

June 10, 2014

BCUC Review Task Force
c/o Generation and Regulatory Branch,
Electricity and Alternative Energy Division,
Ministry of Energy and Mines,
PO Box 9314 Stn Prov Govt,
Victoria, BC, V8W 9N1.

via email: bcucreview@gov.bc.ca

Dear Mesdames/Sirs:

Here are our comments regarding the review of the BC Utilities Commission.

A. SUMMARY OF MAJOR RECOMMENDATIONS:

Overall Orientation

Principally, we think the government needs to decide whether they want a competent, robust and effective arms-length regulator or an inept, tame little lapdog (though some might put it more charitably than that). The two options are mutually exclusive.

Leadership

The BCUC needs a complete overhaul of leadership. The Commission has no real sense of direction. Assuming the Commission has its core jurisdiction restored to it, it needs beefing up on the leadership side with the re-institution of the post of Executive Director, but that role should be more administrative and less policy-oriented than in the past.

Composition

The present set-up with only one full-time Commissioner besides the Chair, and reliance on a cluster of part-time/ad hoc appointees is seriously inadequate, and deprives the organization further of direction, expertise and consistency.

Operations

The enforcement section seems to exist only to try to keep the (hopeless) natural gas “customer choice” program (which needs to be reviewed and probably phased out). Enforcement should concentrate on addressing complaints from utility customers and trouble-shooting disputes they have with utilities.

ICBC

Move it out.

BC Ferries

Move it in

Process

There needs to be a major overhaul of the Commission’s hearing process, especially discovery. We have made some suggestions over the years which have been mostly ignored.

B. DISCUSSION

1. The Role of the Regulator

The traditional role of tribunals established to regulate monopoly services, whether in transportation, communications, or public utilities, is to provide a proxy for market forces to determine fair prices and fair levels of service. While providing a substitute for a market in the absence of competition remains a core function of utility regulators, their role has expanded significantly in the context of growing complexity of energy systems and social needs.

Integrated resource planning is a key example: the removal of regulatory oversight of BC Hydro’s Integrated Resource Plan severely undermined the capacity of the BCUC to fulfil its mandate in a holistic and strategic way. On the other side of the coin, detaching the IRP from the process of rate-setting diluted the value of the planning process itself by undermining the connection between plan and execution.

The BCUC is sometimes characterized as an “economic regulator.” Those who use this phrase invariably seek to confine the Commission to the far narrower role of *financial* regulator. *Economic* regulation encompasses a far broader range of issues: the Oxford Dictionary defines “economics” as “the branch of knowledge concerned with the production, consumption, and transfer of wealth.” That is a very wide mandate.

While it is sometimes said that policy is the realm of government and execution is that of the regulator, this is an over-simplified way of looking at the issues. There is not really a clean divide between policy-making and regulatory decision-making. It is more useful to think of policy as a continuum, ranging from high-level, directional policy (which is concerned with the prioritization of values and objectives in relation to societal needs), and lower-level policy issues which translate that panoramic and strategic vision into implementation.

In general, we think that the higher the level of policy, the more cleanly it belongs in the realm of government; the farther downward one moves on the continuum toward on-the-ground implementation, the more it lies within the proper purview of the regulator.

For example, in relation to rate structures and rate design, the role of government is to define broad societal objectives. Selecting the rate design strategies to meet those objectives (for example, block or tiered rates), fine-tuning them, and putting them in place, is the role of the regulator.

Furthermore, there will always be “blank spaces” in policy elaborated by government, and it is up to the regulator to fill them in in a way which is consistent with broadly-elaborated policy and the interests of the public.

Government should approach BC Hydro on the general footing that the closer an issue is to the ground, the more distant should be the hand of government. We have seen extreme forms of ministerial micro-management in recent years, perhaps most spectacularly in the ministerial power to prescribe specifications for smart meters [see “smart meter” definition, *Clean Energy Act* s. 17(1)]. We have difficulty seeing how it assists government, the regulator, the utility, or the public when government gets its fingerprints on that level of operational decision-making.

