

Independent Review of the

British Columbia Utilities Commission

Final Report

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Executive Summary

Energy utility regulators face a challenging and complex operating environment. The pressures they face are aptly summarized by Malcolm Sparrow in this extract from his book on regulation:

“Regulators, under unprecedented pressure, face a range of demands, often contradictory in nature: be less intrusive—but more effective; be kinder and gentler—but don’t let the bastards get away with anything; focus your efforts—but be consistent; process things quicker—and be more careful next time; deal with important issues—but do not stray outside your statutory authority; be more responsive to the regulated community—but do not get captured by industry.”¹

Introduction

The BC Utilities Commission’s primary responsibility is to regulate British Columbia’s natural gas and electricity utilities, and Basic automobile insurance rates. The Provincial Government appointed an independent Task Force to review the BCUC with the goal of increasing the BCUC’s effectiveness and efficiency. We were asked to review comparable utility regulators in other jurisdictions, BCUC processes, and the BCUC’s structure, resource needs, and performance.

The Task Force held over 40 meetings and conference calls with 25 stakeholder groups, and received 43 written submissions over four consultation phases. We also received input from current and former BCUC staff and commissioners, and representatives of similar tribunals. We retained KPMG to complete a detailed performance and operational review, and a regulatory expert provided perspectives on regulatory independence.

Overall Findings

The Task Force’s seven key findings on restoring a strong and independent BCUC are reinforced by a substantial consensus of the participants in this review:

1. It is the provincial government's prerogative to set provincial energy policy, to define the Commission's mandate, and to direct the Commission on specific matters. However, some directions go beyond articulating the policies that the BCUC is obligated to advance, by prescribing detailed instructions to the Commission on matters that would, under normal circumstances, be left to the Commission to determine. In the future, government should delineate policies to the Commission clearly, and in advance of Commission processes, then leave the Commission to act independently within its mandate. Where the government does wish to retain the final decision in a matter to itself, and there are complex issues within the

¹ From The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance by Malcolm Sparrow, John F. Kennedy School of Government, Harvard University, Bookings Press, 2000.

expertise of the Commission that should be reviewed, the government should consider referring the matter to the Commission for a recommendation only.

2. The existence of an independent expert Commission is more important than ever today. By regulating monopolies the BCUC provides an essential public service. Unfortunately the Government and key stakeholders have less confidence in the BCUC than in the past. Rectifying this requires restoring the Commission's independence within its mandate and increasing the Commission's expertise and credibility. Without these, there is little reason to expect stakeholders will respect or defer to it.
3. The Commission needs to be strengthened, and be seen to be strengthened. In order to make the Commissioner's role attractive to a broader range of candidates, there needs to be more full-time Commissioners, higher compensation and longer terms. All appointees to the Commission must bring recognized relevant expertise to the Commission. The Commission Chair needs to be actively involved in identifying required expertise, recruiting and selecting new Commissioners.
4. The Commission staff needs to be strengthened. This requires the appointment of an Executive Director or Chief Operating Officer with general oversight responsibilities, higher salary ranges to allow the Commission to be competitive with those it regulates, and more training for existing staff.
5. Commission review processes should be improved. Where appropriate, the Commission should do more in the early scoping of hearings, vetting who has standing to appear, reviewing the relevance of staff information requests, and using its staff and counsel to help draft decisions. The Commission should also set and publicly report on a number of performance goals including, most importantly, the overall time between receiving an application and issuing the decision, and the time between the close of evidence and issuing the decision.
6. Crown corporations present unique regulatory challenges. BC Hydro and ICBC are significant corporate entities in the British Columbia economy. Their sole shareholder is the Province. Governments must balance their many responsibilities in this area: owner, policy setter and regulator (through regulatory agencies). While in theory all regulated bodies should be treated the same, the reality is that in many jurisdictions, the regulatory model for Crown corporations is applied differently. If carefully designed, such modifications need not violate the independence of the regulator in carrying out its mandated responsibilities.
7. Solutions to most of the Commission's challenges do not require legislative or regulatory changes. Rather, they involve clarity of the governance model, changes to BCUC management and structure, and regulatory process improvements.

Our recommendations are interspersed throughout our Report and also listed in section 5.

Part 1

Introduction and Objectives

The British Columbia Utilities Commission (BCUC or the Commission) operates under and administers the *Utilities Commission Act* (UCA). Most of its resources are devoted to regulating British Columbia's natural gas and electricity utilities, and universal compulsory automobile insurance. It approves utilities' revenue requirements and rates, and capital projects and their costs. As a quasi-judicial tribunal, the BCUC issues orders and decisions based on evidence, and abides by standards of procedural fairness and natural justice.

Most Canadian provinces, territories, and American states have a board, commission, or panel similar to the BCUC. Their common mandate is to balance the interests of the consumer and the utility company. As described in its Mission Statement, the BCUC aims to ensure ratepayers receive safe, reliable and non-discriminatory energy services at fair rates from the utilities it regulates, and that shareholders of those utilities are afforded a reasonable opportunity to earn a fair return on their prudently invested capital.

In response to concerns about the BCUC's effectiveness and efficiency, the Government of British Columbia announced in November 2013 that there would be an independent review of the BCUC as part of the Government's Core Review process. The scope of Core Reviews includes the mandates and delivery models of boards and commissions. The Minister of Energy and Mines and Minister Responsible for Core Review (the Minister) launched the review of the BCUC in late April 2014. This review is led by an independent Task Force, charged with making recommendations on how to improve the Commission's effectiveness and efficiency.

In announcing the review, the Minister noted the important role the BCUC plays in overseeing British Columbia's utilities, and that the review will make sure the BCUC has the tools and processes in place to resume setting BC Hydro rates by the third year of the 10 Year Plan for BC Hydro. Under this 10 Year Plan, BC Hydro rate increases are set at 9% and 6% for the two years ending in March 2016; for the three subsequent years rates will be set by the BCUC within caps of 4%, 3.5%, and 3%. Full rate regulation will resume for the fiscal year beginning April 1, 2019.

The scope of our review is set out in Appendix 1, the Terms of Reference. We are to review, evaluate, and make recommendations on:

- Other jurisdictions' regulatory models and key benchmarks;
- BCUC processes;
- BCUC's structure, resource needs, and performance; and
- In consultation with Ministers, any other matters we consider significant.

In mid-July 2014, we were asked by the Minister to investigate the potential efficiencies that could be gained from BCUC regulation of private sector water utilities, and four issues arising from the current

regulatory model governing the relationship between the Province and the Commission. The Minister's letter describing these additional matters is also included in Appendix 1.

As dictated by the Terms of Reference, the purpose of our engagement is to focus on the BCUC's governance structure, processes, organization, and performance to ensure British Columbians receive value for money, paid for in their rates, that funds the Commission. Some participants' comments on government policies and BCUC processes were considered to be beyond the scope of this review if they were not germane to the matters contained in the Terms of Reference or the Minister's letter.

Report Structure

Our Report has two main parts. In this part we:

- Summarize the approach, external reports, and processes leading to our observations, conclusions and recommendations;
- Provide a strategic context, including the changing and more complex regulatory environment, and mandates of and interaction between governments and regulators; and
- Summarize how the BCUC compares with other provincial and state regulators, and the National Energy Board (NEB), on mandate, budget, number of Commissioners and staff and expenditures per capita.

In the second part, comprising most of our Report, we review, evaluate, and make recommendations on specific matters listed in sections 2 and 3 of the Terms of Reference, plus the Minister's letter. It is organized into four sections:

- **Governance:** topics affecting the Commission that are largely established by the Province, mostly through the legislative framework under which the BCUC must operate.
- **BCUC Processes:** topics that are mostly within the BCUC's control as a quasi-independent administrative tribunal, including the ways it manages its proceedings.
- **BCUC Structure, Organization, and Performance:** topics largely associated with the BCUC's management of itself, including capacity, resource needs, and organizational efficiency and effectiveness.
- **Other Matters:** a different regulatory approach for BC Hydro, the potential efficiencies gained from BCUC regulation of private water utilities, perspectives on the unique regulatory treatment of the Insurance Corporation of British Columbia (ICBC), and public communications.

Approach

The Task Force met or spoke with most stakeholders who expressed interest, and asked its secretariat to seek meetings or calls with specific groups or individuals to attempt to ensure balanced input over four rounds of verbal and written consultation opportunities. The four rounds of consultation were:

- Round 1: Opportunity for stakeholders to provide verbal and written comment on the issues relevant to the Terms of Reference.
- Round 2: Opportunity for stakeholders to provide verbal and written comment on issues raised as a result of other stakeholders' submissions, or clarify a previous submission.
- Round 3: Provide comments on the issues raised in the Minister's letter to the Task Force or any new issues that were raised as a result of Round 2 submissions.
- Round 4: Opportunity for stakeholders to provide written comment on the Interim Report.

Between April 24 and August 11, 2014, the Task Force held over 30 meetings and 12 conference calls with over 50 people, representing energy utilities, First Nations, customer and industry groups, ICBC, private water utilities, gas marketers, and legal firms. These meetings and calls proceeded on the understanding that the comments and opinions would not be for attribution (i.e., nothing in subsequent Task Force reports would identify, implicitly or explicitly, "who said what").

The Task Force also received 43 written submissions through the four rounds. These written submissions are online²; the Final Consultation Summary is available as Appendix 2.

In addition, Task Force members, either individually or as a group, met with approximately 20 current and former BCUC staff and Commissioners. The Task Force also met or had calls with the NEB, the Alberta Utilities Commission (AUC), the Alberta Utilities Consumer Advocate, the Washington Utilities and Transportation Commission (WUTC), the Ontario Energy Board (OEB), Manitoba Public Utilities Board and individual experts from other jurisdictions.

The Task Force retained KPMG to undertake a performance and operational review of the BCUC, including benchmarking the Commission against other jurisdictions as well providing considerations for the Task Force with regards to improving the BCUC's effectiveness and efficiency. The executive summary of the KPMG report is available in Appendix 3 and the full report is online³. A summary of KPMG's key findings appears on page 10.

The Task Force also retained Rowland J. Harrison, Q.C. to provide an assessment of independence and the BCUC. Independence and energy regulators is a challenging topic related to many of the issues that are before the Task Force. Harrison's paper *Independence and the British Columbia Utilities Commission* is attached as Appendix 4.

The Task Force expresses its sincere thanks to all who participated in this review for their cooperation. Contributions were thoughtful, thorough and helpful.

² http://www.empr.gov.bc.ca/EPD/Electricity/BCUC_Review/Pages/default.aspx

³ *ibid.*

Strategic Context: Mandates of Government and Regulators

The BCUC operates within a policy and regulatory framework established by the Government of British Columbia and delivered through a variety of mechanisms. Their roles differ: as a regulator, the BCUC's traditional focus is on the most cost-effective solutions while government frequently has a broader public policy focus. Further complexity arises from government's ownership of two BCUC regulated entities, BC Hydro and ICBC. BC Hydro and ICBC can be delivery agents for social and environmental policies in the broader public interest given their public ownership, (e.g. renewable electricity targets, road safety programs) that go beyond the traditional mandate of the BCUC.

British Columbians pay around \$4 billion per year to BC Hydro for electricity and another \$4 billion per year in vehicle insurance premiums. Both are monopolies for many of the services they provide. BC Hydro rates, in particular, have been increasing in excess of inflation over the last decade.⁴ Stakeholders value the role of an independent Commission in overseeing the prudence of the operation of all utilities in the Province because of the lack of market discipline on utilities, the major impacts of utility rates on consumers and the impact rates have on the economic competitiveness of the Province.

Rising Electricity and Gas Rates

Access to competitively priced electricity and natural gas has long been a cornerstone of British Columbia's economic and social development policies. However, there are several cost drivers placing upward pressure on rates. Both gas and electricity utilities must continue to reinvest in their assets to continue to provide safe and reliable service. In addition, for electricity, BC Hydro's accumulated regulatory accounts, weak export markets, and higher costs for new supplies have contributed to rate forecasts that prompted the government's 10 Year Plan for BC Hydro. Despite falling commodity costs for natural gas, several factors have combined to dampen demand growth on infrastructure installed in anticipation of higher gas throughput, including demand side programs, the carbon tax, and the loss of industrial loads on Vancouver Island and the North Coast.

Role of Government

It is the sole prerogative of governments to set energy policies and then convey them to their utility regulators clearly and effectively. Governments may do this through legislation, regulations, directions, and directives, as well as softer policy statements in strategic plans. All of these can be appropriate tools, when delivered in an understandable and timely way, for introducing public policy criteria that extend beyond the traditional mandate of regulators.

