission ("OSC") issued a draft policy statement, subsequently adopted with minor modifications after the action in question had been commenced.

62           This policy statement purported to be a guide to those engaged in the marketing and selling of penny stocks as to business practices the OSC regarded as appropriate. As was set out in greater detail in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, major securities commissions such as the OSC have a policy role in the regulation of capital markets in the public interest as well as an adjudicative function in applying sanctions in specific cases. The following headnote from *Ainsley* is, I think, relevant to the point before us.

          The validity of the policy statement turned on its proper characterization. If the statement was a non-binding statement or guideline intended to inform and guide those subject to regulation, the statement was valid and within the authority of the OSC; guidelines of this nature do not require specific statutory authority and such guidelines are not invalid merely because they regulate in the sense that they affect the conduct of those at whom they are directed. If, however, the statement imposed mandatory requirements enforceable by sanction, then the statement required statutory authority; a regulator cannot issue *de facto* laws disguised as guidelines.

63           The issue of non-mandatory guidelines is not a question before us. Here, I repeat, the Commission has explicitly purported to enforce the application of its directions with the threat of sanctions.

64           In my view, the appellant is entitled to a declaration that the Directions in the reasons for Decision for Order G-89-94 issued 24 November 1994 which ordered the application of the Integrated Resource Plan to British Columbia Hydro and Power Authority are beyond the statutory powers of the Commission and are accordingly unenforceable.

65           I would make no order as to costs.

"The Honourable Mr. Justice Goldie"

**I AGREE:**           "The Honourable Madam Justice Prowse"

**I AGREE:**           "The Honourable Madam Justice Newbury"

Pursuant to s.121 of the *Utilities Commission Act*, the foregoing will be certified as the opinion of the Court to the Commission.

**Maple Lodge Farms Limited** *Appellant*;

and

**Government of Canada and the Minister of Economic Development, responsible for Industry, Trade and Commerce** *Respondents*;

and

**Canadian Chicken Marketing Agency**  
*Intervener.*

File No.: 16266.

1981: November 4; 1982: July 22.

Present: Laskin C.J. and Ritchie, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Administrative law — Discretion — Import permits required by statute for goods on import control list — Guidelines issued dealing with conditions for import — Whether or not Minister had discretion to deny permits — Whether or not discretion properly exercised — Export and Import Permits Act, R.S.C. 1970, c. E-17, s. 8.*

The Minister of Industry, Trade and Commerce refused to issue appellant a permit as required by s. 8 of the *Export and Import Permits Act*, to import a product included on an import control list, notwithstanding the ministerial guidelines dealing with the matter. Appellant questioned whether or not the Minister had any discretion to refuse to issue such a permit, and argued that, if he did, that discretion had been unlawfully exercised. The Federal Court, Trial Division, denied appellant's application seeking a writ of mandamus ordering the Minister to issue the permit sought and the Federal Court of Appeal upheld that decision.

*Held:* The appeal should be dismissed.

The Minister can properly and lawfully formulate general requirements for the granting of import permits, but these guidelines cannot confine the discretion accorded him under s. 8 of the Act. Here, the Minister properly exercised that discretion. Considerations relating to the amount of available dressed chicken and over-all market conditions were very relevant to his

**Maple Lodge Farms Limited** *Appelante*;

et

**Le gouvernement du Canada et le ministre au Développement économique chargé de l'Industrie et du Commerce** *Intimés*;

et

**Office canadien de commercialisation des poulets** *Intervenant.*

N° du greffe: 16266.

1981: 4 novembre; 1982: 22 juillet.

Présents: Le juge en chef Laskin et les juges Ritchie, Estey, McIntyre et Chouinard.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Droit administratif — Pouvoir discrétionnaire — Licences d'importation exigées par la loi pour les marchandises sur la liste des importations contrôlées — Lignes directrices sur les conditions d'importation — Le Ministre a-t-il le pouvoir discrétionnaire de refuser les licences? — Si oui, le pouvoir discrétionnaire a-t-il été régulièrement exercé? — Loi sur les licences d'exportation et d'importation, S.R.C. 1970, chap. E-17, art. 8.*

Le ministre de l'Industrie et du Commerce a refusé de délivrer à l'appelante une licence, requise en vertu de l'art. 8 de la *Loi sur les licences d'exportation et d'importation*, pour l'importation d'une marchandise qui figure sur une liste de marchandises d'importation contrôlée, malgré l'existence de lignes directrices qui portent sur le sujet. L'appelante a mis en doute l'existence du pouvoir discrétionnaire du Ministre de refuser une licence et a soutenu que, s'il l'avait, ce pouvoir discrétionnaire n'avait pas été exercé conformément à la loi. La Division de première instance de la Cour fédérale a rejeté la demande de l'appelante visant à obtenir un bref de *mandamus* qui ordonne au Ministre de délivrer la licence demandée et la Cour d'appel fédérale a confirmé cette décision.

