BC Hydro
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March 30, 2021

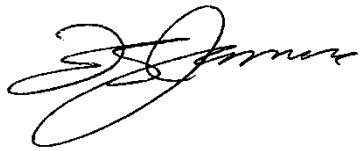
Mr. Patrick Wruck
Commission Secretary and Manager
Regulatory Support
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Mr. Wruck:

RE: British Columbia Utilities Commission (BCUC or Commission)
British Columbia Hydro and Power Authority (BC Hydro)
FortisBC Inc. (FortisBC) Rate Design and Rates for EV Direct Current Fast Charging Service Application (FortisBC Application)
BC Hydro's Submission in Accordance with Request in Exhibit A-13

BC Hydro writes in accordance with the regulatory timetable set out by BCUC Order No. G-33-21 to provide its submissions to address the legal interpretation questions requested by the BCUC as stated in Exhibit A-13 of the FortisBC Application proceeding.

Yours sincerely,



Fred James
Chief Regulatory Officer

ms/tl

Enclosure

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FortisBC Inc. (FortisBC) Rate Design and Rates for EV Direct Current Fast Charging Service Application

Written Submission
on behalf of
British Columbia Hydro and Power Authority

March 30, 2021

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1 General Comments

BC Hydro believes that a public utility, such as FortisBC and BC Hydro, has an important role to play in fostering the growth and development of electric vehicle charging infrastructure to support transportation electrification in BC and to support the greenhouse gas emissions reduction in British Columbia, consistent with section 18 of the *Clean Energy Act*. Additionally, BC Hydro submits that approving a rate that allows FortisBC to collect revenue from users of its electric vehicle fast charging service is also consistent with section 18 of the *Clean Energy Act*, which states that the BCUC must allow a public utility to recover costs incurred with respect to electric vehicle charging stations that are prescribed undertakings. Further, as discussed below, the BCUC must give section 18 of the *Clean Energy Act* and section 5 of the GGRR a fair, large and liberal interpretation that best ensures the attainment of their objects.

2 Specific Responses

In Exhibit A-13, the BCUC invites parties to provide their submissions on legal interpretation of certain provisions of the Greenhouse Gas Reduction (Clean Energy) Regulation (**GGRR**). In response, BC Hydro provides:

- A discussion on the principles governing statutory interpretation; and
- Its responses to each question raised by the BCUC in Exhibit A-13.

2.1 Principles of Statutory Interpretation

On March 18, 2021, BC Hydro submitted its final argument in its Fiscal 2022 Revenue Requirements Application proceedings, in which BC Hydro made submissions relating to legal principles governing statutory interpretation and their specific application to interpret the GGRR. That portion of the submission, which is quoted below (footnotes omitted), is adopted herein:

> 163. It is essential to interpret the *Clean Energy Act* and the GGRR in accordance with the accepted principles of statutory interpretation. The leading case on statutory interpretation is *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, in which the Supreme Court of Canada relied on the following statement from Elmer Driedger in *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> 164. In *Sullivan on the Construction of Statutes*, the author explains further:

> Under Driedger's modern principle, interpreters are obliged to consider the entire context of the text to be interpreted. As Driedger himself indicated, this includes the external context in its broadest sense.

165. The BCUC must also interpret legislation in B.C. in accordance section 8 of the *Interpretation Act*:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

166. Therefore, the BCUC must give section 18 of the *Clean Energy Act* and section 5 of the GGRR a fair, large and liberal interpretation that best ensures the attainment of [their] objects.

The objects of section 18 of the *Clean Energy Act* are clearly expressed in the wording of that section: "[F]or the purposes of reducing greenhouse gas emissions in British Columbia", a public utility that carries out a prescribed undertaking must be allowed "to recover its costs incurred with respect to the prescribed undertaking", and the BCUC must set rates to "enable" this to occur and "must not exercise a power under the *Utilities Commission Act* in a way that would directly or indirectly prevent a public utility … from carrying out a prescribed undertaking."