⁴ Annual BC Hydro rate increases have been and will be: 2010/11, 6.11%; 2011/12, 8%; 2012/13, 3.91%; 2013/14, 1.44%; 2014/15, 9.0%; and 2015/16, 6.0%.

Role of a Utility Regulator

Under the “regulatory compact”, in exchange for an exclusive right to serve a region, a utility must provide safe and reliable service to its customers at rates that are based on costs, and the regulator must allow the utility an opportunity to earn a fair return on its prudently invested capital.

As in a full judicial process, quasi-judicial tribunals like the BCUC are required to carry out their mandate using fair, reasonable and transparent processes, with evidence-based decisions that may be readily understood. Failure to act in this manner may result in an appeal to the courts. Having an independent regulator with recognized expertise that can come to a decision is often very useful in assessing controversial matters.

Regulators set rates and review proposed capital projects and supply contracts in the “public interest”. In a utility regulation context, “public interest” has traditionally been more narrowly defined than in a government public policy context. For example, unless directed otherwise by government, energy utility regulators have tended to exclude or downplay social and environmental considerations. Today, there is increasing pressure to respond to broader non-economic criteria. As the recipient of policy directions, the BCUC enables BC Hydro, ICBC, and investor owned utilities to deliver priority services and implement policies that are essential to the Government’s mandate but go beyond simply the provision of least cost energy and insurance.

Increasing Deviations from Traditional Regulatory Roles

Government policies can mitigate or exacerbate rate pressures. Following a BCUC inquiry, the legislated heritage contract ensures BC Hydro customers continue to benefit from its existing low cost generation sources. The 2002 Energy Plan policy of stepped rates, implemented and fine-tuned by the BCUC after public reviews and a government directive, has provided most of BC’s large industrial customers with opportunities to reduce their electricity bills by implementing conservation measures. These are both examples where government policy has been clearly articulated following a public process, leading to better outcomes for ratepayers.

There are also examples where the policy goals that the BCUC is obligated to advance have been ambiguous or even conflicting, causing difficulty for the Commission and stakeholders. Many stakeholders cited the *Clean Energy Act* (CEA), which ambitiously introduced sixteen provincial energy objectives to guide Commission decisions. These objectives have come to be seen as being too diverse and in many cases contradictory with each other or the UCA, making it difficult for the BCUC to balance the stated objectives. While stakeholders do not question the legitimate role of government in setting energy policy and seeing that it is implemented, they overwhelmingly favour the government limiting itself to setting the broad policy framework and letting the Commission determine, or at least recommend, specific outcomes.

Tribunals in Other Jurisdictions: How Does the BCUC Compare?

The BCUC currently regulates natural gas and electricity utilities, intraprovincial pipelines, and ICBC. It also is responsible for reviewing ratepayer complaints. The regulators reviewed as part of the KPMG jurisdictional scan⁵ have mandates similar to the BCUC's, but with some significant differences:

- Most other regulators are not responsible for universal compulsory auto insurance. The Manitoba and Nova Scotia boards are the only other regulators reviewed who also regulate auto insurance;
- Of the regulators reviewed, many have some form of oversight related to water and/or sewage; and
- Of the regulators reviewed, many have other responsibilities such as licensing of funeral homes, cemeteries, gaming, telecommunications, garbage haulers, safety, consumer protection and petroleum product pricing.

The Tables below, and the KPMG jurisdictional scan, show that the BCUC operates at staffing and expenditure levels which are lower than most comparable tribunals, but that the BCUC's staffing and expenditures more than doubled in the 2002-2013 period. Notably, all five tribunals' expenditure increases far outpaced the 23% increase in the total Canadian Consumer Price Index between mid-2002 and mid-2013.

Jurisdictional Scan of BCUC and other Selected Regulators 2013

	BCUC	Manitoba Public Utilities Board	Ontario Energy Board	Quebec – Regie de l'énergie	Alberta Utilities Commission	Nova Scotia Commission (Utility and Review Board)	WUTC	Oregon Public Utility Commission	National Energy Board
# Full-time commissioners	1	1	6	7	8	8	3	3	6
# Part-time commissioners	11	9	6	3	7	0	0	0	6
Total commissioners	12	10	12	10	15	8	3	3	12
# Full-time Equivalent (FTE) commissioners	5.5	2	NRA*	NRA	9.5	8	3	3	NRA
# FTE staff (excluding commissioners)	38	7	171	82	135	32	166	126	436
Total costs of operation of commission/board	\$7,619,441	\$3,499,000	\$35,595,501	\$14,209,226	\$33,475,797	\$9,449,000	\$22,951,012	\$20,450,589	\$69,600,000
Expenditure per capita	\$1.66	\$2.77	\$2.63	\$1.74	\$8.32	\$10.04	\$3.29	\$5.20	\$1.98

*NRA = Not readily available

⁵ See "BCUC metrics and peer group jurisdictional key performance indicators and benchmarks", pages 60-76, of the KPMG Report at http://www.empr.gov.bc.ca/EPD/Electricity/BCUC_Review/Pages/default.aspx.

BCUC and other Selected Regulators: Resource growth between 2002⁶ and 2013

		Budget	Per capita cost of regulation (per year)**	Full-time Commissioners	Part-time Commissioners	Staff
BCUC	2002	\$3,300,000	\$0.81	1	4	19
	2013	\$7,600,00	\$1.66	1	11	38
	% Increase	130%	105%			100%
Ontario Energy Board	2002	\$20,300,000	\$1.74	8	8	101
	2013	\$35,600,000	\$2.63	6	6	171
	% Increase	75%	51%			69%
Quebec - Regie de l'energie	2002	\$7,200,000	\$0.98	7	2	66
	2013	\$14,200,000	\$1.74	7	3	82
	% Increase	97%	78%			24%
Alberta Energy and Utilities Board	2002	\$17,300,000*	\$5.66	N/A	N/A	40
Alberta Utilities Commission	2013	\$33,500,000	\$8.32	8	7	135
	% Increase	94%	47%			238%
National Energy Board	2002	\$30,000,000	\$0.96	8	6	281
	2013	\$69,600,000	\$1.98	6	6	436
	% Increase	132%	106%			55%

*AUC's 2014 estimate of the Alberta Energy and Utilities Board's costs of utility regulation in 2002.

** The annual budget or portion devoted to energy utility regulation (Alberta) divided by the population of the province or Canada (NEB).

⁶ Source for 2002 statistics: page 7, BCUC Service Plan for 2003/04 through 2005/06, January 31, 2003, except for the Alberta Energy and Utilities Board's 2002 budget.

Summary of Key Findings from the KPMG Report “Task Force: Performance and Operational Review of the British Columbia Utilities Commission”

The following topic box contains the Task Force’s summary from KPMG’s report as drawn from the Executive Summary (Appendix 3).

- The BCUC has experienced significant growth in certain areas of the scope of its mandate, which is consistent with other peer jurisdictions.
- The BCUC has struggled to effectively manage its scope and scope changes.
- BCUC is not resource empowered and this currently impacts its ability to be an effective regulator.
- Executive leadership of BCUC vests primarily in one individual, being the current CEO/Chair of the BCUC. This is unusual compared to peer jurisdictions.
- Strategic initiatives do not appear to be fully performed, and performance measures do not appear to be disclosed.
- Other peer jurisdictions have a higher proportion of full-time Commissioners.
- Jurisdictions (e.g. Alberta and Ontario) which have a high number of part-time Commissioners, have commissioners with deeper and more relevant energy-related experience.
- The Province does not have a formal public advocacy body or department that is involved in BCUC’s hearing processes and it is common for broad public interests not to be fully represented in BCUC proceedings.
- Out-of-scope intervener interactions in hearings is a common issue both at the BCUC and other peer jurisdictions.
- BCUC information requests are growing significantly on applications. Requests are not subject to materiality or relevance reviews and are issued without adequate consideration, planning and monitoring controls.
- There is limited and inconsistent pre-application planning or consultation with utility applicants and other stakeholders to review the key issues and agree on the minimum information that will be required for proceedings.
- Basic project and process management appears to be inconsistently applied across the BCUC functions on different application hearings.
- On a total cost basis (or on a per regulated customer or a percentage regulated revenue basis), the Commission’s operating costs are low compared to other regulators.
- It is difficult to state what an appropriate cost base should be until a review of BCUC’s scope and strategic direction, combined with an assessment of resource allocation, is undertaken.

Part 2: Task Force Evaluation of Matters in the Terms of Reference

1. Governance

These are topics affecting the BCUC that are largely established by the provincial government, including the legislative framework, regulations, directives, directions, and policies.

a. Independence of the BCUC

Addressing the degree of independence of the BCUC is integral to the discussion of many issues before the Task Force. Independence engenders respect for the tribunal, and the regulatory process, and leads to broader acceptance of regulatory decisions.

Striving for independence, within the BCUC's mandate, is a goal shared by most stakeholders, as well as the government. In the Premier's June 2014 mandate letter to the Minister of Energy and Mines establishing Ministry priorities for 2014/15, the Minister is to "*Receive and review the recommendations of the British Columbia Utilities Commission independent review panel before making recommendations for reform to Cabinet on how to restore a strong and independent BCUC.*"

Directive powers in relation to regulatory tribunals are not unique to British Columbia. Although the form and what can be directed may differ, it is a fairly common part of various regulators' enabling legislation. In British Columbia, Government has the ability to displace the Commission's discretion or specify outcomes on matters through directives, directions, exemptions, and regulations under sections of legislation, primarily section 3 of the UCA, and the CEA. Since 2010, Government has issued almost eight electricity-related directives per year, as compared to an average of two per year between 1980 and 2009. Many of the recent ones are regulations specifying the implementation details for provisions of the CEA.

To explore this issue further, the Task Force retained Rowland Harrison Q.C. to review the principles of independence and how these principles apply to the BCUC. Harrison's paper asserts that,

The essence of tribunal independence is that a tribunal, when considering an individual matter before it (whether its role is to make an actual decision or to make a recommendation for final decision by another authority, usually cabinet), is free from influence, either implicit or explicit, that is external to its own process....It is for the legislature to decide what the mandate of a tribunal is to be and the extent to which the tribunal is to be independent in fulfilling its mandate. What should be avoided is representing a tribunal as being independent – giving rise to expectations that the tribunal will perform its functions at arm's length from government – while at the same time adopting mechanisms that undermine its independence.

In stakeholder consultation sessions, a broad consensus emerged that in order for the BCUC to be effective, it needs to have credibility and independence while working within the policy parameters set by government.

Harrison notes that independence in the context of regulatory tribunals is not absolute, but is a matter of degree and governments may wish to retain a high degree of oversight over certain functions such as final approval of infrastructure projects. This is the model under which the NEB currently operates for approvals of major pipeline projects whereby the NEB provides recommendations to Cabinet and Cabinet accepts or rejects the NEB's recommendations.

The focus from government should be on establishing clear policy and not on the results from the regulator. As one stakeholder commented, *"The BCUC should be assumed by government to have greater technical expertise than exists within government and, through its regulatory processes, able to obtain a better understanding of specific facts of any particular case. If the government doubts either the competence or the fact finding ability of the BCUC, the solution is to strengthen the BCUC, not seek to direct it with respect to outcomes."*

Conclusions

Government has a legitimate role in determining what the mandate should be for the BCUC and that role may differ by function (e.g. recommendations from the regulator with respect to infrastructure projects and decisions from the regulator setting rates).

To be effective, the BCUC needs to have credibility, public confidence, and independence within the exercise of its mandate as set by government. The growth in directives to the Commission suggests that government may have lost confidence in the BCUC's decision making capability and ability to implement public policy objectives.

Regulatory bodies' independence lies on a spectrum from highly independent, arm's length regulator to an agent of government. If government wishes to reserve final decision on certain projects and plans it can choose to exempt them from oversight (as done with the CEA), or make broader use of section 5 under the UCA whereby the Commission could make recommendations to government on specific matters referred to it by government.

The Province should establish clear, general policies that are to be applied to utility regulation. These should be set out for the BCUC in clear legislation, regulations or policy documents. The Province should have confidence in the regulator to implement these policy objectives in the public interest.

The Task Force notes that the energy policy and legislative framework has not been reviewed since the 2007 Energy Plan and the 2010 CEA were prepared. The 2007 Energy Plan establishes some targets which are no longer current and other policy actions that government may want to revisit given changing energy policy priorities including the ongoing development of a liquefied natural gas industry.