*Arrêt:* Le pourvoi est rejeté.

Le Ministre peut, en vertu de la loi, formuler des conditions générales touchant l'octroi de licences d'importation, mais ces lignes directrices ne peuvent pas restreindre le pouvoir discrétionnaire que l'art. 8 de la Loi lui confère. En l'espèce, le Ministre a exercé ce pouvoir discrétionnaire conformément à la loi. Les questions relatives à la quantité de poulet éviscéré disponible



decision to refuse to grant appellants the supplementary import permits they sought.

APPEAL from a judgment of the Federal Court of Appeal, [1981] 1 F.C. 500, 114 D.L.R. (3d) 634, 42 N.R. 312, dismissing an appeal from a judgment of Dubé J. dismissing an application for mandamus. Appeal dismissed.

*D. K. Laidlaw, Q.C.*, and *Alan J. Lenczner*, for the appellant.

*W. A. Hobson, Q.C.*, and *R. P. Hynes*, for the respondents.

*François Lemieux*, for the intervener the Canadian Chicken Marketing Agency.

The judgment of the Court was delivered by

McINTYRE J.—This appeal arises out of the refusal of the Minister of Economic Development, responsible for Industry, Trade and Commerce of the Government of Canada, (the Minister) to issue to the appellant certain supplementary import permits under s. 8 of the *Export and Import Permits Act*, R.S.C. 1970, c. E-17, and Regulations passed thereunder. The permits sought would allow the appellant to import live chickens, having a weight of less than five pounds per chicken, which are in the submission of the appellant essential to the continued operation of its business. Upon the refusal of the Minister, the appellant applied to the Federal Court, Trial Division, for a writ of mandamus ordering the Minister to issue the import permits for the importation of four million pounds of live chicken. The motion was dismissed. An appeal was taken to the Federal Court of Appeal (Heald and Le Dain JJ. and MacKay D.J.) where it was dismissed for reasons written by Le Dain J., for the unanimous court. This appeal is by leave, granted November 3, 1980.

The judgment of Le Dain J. is now reported at [1981] 1 F.C. 500. It sets out the facts and statutory provisions involved in a determination of this case, and it deals with all the issues raised. I am in agreement with the disposition made of this appeal in the Federal Court of Appeal and with

et aux conditions générales du marché sont très pertinentes relativement à sa décision de refuser les licences supplémentaires d'importation.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1981] 1 C.F. 500, 114 D.L.R. (3d) 634, 42 N.R. 312, lequel rejette l'appel interjeté contre le jugement du juge Dubé de rejeter la demande de *mandamus*. Pourvoi rejeté.

*D. K. Laidlaw, c.r.*, et *Alan J. Lenczner*, pour l'appelante.

*W. A. Hobson, c.r.*, et *R. P. Hynes*, pour les intimés.

*François Lemieux*, pour l'intervenant l'Office canadien de commercialisation des poulets.

Version française du jugement de la Cour rendu par

LE JUGE McINTYRE—Le présent pourvoi découle du refus du ministre au Développement économique chargé de l'Industrie et du Commerce du gouvernement du Canada (le Ministre) de délivrer à l'appelante certaines licences supplémentaires d'importation en application de l'art. 8 de la *Loi sur les licences d'exportation et d'importation*, S.R.C. 1970, chap. E-17, et ses règlements d'application. Les licences demandées permettraient à l'appelante d'importer des poulets vivants pesant moins de cinq livres chacun, importation que l'appelante prétend essentielle à la continuation de son activité. Après le refus du Ministre, l'appelante a demandé à la Division de première instance de la Cour fédérale, un bref de *mandamus* qui ordonne au Ministre de délivrer les licences d'importation pour quatre millions de livres de poulets vivants. Sa requête a été rejetée. La Cour d'appel fédérale (les juges Heald et Le Dain et le juge suppléant MacKay) a rejeté à l'unanimité l'appel interjeté par l'appelante, pour les motifs rédigés par le juge Le Dain. L'autorisation d'appeler à cette Cour a été accordée le 3 novembre 1980.