The objects of the legislation are also clear from its context, which are discussed in more detail in BC Hydro's final argument in its Fiscal 2022 Revenue Requirements Application proceedings.[1]

BC Hydro submits that when considering the following questions, the BCUC must ensure that these objects are not only considered but also attained.

2.2 Submission on Specific Questions Raised by the BCUC

1. Section 5(1) of the GGRR defines an "eligible charging site" as a site where one or more eligible charging stations are located; "limited municipality" as a municipality with a population of 9,000 or more; and "site limit" as the number calculated by dividing the municipality population by 9,000 and rounding the quotient up to the nearest whole number.

   How should a "site" be interpreted for the purposes of determining a "site limit" within a "limited municipality"? For example, should there be any considerations regarding geographic location, location size, or number of fast charging stations for a "site"? Can multiple electric vehicle (EV) charging service providers operate their fast charging stations under the same "site"?

[1] BC Hydro Fiscal 2022 Revenue Requirements Application, BC Hydro Final Argument, at para. 169 and 170.

As noted in the question, the phrase "site limit" is a defined term under the GGRR, which basically provides a formula for calculation. The meaning of a defined term should be applied when interpreting the GGRR.

Additionally, even if the BCUC were to look at the "site" wording itself, BC Hydro submits that the "site" word should be given the same meaning in the "eligible charging site" and the "site limit". BC Hydro has interpreted "site" in the phrase "eligible charging site" to mean a contiguous spatial area where one or more electric vehicle charging stations are located.[2] It is a basic principle of statutory interpretation that words should be given the same meaning throughout a statute, unless the contrary is clearly indicated by the context.[3] This principle is codified in section 12 of the *Interpretation Act*, which states that "Definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, apply to the whole enactment including the section containing a definition or interpretation provision." There is no clear indication in the context of the GGRR that the "site" in the "site limit" "in relation to a limited municipality" should be given a different meaning as the "site" used in the "eligible charging site".

There should not be any considerations for "geographic location, location size, or number of fast charging stations for a site" as suggested by the question when interpreting the meaning of "site", because none of these limitations is specified in the GGRR. To the extent that the "geographic location" refers to the location of a station in a "limited municipality", it is relevant to the consideration of whether the "site limit" in that the municipality is exceeded under section 5(2)(b)(ii) of the GGRR.

Similarly, there is no express limitation in section 5 of the GGRR on the number of electric vehicle charging service providers at the same site. BC Hydro submits that as long as installation of various electric vehicle charging stations can be technically and appropriately done at the same site, there could be some benefits for electric vehicle drivers to have different electric vehicle charging service providers at the same site. For example, different electric vehicle charging service providers may provide different electric vehicle charging levels, or may accommodate vehicles using the CHArge de Move (CHAdeMO) specification or the Combined Charging System (CCS) specification.

2. Section 5(2)(b) of the GGRR states that an eligible charging station is a prescribed undertaking if "the public utility reasonably expects, on the date the public utility decides to construct or purchase an eligible charging station, that (i) the station will come into operation by December 31, 2025, and (ii) if the station will be located in a limited municipality, the number of eligible charging sites in the municipality on the date the station will come into operation will not exceed the site limit for the municipality on that date."

a. How should "on the date the public utility decides to construct or purchase an eligible charging station" be interpreted? What information should be used to

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2 BC Hydro Fiscal 2022 Revenue Requirement Application, Exhibit B-4, BC Hydro's response to BCUC IR 1.5.3.

3 *R. v. Zeolkowski*, 1989 CanLII 72 (SCC), [1989] 1 S.C.R. 1378 at 1387 per Sopinka J.; *Thomson v. Canada (Deputy Minister of Agriculture)*, 1992 CanLII 121 (SCC), [1992] 1 S.C.R. 385 per Cory J.

determine when that date was? Should the utility be required to also determine the site where the eligible charging station will be located by that date?