This approach buffers the political and regulatory realms from each other to their mutual benefit, gives room to the regulator to make necessary but not always popular decisions, provides government with the necessary arms-length from those decisions, and at the same time recognizes that there is a grey zone where the over-arching role of government meets the more logistical realm of the regulator. It is very important that the two interact in a dynamic way within that zone, in an explicitly-defined and transparent manner, so that policy and implementation operate together in a way that serves the public interest and produces better decisions – with better-informed policy, and with more coherently-directed regulatory action.

It is particularly critical that each of the players – government, BC Hydro, and the regulator – are firing on all cylinders and fulfilling their roles as effectively as possible, and with minimal friction at their respective borders, to get through the very difficult situation that now faces the utility, and in particular to navigate through the mix of surging costs and burgeoning deferrals.

Thus the most vital role of government in relation to BC Hydro (and energy regulation generally) is to provide coherent and sound over-arching policy direction – to map out effective answers to the “big questions” and set priorities in the balancing process as between the competing imperatives facing the utility and the sector. The more government reaches downward into the detailed implementation of policy, the worse the result for government, for BC Hydro, for the regulator and for public confidence. At the level of regulation, openness and transparency are critical preconditions of public understanding, confidence and support, and willingness to tolerate outcomes where no pain-free options are available.

There should be a robust and open-channel three-way line of communication between government, BC Hydro and the regulator, so that government policy-making is optimally informed, and so that the regulator and utility have a proper appreciation of evolving policy. The regulator must be at sufficient arms-length from government to fulfil its role as an independent expert tribunal, but sufficiently involved in dialogue with government to ensure that policy directions are effectively charted and understood in a complex sector with such enormous societal consequences.

BC Hydro, for its part, needs to find the right balance between integration in government energy policy-making, and autonomy; between working with the Ministry, and providing push-back where it is needed, especially during the complicated recovery period which lies ahead.

The problems facing BC Hydro are medium to long-term in nature and will require frameworks in which optimal resolutions may be crafted. Among other things, that means longer-term regulatory cycles so that rate increases can be smoothed over multiple years, as an alternative to simply kicking the can another year or two farther down the street with every BC Hydro test period.

2. Administrative Prescriptions for the BCUC

Principal responsibility should rest on the shoulders of the regulator in the difficult task of managing and resolving the inherited cost and deferral crunches facing BC Hydro, and especially the sculpting of rate increases over the coming period. The BCUC should design and implement a rates trajectory that will restore the financial sustainability of BC Hydro while at the same time mitigating the damage to households, institutions and businesses, as ratepayers absorb the impact of surging cost and at the same time bring runaway deferrals (with their amortizations that are far off the scale once approved by the BCUC) under control.

There is no easy solution. Bringing public understanding along with the process will be vital. Decisions must be very carefully tuned, with a close eye to many competing objectives and interests. Above all, there must be sensitivity to the needs of

ratepayers, balanced against the need to protect the viability of BC Hydro and other utilities and regulated entities, and against environmental imperatives.

That is a tall order, one of the most complex challenges in the provincial realm (which is not short of challenges – but most of which lie within the classical problem of allocating finite resources among competing needs and demands. This one has several other layers of complexity.)

Structure and Resources of BCUC

None of the following proposed measures to bolster the capacity of the Commission require government intervention, other than order-in-council appointments of a new Chair and commissioners. The additional financial resources which are needed can be obtained by increasing levies imposed on regulated entities, which are set by the Commission. There are off-setting benefits and savings for them, in turn, to mitigate any reaction against increasing their payments to the Commission.

a. Increase the number of full-time commissioners and recruit from different vantage-points

Today, the Commission has a full-time Chair, one full-time commissioner, and nine part-time commissioners who are rotated between proceedings. The present Chair does not sit in any oral public hearings. There is only one commissioner devoted full-time to direct regulatory work. In addition to its functions under the *Utilities Commission Act*, the BCUC sets tolls and terms of service for intra-provincial oil pipelines under the *Pipeline Act*.