Les motifs du juge Le Dain sont maintenant publiés à [1981] 1 C.F. 500. Ils énoncent les faits et citent les textes de lois utiles à la décision de l'affaire et ils abordent tous les moyens invoqués. Je suis d'accord avec la façon dont la Cour d'appel fédérale a disposé de cet appel et avec les motifs

Looking at these provisions as a whole, I am of the opinion that section 8 of the Act confers upon the Minister a discretion as to whether or not to issue an import permit in a particular case. Section 28 of the *Interpretation Act*, R.S.C. 1970, c. 1-23, requires, of course, that the word "may" in section 8 be construed as permissive unless the context indicates a contrary intention. See *McHugh v. Union Bank of Canada* [1913] A.C. (P.C.) 299; *Smith & Rhuland Limited v. The Queen, on the relation of Brice Andrews* [1953] 2 S.C.R. 95. This is not a case for application of the principle recognized in *Julius v. The Right Rev. the Lord Bishop of Oxford* (1879-80) 5 App. Cas. 214 and referred to in *The Labour Relations Board of Saskatchewan v. The Queen on the relation of F. W. Woolworth Co. Ltd.* [1956] S.C.R. 82 at page 87, that permissive words may be construed as creating a duty where they confer a power the exercise of which is necessary to effectuate a right. The *Export and Import Permits Act* does not create or recognize a legal right to an import permit. Chicken was placed on the Import Control List, pursuant to section 5(1)(a.1) of the Act for the purpose of restricting its importation to support action taken under the *Farm Products Marketing Agencies Act*, S.C. 1970-71-72, c. 65. As I have said, the effect of its inclusion in the List is, by section 14 of the Act, to prohibit its importation "except under the authority of an in accordance with an import permit issued under this Act." The common law right to import goods is to that extent abrogated. It is an implication of section 5(1)(a.1) of the Act that the Minister is to exercise his authority to issue or refuse permits for the purpose specified therein. It cannot have been intended, in view of this declared purpose, that the power to issue permits should be a mere Ministerial duty imposed for the sole purpose of monitoring the extent to which an unlimited right of importation is in fact exercised.

The words in section 8, "in such quantity and of such quality, by such persons, from such places or persons and subject to such other terms and conditions as are described in the permit or in the regulations", do not refer to conditions defining a right or entitlement to a permit but to the terms and conditions to which an issued permit may be subject. This is clear from the terms of section 12(a) of the Act, which, in conferring the power to make regulations, speaks, *inter alia*, of "the terms and conditions, including those with reference to shipping or other documents, upon which permits, cer-

J'estime qu'il ressort de ces dispositions prises dans leur ensemble que l'article 8 de la *Loi* accorde au Ministre un pouvoir discrétionnaire de délivrer ou de ne pas délivrer une licence d'importation dans un cas donné. L'article 28 de la *Loi d'interprétation*, S.R.C. 1970, c. 1-23, exige évidemment que le mot «peut» de l'article s'interprète comme exprimant une faculté à moins que le contexte ne manifeste une intention contraire. Voir les affaires *McHugh c. Union Bank of Canada* [1913] A.C. (C.P.) 299; *Smith & Rhuland Limited c. La Reine ex rel. Brice Andrews* [1953] 2 R.C.S. 95. La présente affaire ne donne pas lieu à l'application du principe reconnu dans l'affaire *Julius c. The Right Rev. the Lord Bishop of Oxford* (1879-80) 5 App. Cas. 214, et mentionné dans l'affaire *The Labour Relations Board of Saskatchewan c. La Reine ex rel. F.W. Woolworth Co. Ltd.* [1956] R.C.S. 82, à la page 87, selon lequel des termes accordant une faculté peuvent s'interpréter comme créant un devoir s'ils confèrent un pouvoir dont l'exercice est nécessaire pour donner effet à un droit. La *Loi sur les licences d'exportation et d'importation* ne crée ni ne reconnaît de droit strict à une licence d'importation. Le poulet a été ajouté à la liste de marchandises d'importation contrôlée en vertu de l'article 5(1)a.1) de la *Loi* dans le but d'en restreindre l'importation afin d'appuyer une mesure prise en vertu de la *Loi sur les offices de commercialisation des produits de ferme*, S.C. 1970-71-72, c. 65. Comme je l'ai déjà mentionné, l'inscription du poulet sur la liste a pour effet, en vertu de l'article 14 de la *Loi*, d'en interdire l'importation «si ce n'est sous l'autorité et en conformité d'une licence d'importation délivrée selon la présente loi». Le droit général d'importer des marchandises est abrogé d'autant. Il découle de l'article 5(1)a.1) que le Ministre doit exercer le pouvoir qui lui est confié de délivrer ou de refuser des licences pour les fins qui y sont mentionnées. Il est impossible, étant donné l'objet qui y est exprimé, que le législateur ait voulu que l'autorité de délivrer des licences soit simplement une obligation imposée au Ministre dans le seul but de lui permettre de vérifier dans quelle mesure un droit illimité d'importer est effectivement exercé.