In BC Hydro's view, the phase "on the date the public utility decides to construct or purchase an eligible charging station" in section 5(2)(b) of the GGRR is not ambiguous. It defines the time when the public utility reasonably expects the two factors listed in section 5(2)(b)(i) and (ii) to occur.

The only "site" determination by a public utility "on the date the public utility decides to construct or purchase an eligible charging station" is whether the site for the electric vehicle charging station will be located in a "limited municipality", because the public utility needs to reasonably expect that "the number of eligible charging sites in the municipality on the date the station will come into operation will not exceed the site limit for the municipality on that date" as required under section 5(2)(b)(ii) of the GGRR. However, the "site" for an electric vehicle charging station within a limited municipality may be changed from one spatial area to another, within that municipality, without affronting section 5(2)(b)(ii) of the GGRR.

BC Hydro agrees with FortisBC's argument[4] that the information required to determine "the date the public utility decides to construct or purchase an eligible charging station" is an evidentiary question and the evidence required to show "the date" of a public utility's decision may vary from utility to utility. For example, for BC Hydro, "the date the public utility decides to construct or purchase an eligible charging station" is the date when the expenditures associated with the construction or purchase of the eligible charging station are internally approved via an Expenditure Authorization Request.

b. Considering that there may be circumstances where it may not be known if an eligible charging station has met the criteria to be a prescribed undertaking until the station comes into operation, should the BCUC make a determination, on a forecast basis, of whether an eligible charging station is a prescribed undertaking? What are the advantages and disadvantages to the utility and its ratepayers of the BCUC making such a determination on a forecast basis?

The BCUC's role in considering whether an electric vehicle charging station is a prescribed undertaking is set out in section 18 of the *Clean Energy Act*: "set[ting] rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking" and "not exercise[ing] a power under the *Utilities Commission Act* in a way that would directly or indirectly prevent a public utility … from carrying out a prescribed undertaking". Only in the context of carrying out these mandates would it be necessary for the BCUC to consider whether a public utility's electric vehicle charging stations are prescribed undertakings as set out in section 5 of the GGRR.

For BC Hydro and likely other public utilities, recovery of costs incurred with respect to electric vehicle charging service as allowed under section 18 of the *Clean Energy Act* is sought in a revenue requirements application. In the context of that application, the BCUC would consider whether an electric vehicle charging station is a prescribed undertaking for the purposes of allowing cost recovery in rates for a relevant test period.

[4] FortisBC Final Submission, para. 18.

Whether a public utility meets the requirement of the GGRR is a factual determination based on evidence. That is, based on the evidence tendered in the proceedings, the BCUC would assess whether the evidence, on a balance of probabilities[5], establishes that "the public utility reasonably expects, on the date the public utility decides to construct or purchase an eligible charging station, that:

> (i) The station will come into operation by December 31, 2025, and
>
> (ii) If the station will be located in a limited municipality, the number of eligible charging sites in the municipality on the date the station will come into operation will not exceed the site limit for the municipality on that date."

BC Hydro also submits that the requirements of section 5 of the GGRR are not particularly difficult to meet at this time. December 31, 2025 is still several years away, the number for the "site limit" in the more populous municipalities is relatively high, and the regulation recognizes the need to provide some flexibility by requiring a public utility to "reasonably expect" that the conditions under section 5(2)(b) are met.

3. The GGRR was amended on June 22, 2020 to include EV charging stations as a prescribed undertaking. FBC submits that section 18 of the CEA and section 5 of the GGRR have a "retrospective" effect, "as they require the recovery of the costs of all charging stations that come into operation by December 31, 2025, which by definition includes stations in operation prior to June 22, 2020."

a. Does section 5 of the GGRR include fast charging stations that came into operation prior to June 22, 2020 as a prescribed undertaking on a retrospective basis? Why or why not?