By way of comparison (and at last count) the Ontario Energy Board has a Chair, two Vice Chairs, six full-time board members, four part-time members, and a Chief Operating Officer¹. The Alberta Utilities Commission has a Chair, a Vice Chair, five commissioners, and five acting commissioners.

In our view, the current BCUC model cannot offer the consistency and intensive expertise that the situation requires – not only with respect to BC Hydro, but also with respect to the complex issues facing the other entities regulated by the BCUC. The FortisBC utilities, in particular, are undergoing significant transformation.

The Commission should be led by a corps of full-time commissioners with expertise and continuity to provide the necessary guidance through a difficult situation. We recommend that there be at least three, or perhaps four full-time commissioners, in addition to the Chair, and together they should hear most or all major applications.

¹ The OEB has a significantly heavier workload, however, especially in view of the large number of local and municipal electrical distribution companies under its jurisdiction.

Part-time commissioners should be brought in as needed to deal with periodic caseload issues or to introduce special expertise.

Commissioners need to have a broad grasp of the energy sector, a strong sense of strategic analysis, and an understanding of the need to consult and engage key players and the public effectively. They need to understand how to run fair proceedings, while being capable of developing innovative process solutions tailored to the emerging problems. They need to be capable of enhancing the public's confidence in their processes and decisions.

The staff of the Commission should be the key repository of fine-detail expertise, so that the collaboration between commissioners and staff combines solid and meticulous technical input with sound strategic direction.

Commissioners should be recruited from key stakeholder groups with experience in the BCUC and its process, including especially people with a background in the ratepayer interest, and in the public and private utility interest. They must be able to project appropriate sensitivity and attention with respect to the environmental dimensions of the regulatory dilemma, and with respect to First Nations entitlements and issues. Confidence and buy-in from private utilities and from ratepayers will be especially important for the Commission to tackle the difficult issues within its mandate. Recruitment should start immediately after a new Chair is in place.

Compensation for Commissioners needs to be reviewed in order to recruit and retain highly-qualified people.

b. Restore the position of Executive Director

The current BCUC Chair does not preside over regulatory hearings, but appears mainly to devote his attention to administration and liaison functions. The Chair should provide leadership to the entire organization and especially should head up the most important policy-laden hearings, to put a stamp on regulatory direction and practice, as was the practice in the past.

The position of Executive Director was eliminated several years ago, and should be restored (potentially re-styled as Chief Administrative or Operating Officer). With an increase in the number of full-time commissioners, the position should be less directly involved in substantive regulatory processes than in the past, but would lead and co-ordinate the staff and oversee the administration of the organization.

The BCUC also appears to be short of support staff and to suffer from resultant inefficiencies and operational bottlenecks.

c. BCUC Financial Resources

The Commission will probably require a modest increase in its budget, which would mean an increase in levies imposed upon regulated utilities. This can be offset by providing more effective regulation and adopting more efficient procedures, especially in the discovery phase of applications, which currently impose very large costs and drains on utility personnel resources.

Procedural Reforms

There is a great deal of room to make BCUC proceedings more timely, efficient and cost-effective. Jim Quail circulated a discussion paper several years ago, when Robert Hobbs was BCUC Chair, proposing a number of procedural reforms, focusing especially on the unwieldy discovery process. Only a few suggestions were acted upon. The proposed reforms included better-defined processes to filter out pre-hearing Information Requests with marginal relevancy and experimentation with real-time Q&A-style discovery to replace some written Information Requests in large proceedings in order to moderate the huge numbers of detailed “factoid” requests that arise in these cases.

In that discovery process, replacing at least one round of written Information Requests from Commission staff, staff would direct oral questions to utility witnesses; the exchange would be transcribed; the utility would enhance the transcript by providing complete answers where this was not possible in the real-time exchange and generally would tidy up the document, which would be filed as evidence in the proceeding. Intervenors would be free to attend the examination if they so desired.