Recommendations

Government's policy objectives and directives should be clear and understandable to ensure policy alignment by the Commission.

When issuing directions to the Commission, the Task Force recommends the following guidelines:

- Directions should not dictate specific outcomes or intrude into the BCUC’s consideration of individual applications;
- Directions should be timely and issued before proceedings begin; and
- Policy statements are not necessarily legally binding; where a policy is to be mandated it should be made in a legally effective way, such as a direction under section 3 of the *Utilities Commission Act*.

Government should consider updating both the Energy Plan and the *Clean Energy Act* to ensure they are consistent with current government policies.

b. Legislative Framework

The BCUC’s governing statute is the UCA which establishes the Commission’s organizational structure and mandate. The UCA was passed in 1980 when BC Hydro was moved under full BCUC regulation. In the following years, the UCA has undergone numerous amendments. Stakeholders are generally supportive of the current legislative framework and felt that most of the pressing challenges faced by the Commission would not be resolved by legislative changes.

The BCUC’s mandate is quite broad, with the result that the Commission must regulate services and activities even where the benefits of regulation are questionable due to the small scale of operations or the existence of competition. Current processes for exemptions from provisions of the UCA require either a Minister’s Regulation (for exemptions from the need for a Certificate of Public Convenience and Necessity (CPCN), rates, and energy supply contract approvals) or Cabinet pre-approval (for Commission-initiated exemptions from any or all provisions of the UCA) and accordingly can be inefficient and time consuming. The solutions to the problem of disproportionate regulation include:

- Expressly allowing the Commission to decide not to regulate where it is not in the public interest due to the existence of competition or other factors;
- Improving the current exemption process; and/or
- Redefining what a “public utility” is under the UCA.

Many stakeholders consider a priority amendment should be to review the broad definition of “public utility” to clarify whether the BCUC should regulate operations such as thermal energy systems, biomethane upgraders, compressed natural gas and liquefied natural gas transportation fuel services, waste heat providers, and electric vehicle rechargers and similar short term electricity resellers.

To address alternative energy initiatives captured by the definition, in August 2014 the BCUC completed a three year generic review by approving a “Thermal Energy Systems Regulatory Framework”. This followed its 2012 “Report on the Inquiry into the Offering of Products and Services and Other New Initiatives”, which recommends the continued use of the UCA exemption provisions where the Commission finds regulation is not warranted. Six months after submitting its request for three types of exemptions (micro thermal systems, strata owned systems, and systems with a capital cost less than a defined maximum, currently set by the BCUC at \$15 million), the BCUC received Cabinet pre-approval, and two months later issued three Orders implementing the exemptions.

The 2010 CEA is intended to provide greater clarity to the Commission about the Province's policy framework. Section 2 of the CEA establishes sixteen energy objectives the Commission must "consider and be guided by" with respect to BC Hydro in the context of CPCN applications, expenditure determination requests and energy supply contracts filings. A copy of section 2 of the CEA is attached as Appendix 5. For other public utilities, the BCUC must "consider" the energy objectives in the context of their CPCN, expenditure determination and energy supply contracts filings. The CEA also exempted a number of BC Hydro projects, contracts and expenditures from Commission overview and moved approval of BC Hydro's Integrated Resource Plan to Cabinet.

Although the CEA attempted to bring policy clarity to BCUC decisions, many of the detailed sixteen energy objectives can conflict and be difficult to reconcile. The mandatory language of the UCA requires that the Commission, when dealing with BC Hydro matters, "must consider and be guided by" the energy objectives. This can lead to decisions from the Commission that, when trying to weigh and evaluate these objectives, may not be seen by the government as consistent with its intended policy.

By way of example, the OEB's enabling legislation has fewer but broader energy objectives for both the electricity and gas industries which help define the mandate and provide a clearer policy framework for the OEB. For electricity, these objectives are reproduced below.

Ontario Energy Board Act Objectives

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

Conclusions

A general review of the UCA may be useful but it should not be considered a priority. However, the Commission's ability to forgo actively regulating some entities should be clarified in legislation to expressly allow the Commission to limit or forgo active regulation where the BCUC finds that regulation is not in the public interest due to the existence of competition or other factors such as the size or number of customers.

Current exemption provisions in the UCA take time and effort that is often disproportionate to the situation. However, with the approval of the thermal energy system regulatory framework and exemption orders, the Commission is implementing significant exemptions without the need for legislative change. Changes to the definition of “public utility”, coupled with a more streamlined exemption process, would lead to more efficient and effective regulation.

The broad array of energy objectives in the CEA and the requirement, unique to BC Hydro, that the Commission must both “consider” and “be guided by” them has not worked well. “Guided by” has a mandatory connotation, making it more difficult to reconcile competing objectives. Removing “guided by” would make it clear that the BCUC must use its discretion in balancing conflicting objectives, in the same way it does for all other utilities. The CEA energy objectives should be reviewed and amended. Also, where government believes a particular energy policy objective should take priority over others, it could direct the priority in advance under its section 3 direction powers, or it could turn the matter into a reference as a section 5 inquiry.

Recommendations

The *Utilities Commission Act* should be amended to clarify the Commission’s ability to forebear, or decline to regulate, in specified circumstances.

Amendments to the definition of “public utility” should be considered to exempt services and facilities where Commission regulation is not warranted.

The existing exemption processes should be streamlined by requiring a Minister’s Regulation for all exemption proposals, rather than Cabinet approval for some.

Government should review and amend the energy objectives in the *Clean Energy Act* to reduce conflicts among them, and between them and the *Utilities Commission Act*.

The requirement, unique to BC Hydro, in the *Utilities Commission Act* that the Commission “must consider and be guided by” the *Clean Energy Act* energy objectives should be changed to a requirement that the Commission “must consider” the energy objectives, just as it does for all other utilities.

c. Commissioners

Many stakeholders noted that in recent years the stature of the Commission has reduced due to the appointment of a comparatively large number of part-time Commissioners (11 of 12), and some appointments that do not bring the Commission the type of recognized expertise or talent it needs. This is in spite of the technical nature and importance to the Province of the matters the Commission must decide.

Under section 2 of the UCA, Commissioners are appointed by the Lieutenant Governor in Council after “a merit based process.” One Commissioner is designated as the Chair and other Commissioners are appointed after consultation with the Chair. The Chair is the Chief Executive Officer (CEO) of the Commission and “...has supervision over and direction of the work and the staff of the Commission.”

Cabinet may also designate a Commissioner as Deputy Chair after consultation with the Chair. There has not been a Deputy Chair since 2001.

The Province's 2002 Energy Plan affirmed the need for a strong and competent regulator and recommended two additional full-time Commissioners, who were subsequently appointed after a public recruitment process. This resulted in a period from 2003 to 2008 where there were three full-time Commissioners, including the Chair. The BCUC currently only has one full-time Commissioner (the Chair and CEO) and 11 part-time Commissioners, with no term lasting longer than four years. Most energy utility regulators in other jurisdictions employ between three to eight full-time Commissioners.

Many stakeholders indicated that Commissioners should be selected based on appropriate skill sets and experience, including knowledge of the sector being regulated, legal, engineering, economics, utility regulation, accounting or financial expertise. In some jurisdictions the Chair takes an active part in the recruitment of Commissioners with an explicit goal of creating and maintaining a Commission with a balance of diverse and relevant expertise.

Some stakeholders believe that using part-time Commissioners on panels slows down processes due to scheduling issues. The term given to Commissioners can also impact the BCUC's effectiveness as short appointment terms limit building institutional knowledge and may discourage potential applicants. Few stakeholders held views on whether a Deputy Chair was needed.

Key to attracting and retaining the best people as Commissioners is compensation and appointment terms. Current compensation ranges, adhering to Provincial Treasury Board Directive 2/11⁷ which specifies remuneration guidelines for appointees to administrative tribunals, are \$85,000 to \$113,000 for BCUC full-time Commissioners and \$525 per day for part-time Commissioners. This makes it more difficult to recruit experienced Commissioners. Many stakeholders, including utilities and end use customers that fund 100 percent of the Commission's budget, support higher compensation ranges for the Chair, Commissioners and staff.

⁷ http://www.fin.gov.bc.ca/psec/disclosedocs/TB-directive_2_11_remun_guide_admin_tribunals.pdf

Comparable Compensation

Other Boards

The following table sets out compensation paid in other jurisdictions to individuals in similar roles.

	Full-Time Commissioners	Part-Time Commissioners (per diem)	Chair/CEO	Vice-Chair
BCUC	\$85,000-113,000	\$525	\$180,000	\$108,500-\$144,000
National Energy Board⁸	\$173,000-203,000	\$890-\$1,010	\$263,000-\$309,000	\$200,000-\$234,000
Ontario Energy Board	\$160,000	\$800	\$400,000 ⁹	\$270,000
Alberta Utilities Commission¹⁰	\$120,000-\$166,000	\$1,000	\$209,000-\$281,000	\$153,000-\$213,000
British Columbia Securities Commission	NRA*	\$1,000**	\$400,000***	\$202,000-\$325,000

Note: Some jurisdictions only report salaries while others report total compensation. BCUC compensation excludes benefits.

*NRA = Not readily available

**Hearings that last longer than four hours.

***Current CEO earns approximately \$435,000.

Regulated Entities

Some stakeholders indicated the Chair and the Commissioners compensation should be somewhat in alignment with the entities they regulate. At this time they are not. Currently, BC Hydro has over 47 employees who are paid more than the BCUC Chair; at ICBC 35 employees are paid more than the BCUC Chair. The top five FortisBC employees' average compensation is \$780,000.¹¹

The Courts

In British Columbia in 2013 Justices of the Supreme Court received annual compensation of \$295,500 and Provincial Court judges \$231,138.¹²

Conclusions

Any Commission's credibility with stakeholders is largely a reflection of the individual Commissioners' independence, integrity, expertise and dedication. The BCUC must be strengthened and seen to be

⁸ <http://www.appointments-nominations.gc.ca/prsnt.asp?menu=1&page=renum&lang=eng>

⁹ Compensation is salary only, total compensation is \$480,000.

¹⁰ http://www.gp.alberta.ca/documents/orders/orders_in_council/2014/714/2014_322.html

¹¹ FortisBC advises that \$548,000 of the top five FortisBC employees' average compensation is recovered from ratepayers.

¹² Submission to the British Columbia Judges Compensation Commission by the Canadian Bar Association British Columbia Branch, June 2013, p.23

strengthened. This requires attraction of more full-time Commissioners with recognized expertise in areas relevant to the mandate of the Commission.

The Commission needs to be able to offer competitive compensation to skilled individuals who will contribute to its decisions and add to its stature. Current salaries and per diems are inadequate and do not recognize the importance of the decisions the Commission makes to the Province. Increasing Commission compensation will likely require exempting the BCUC from Treasury Board Directive 2/11. This has been done for the British Columbia Securities Commission and should also be done for the BCUC.

Subject to a more thorough compensation review, it would appear that compensation for the Chair should be at approximately the same level as a Provincial Court judge (\$231,138). Compensation for full-time Commissioners of approximately \$160,000 and for part-time Commissioners of between \$800 to \$1,000 per day seems reasonable.

The Commission should have two to four full-time Commissioners with fewer Commissioners being part-time than at present. Commissioners should have recognized and relevant expertise and skill set(s) required.

There needs to be a greater recognition of the Commission's particular skill requirements at the time of hiring and a proper balance of relevant skills targeted. Other jurisdictions have had success in recruiting Commissioners from the existing talent pool of regulatory staff: recruitment processes should not discourage BCUC staff from consideration.

Commissioner appointment terms should generally be longer and staggered.

Part-time Commissioners can be a valuable part of the Commission. They bring flexibility and needed expertise to particular issues, but they are not a substitute for a core of knowledgeable full-time Commissioners. On each panel, it would be appropriate to have at least one full-time Commissioner and, normally, not more than one part-time Commissioner.

A Deputy Chair may be a suitable appointment for one of the future full-time Commissioners, but it is not a priority at this time.

Recommendations

The recruitment process for the Commission needs to be changed dramatically. Higher compensation must be offered and the Chair must be actively involved in recruiting candidates with recognized expertise that meets the needs of the Commission at the time of hiring.

Two full-time Commissioners, in addition to the Chair, with recognized and relevant expertise, should be added as soon as possible.

The number of part-time Commissioners should be reduced to the point they approximate the number of full-time Commissioners.

d. Staff Remuneration

As part of the broader public service, the BCUC is subject to salary constraints placed on it by the Public Sector Employers' Council (PSEC). These constraints make it challenging to recruit and retain mid-career professionals who have related utility regulatory expertise. Higher salary ranges for British Columbia Securities Commission staff and Crown corporations have been approved by government in previous years.