Les mots de l'article 8 («en la quantité et de la qualité, par les personnes, des endroits ou des personnes et sous réserve des autres stipulations et conditions que décrivent la licence ou les règlements») ne visent pas les conditions dont dépendrait le droit d'exiger une licence, mais les conditions auxquelles une licence peut être assujettie une fois délivrée. Cela ressort clairement des termes de l'article 12a) de la *Loi* qui, en établissant le pouvoir de prendre des règlements, parle notamment des «conditions, y compris celles qui concernent les documents d'expédition ou autres, auxquelles des licences,

helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:

The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259).

In any case, the words employed in s. 8 do not necessarily fetter the discretion. The use of the expression "a permit will normally be issued" is by no means equivalent to the words 'a permit will necessarily be issued'. They impose no requirement for the issue of a permit.

In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not

licences connaissent les grandes lignes de la politique et de la pratique que le Ministre entend suivre. Donner aux lignes directrices la portée que l'appellante allègue qu'elles ont équivaldrait à attribuer un caractère législatif aux directives ministérielles et entraverait l'exercice du pouvoir discrétionnaire du Ministre. Le juge Le Dain a analysé cette question et dit, à la p. 513:

Le Ministre est libre d'indiquer le type de considérations qui, de façon générale, le guideront dans l'exercice de son pouvoir discrétionnaire (voir *British Oxygen Co. Ltd. c. Minister of Technology* [1971] A.C. (C.L.) 610; *Capital Cities Communications Inc. c. Le Conseil de la Radio-Télévision canadienne* [1978] 2 R.C.S. 141, aux pp. 169 à 171), mais il ne peut pas entraver ce pouvoir discrétionnaire en tenant les lignes directrices pour obligatoires et en excluant tous les autres motifs valides ou pertinents pour lesquels il peut exercer son pouvoir discrétionnaire (voir *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259).

De toute façon, les termes employés dans l'art. 8 n'entravent pas nécessairement l'exercice du pouvoir discrétionnaire. L'expression «une licence est émise» n'est absolument pas équivalente à «une licence est nécessairement émise». Ces termes n'imposent pas de condition à la délivrance d'une licence.

En interprétant des lois semblables à celles qui sont visées en l'espèce et qui mettent en place des arrangements administratifs souvent compliqués et importants, les tribunaux devraient, pour autant que les textes législatifs le permettent, donner effet à ces dispositions de manière à permettre aux organismes administratifs ainsi créés de fonctionner efficacement comme les textes le veulent. A mon avis, lorsqu'elles examinent des textes de ce genre, les cours devraient, si c'est possible, éviter les interprétations strictes et formalistes et essayer de donner effet à l'intention du législateur appliquée à l'arrangement administratif en cause. C'est aussi une règle bien établie que les cours ne doivent pas s'ingérer dans l'exercice qu'un organisme désigné par la loi fait d'un pouvoir discrétionnaire simplement parce que la cour aurait exercé ce pouvoir différemment si la responsabilité lui en avait incombé. Lorsque le pouvoir discrétionnaire accordé par la loi a été exercé de bonne foi et, si nécessaire, conformément aux principes de justice



## Practice and Procedure Before Administrative Tribunals

### Chapter 3 — Administrative Agencies And Government Policy

#### 3.2 — AGENCY INFLUENCE

##### 3.2(d) Formal Policy Guidelines

### 3.2(d) Formal Policy Guidelines

In my view, every federal and provincial agency has the authority to issue policy guidelines, although few agencies do so. Where administrative agencies issue guidelines, they should do so publicly in clear, understandable terms.

Sometimes, the power to issue guidelines is not clearly set out in the legislation, but may be implied. See *Re Capital Cities Communication Inc. and CRTC*<sup>26</sup> where the tribunal issued a policy statement which it subsequently followed before a case was heard. The court held that the legislation implicitly authorized the development and publication of policy statements, provided that the CRTC did not thereby fetter its discretion. Contrasted to that decision is that of the Ontario Court of Appeal in *Re Hopedale Dev. Ltd. and Oakville*.<sup>27</sup> In that case, the OMB was found to have fettered its discretion by establishing a policy in advance of hearing a case and then treating that policy as binding on it. The two decisions are quite consistent.