BC Hydro's view on the retrospective application of section 5 of the GGRR is provided in its final argument in its Fiscal 2022 Revenue Requirements Application proceeding, which is copied below and adopted herein (original footnotes omitted):

> 167. As required by principles of statutory interpretation, the words of the legislation must be read in their grammatical and ordinary sense. There is no ambiguity in the words of section 18 of the *Clean Energy Act* or section 5 of the GGRR:

[5] BC Hydro agrees with FortisBC's final submission (para. 24, 25) that the standard of proof in administrative processes is the balance of probabilities. The following statement from *Alton v. Superintendent of Motor Vehicles*, 2001 BCSC 1884 (CanLII), is also instructive: "The hearing conducted by an adjudicator under the Act is in the nature of an administrative proceeding…. The governing legislation is regulatory in nature and by its focus is not upon individual punishment or penal sanction, but upon the improvement of highway traffic safety for the benefit of the public at large (*Buhlers v. B.C. Superintendent of Motor Vehicles* (1999), 1999 BCCA 114 (CanLII), 170 D.L.R. (4th) 344)…. The burden of proof is the civil standard of a balance of probabilities (*Dennis v. The B.C. Superintendent of Motor Vehicles*, 2000 BCCA 653 (CanLII), [2000] B.C.J. No. 2447 (B.C.C.A.))."

(a) Section 18(2) of the *Clean Energy Act* requires the BCUC to set rates that are sufficient for public utilities to recover their "costs incurred" on prescribed undertakings;

(b) Section 5 of the GGRR describes a class of prescribed undertakings that includes eligible charging stations "the public utility constructs and operates, or purchases and operates" and reasonably expects to come into operation "by December 31, 2025"; and

(c) There is nothing in the words of the relevant legislation that suggests that stations that came into operation prior to June 22, 2020, or prior to any date, are excluded.

168. Therefore, on the wording of the legislation read in its grammatical and ordinary sense, it is clear that a public utility's eligible charging station that came into operation prior to June 22, 2020 is within the class of prescribed undertakings described in section 5 of the GGRR. Section 18 of the *Clean Energy Act* requires rates to be set that allow public utilities to recover their costs incurred on those stations.

169. The object and purpose of section 18 of the *Clean Energy Act* and section 5 of the GGRR supports the clear meaning of the words that the cost of stations that came into operation prior June 22, 2020 must be recovered. The object and purpose of the legislation is clear from its context. This context includes:

- the BCUC's direction in early 2018 to FortisBC Inc. to exclude its EV charging stations from rate base, and the BCUC's commencement of a two-phase Inquiry into the Regulation of Electric Vehicle Charging Service;
- the B.C. Government's legal counsel stating in the February 27, 2019 procedural conference that the B.C. Government "strongly supports investments in EV charging services by those non-exempt public utilities" (e.g., FortisBC Inc. and BC Hydro) and that "it would be appropriate for non-exempt public utilities to recover those costs from ratepayers"; and
- non-exempt utilities including BC Hydro proceeding with investments in EV charging stations in advance of the provincial government responding to the BCUC's recommendations coming out of the Inquiry.

170. In this context, the remedial purpose of section 5 of the GGRR is to ensure that public utilities will recover their investments in eligible charging stations. The object of section 5 of the GGRR and section 18 of the *Clean Energy Act* is to encourage non-exempt public utilities to invest in eligible charging stations in order to reduce GHG emissions in B.C. Limiting cost recovery to only those stations that came into operation on or after June 22, 2020 would contradict the wording, remedial purpose and object of the GGRR and *Clean Energy Act.* It would be an unreasonable interpretation of the legislation.

…

172 The fact that the recovery of costs of eligible charging stations that came into operation prior to June 22, 2020 is required is not properly characterized as a retrospective effect. A retrospective effect involves a change in vested rights, a past event or completed transactions. For instance, the Ontario Superior Court of Justice in *Chesterman Farm Equipment Inc. v CNH Canada Ltd.*, stated at paragraph 99: "It is well-established that a statute with retrospective effect is one that takes away or changes tangible rights that have vested in a party." [Emphasis added.] The authorities also similarly describe retrospective legislation as imposing "prejudicial consequences" on a "past event" or "completed transaction".