Recruitment professionals have advised the Commission that the compensation it is able to offer is not sufficient to attract most seasoned professionals with leadership experience. For example, a recent search to fill a position at the BCUC found that most potential candidates were currently earning between \$150,000-175,000, which is well above the maximum of \$135,000 the BCUC was able to offer.

Currently, twenty-one employees have reached 90% of their maximum salary range and nine have reached 100% of their maximum salary range with no opportunity to adjust compensation to reflect the market. This means the Commission is at risk of losing significant expertise.

Executives Reporting to CEO or Chair¹³ (Responsible for Regulatory Matters)	Total Compensation*
BC Utilities Commission <i>Director, Rates¹⁴</i>	\$177,496
BC Hydro <i>Executive VP, Finance & CFO</i>	\$396,127
FortisBC <i>CFO & Treasurer</i>	\$567,704¹⁵
British Columbia Securities Commission <i>Executive Director</i>	\$387,325
ICBC <i>CFO</i>	\$489,107

*Total compensation includes incentive plans, pension, benefits, other compensation (including vacation and expenses)

Other jurisdictions also use a variety of indicators to establish pay. Some regulators match positions to comparable ones in the private sector, then establish pay at the market median. Performance pay may be tied to meeting regulatory timelines as well as other metrics. Other regulators, whose salaries are tied to government pay ranges, indicated that their regulatory staff earn approximately 25% less than comparable staff at the utilities they regulate.

¹³ Source: <http://www.fin.gov.bc.ca/psec/disclosure/disclosure13-14.htm>
http://www.fortisbc.com/About/InvestorCentre/GasHoldingCompany/Documents/ExecCompOnly_FHI_B_1_Post_Audit_Comp_Mar_14_2014_SEDAR.pdf

¹⁴ Currently the highest paid staff position below the Chair/CEO.

¹⁵ FortisBC advises that \$450,000 of this compensation is recovered from ratepayers.

Conclusions

For certain expertise and skill sets, the Commission needs to be able to pay more in order for the Commission to be successful in its recruiting efforts. This will require adopting salary scales closer to market levels and removing constraints on the Commission's ability to allocate its budget between compensation and other budget items.

PSEC limits on BCUC compensation interferes with the Commission's ability to recruit and retain qualified staff. Government controls, which cap the overall salary budget within their approved budget, constrain the Commission's ability to form the appropriate organizational structure. Such compensation and budget constraints tend to limit the hiring of qualified senior staff, encourage the use of outside consultants and accelerate staff turnover.

Recommendation

Government should continue to approve BCUC's compensation framework but increase the upper limit of compensation ranges in line with market levels so the Commission is competitive in recruiting and retaining qualified individuals.

2. BCUC Processes

a. General Comments

As a quasi-judicial tribunal, the Commission controls its processes for reviewing and adjudicating applications. The Commission has developed a number of processes to support its duties under the UCA, including:

- Resolving applications that are routine and straightforward at Commission meetings;
- As applications become more complex, the use of written hearings, Streamlined Review Processes (SRP) and Negotiated Settlement Processes (NSP) are used as appropriate. Written hearings are conducted entirely through written submissions: written requests for information; filing of written evidence; and submission of written arguments and replies. SRP and NSP usually contain some components of the written hearing process; and
- For the most challenging applications, a full oral public hearing. In oral hearings, participants appear in person before the Commission panel, present oral evidence and ask questions of the utility's and other parties' witnesses. Oral hearings tend to be time and resource intensive.

Many stakeholders believe that BCUC processes have generally become slower and less efficient, although they did note that the BCUC does typically select the appropriate process for a given application.

Stakeholders indicated that processes have become lengthier for a number of reasons, including:

- Lack of a strategic approach by the Commission in evaluating applications;
- Increased complexity of issues, in particular frequent consideration of social and environmental issues;
- Applications may contain irrelevant or incomplete information;
- BCUC consultants may have a vested interest in prolonging proceedings; and
- Staff roles are not always clear in proceedings.

Most stakeholders supported the value that is created by ensuring there is relevant stakeholder input to Commission proceedings.

In the following sections we consider the key concerns that were raised with the Task Force in more depth and provide our conclusions and recommendations with respect to each.

b. Guidelines and Policies

The BCUC has at least 17 guidelines and policies¹⁶ for its processes. These cover resource planning, utility system extension tests, dispute resolution processes, reconsideration and appeals, First Nations information filing, CPCNs, streamlined review process, negotiated settlement process, and other matters. Some of these were established over a decade ago. Guidelines that are due for an update include the 2007 “Participant Assistance /Cost Award Guidelines (PACA)” as per section 2.f of this Report, “Participants Guide to the BCUC” (last revised in 2002), and the “New User’s Guide” (2004).

One area of particular concern is the minimum information requirements for common or routine applications. It is felt the lack of clarity on required content has led in some instances to misunderstandings, unnecessary or extraneous information, and an increased number of information requests.

Conclusions

The guidelines are generally useful, effective, and particularly helpful to those new to the Commission. Periodic review of existing guidelines will ensure they remain relevant and applicable but updating could be done more frequently and there are some areas that would benefit from additional guidance.

Recommendation

The BCUC should periodically review existing guidelines and policies to ensure they remain useful, effective and up to date. In particular, the Commission should improve or issue minimum content guidelines for common applications such as facility and revenue requirement applications.

c. Scoping or Defining Issues in Proceedings

A number of stakeholders felt that contested proceedings would benefit greatly from increased scoping of issues at an early stage in order to limit the number of information requests and cross examination

¹⁶ <http://www.bcuc.com/Guidelines.aspx>

questions to those relevant to the proceeding. Others warned that excessively detailed issues lists can lead to procedural delays and arguments about whether or not matters are “in scope” and whether parties are sufficiently affected by an application in order to be granted standing (discussed in section 2.f).

Conclusions

The Task Force agrees that while an issues list can never be completely final, additional scoping of issues early in a proceeding would be beneficial. Issues lists published by the NEB and AUC rarely exceed one page and are widely perceived as helpful.

Recommendation

The Commission should work with applicants and stakeholders early in a hearing process to define the issues in the proceeding.

d. Alternatives to Oral or Written Hearings

If an application is not overly contentious and issues are likely to be explored in a day or less, the Commission may consider using a SRP. The Commission may also consider using a NSP to seek agreements among regulatory participants about matters before the Commission.

Utility stakeholders reported that the SRP and NSP work well. BC Hydro noted a recent successful SRP for a Residential Inclining Block rate application, with a same-day decision after one round of information requests. However, some interveners were concerned that in some cases expedited processes may not allow enough time to consult with experts. The success of a NSP largely relies on having an effective, knowledgeable facilitator to lead the process.

Conclusions

In general, the BCUC does well in selecting an appropriate review process to suit the application.

One of the key concerns the Task Force heard was the increased turnaround times for oral and written hearings. Periodic public hearings can provide detailed cost information, useful in determining utilities’ revenue requirements, although they can encourage utilities to ask for more than is required recognizing that what is likely to be granted may be less.

NSPs and multi-year performance based rate making can result in more timely decisions and a lower regulatory burden than frequent oral hearings. NSP Guidelines have been recently improved by clarifying potential staff roles as an Active Participant, Advisor, Observer or Facilitator. For some NSPs it may be appropriate to assign BCUC staff to act as advocate (for example, for residential customers), with this role clearly separate from other staff roles.

There are opportunities to improve processes by drawing on best practices from other jurisdictions, including:

- Staff review of draft applications;
- Developing a mandatory application completion checklist;
- Using pre-application workshops and defining scope and narrowing issues at the outset of a hearing; and
- Establishing targeted (non-legislated) guidelines, including decision targets in the regulatory timetable.

When choosing alternatives in CPCN applications or integrated resource plans, the Commission should not require utilities to provide analyses for unrealistic options.

BCUC reliance on consultants can impair the BCUC from building its internal capacity. Consultants can be influential and may have a vested interest in lengthy proceedings. As with part-time Commissioners' schedules, the use of consultants can lead to scheduling issues and prolonged processes.

e. Information Requests

Once BCUC staff and interveners have reviewed an application, they may pose questions about it to the utility applicant. The BCUC panel sets deadlines for making information requests (IRs) and for receiving the applicant's responses. There may be more than one round of IRs established in the regulatory timetable, and intervener IR deadlines usually follow Commission IRs by a week or two to reduce duplication.

The increase in the number of IRs posed by BCUC staff in recent years is a major burden for many utilities. BC Hydro, FortisBC, and Pacific Northern Gas provided statistics documenting the significant rise in the number of IRs for comparable applications. For example, FortisBC notes that the total number of IRs answered by FortisBC Energy Utilities in 2013 was approximately 7,800 compared to the total IRs answered in 2006 of approximately 1,200. Utilities suggest that many IRs are irrelevant and too many IRs can cause hearings to lose focus. Concerns were also expressed about an adversarial tone in the wording of some questions. Reasons given by utilities for this trend includes minimal supervision of the staff IR process (formerly done by the Executive Director), lack of supervision of consultants, and staff curiosity and inexperience.

Stakeholders have differing views on IR matters. The Commercial Energy Consumers Association of British Columbia (CEC) considers that the extensive use of IRs to answer questions in advance has reduced hearing times and costs. The British Columbia Public Interest Advocacy Centre suggests an upper limit on the number of IRs be imposed. The Association of Major Power Customers (AMPC) believes the sheer volume of utility application materials leads to more IRs, and suggests standardization, uniform accounting, and plain language as elements of a possible solution. An expert with experience in the United States noted that after pre-filing workshops and processes, the utility would provide a final draft application to the regulatory staff to seek comments prior to filing the final formal application.

At both the NEB and AUC, proposed IRs are reviewed by lead staff and legal counsel, and in some cases by Panel members.

The BCUC recognizes that IR processes need to be better managed, and advises that it is initiating changes to address tone and ensure relevance. It notes the number of IRs is influenced by the quality of the application and the number of BCUC decisions that are being sought in the application.

Conclusions

The substantial increase in the number of staff IRs does not appear to have improved outcomes, while increasing the cost of regulation borne by ratepayers.

If requested by applicants, reviews of draft applications by staff can provide feedback, ensuring applications are complete before the IR process commences, saving time and costs. For significant reviews, a workshop or similar Panel scoping process to develop an issues list should be held early in the process. Draft issues lists could be referred to participants for comment, and lengthy issues lists should be avoided. Through its senior staff, legal counsel, the Panel, or a combination of the three, the BCUC should then ensure all BCUC IRs are screened for relevance to the scope that has been established. Even for routine applications, all BCUC staff IRs should be examined and edited by senior staff, counsel, and possibly Commissioners. Preambles to provide context for the question should normally be provided.

Recommendation

All proposed information requests from BCUC staff and consultants should be reviewed by senior staff, by legal counsel, and possibly the Panel.

f. Intervener Participation

Standing

Many BCUC decision-making processes benefit from participation by parties other than the applicant. With few exceptions, the BCUC accepts individuals and organizations as interveners or interested parties as long as they register. To date, with the possible exception of the Fortis “Smart Meters” Application, this has not been a significant problem but as the Mackenzie Valley Pipeline, Enbridge Northern Gateway Project and Trans Mountain Pipeline expansion proceedings have shown, projects are increasingly subject to interventions by large numbers of people who do not appear to be directly affected or have relevant information or expertise.

When compared with other jurisdictions, the UCA is not explicitly as restrictive in granting “standing”, or the ability to participate in a proceeding. For example, under recent amendments to the NEB Act (section 55.2) , for certificate applications, standing will be granted to those “directly affected” and may be granted to any person who, in the Board’s opinion, has relevant information or expertise. This test also appears to be used in a broader context for non-facility proceedings. The AUC applies a similar test

for standing on facilities and has refined its requirements on “directly affected” to only automatically include individuals who are located within a defined distance of the proposed project. The AUC has no restrictions for rate applications, but few individuals intervene, in part because proceedings are complex, time consuming and they cannot claim costs.

The BCUC has recently denied standing to parties where they had no direct connection with the utility in question and the issues they were concerned about would be dealt with by others.

Participant Funding

In 1993, the UCA was changed to allow the Commission to order a participant in a proceeding—normally the applicant—to pay all or part of the costs of another participant. Procedures and maximum amounts payable are contained in the PACA Guidelines, last amended in 2007. Over the last decade, total costs awarded have usually ranged between \$1.3 and \$2.9 million per year.