Guidelines or policy statements are guidelines only. They can arise out of generic or policy hearings where an agency may invite, upon published notice, submissions from interested parties. The guidelines can be adopted without a hearing, but are better accepted if they follow a well publicized and attended hearing such as in the *Capital Cities* case outlined above. The policy statements are not binding on the agency and therefore do not fetter its discretion. The statements can be departed from at will, but can be accepted or adopted in a decision as long as the evidence in the case is heard and weighed first.<sup>28</sup>

Unquestionably, an agency declares policy with every decision it makes. It is, however, not bound by its own earlier decisions. Nevertheless, every agency should seek to create a stable, predictable and uniform policy.

It is important that agencies have policies, even though they may not be of a formal type. It is also important that policies, which guide the agency in general terms, be made known to those affected.

A major difference between an administrative agency and a court is that the court cannot make a policy pronouncement in advance. Yet stare decisis is itself a pronouncement. If one searches the law, one can ascertain the general policy of the court, given the facts. In a general way, particularly with far-reaching and experienced agencies, the same general concept is useful to the public.

Administrative agencies can demonstrate the direction in which they are moving in a number of ways:

- (1) by issuing general published statements of policy;
- (2) by holding generic hearings and issuing reports which can be of significant guidance in the future;
- (3) by issuing decisions on a given set of facts;

(4) by issuing published guidelines on how a matter is processed before the agency; and

(5) by issuing statements of practice and procedure which are followed by the agency (or where required, are approved by an order-in-council).

It is not realistic to suggest that agencies do not consider, in advance, their own attitude towards a theoretical fact situation. There is no meaningful reason why, before facts arise, an agency should not create policy guidelines to give some indication of how it may interpret its mandate and how it will deal generally with matters in the future. At the same time, agencies must bear in mind that they must not fetter their judgment. This is not an impossible task by any means, in practice, except to those unwilling to peer around a corner before reaching it.

There are many ways in which a board can make known its policies, other than through policy statements and past decisions. There are newsletters, conferences, speeches, presentations at universities, public forums, articles published in journals, the continual interchange and dialogue with the media, the affected regulated industry and many more.

Agency guidelines are discussed in more detail later in this work in chapter 6 "Binding and Non-Binding Agency Instruments — Orders, Rules and Guidelines".

---

## FOOTNOTES

---

<sup>26</sup> [\*Re Capital Cities Communications Inc. and CRTC\*, 1977 CarswellNat 553, \[1978\] 2 S.C.R. 141, 36 C.P.R. \(2d\) 1, 81 D.L.R. \(3d\) 609, 18 N.R. 181.](#)

---

<sup>27</sup> [\*Re Hopedale Dev. Ltd. and Oakville\*, 1964 CarswellOnt 175, \[1965\] 1 O.R. 259, 47 D.L.R. \(2d\) 482 \(C.A.\).](#)

---

<sup>28</sup> See, in illustration [\*Wolverine Forest Products Ltd. v. Ontario \(Workers' Compensation Appeals Tribunal\)\*](#), 1993 CarswellOnt 1900, 64 O.A.C. 228 (Ont. Div. Ct.). In that case the Ontario Divisional Court stated that the application of a standard policy developed by the Ontario Worker's Compensation Board did not elevate that policy to the level of subordinate legislation. "It is essential for the Board to have such a policy in order to dispose of the large volume of cases that it deals with each year in a consistent manner." It is open to a person in an individual case to show that the policy is inappropriate.

2019 - 07 - 30

## **Practice and Procedure Before Administrative Tribunals**

### **Chapter 6 — Binding and Non-Binding Agency Instruments — Orders, Rules and Guidelines**

#### **6.5A — VARIOUS FORMS OF POLICY-MAKING**

Purpose iv: To Assist in Consistency in Decision-Making by the Agency

#### **Purpose iv: To Assist in Consistency in Decision-Making by the Agency**

By consistency in decision-making I refer to similar circumstances rendering similar results.

Consistency is important in agency decision-making. It permits the rational development and arrangement of public affairs. Where economic or other planning decisions must be made on the basis of past action or likely expectations, inconsistent decisions by decision-makers can cause financial and other hardships. And inconsistency in action increases uncertainty and costs to participants as it becomes difficult for consultants and advisors to give advice as to rights and action to be taken.