173. Section 5 of the GGRR and section 18 of the CEA do not have the above effect. Instead, they impose an obligation on the BCUC in respect to the exercise of its powers under the UCA going forward. Specifically, they require the BCUC to set rates to allow public utilities to recover their cost incurred with respect to charging stations that are prescribed undertakings. BC Hydro's rights or abilities to operate charging stations that came into operation prior to June 22, 2020 have not changed. Nor does the legislation impose prejudicial consequences on the operation of such stations. Furthermore, BC Hydro's charging stations that came into operation prior to June 22, 2020 are not simply a "past event" or "completed transaction". Rather, these stations continued to operate past June 22, 2020.

174. In *A.G. Quebec v. Expropriation Tribunal*, the Supreme Court of Canada considered the effect of changing provisions for abandoning an expropriation after the commencement of an expropriation. The Supreme Court of Canada determined that the amendments did not operate retrospectively as they did not seek to affect any completed past transactions, but instead applied only to the ongoing expropriation process. The B.C. Court of Appeal in *Krangle (Guardian ad litem of) v. Brisco*, 2000 BCCA 147 commented on this case and stated at page 56:

> In essence, if the relevant facts with which a provision is concerned are not all in the past, the application of the provision, when it is enacted, is "immediate" as opposed to "retrospective".

175. Similarly, BC Hydro's eligible charging stations are not "all in the past," but are assets that BC Hydro continued or continues to operate.

176. BC Hydro submits that section 18 of the *Clean Energy Act* and section 5 of the GGRR simply require the BCUC to set rates going forward that allow BC Hydro to recover the costs of its eligible charging stations. This is not a retrospective effect.

177. In the alternative, BC Hydro submits that any retrospective effect is clearly authorized by the words of section 18(2) of the *Clean Energy Act*. The court in *Aheer Transportation Ltd v. Office of the British Columbia Container Trucking Commissioner*, found that a regulation can have retroactive (or retrospective) elements if authorized by its enabling statute: "The only question is whether the enabling legislation authorizes the retroactive elements of the Regulation. If it does, the Regulation is valid

and enforceable." This is the case with the GGRR. Section 18(2) of the *Clean Energy Act*, under which the GGRR is enacted, requires the recovery of costs "incurred" (past tense) with respect to a prescribed undertaking:

> (2) In setting rates under the Utilities Commission Act for a public utility carrying out a prescribed undertaking, the commission must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking. [Emphasis added.]

Section 18 clearly refers to the recovery of costs incurred in the past.

178. Also in the alternative, the presumption against retrospectivity does not apply. The Supreme Court of Canada stated in *Brosseau v. Alberta Securities Commission*: "The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit." In other words, this presumption is inapplicable if (1) there is no prejudice, such as a new penalty, disability or duty, or (2) there is prejudice, but it intended as protection for the public rather than as punishment for a prior event. The presumption against retrospective application of regulation does not apply to section 5 of the GGRR because allowing cost recovery of EV charging stations coming into service on or before June 22, 2020 is not prejudicial – it confers a benefit. Even if the consequence were to somehow be characterized as being prejudicial, the reduction of GHG emissions is for protection of all British Columbians.

BC Hydro submits that the BCUC must set rates to allow a public utility to recover its costs on its prescribed undertakings, including its costs on stations that came into operation prior to June 20, 2022.

b. In the case of a station that needed to be upgraded to meet the criteria to be a prescribed undertaking, what portion of the total capital cost of the upgraded station should be allowed into a public utility's rate base? For instance, would this be the entire cost of the upgraded station less accumulated depreciation, or only the incremental investment portion for the upgrade? Please provide reasons in support.

For the following two primary reasons, BC Hydro submits that the entire cost of the upgraded station should be allowed into a public utility's rate base, and not just the incremental investment portion for the upgrade.