In other jurisdictions, intervener funding policies and programs vary widely. The Washington Utilities and Transportation Commission has no program: all interveners pay their own costs. The NEB has a modest assistance program for facilities hearings only. Municipalities and companies are not eligible. Funding is awarded early in the process, and is not intended to cover all costs. Like the BCUC, the OEB may award funding to interveners based on maximum per diems. The OEB is currently reviewing the representation of consumer interests in its proceedings.¹⁷ Staff in California’s Division of Ratepayer Advocates, funded by the state government, are employed by, but independent from, the California Public Utilities Commission. In Manitoba, the Manitoba Public Utilities Board may provide preliminary approval of interveners’ budgets before hearings begin, and may order a portion be paid during the hearing.

In Alberta, intervener funding awarded by the predecessor to the AUC peaked at \$23 million per year, prompting changes in 2008/09. Now, the “Utility Consumer Advocate”, a government department within Service Alberta, operates with an annual budget of \$9.1 million, much of which is allocated to advancing residential, small business, and farm interests at AUC proceedings. Since the creation of the Utility Consumer Advocate, the main recipient of AUC cost awards is the Consumers’ Coalition of Alberta. The AUC is reviewing its own intervener funding model.

BCUC stakeholders hold differing perspectives on intervener funding rules. Some stakeholders suggest a screening process to discourage duplication by multiple interveners asking similar questions and repeating positions, and then seeking cost awards. Intervener groups tend to hold views similar to those of the BC Sustainable Energy Association and Sierra Club of BC, which believe PACA operates smoothly but the rules are onerous in certain respects. Many intervener groups noted that PACA rates have not changed since 2007, and the challenges associated with waiting for a funding decision months or years after the expense has been incurred. The Treaty 8 Tribal Association notes that the PACA Guidelines provide for interim awards only under exceptional circumstances. They support an

¹⁷ http://www.ontarioenergyboard.ca/oeb/Documents/EB-2013-0301/ltr_Consultation_Intervenor_Participation_20130822.pdf

incremental cost award approach: once interveners have been determined to be eligible for funding and the scope of the intervention approved, they would receive a cost award for a portion of their costs, with the remainder based on merit considerations.

While some stakeholders raised concerns about under-representation of residential and ICBC customers, few support the creation of an independent consumer advocate. Utilities and interveners with experience in Alberta and California caution that a separate consumer advocate can be expensive and duplicative. In its new NSP Guidelines, a BCUC panel can appoint a staff member as an “Active Participant” to represent ratepayers’ interests: for NSPs, this may achieve similar results at less cost.

Conclusions

The issues of standing and funding are different and must be dealt with separately. Parties who are directly affected have a right to be heard and the Commission should exercise its discretion as to whether it wishes to hear from persons who are not directly affected but who have information or expertise that may be helpful to the Commission. While it may not be necessary to codify this approach to standing in legislation, doing so could be useful and help avoid a referral to the courts in a strongly contested hearing.

The Commission is the master of its processes and can and should use that control to focus the issues and minimize or avoid duplicate or repetitive questions of applicants.

The extension or allocation of participant funding to intervenor groups can be a valuable tool in bringing forward useful evidence that otherwise might not be before the Commission. Used wisely it can also provide incentives and encouragement to interveners to pool resources and coalesce behind one counsel and/or expert.

The BCUC has generally been successful in balancing the many trade-offs associated with PACA policy and amounts. However, the funding levels in the 2007 PACA Guidelines should be reviewed in light of inflation and to more frequently allow partial cost awards in advance of a decision, subject to a reduction in the total amount if the intervenor’s contribution did not meet expectations.

Establishing a separate consumer advocate office at this time would bring costs and risks. The BCUC should continue to test the use of its own staff to represent under-represented groups in NSPs. For hearings, section 116 of the UCA already gives the Commission the authority to appoint counsel to represent a “class of persons”, subject to approval of the Attorney General. The BCUC could call for proposals and contract for services to act on behalf of certain interests if it felt a key interest would not otherwise be adequately represented.

Recommendations

The BCUC should formalize its policies on granting intervenor status and publish them.

Government should not establish an independent consumer advocate.

Participant Assistance/Cost Award Guideline per diem rates and interim award policies should be reviewed.

When appropriate, the BCUC should use its authority under section 116 of the *Utilities Commission Act* to retain counsel to act on behalf of underrepresented interests.

Section 116 of the *Utilities Commission Act* should be amended to remove the need for the Attorney General's approval when the Commission hires counsel to represent underrepresented interests.

g. Application Cycle (Turnaround) Times

Timelines or cycle times refer to the time it takes a regulator to issue its decision from either the application date or close of final arguments. Efficient regulatory processes need to balance the need for completing the evidentiary record and ensuring that due process is followed, while respecting the interests of utilities and their customers.

In the past, the BCUC has measured its cycle time performance (the number of calendar days between the receipt of a complete application and the issuance of a decision) for applications dealt with by oral hearings, written hearings and negotiated settlements. The BCUC has not included these measures in its annual reports since 2008, but advises that its 2013/14 Annual Report will contain this information. Based on the available information, the table below illustrates how 2013/14 cycle times have lengthened when compared with cycle times from two earlier time periods.

BCUC Cycle Times

	2003/04 to 2006/07		2006 to 2008		2013/14	
	Average Annual Number of Applications	Average Cycle Time (Days)	Average Annual Number of Applications	Average Cycle Time (Days)	Number of Applications	Average Cycle Time (Days)
Oral Hearings	5	227	8	259	6	296
Written Hearings	13	132	20	127	14	241
Streamlined Reviews	0		0		5	89
Negotiated Settlements	7	111	6	95	0	
Non-Hearing Applications	154	32	184	25	218	40

Note: The first two time periods vary slightly (e.g. calendar vs fiscal year) but the number of applications is the annual average for these two time periods

Sources: 2007/08 Annual Report pp 87-93; Draft 2013/14 Annual Report

Most stakeholders commented that the amount of time the BCUC takes from submission of an application to decision has increased over the last several years. BC Hydro noted that the mandate of the BCUC has expanded: for example, the BCUC must determine the adequacy of BC Hydro meeting its duty to consult with First Nations. The legislative requirement for the BCUC to consider, and in some

circumstances be guided by, the CEA energy objectives, has also added to the complexity of application reviews.

Increasing cycle times have resulted in rising regulatory costs for utilities and their ratepayers. Utilities also commented that the increasing cycle times have impeded their own planning, program and construction timetables.

Some jurisdictions have legislated timelines under which regulators are required to issue decisions. The California Public Utilities Commission is required to report annually on the number of proceedings where resolution exceeded formal prescribed time periods. Recent changes to the *National Energy Board Act* have introduced legislated timelines for facility applications, although there are provisions to extend the term. The WUTC has ten months to issue a decision on most general rate applications, after a statutory notice period. The AUC has both legislated and non-legislated targets. In British Columbia, the Environmental Assessment Office (EAO) is legislated under the *Environmental Assessment Act* to submit project referrals to Ministers for decisions within 180 days, and Ministers must decide within 45 days. The EAO does have latitude in its legislation to suspend a review period.

In its submission to the Task Force, BC Hydro recommended a guideline and performance measure for application reviews: 100 percent of BCUC decisions should be issued within one year of the application submission and 100 percent of BCUC decisions should be issued within 90 days of the close of arguments.

Based on input from stakeholders, there is support for an approach where the BCUC would adopt performance targets with respect to decision timelines. Stakeholders also expressed the need to allow flexibility for the BCUC to extend beyond targets for proceedings that are more complex.

Conclusions

Lengthening cycle times for oral hearings, written hearings and non-hearing applications incur costs and uncertainties.

As noted earlier, the Commission is the master of its processes and establishing timelines for reviews and decision by legislation would erode its independence. Hearings could be concluded prematurely or reasons written hastily in order to meet the deadline. There is little support from stakeholders for a legislated solution to improving timelines, however, there is certainly recognition that timelines are lengthening and the BCUC should establish targets and report on them.

Building on the BCUC's internal target of issuing decisions 90 days after the submission of a final argument phase, a more detailed set of performance targets should be developed in consultation with stakeholders, and the BCUC's record in meeting them reported in detail. Performance measures are discussed further in section 3.e.

The performance targets will need to be informed by other process improvements. These include recommendations that the BCUC should reduce the number of its IRs and while Commissioners remain responsible for the decisions, make greater use of BCUC staff to assist in drafting them.

Recommendation

The BCUC should develop performance targets for key application cycle times and report on them annually.

h. Generic Proceedings and Coordinated Regulatory Processes

The Commission uses generic proceedings where an issue applies to a group of utilities. A common use is for periodic hearings into utility cost of capital/return on equity/risk premiums benchmarks. The most recent example was a two stage, 25 month process ending with a Decision and Order in March 2014. Other recent examples of generic proceedings include the Alternative Energy Services Inquiry and Mandatory Reliability Standards (MRS) Inquiry. In the 1990s, the Commission initiated generic reviews on utility system extension tests and utility participation in retail markets downstream of the utility meter.

The BCUC and the EAO signed a Memorandum of Understanding (MOU) in 2009 for projects that need both a CPCN and Environmental Assessment Certificate. Under the MOU, they agree to coordinate regulatory schedules and public sessions and promote sharing evidence relevant to both processes. Under the MOU, each agency retains its statutory jurisdiction, so “split decisions” remain possible in the future. The MOU includes a model schedule that sets out the main steps for each agency over a 29 month period. To date, the MOU has not been used.

Few stakeholders had views on the use of generic or coordinated processes, and those who did generally indicated their current use was suitable but they should not be expanded into other topics. In particular, small utilities noted they lacked the resources to retain counsel and consultants to participate actively in some generic proceedings, even when they participated through a coalition. Exacerbating this concern are the prolonged cycle times for some generic proceedings: the Alternative Energy Services Inquiry written hearing was a 19 month process, and the Generic Cost of Capital Stage 1 oral hearing concluded after 14 months. An oral hearing on the same topic in 1999 was completed in less than six months.

Conclusions

The BCUC appears to be using generic proceedings appropriately, although increasing complexity and duration is a concern. Generic cost of capital and risk premium proceedings are clearly preferable to individual ones, as happens in Washington State, where the WUTC has a legal obligation to review each utility’s capital structure and return on equity.

If the Province is concerned about inefficiencies associated with having two separate environmental and CPCN processes for a BC Hydro project, rather than exempting the project from the need for a CPCN, it could consider more extensive use of UCA section 5 inquiries, with government making one decision

based on the EAO and BCUC recommendations. This would be an approach similar to the former energy project review process under the repealed Part 2 of the UCA.

i. Compliance and Reporting

Under section 24 of the UCA, the Commission “must” keep itself informed about the conduct of public utility business and compliance. The BCUC formally established a three person Performance Monitoring, Conduct and Compliance (PMCC) group in 2012 to address internal concerns about its ability to track compliance matters. PMCC was also assigned the electricity system MRS compliance and monitoring processes. The addition of Administrative Penalties sections (Part 8.1) to the UCA, and the subsequent Regulation, gives the BCUC powers to impose fines and remedies upon utilities, gas marketers, and those subject to MRS requirements.

Utilities and ICBC expressed five main concerns about reporting requirements and a separate PMCC function:

- PMCC was set up without consultation and represents another layer of supervision by the BCUC.
- It has increased utilities’ and ICBC’s costs. For example, FortisBC has added the equivalent of a half time position to manage BCUC compliance filing requirements.
- There are too many filing requirements. While BC Hydro’s have declined from 439 to 288 per year in the last three years, that still averages about one a day. ICBC advises it has 17 ongoing compliance filings, and must file reports for most information technology capital projects exceeding \$1 million before the expenditure can be made.
- Many filings are prepared solely for the BCUC, so they are of no value for internal management.
- The conditions imposed in Commission Orders and Decisions that require follow-up reporting are not always clear and the number has grown.

The BCUC is taking steps to reduce unnecessary or ambiguous reporting requirements, including streamlining the annual report template for small utilities, and training staff and Commissioners in writing clear and precise directives. It is also now ensuring all compliance reports are acknowledged.

Conclusions

The Task Force agrees that the BCUC’s compliance monitoring function was deficient prior to the creation of a separate PMCC, but is not convinced that the PMCC structure is the preferred way to manage it. Commissioners and staff may be more circumspect about imposing conditions with little value if they continue to be responsible for monitoring compliance, rather than ending their responsibilities when the decision is issued.