There is also a psychological importance to consistency in decision-making. It appears to be a basic aspect of human nature that we all expect to be treated the same in similar circumstances. Where this does not happen (and the result is perceived as being less advantageous to the individual) there is a feeling of resentment, a feeling that the decision-maker is acting without good reason (arbitrarily) and a general refusal to accept the decision which can lead to social disorder or malcontent.<sup>[40](#)</sup>

Furthermore, in creating a legislative scheme, absent some very unusual and express direction to the contrary, Parliament does not generally intend that scheme to be administered arbitrarily. Striving for consistency in decision-making assists in the avoidance of arbitrary decision-making.

Inconsistent decisions can also result in inefficiencies in the system by leading to increases in applications brought as applicants hope to secure alternative approaches which best serve their personal interests — perhaps even in hopeless cases, on the basis of "who knows — maybe I'll strike it lucky!"

Inconsistent action leads to appeals, judicial reviews with resulting costs to parties and agency in costs, re-hearings, etc.<sup>[41](#)</sup>

Inconsistent action creates insecurity and lack of confidence in agency decision-making. If agency members regularly adopt different approaches in similar situations it calls into question the validity of earlier decision-making and shakes the confidence of the public in the agency.

Inconsistency in decision-making can also increase the length of proceedings as participants argue over alternative approaches taken in past.

Inconsistency can cause stress and disunity between decision-makers and a perception of a struggle between alternative views for dominance.

Inconsistency can *sometimes* mask sloppy thinking and a failure to force the mind to fully address an issue.

Yet many agencies operate under circumstances that work against consistency. They must operate under statutes that must be interpreted and which often are not clear or may even contain inconsistencies resulting from revision and drafting additions over the years. In addition, as

discussed earlier, agencies must decide each application on the basis of the specific circumstances of each case. Agencies are not bound by internal precedent and cannot bind themselves to follow their earlier decisions. Subject to legislative or judicial direction, each decision-maker is required to interpret the law, and exercise discretion according to his or her conscience in each case.<sup>42</sup> This is not a fluke or an unintended consequence. Parliament *could* make rules if it thought it appropriate, or it could authorize the making of rules by some other entity.

The fact that most decision-making by agencies is done through individual members or panels of members rather than the agency as a whole also increases the chances of inconsistent decision-making. This difficulty is compounded by the fact that some agencies are composed of large numbers of individuals spread over a wide geographic area making communication between them difficult. Consistency may also be a problem for agencies which are composed of *ad hoc* decision-makers or part-time decision-makers who do not interact and again are unable to communicate easily or often. Agencies with large number of new short-term decision-makers can develop consistency problems as the unfamiliarity of the members with either the legislation, the realities of the area in which the agency works, and the policies of the agency leads to different decisions being made.

Consistency problems can also arise where there are complex areas of law, in areas where individual members lack expertise, or in areas in which there is no easily demonstrable correct answer and one is often trying to develop the more subjective "best" answer.

Legislative schemes often involve the application of a great deal of discretionary decision-making by agencies where the agency has a choice to determine what may be appropriate in specific circumstances, often in areas of opinion where there is no clear absolute answer

Guidelines can assist in consistent decision-making by providing an easily accessible source of thinking and advice to agency decision-makers wherever located that keeps them advised of the agency thinking respecting policy or legal interpretation. Such guidelines can provide the decision-makers with starting points in their thinking respecting individual cases.<sup>43</sup>

The value of guidelines respecting consistency is that they expose decision-makers to well-considered views of general application which can serve as starting points in the decision-maker's deliberations. But they should not be end points as well. They cannot be treated as rules — unless there is valid legislative direction to do so.<sup>44</sup> Decision-makers cannot fetter their discretion or judgment by blinding and automatically following guidelines to the exclusion of their own deliberations or consideration of the particular circumstances of the specific case before them.

Thus great care must be taken by an agency in the drafting and use of guidelines to avoid the impression that those guidelines are used as more than mere instruments of assistance but as laws or the means to avoid the agency exercising its discretion or judgment on a case-by-case basis. The agency should not write its guidelines in a way that gives the impression that they should be departed from only in unusual circumstances, or otherwise adopt internal processes that increase the difficulties for an agency member to depart from a guideline, or otherwise operate to discourage such departures.<sup>45</sup>

At the same time a party cannot sit in the bush, refuse to provide the agency with any countervailing arguments or evidence respecting the applicability of the guideline and then later complain if the agency decides to apply the guideline.<sup>46</sup>

I will return to the use of policy guidelines later in this chapter. The concept of the fettering of discretion is also discussed extensively in chapter 5B "Discretion" under the heading: "5B.5(c) Discretion Must Be Exercised on the Merits of Each Case".