Oral public hearings should be more focused in their scope, so that they are devoted to exploring the core issues embedded in major applications rather than chasing down hosts of fine detail. Procedural conferences should be used to narrow the scope of hearings, not to add to the regulatory shopping-list as is often the case. Meaningful public accountability requires that hearings focus on the important issues in the public interest. As the chair of another province’s utility regulator recently commented to me, much of the process seems to focus on the “aphids on the leaves on the trees in the forest.”

The Commission should experiment with a broader range of formats for the review of issues and applications, ranging from workshops, to conferences, to panel discussions, to inquiries into general and strategic issues. (The Commission has made no use of its power to initiate inquiries under s. 24 of the UCA for many years).

The Commission should aim for significantly tighter time-lines for considering applications and rendering decisions, and eliminate procedural and logistical bottlenecks wherever possible. Undue delay seriously undermines the usefulness of Commission decisions, such that (for example) a large proportion of the utility test

period in issue in typical Revenue Requirements proceeding may have already passed before final rates are fixed. This has contributed to the dynamic that sees issues and costs detrimentally deferred.

Intervenor Funding

Effective representation of residential ratepayers is entirely dependent today upon the vagaries of PACA awards and funding from the Law Foundation of BC. The Foundation disperses monies collected from the bank interest on lawyers' trust accounts. Years of very low interest rates have depleted its resources.

There are various potential ways to stabilize funding for this critically-important voice in the regulatory process. One would be for the Commission and the Foundation to seek to negotiate a cost-sharing arrangement which would provide more constant and predictable funding for BCPIAC. Another would be for government or the Commission to contract with BCPIAC for the provision of representational services. A third would be to constitute BCPIAC or a successor organization as an independent consumer advocacy office operated within the aegis of the Commission or that of an appropriate government ministry, whether under a service contract or as a directly-funded agency.

Public Accountability

The Commission should pay more attention to its public face and public accountability. While it should not be advocating particular outcomes, it should play a more active role in informing and educating the public about what it does and the issues it faces. Developing a corps of full-time commissioners would make this more feasible. The Chair and other commissioners should make regular use of print and electronic media to raise awareness, and sponsor town hall meetings and other outreach – not only to drum up input on routine utility filings, but also to increase understanding, transparency and accountability.

Asking the Right Question

The traditional practice in energy project approvals is that the utility must demonstrate that each proposed project is “cost effective” – that is, that its long term financial benefits are greater than its long term cost. In our opinion, that is not the right question, and it leads to sub-optimal decisions in an environment where the social license – the public's tolerance for pain – for initiatives which increase rates is tenuous. It examines projects in isolated silos. It negates strategic planning.

The question which should be asked, but is not, is this: what is the best place to spend the next x-million ratepayer dollars? Put another way, what is the best use of the social license to incur ratepayer cost in order to achieve our objectives?

As a matter of general orientation, the regulator must adopt a more sceptical mind-set when it comes to received wisdom and common assumptions, whether in the realm of technologies, rate design, or load forecasting.

C. LEGISLATIVE REFORMS

We think that there are three legislative projects which are needed to create a regulatory institution which is up to the challenges facing it. In ascending order of scale, and in chronological order:

1. **The jurisdiction stripped away by amendments to the *Utilities Commission Act* and the enactment of the *Clean Energy Act* should be restored.** This means restoring BC Hydro's resource planning process to the jurisdiction of the Commission, along with consideration and approval of major projects, energy purchases, and other initiatives. The Minister would retain ultimate control and accountability through the mechanisms of special and general directions under the UCA, but micro-management from Victoria harms both the political and regulatory spheres.