There are initiatives that enable the BCUC to instill stakeholder confidence in the regulatory process without being overly burdensome. For existing and future compliance reports, the BCUC should ask itself if the contents are necessary and useful, especially if the report is being prepared exclusively for the BCUC. Compliance resources should focus on matters that pose risks of increasing customer costs and rates: CPCN project progress reports are examples. Some of the onus needs to be shifted from the

BCUC to the reporting utility to report deviations from forecasts that predicated a decision, such as the timely reporting of cost of overruns or actual versus forecast gas extension connections. Some periodic compliance reports could have sunset clauses, and the decision to discontinue them could be delegated to staff to avoid the need for Commission Orders.

Recommendations

The BCUC should make additional efforts to ensure all compliance reports are necessary and useful, and eliminate the reporting requirement for those that are not.

The BCUC should place more responsibility on regulated entities to report, on an exception basis, deviations from forecasts that could affect costs and rates, instead of routine reporting.

The BCUC should reconsider the need for a separate Performance Monitoring, Conduct and Compliance group as the best way to manage the compliance reporting function.

i. Mandatory Reliability Standards

The Province gave the BCUC jurisdiction (section 125.2) to adopt electricity system reliability standards for British Columbia. Regulations followed, describing the parties subject to adopted standards and giving the BCUC the power to impose penalties for contravening them.

In October 2012, the BCUC began a MRS inquiry in anticipation of U.S. developments and the need to implement a new “bulk electric system” definition, along with exception requirements and penalty processes. In April 2014, the BCUC submitted its recommendation to Government to incorporate the North American Electricity Reliability Council (NERC) “bulk electric system” definition and associated exceptions into the MRS Regulation. An exception process could address some of the MRS-related concerns relayed to the Task Force.

MRS has been developed across North America in an attempt to avoid another system-wide transmission blackout. In British Columbia and elsewhere, those who have been involved with MRS conclude the process has been prolonged, extensive, expensive and inefficient. Changes to BC legislation and regulations may be needed to reflect North America-wide changes made by the North American Electricity Reliability Council (NERC) and/or the US Federal Energy Regulatory Commission. Some stakeholders suggest the BCUC lacks the capacity to regulate and monitor MRS, while BC Hydro has the expertise but does not want to incur additional costs, risks, or responsibilities. BC Hydro actively participates in the Western Electricity Coordinating Council and NERC. Membership in these organizations allows BC Hydro to influence various policy planning and operational activities that affect the reliable and economical operation of the Western Interconnection. BC Hydro also maintains an agreement with US based Peak Reliability Corporation, the Reliability Coordinator for the Western Interconnection.

Conclusions

It is essential to have MRS to keep British Columbia aligned with the rest of North America. Enforced MRS increase the reliability of the transmission system and reduce the risk of blackouts. Ultimately, whether it is the transmission owners or the BCUC that is responsible for assessing and adopting standards, and ensuring compliance, the entity responsible needs to have the resources, cost recovery capability, and the expertise to be effective.

A greater role in ensuring MRS are met aligns with BC Hydro's multiple roles in transmission planning, development, ownership, grid operations and balancing. In addition, MRS coordination would leverage BC Hydro's institutional expertise in ensuring grid reliability for the vast majority of the Provincial Bulk Electric System.

Nonetheless, it appears that MRS oversight should remain with the BCUC to ensure that British Columbia entities are overseen by an independent authority. Government could partner with stakeholders to explore regulatory options (including exclusions allowed under the new "bulk electric system" definition) to ensure the appropriate level of MRS application and oversight occurs.

3. BCUC Structure, Organization, and Performance

These are topics largely associated with the BCUC's management of itself, including capacity, resource needs, and organizational efficiency and effectiveness.

a. Levy Funding Model

The Commission is authorized to recover its costs from public utilities and others by fixing levies according to section 125 of the UCA and parameters set out in the Levy Regulation, BC Reg. 283/88. The Commission recovers most of its costs by way of a "per gigajoule (GJ)" levy assessed on each regulated utility, based on the volume of energy the utility sold in the previous calendar year. The levy rate for 2014/15 is 1.576 cents per GJ, which also includes a \$525,000 under-recovery from 2013/14. The levy rate has roughly doubled since the early 2000s, a reflection of the significant rise in BCUC expenditures (see section 3.d for a discussion of the BCUC's resource and capacity needs). ICBC is currently levied at \$700,000 per year, a proxy for BCUC regulatory services.

The Commission also recovers proceeding costs directly from utilities for Commission expenditures attributable to public hearings and other proceedings under the UCA. Revenues are also collected from intra-provincial pipeline companies, natural gas marketers, and other utility regulatory agencies that contract with the Commission for advice and assistance.

Most other energy regulators are funded in a similar fashion through a per GJ, per customer or per connection basis along with direct cost recovery for discrete processes/hearings.

Throughout the consultation process, no stakeholder opposed or offered an alternative to the existing per GJ levy funding model. Some stakeholders did note that the Commission should make efforts, when

substantially increasing the levy, to consult with affected utilities. Others suggested the flat fees charged are too low and have not changed in years.

Conclusions

The per gigajoule funding levy should continue as it is currently constituted. When it appears the levy will change substantially, the BCUC should provide sufficient notice to allow utilities to budget accordingly.

ICBC, gas marketer and pipeline fees should be periodically reviewed to ensure cost recovery is reasonably aligned with cost causation.

b. Executive Director Position

Section 7 of the UCA gives the Commission the authority to employ a Secretary and other officers and employees it considers necessary. Since 2007, the BCUC has not retained an Executive Director to assist the Chair in leading staff and the administration of the BCUC.

The Chair is the Chief Executive Officer of the Commission and has supervision over and direction of the work and the staff of the Commission. It is a challenging role: leading the administration of the organization, overseeing Commission tribunal work and sitting as a Commissioner.

Numerous stakeholders have advocated for the reinstatement of the Executive Director or Chief Operating Officer (COO) position as a way to provide senior level staff leadership. Stakeholders believe that an Executive Director would ensure improved communications with government regarding policy, provide a strategic lens to IRs from the Commission, and supervise and direct staff with regard to their work.

Alberta and Washington regulators both have a staff Executive Director or COO, and the NEB has recently split its COO position into two.

Conclusions

The BCUC needs a strong Executive Director who can lead staff participation in all proceedings. With an Executive Director in place, the Chair may be relieved of many administrative duties, making the Chair more available to lead the Commissioners and participate directly in proceedings.

As the accountable lead staff, reporting to the Chair, an Executive Director will provide overarching oversight, coordination, and quality control, resulting in more consistent processes and improved outcomes.

Recommendation

An Executive Director/ Chief Operating Officer position should be restored and legislatively required.

c. Use of BCUC Counsel

As a quasi-judicial body, many stakeholders acknowledged the use of legal counsel is critical. Legal counsel for regulators typically ensure there is focus in completing the evidentiary record and provide guidance and advice in dealing with various regulatory and legal issues in proceedings.

Some jurisdictions rely on the Attorney General's office for legal advice. Others use staff counsel while also retaining the option to use external counsel.

There were no strong opinions shared on whether the BCUC would best be served by staff or contracted external counsel. Many stakeholders felt counsel ability and making effective use of counsel are more important than whether the counsel is internal or external. Some stakeholders advocated for more use of counsel to screen IRs.

Given the restrictions on government salaries, the Commission would likely have difficulty recruiting staff legal counsel, and regulatory legal expertise is highly sought after by utilities.

Conclusion

It appears at this time there is no compelling reason why Commission counsel should be retained on staff as opposed to contracted. The BCUC should regularly evaluate the most cost-effective method of legal representation for the Commission.

d. Capacity and Resource Needs

The annual budget of the BCUC is fully funded by regulated entities and only if there is an under-recovery of expenses is the bottom line of the government's budgetary accounts affected. The BCUC submits its budget to the Minister Responsible to be approved by the Ministry and Treasury Board. While the approved budget has remained unchanged at \$6,674,000 since fiscal 2010/11, the BCUC has felt it necessary to overspend its salaries and benefits and operating costs budget every year since then. In order to finance its operations the subsequent year levy is increased to recover the previous year's deficit by way of a "deferred recovery".

Beginning in 2012, all management and executive salaries were frozen and the performance incentive program dismantled and rolled into base pay as per provincial government direction to the Crown Corporation Employers Association. In 2013, the Ministry of Justice included the Commission in the government wide salary budget reduction program.

The Table below summarizes the Commission's staffing and budgets in the ten years since its mandate was expanded to include the regulation of Basic auto insurance. Before 2003, staff levels hovered around 20 and annual expenditures around \$2.5 million. Year to year workload fluctuations are inevitable, the CEA has introduced complexity, the number of regulated utilities has grown with the addition of some small district energy systems, and duties have expanded to include First Nations consultation adequacy, MRS, and natural gas customer choice. Nonetheless, some stakeholders

consider the upward trend in staffing and expenditures outpaces the increases in the Commission's responsibilities, especially given its role in regulating BC Hydro has been significantly reduced.

Commission Staffing and Expenditures

	Number of Staff (FTE)	Chair and Full Time Commissioners	Part-Time Commissioners	Expenditures	Professional Services (Included in Expenditures)	Professional Services as % of Expenditures
2013/14	38	1	11	\$7,619,000	\$1,426,000	19%
2012/13	34	2	10	\$7,946,000	\$2,065,000	26%
2011/12	30	2	9	\$6,760,000	\$1,759,000	26%
2010/11	28	2	11	\$6,031,000	\$1,384,000	23%
2009/10	28	2	8	\$6,672,000	\$1,829,000	27%
2008/09	26	2	8	\$5,235,000	\$1,276,000	24%
2007/08	27	3	6	\$4,902,000	\$1,028,000	21%
2006/07	25	3	6	\$4,968,000	\$1,202,000	24%
2005/06	25	3	6	\$4,833,000	NRA*	
2004/05	24	3	7	\$4,267,000	\$1,029,000	24%
2003/04	22	3	7	\$4,317,000	NRA	

*NRA = Not readily available

The average number of years of service for Commission staff has declined from 7.8 in 2009/10 to 5.7 in 2013/14. Four experienced senior managers have retired over a seven year period. Consultants may be retained in response to salary range caps and to augment inexperienced staff, which raises costs and may suppress building internal capacity. Attrition rates are also trending upward: one of the reasons for staff turnover is the inability of the BCUC to offer salaries similar to those paid by the utilities it regulates. See section 1.d for a further discussion of staff remuneration.

Information systems at the BCUC are limited by funding and technology requirements that are a result of the BCUC's dependency on the Province's Shared Services Ministry. KPMG's review of BCUC's technology indicates that it is outdated and requires investments as technology limitations lead to reliance on key individuals who have knowledge of precedent and past regulatory practice. Some stakeholders indicated that expanded search capacity on the BCUC website would be helpful.

Conclusions

KPMG's jurisdictional scan indicates that the BCUC's per capita regulatory costs, while having grown, remains relatively low. Regulatory expenditure in British Columbia per capita is \$1.66 compared to an average of \$4.50 per capita across eight other jurisdictions surveyed.

Commissioner and staff compensation range maximums need to be increased. For expenditures other than compensation, it is not possible at this time for the Task Force to determine if the Commission has the appropriate amount of resources. The BCUC and government should first implement the

recommendations from this review, particularly with respect to the BCUC's organizational structure and regulatory and management processes, and then evaluate its resource needs.

In reviewing regulators in other jurisdictions, we observe there is an opportunity to enhance communications between the BCUC and the Province to ensure policy alignment. For example, the OEB and the Energy Minister have a Memorandum of Understanding¹⁸ that lays out respective roles and responsibilities, and an annual OEB Business Plan¹⁹ sets out budget and Board priorities. The AUC also publishes a strategic plan²⁰ that guides the organization and provides performance measures.

The BCUC competes in a competitive labour market to recruit the needed skills to the Commission. Current government salary restrictions should be revised to ensure the BCUC has the ability to retain and recruit the qualified expertise it needs to carry out its mandate.

Recommendations

The Commission should develop a rolling three-year strategic and financial business plan with performance targets and use this as a vehicle to dialogue with stakeholders and the provincial government.

Any government compensation program that affects the BCUC should be designed so that it does not limit its ability to be competitive in recruiting and retaining staff.

The BCUC's budgeting process should be transparent and ensure budgeted and planned expenditures are reflective of its operating environment.

The Province should partner with the BCUC on developing an information technology strategy and evaluate database search engines used by other regulators for application in British Columbia.

e. Performance Measures

For any organization, performance measures enhance transparency and accountability. For the BCUC, developing and adopting performance measures would involve selecting indicators and setting targets, perhaps with input from BCUC stakeholders, and then measuring and reporting on results. Performance measures would be a valuable addition to complete and operationalize the BCUC's draft 2014 Strategic Plan.