I like guidelines. As outlined in this chapter they are of real value to the operation of agencies. I very much doubt that I could have performed my work as well on my first administrative agency without the significant effort made by the individuals who conceived the various policy and

procedural positions set out in that agency's guidelines. Having said that, it is equally important that decision-makers not adopt an undue reliance on the use of guidelines. It is important that decision-makers not lose their edge. One of the dangers of experience, and the over-reliance on guidelines, is the temptation to rely on system and to lose the ability to know when something is different and requires a response that is out of the ordinary. This is a real concern in administrative decision-making where the inability to recognize the unusual case and properly react thereto can cost real money or inflict significant harm. Agencies focus significant resources on the concern for the "rogue decision-maker" — an individual who acts outside of agency policy. But, as many modern media reports and official inquiries are revealing a significant problem — agencies which fail their public mandate because they are unable to see beyond their standard response — Guideline and policy development is an important tool to assist agencies make better decisions and avoid arbitrariness. However, it is impossible to capture every situation in a policy; and the principle that one always remains willing to deviate from policy should be more than mere lip service. One must always remain vigilant and able to detect when something is not the norm — notwithstanding its outward appearance. This requires a continuing sensitivity and awareness to the particulars of the specific.

---

## FOOTNOTES

---

<sup>40</sup> In *SCA Packaging Ltd. v. Boyle (Northern Ireland)* [2009] ICR 1056, [2009] UKHL 37, [2009] IRLR 746 (U.K.H.L.) Lord Hope of Craighead made the following comments respecting the interpretation of a term in a U.K. statute dealing with discrimination relating to disabilities:

The definition of "disability" lies at the heart of the Disability Discrimination Act 1995. So a proper understanding of what it means is essential if all those who are disabled, as that term is defined in the Act, are to be brought within its protection. Parliament went to considerable lengths to define this expression. First, there is the general test laid down in section 1(1), which provides:

Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Then there are provisions in Schedule 1 which examine the issue in much more detail. In each paragraph there is a power to make regulations in the light of how the paragraph to which it relates is working out in practice. And there are the provisions that the Schedule itself sets out. Not only is it important that these detailed provisions should be understood and applied in the right way. It is important that they should be interpreted uniformly throughout the United Kingdom.

---

<sup>41</sup> The irony in this is that inconsistency in itself is not grounds for judicial review (*Domtar Inc. v. Québec (Comme d'appel en matière de lésions professionnelles)* 1993 CarswellQue 145, [1993] 2 S.C.R. 756).

---

<sup>42</sup> *Ontario (Minister of Municipal Affairs & Housing) v. Transcanada Pipelines Ltd.* (2000), 2000 CarswellOnt 1072, 186 D.L.R. (4th) 403 (Ont. C.A.) ("A tribunal is not bound to follow its own decisions on similar issues although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it."); *Canada (Minister of Employment & Immigration) v. Jawhari* (1992), 59 F.T.R.



22 (Fed. T.D.) (not open to Immigration and Refugee Board to determine application solely on basis of an earlier Board decision, the matter had to be determined on its own merits.).

---

<sup>43</sup> In [\*El-Hennawy v. Law Society of Upper Canada\*](#), 2014 CarswellOnt 953, 2014 ONSC 375 (Ont. Div. Ct.) the Divisional Court has held that Convocation of the Law Society of Upper Canada had the authority to make non-binding guidelines to structure the exercise of its discretion in making indemnification grants. The Court noted that the guidelines were a way of structuring the exercise of the Society's discretion and providing some consistency.

---

<sup>44</sup> [\*Kripps v. Canada \(Attorney General\)\*](#) (2002), 2002 CarswellNat 1107, 219 F.T.R. 146 (Fed. T.D.).

---

<sup>45</sup> In illustration see [\*Ha v. Canada \(Minister of Citizenship & Immigration\)\*](#), 2004 CarswellNat 247, 2004 FCA 49, 11 Admin. L.R. (4th) 306, 236 D.L.R. (4th) 485 (Fed. C.A.). See also [\*Tremblay v. Québec \(Commission des Affaires sociales\)\*](#), 1992 CarswellQue 108, [1992] 1 S.C.R. 952, 90 D.L.R. (4th) 609 (S.C.C.) where systemic pressure on board members to consult other members of the agency in full board meetings before departing from previous agency decisions was found to be improper.