(a) Section 18 of the *Clean Energy Act* allows the recovery of costs with respect to a "prescribed undertaking", which is set out in the GGRR. Under section 5 of the GGRR, the prescribed undertaking is an eligible electric vehicle charging station. Thus, the only reasonable interpretation of section 18 of the *Clean Energy Act* is that the entire cost with respect to a station, not just the incremental portion of the upgrade, is recoverable.

(b) As discussed more fully below, the phrase "with respect to" in section 18 of the *Clean Energy Act* are words of the "widest possible scope". All costs "relevant or rationally connected to" the prescribed undertakings must be recovered in rates. Thus, only

allowing recovery of the "incremental portion" of the costs would be contrary to the wording and intent of the *Clean Energy Act*.

4. Section 18(2) of the CEA provides that the BCUC "must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking." Section 18(3) of the CEA also provides that the BCUC "must not exercise a power under the *Utilities Commission Act* in a way that would directly or indirectly prevent a public utility… from carrying out a prescribed undertaking."

Should all cost components of an eligible charging station be eligible for recovery under the GGRR (for example, paving costs, lighting installation and maintenance costs, washroom facilities, wheelchair accessible ramps)? Why or why not? If reasonable limits on cost recovery are required, how should they be determined and why?

BC Hydro submits that all the costs incurred relevant or rationally connected to providing the electric vehicle fast charging service must be allowed to be recovered in rates. BC Hydro's reasons for this position are articulated in its final submission in the Fiscal 2022 Revenue Requirements Application proceeding, the relevant portion of which is copied below and adopted herein (original footnotes omitted):

> 159. Section 18(2) of the *Clean Energy Act* requires that, if an EV charging station is a prescribed undertaking under section 5 of the GGRR, all of the "costs incurred with respect to the prescribed undertaking" must be recovered in rates. In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, the Supreme Court of Canada interpreted the phrase "with respect to" very broadly, as follows:
>
> > 15 On a plain reading, the phrase "evidence with respect to the commission of an offence" is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.
> >
> > 16 This reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:
> >
> > > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added in the Supreme Court of Canada decision.]

> 17. We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's *prima facie* case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants.
>
> 160. Consistent with the above judgment of the Supreme Court of Canada, the words "with respect to" in section 18 of the *Clean Energy Act* are words of the "widest possible scope": all costs "relevant or rationally connected to" the prescribed undertakings must be recovered in rates.
>
> 161. Therefore, section 18 of the *Clean Energy Act* requires recovery in rates of BC Hydro's costs on its prescribed undertakings, including all operating costs associated with operation of the charging station, amortization costs for stations in service, energy costs to charge the EVs, the costs for site preparation, land/site lease, lighting, signage, advertising, or rights-of-way. All of these costs are recoverable because they are all part of the "costs incurred with respect to the prescribed undertaking".

In its questions, the BCUC included some examples of amenities at an electric vehicle charging station that may or may not be included for cost recovery. As stated above, BC Hydro submits that the test is whether the amenities are relevant and reasonably connected to providing the electric vehicle fast charging service. A determination is likely to be based on the evidence presented in a proceeding and the types of the cost that a public utility decides to seek to recover in its revenue requirements applications or other rate applications.

3 Conclusion

BC Hydro supports FortisBC's Application and respectfully submits that section 18 of the *Clean Energy Act* is clear on its face and in its intent that a public utility should not be prevented directly or indirectly from carrying out a prescribed undertaking and should be allowed to recover in rates the costs with respect to a prescribed undertaking that a public utility has decided to carry out. BC Hydro further submits that section 5 of the GGRR clearly sets out the criteria for an electric vehicle charging station to be a prescribed undertaking.

ALL OF WHICH IS RESPECTFULLY SUBMITTED MARCH 30, 2021

Per: _____

Song Hill, Senior Solicitor & Counsel

British Columbia Hydro and Power Authority