In 2003 and again in 2004, the BCUC prepared rolling three year "Service Plans" that included performance measures and targets for each of eight goals. Recent Annual Reports include indicators such as customer complaints, total cost of regulation, and cost of regulation per customer. Earlier Annual Reports contained additional performance indicators, including:

¹⁸ http://www.ontarioenergyboard.ca/oeb/ Documents/About%20the%20OEB/Memorandum_of_Understanding_OEB_MEI.pdf

¹⁹ http://www.ontarioenergyboard.ca/oeb/ Documents/Corporate/OEB_Business_Plan_2013-2016.pdf

²⁰ http://www.auc.ab.ca/about-the-auc/who-we-are/Documents/AUC_Business_Plans/2012-2013%20to%202014-2015%20AUC%20Business%20Plan.pdf

- Cost of regulation per GJ of energy sold; and
- Cycle times (with detailed graphs) for applications dealt with by oral hearings, written hearings, and negotiated settlements.

Earlier Annual Reports also included Commissioner, staff, budget, and per capita cost comparisons with other tribunals, similar to some of the information provided in Appendix B of KPMG's "Performance and Operational Review of the British Columbia Utilities Commission".

For utilities, establishing and reporting on performance measures has been attempted for years. Standard measures for customer service, safety, and reliability allow comparisons with peer utilities. The task is more novel for regulatory tribunals, where there is a tendency to focus on "process" performance indicators rather than qualitative ones. A cogent, well written decision that misses a deadline would usually better serve the public than a hastily prepared one that meets a deadline but leaves it more vulnerable to a legal challenge. Some suggest the BCUC's "value" can be quantified by the difference between the total revenue requirement applied for and the lower total revenue requirement that is approved. Others conclude that the regulator is performing well if there is public and stakeholder confidence that applications will be thoroughly examined and independently judged by proficient staff and Commissioners. The AUC surveys its stakeholders annually to elicit qualitative performance evaluations.

Both the OEB and AUC provide performance measures and targets in their annual business plans. Examples include:

- the "satisfaction index" for the regulator, as measured by an annual stakeholder satisfaction survey, is greater than 75%;
- 97% of complaints/inquiries will be responded to and 80% closed within target timelines of one day (response by e mails), 5 days (response by letter), and 5 days (closed);
- 100% of decisions are issued within 90 days after the close of record;
- Employee satisfaction index as measured by the regulator's employee survey is at least 5% greater than the index for similar organizations participating in the provincial government's annual employee survey; and
- Implement a risk-based approach to the assessment of compliance by retailers and marketers.

Staff compensation and incentive pay may be tied to achieving performance targets.

For the BCUC, Commission costs broken down by proceeding (total Commissioner, staff, and consultant costs) may be an indicator of efficiency of different types of review processes. Responsibility for meeting some targets could be shared with the Province, such as information technology upgrades, competitiveness of Commissioner and staff compensation, and reduced turnaround times for exemption orders requiring government approval.

It is the Task Force's view that performance targets should include turnaround times for various types of applications and decisions, budget management, and complaints investigations.

Recommendation

In consultation with government and stakeholders, the BCUC should establish performance indicators and targets, including but not limited to application cycle times (discussed in section 2.g), and report results on its website and in its Annual Reports.

4. Other Matters

a. BC Hydro: A Different Regulatory Approach

In the Minister's letter, he asked the Task Force to address four additional issues that are pertinent to the regulatory model in British Columbia. The first three of these issues are dealt with in earlier sections. This section discusses whether a different regulatory model for Crown Corporations should apply as compared to investor-owned utilities.

BC Hydro, as a provincial Crown corporation, has a unique relationship with the BCUC. BC Hydro is central to the Province's energy, environmental, and economic development policies, and provides revenues to all levels of governments through dividends, water rentals, taxes, and grants in lieu of taxes.

Significant benefits have been created by having an independent party examine BC Hydro applications. For example, in late 2006, the BCUC rejected a BC Hydro electricity supply contract with Alcan, citing insufficient contract pricing and ratepayer benefits. A renegotiated contract with a longer term, better pricing, and increased capacity was approved in early 2008: after a comprehensive review, the BCUC concluded that the net benefits to BC Hydro ratepayers were now positive under most reasonable future scenarios.

Prior to 1980, BC Hydro's rates and other activities were approved by the Province. The 1980 UCA expanded utility regulation, which previously existed for investor owned utilities, to BC Hydro. Having a publicly owned utility fully regulated by a public agency is unusual, which helps to explain over three decades of exemption orders, court challenges, directions, and legislation that limited or eliminated BCUC's authority to regulate BC Hydro. For example:

- The 1982 *Rate Restraint Act* limited BC Hydro's rate increase to 6%, far short of the 30% that would be necessary in 1983 for BC Hydro to achieve its financial targets;
- Exemption orders allowed BC Hydro to acquire electricity from independent power producers, and its own Seven Mile Unit 4 project, without BCUC oversight;
- A 1992 Direction capped rate increases to two percentage points above the inflation rate;
- As a result of the 1996 *Tax and Consumer Rate Freeze Act*, the 1998 *BC Hydro and Power Authority Rate Freeze and Profit Sharing Act*, and the 2000 *Budget Measures Implementation Act*, BC Hydro rates were essentially frozen from 1994 to 2003; and
- The 2010 CEA exempted most major projects, programs, contracts and expenditures from Commission oversight and moved approval of BC Hydro's Integrated Resource Plan from the Commission to government.

Following policy commitments in the 2002 Energy Plan that the BCUC will once again regulate BC Hydro rates, full BCUC regulation of rates occurred until 2012. BC Hydro's 2011 revenue requirement application for a 9.73% rate increase for three years prompted a government review of BC Hydro, and the revised application for increases of 8%, 3.91% and 1.44% and their approval was directed by government.

In March 2014, the government issued orders to BC Hydro and the BCUC to implement the 10 Year Rate Plan for BC Hydro, setting rate increases and then rate caps until April 2019 via Directions 6 and 7 to the BCUC.

In response to the Minister's letter, the Task Force held another round of written submissions and met with interested stakeholders. The consensus was that, in theory, there should not be a different regulatory model for Crown corporations providing monopoly services as compared to investor-owned utilities. The Task Force agrees with this view.

The Task Force also realizes that, in practice, this theory is unlikely to hold given governments' interest in matters affecting BC Hydro. History shows that for much of the last 35 years, BC Hydro has been operating in a partially regulated manner, with many major decisions being approved solely by governments.

Conclusions

A hybrid approach that allows a review and recommendations by the Commission, while giving government the authority to make the final decision, is available pursuant to UCA section 5. Section 5 requires the BCUC, on Cabinet's request, to provide advice on any matter regardless of whether it is in the Commission's jurisdiction. Section 5 also allows Cabinet to issue Terms of Reference for the inquiry. Government, rather than exempting projects and/or plans through direction and legislation, could direct these projects be subject to a section 5 review and recommendation to Cabinet.

This provides the benefit of a public process and independent verification of projects and plans but reserves the final decision on plans and projects that have broader public interest criteria to be decided by elected officials.

Broader use of section 5 is similar to the approach taken by the Federal government in its recent amendments to the *National Energy Board Act*. These amendments redefined the role of the Board, which is now mandated not to decide on applications for pipeline certificates, but to instead make a recommendation to the Federal Cabinet.

Section 7 of the CEA lists several BC Hydro projects, contracts, programs and expenditures that are exempt from BCUC oversight. Section 8 states that BC Hydro's rates must recover costs incurred with respect to these exempt projects, contracts, programs, and expenditures.

Some have suggested that under the current wording of section 8 of the CEA it is arguable that there are no consequences for BC Hydro if there are cost overruns for expenditures with respect to the section 7

exempted projects, even expenditures incurred in the execution of an exempted project that could be found to be imprudent.

The Task Force believes this interpretation of section 8 is incorrect as the Minister made it very clear in introducing the CEA that the Commission maintained its rate setting powers with respect to projects exempted from review by the CEA.

*These specific clean power procurement processes that provide the power to achieve self-sufficiency will not be put at risk or delayed. They will be exempt from costly and time-consuming reviews under the Utilities Commission Act, yet they will still be subject to the B.C. Utilities Commission oversight with respect to rate-setting requirements*²¹

Furthermore, BC Hydro has recognized the Commission's oversight of its prudence in incurring costs in executing exempt projects under the CEA in the past²².

The Task Force is of the view that it is an important part of the Commission's mandate that once policy approval has been given to an exempt project, the BCUC ensure that it is executed in a prudent manner.

Recommendations

Government should make use of section 5 inquiries for projects and plans that it may otherwise wish to exempt.

Government should confirm the Commission's ability to undertake prudency reviews of the execution of exempted projects.

b. Investor Owned Water Utilities

Private water utilities are regulated under the *Water Utility Act*, where a "water utility" is defined as a person or business that owns or operates waterworks serving five or more connections for compensation. There are currently 135 water utilities serving approximately 30,000 households. Most were created to enable residential or recreational developments in rural areas where other water authorities, such as regional districts, did not yet exist or were unwilling to provide service. Other water systems are publicly operated by local governments and are not subject to the *Water Utility Act*.

The Utility Regulation Section in the Water Management Branch, Ministry of Forests, Lands, and Natural Resource Operations (the Water Comptroller), has regulated water utilities since 1972. Unlike the BCUC, the Water Comptroller does not recover its costs from utilities but instead is taxpayer supported. The Utility Regulation Section program functions with a budget of about \$500,000 per year and five staff; however, staff have other water management responsibilities in addition to utility regulation.

Moving the economic regulation of private water utilities, BC Ferries, and ICBC to the BCUC was considered as part of government's 2002 Core Services Review. It was proposed that the BCUC could

²¹ BC Hansard, May 26, 2010. p. 5789

²² BC Hydro 2011 Revenue Requirement Hearing, Procedural Conference May 28, 2010, p. 32.

achieve efficiencies by deregulating all but the largest water utilities and leaving the rest to be regulated on a complaints basis. Government concluded that the Water Comptroller would retain regulatory authority for several reasons, including health concerns related to water quality, increased BCUC workloads arising from taking on the regulation of ICBC, and an unwillingness to transfer staff and budget from the Water Comptroller to the BCUC.

In meetings with stakeholders, it was again suggested to the Task Force that there may be efficiencies in moving water utility regulation to the BCUC. In the July 15, 2014 Minister's letter, he asked the Task Force to explore the potential efficiencies that could be gained from BCUC regulation of private water utilities.

The Task Force met or had conference calls with four private water utilities serving between 80 and 7,000 connections. Others declined to meet, saying they were generally satisfied with the status quo. We also met with three Water Comptroller staff. Five stakeholders provided comments in written submissions. In general, we heard that:

- The current rate regulation process works well;
- Relationships between private water utilities and the Water Comptroller are effective and efficient;
- If regulation of private water utilities was to move to the BCUC, there is value in preserving the Water Comptroller staff's regulatory and institutional knowledge; and
- The Water Comptroller's "break even" approach to setting water rates for most systems keeps rates lower but discourages investment.

AMPC commented that water utilities are similar to capital intensive "pipe and wire" energy monopolies and these natural monopolies would be most efficiently regulated by a single commission. CEC submits that both private sector water and sewer utilities be brought under the auspices of the BCUC to enable quasi-judicial resolution of complaints. Lawson Lundell considers that efficiencies from a consolidation would only be possible if the Water Comptroller's institutional knowledge and practices were largely kept intact. FortisBC suggests that adding water utilities to the BCUC's mandate would present an additional challenge to its ability to improve the efficiency and effectiveness of the existing regulatory model.

Water Comptroller staff advised the Task Force of their initiatives to address small water system issues with the Union of British Columbia Municipalities, Ministry of Health, and several local governments, and that deregulation would not be supported by these and other agencies.

Many water utilities are finding it difficult to upgrade aging infrastructure and meet more stringent drinking water standards. These delays contribute to Health Authorities' issuing Boil Water Notices, and occasionally the abandonment of utilities that then escheat to the Province. With 85% of private water utilities having fewer than 100 connections, the ability to increase rates for capital improvements without creating rate shock may be difficult. Only two of the larger private water utilities (EPCOR White Rock and Water West) are allowed a rate base-rate of return capital structure; many others lack the reserve or trust funds to adequately maintain their infrastructure.