See also the trial and appeal level decisions in [\*Thamotharem v. Canada \(Minister of Citizenship & Immigration\)\*](#), 2006 CarswellNat 6, 2006 FC 16 (Fed. T.D.); reversed 2007 CarswellNat 1391, 2007 FCA 198, 60 Admin. L.R. (4th) 247 (Fed. C.A.), leave to appeal to S.C.C. refused 383 N.R. 400 (note), 2007 CarswellNat 4334, 2007 CarswellNat 4335, [2007] S.C.C.A. No. 394 (S.C.C. Dec 13, 2007). In that case the Immigration and Refugee Board had issued a guideline which provided that a hearing would start with the agency's questioning of a claimant (rather than the claimant's counsel leading off the hearing). The guideline used mandatory language ("the standard practice will be") and provided that the member might deviate in "exceptional circumstances". The trial level proceeding found that among other things there was also evidence that the agency managers were required to monitor the compliance with the guidelines of individual members; that members not complying were personally asked by the Vice-Chair to explain their deviation; and the application of the guidelines in appropriate circumstances was a factor in a member's performance appraisal. The trial level decision found that the guideline fettered the discretion of the members.

On appeal, the Federal Court of Appeal reversed the trial decision on this issue. In doing so it also took a somewhat different view of the facts. The account to the Vice-Chair allegedly required of non-compliant members and the performance review aspects of the trial decision were not mentioned. Instead the Court of Appeal appears to have focused on the language of the guideline, monitoring by the agency for compliance, and an expectation that deviations from the guidelines would be explained in reasons. (The Court of Appeal also dismissed the fact that some members might in fact *feel* that they were bound — holding that if that was so their individual decisions could be challenged for fettering.)

In minority reasons concurring in the result, Justice Sharlow appears to have felt that the guideline was just written incorrectly and that, properly understood, each member continued to have the unfettered discretion to adopt any order of procedure required by the circumstances of each claim.

Justice Evans writing for the majority held that neither the monitoring nor the expectation that deviations should be explained in reasons amounted to fettering.

86. Evidence that the Immigration and Refugee Board "monitors" members' deviations from the standard order of questioning does not, in my opinion, create the kind of coercive environment which would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. On a voluntary basis, members complete, infrequently and inconsistently, a hearing information sheet asking them, among other things, to explain when and why they had not followed "standard practice" on the order of questioning. There was no evidence that any member had been threatened with a sanction for non-compliance. Given the Board's legitimate interest in promoting consistency, I do not find it at all sinister that the Board does not attempt to monitor the frequency of members' compliance with the "standard practice".

87. Nor is it an infringement of members' independence that they are expected to explain in their reasons why a case is exceptional and warrants a departure from the standard order of questioning. Such an expectation serves the interests of coherence and consistency in the Board's decision-making in at least two ways. First, it helps to ensure that members do not arbitrarily ignore Guideline 7. Second, it is a way of developing criteria for determining if circumstances are "exceptional" for the purpose of paragraph 23 and of providing guidance to other members, and to the Bar, on the exercise of discretion to depart from the standard order of questioning in future cases.

With respect to the language of the guidelines, the majority reasons agreed that it appeared to be mandatory. However, in holding that this mandatory language did not amount to a fettering the majority reasons appear to hold that binding procedural discretion was acceptable provided that the member had a "meaningful degree" of discretion to depart therefrom. This aspect of the decision is discussed in more detail in footnote 66.

---

<sup>46</sup> [\*VIA Rail Canada Inc. v. Canadian Transportation Agency\*, 2007 CarswellNat 608, 2007 SCC 15, \[E. 2007-670\] \(S.C.C.\)](#). In this case the Supreme Court of Canada held that the National Transportation Agency did not err in reaching a decision against VIA Rail by taking into account standards set out in its 1998 Rail Code. The Rail Code was the result of a "voluntary, consensus-building process involving extensive consultation with the transportation industry, the community of persons with disabilities and other government." Developed in consultation with an expert human rights agency, the Rail Code standards represent objectives that rail carriers, including VIA, publicly accepted. Its purpose was to function as self-imposed regulation, establishing minimum standards all rail carriers agreed to meet. The Code itself gave notice that: "It is expected that this [passenger rail car accessibility] Part of the Code of Practice will be followed by VIA Rail Canada Inc." VIA Rail, itself, had agreed to the Code.

147 It was, accordingly, a proper factor in the Agency's analysis, especially since the anticipation of compliance is reflected in the language of the Rail Code itself, which provides, in s. 1.1.1: "It is expected that this [passenger rail car accessibility] Part of the Code of Practice will be followed by VIA Rail Canada Inc." The fact that the Rail Code was voluntarily agreed to and not government-imposed reinforces, rather than detracts from its relevance as a factor for assessing VIA's "undue hardship" arguments. VIA knew it had agreed to, and was expected to comply with, the Rail Code.