2. **The *Utilities Commission Act* needs to be cleaned up, updated and rationalized.** The Act is a “Frankenstein” of a statute, full of ill-fitting spliced-on bits and pieces which should be cleaned up or eliminated. For example, the legislature should eliminate “expenditure schedules” (UCA s. 44.2) as an alternative to the Certificate of Public Convenience and Necessity (CPCN), and fashion a comprehensive mechanism for the approval of major capital projects.

3. As either a part of #2 or an alternative, the government should consider **melding the jurisdictions of the BCUC and Environmental Assessment for energy projects**, to create a super-tribunal to deal comprehensively with energy sector regulation. The current structure has two parallel statutory approval processes for projects, with some duplicated responsibilities. For example, the Court of Appeal has ruled that the BCUC's obligation to consider the “public interest” in relation to projects encompasses both environmental and First Nations impacts, paralleling the mandate of Environmental Assessment.

Large projects and initiatives in the energy sector present a host of inter-twined and mutually-dependent dimensions and factors. Arbitrarily carving out roles for two regulatory regimes operating in isolation produces weaker results, as well as unnecessary cost and delay.

Approached carefully, the creation of a comprehensive regulatory institution would hold the potential to win significant First Nations support: the present Environmental Assessment process is perceived by these communities, with some justification, as an inadequate forum to address their needs and concerns, and the present BCUC is not sufficiently equipped institutionally to process First Nations-related issues effectively.

This is a much larger project than the first two; if it is going to be pursued, a process should be established to study the pros and cons, seek buy-in from key players, and fashion appropriate institutional reforms.

Natural Gas “Customer Choice”

This program is a train-wreck. It was introduced in a top-down manner in the absence of any popular demand or public understanding. The market share of the gas marketers remains stalled at a marginal level. The entire program has garnered a huge amount of adverse publicity, most of which was well-deserved.

The program should be phased out. The elimination of negative-option renewals in the contracts may be tending to achieve that result in a very gradual fashion. Restoring the ability of FortisBC Energy Inc. to provide its “stable rate option” and other commodity cost-management tools for consumers would likely snuff the customer choice program in short order.

This does not require any government intervention other than a green light in terms of policy direction. The enforcement resources of the Commission which are aimed at containing some of the abuses of the worst of the marketers should be re-directed toward facilitating the resolution of customer disputes with utilities (disconnections, arrears-payment plants, service quality complaints, and so forth).

BC Ferries and ICBC

We recommend that government consider transferring regulatory oversight of BC Ferries from the closed-door process of the Ferries Commissioner to the BCUC or its successor. BC Ferries is in many ways analogous to a public utility. The quality of its oversight, as well as public confidence, would be significantly enhanced by bringing it into a forum within public view. Modern utility regulation had its origins in the regulation of transportation carriers (railways in particular). BC Ferries and BC Hydro both provide infrastructural services which are vital to the communities of BC and their economies, are highly capital-intensive, and operate on a monopolistic basis. From a regulatory standpoint they are cousins.

On the other hand, BCUC oversight of ICBC has not been particularly effectual. The regulation of an insurer has little in common with utility regulation. It is based on actuarial principles rather than recovery of capital and operating costs.

Insurance is not really within the core expertise of the Commission, and the BCUC is highly dependent upon the judgment of ICBC’s own actuaries. The result is that the Commission itself adds little to the process, and its impact on ICBC premiums and programs has been slight. Furthermore, the subdivision of ICBC’s mandatory and

optional insurance programs into two distinct lines of business for regulatory purposes is not particularly efficient, and does not appear to make operational sense. It was driven by a former government agenda which toyed with either privatizing the Corporation or opening its mandatory insurance coverage to private sector competition.²

The government should consider transferring oversight of ICBC to a different entity (or perhaps direct Ministry oversight) with the specialized expertise needed for the task.

We thank the Task Force for this opportunity to have input and we wish you every success in your deliberations.

Yours truly,
QUAIL & WORTH

per Leigha Worth and Jim Quail

² see the unproclaimed 2003 *Insurance Corporation Act* amendments
http://www.leg.bc.ca/37th4th/3rd_read/gov58-3.htm