Corix suggests moving the regulation of private water utilities to the BCUC would enable a return on equity model, leading to more investment in utility system upgrades. While many water utilities must set aside a small percentage of the capital value into a Replacement Reserve Fund and are able to earn an “operating risk margin” of up to 10% on operating, maintenance, and administrative expenses, Corix argues that this return is small when compared to the cost of service-return on equity approach for the BCUC’s regulated energy utilities.

Conclusions

The Task Force concludes that any efficiencies to be gained by transferring the regulation of water utilities to the BCUC would be minimal, and a transfer could bring new challenges. Given the risk that senior staff would not relocate, the Province could lose their expertise and experience at a time when succession planning should already be a Ministry management priority. If government considers the Water Comptroller’s regulatory costs to be burdensome it could potentially save several hundred thousand dollars a year by adopting a levy regulation under the *Water Utility Act* (similar to the BCUC’s Levy Regulation) and still keep the function with the Water Comptroller.

The regulatory model used by the BCUC is only applicable to two of the 135 water utilities. This means that the BCUC would be required to learn and adopt the existing Water Comptroller’s rate setting methodology. An alternative would be to apply a deemed rate base and capital structure to some of the larger ones, which would translate to large rate increases.

Most of the issues facing private water utilities, including aging infrastructure, compliance with drinking water standards, compliance with reporting and trust fund contributions, escheat, and lack of management capacity, would not be resolved by moving regulation to the BCUC. Rather, a better solution would be having the Water Comptroller consider transitioning to a return on equity and cost of service model to ensure that water utilities are financially viable and capable of providing quality service to their customers. It may also encourage metering and other demand side measures to reduce wasteful consumption and delay the need for capacity additions.

Recommendation

The regulation of private water utilities should remain with the Water Comptroller.

c. ICBC

After government’s 2002 Core Services Review, the BCUC was appointed as the independent regulator for ICBC with the responsibility to approve rates for Basic insurance under the *Insurance Corporation Act*. The regulation of ICBC is unique as only certain sections of the UCA apply to it (e.g. it is not deemed a public utility and it does not have to apply for CPCNs).

A public utility’s revenue requirement is mostly comprised of operating and maintenance costs and capital/infrastructure costs. For ICBC, these costs are only around 15% of its total costs. Around 80% of

ICBC's "revenue requirement" for providing Basic insurance relates to processing and paying out claims (claims costs). Claims costs used in ratemaking are best estimates, based on accepted actuarial practice.

A critical piece of the legal regulatory framework for ICBC's Basic insurance is the regulation Special Direction IC2²³ to the BCUC, as amended. The Special Direction is highly prescriptive in specifying how the BCUC is to exercise its jurisdiction.

In its Written Submission, ICBC concluded that overall the regulatory process works reasonably well, although there are opportunities for improvements. For example, ICBC noted that BCUC processes tend to focus on operating costs, which make up a small percentage of ICBC's revenue requirements and have little or no impact on Basic insurance rates relative to claims costs. By taking a more risk-based and strategic approach to the regulatory process for rate setting and compliance reporting, it believes there are efficiencies to be gained from the current ICBC regulatory system.

Canadian Direct Insurance submits that the Alberta Insurance Rate Board rate setting model is superior as it takes less time and is less formal. Canadian Direct also suggests the use of Commissioners who have past experience with ICBC matters.

Conclusions

On balance, the regulatory model for ICBC works reasonably well although there is room for improvement. ICBC and the Commission should pursue ICBC's suggestions contained in its submission regarding a streamlined review process, independent BCUC actuarial reviews, operating cost reviews, basic/optional allocation methodology, and compliance reporting as opportunities to improve regulatory efficiency and effectiveness.

The Task Force notes how government makes ICBC's policy direction clear to the BCUC. A Minister's letter that is attached to an Order in Council²⁴ acts as the mechanism by which government explains its policy with respect to ICBC. This clarifies government priorities, makes expectations clear and mandates specific timelines. The letter is directed to ICBC but acts to guide the Commission in its decision making.

There are other recommendations contained in this Report that, while not specific to ICBC, will improve ICBC's unique regulatory treatment. These include the need for the BCUC to better manage IRs and compliance reporting.

d. Public Communication

The Commission plays an important role in protecting the public's interest by setting rates and assessing plans and projects. Other regulatory bodies more effectively communicate their decisions, ensure the public understands the regulator's role and correct errors when they are reported in the media. One of the legislated objectives for the OEB is to "Promote...the education of consumers" on natural gas

²³ http://www.bcuc.com/Documents/SpecialDirections/OIC_647_SD-IC2.pdf

²⁴ <http://www.bcuc.com/Documents/SpecialDirections/2013/OIC-153-ICBC.pdf>

matters. The AUC has an information services group that publishes a series of pamphlets and brochures.

Recommendations

As time and resources permit, many of the detailed Commission Guidelines and Policies should be condensed and published as pamphlets.

For high profile decisions, the Commission should consider issuing news releases and fact sheets to help the media and public understand the decisions.

5. Summary of Recommendations

Governance Recommendations	
Independence of the BCUC	
Government's policy objectives and directives should be clear and understandable to ensure policy alignment by the Commission.	
When issuing directions to the Commission, the Task Force recommends the following guidelines:	
<ul style="list-style-type: none"> • Directions should not dictate specific outcomes or intrude into the BCUC's consideration of individual applications; • Directions should be timely and issued before proceedings begin; and • Policy statements are not necessarily legally binding; where a policy is to be mandated it should be made in a legally effective way, such as a direction under section 3 of the <i>Utilities Commission Act</i>. 	
Government should consider updating both the Energy Plan and the <i>Clean Energy Act</i> to ensure they are consistent with current government policies.	
Legislative Framework	
The <i>Utilities Commission Act</i> should be amended to clarify the Commission's ability to forebear, or decline to regulate, in specified circumstances.	
Amendments to the definition of "public utility" should be considered to exempt services and facilities where Commission regulation is not warranted.	
The existing exemption processes should be streamlined by requiring a Minister's Regulation for all exemption proposals, rather than Cabinet approval for some.	
Government should review and amend the energy objectives in the <i>Clean Energy Act</i> to reduce conflicts among them, and between them and the <i>Utilities Commission Act</i> .	
The requirement, unique to BC Hydro, in the <i>Utilities Commission Act</i> that the Commission "must consider and be guided by" the <i>Clean Energy Act</i> energy objectives should be changed to a requirement that the Commission "must consider" the energy objectives, just as it does for all other utilities.	
Commissioners	
The recruitment process for the Commission needs to be changed dramatically. Higher compensation must be offered and the Chair must be actively involved in recruiting candidates with recognized expertise that meets the needs of the Commission at the time of hiring.	
Two full-time Commissioners, in addition to the Chair, with recognized and relevant expertise, should be added as soon as possible.	
The number of part-time Commissioners should be reduced to the point they approximate the number of full-time Commissioners.	

Staff Remuneration
Government should continue to approve BCUC's compensation framework but increase the upper limit of compensation ranges in line with market levels so the Commission is competitive in recruiting and retaining qualified individuals.
Process Recommendations
Guidelines and Policies
The BCUC should periodically review existing guidelines and policies to ensure they remain useful, effective and up to date. In particular, the Commission should improve or issue minimum content guidelines for common applications such as facility and revenue requirement applications.
Scoping or Defining Issues in Proceedings
The Commission should work with applicants and stakeholders early in a hearing process to define the issues in the proceeding.
Information Requests
All proposed information requests from BCUC staff and consultants should be reviewed by senior staff, by legal counsel, and possibly the Panel.
Intervener Participation
The BCUC should formalize its policies on granting intervener status and publish them.
Government should not establish an independent consumer advocate.
Participant Assistance/Cost Award Guideline per diem rates and interim award policies should be reviewed.
When appropriate, the BCUC should use its authority under section 116 of the <i>Utilities Commission Act</i> to retain counsel to act on behalf of underrepresented interests.
Section 116 of the <i>Utilities Commission Act</i> should be amended to remove the need for the Attorney General's approval when the Commission hires counsel to represent underrepresented interests.
Application Cycle (Turnaround) Times
The BCUC should develop performance targets for key application cycle times and report on them annually.
Compliance and Reporting
The BCUC should make additional efforts to ensure all compliance reports are necessary and useful, and eliminate the reporting requirement for those that are not.
The BCUC should place more responsibility on regulated entities to report, on an exception basis, deviations from forecasts that could affect costs and rates, instead of routine reporting.
The BCUC should reconsider the need for a separate Performance Monitoring, Conduct and Compliance group as the best way to manage the compliance reporting function.

Performance Recommendations
Executive Director Position
An Executive Director/ Chief Operating Officer position should be restored and legislatively required.
Capacity and Resource Needs
The Commission should develop a rolling three-year strategic and financial business plan with performance targets and use this as a vehicle to dialogue with stakeholders and the provincial government.
Any government compensation program that affects the BCUC should be designed so that it does not limit its ability to be competitive in recruiting and retaining staff.
The BCUC's budgeting process should be transparent and ensure budgeted and planned expenditures are reflective of its operating environment.
The Province should partner with the BCUC on developing an information technology strategy and evaluate database search engines used by other regulators for application in British Columbia.
Performance Measures
In consultation with government and stakeholders, the BCUC should establish performance indicators and targets, including but not limited to application cycle times (discussed in section 2.g), and report results on its website and in its Annual Reports.
Recommendations on Other Matters
BC Hydro: A Different Regulatory Approach
Government should make use of section 5 inquiries for projects and plans that it may otherwise wish to exempt.
Government should confirm the Commission's ability to undertake prudency reviews of the execution of exempted projects.
Investor Owned Water Utilities
The regulation of private water utilities should remain with the Water Comptroller.
Public Communication
As time and resources permit, many of the detailed Commission Guidelines and Policies should be condensed and published as pamphlets.
For high profile decisions, the Commission should consider issuing news releases and fact sheets to help the media and public understand the decisions.

Appendices

Appendix 1: Terms of Reference and Minister's Letter

INDEPENDENT REVIEW OF THE BRITISH COLUMBIA UTILITIES COMMISSION

Background

The British Columbia Utilities Commission (BCUC) is an independent regulatory agency of the Provincial Government that operates under and administers the *Utilities Commission Act* (1980). Its primary responsibility is the regulation of British Columbia's natural gas and electricity utilities. It also regulates intra-provincial pipelines, many district heating systems and universal compulsory automobile insurance. The BCUC approves projects and costs, and sets rates, while ensuring utilities provide safe and reliable service. As a quasi-judicial tribunal, the BCUC makes decisions based on evidence, and abides by standards of procedural fairness. BCUC proceedings include expert testimony, cross-examination of evidence, and final arguments.

Like other utility regulators, the BCUC's mandate under the *Utilities Commission Act* is to ensure that ratepayers receive safe, reliable and non-discriminatory energy services at fair rates from the utilities it regulates, and that shareholders of those utilities are afforded a reasonable opportunity to earn a fair return on their invested capital.

During the recent Industrial Electricity Policy Review (IEPR), customer groups and utilities frequently raised concerns about the BCUC. As a result, the IEPR Task Force recommended an independent review of the BCUC to evaluate resource needs, review processes, and performance. Government is initiating a review of the BCUC, through the Core Review process, with the goal of increasing the BCUC's effectiveness and efficiency.

Independent Task Force

The Minister of Justice and the Minister Responsible for Core Review hereby authorize a Review of the BCUC as set out in these Terms of Reference.

Further, the Minister Responsible for Core Review appoints a Task Force consisting of three members to implement the Review:

- Michael Costello
- Peter Ostergaard
- Brian Wallace

Scope

The Task Force will review, evaluate and make recommendations respecting the following:

1. A review of comparable utility regulators and models in other jurisdictions, along with key benchmarks.
2. BCUC processes:
 - a. Existing levy funding model and possible alternatives;
 - b. Timeliness, effectiveness, efficiency and cost of reviews;
 - c. Standing/funding for interveners;
 - d. Review processes:
 - d.i. Conventional oral and written public hearings;
 - d.ii. Alternative review processes, including expedited hearing processes and negotiated settlement processes;
 - d.iii. Involvement of the BCUC in alternative regulatory processes;
 - d.iv. Generic proceedings on specific issues that apply to more than one utility;
 - d.v. Opportunities to make hearing processes more efficient and more focused;
 - d.vi. The role, effectiveness and use of guidelines and policies;
 - d.vii. Application cycle (turnaround) times and establishing timelines for reviews and decisions; and
 - d.viii. Coordinated regulatory processes.
3. Structure, resource needs and performance of the BCUC (including but not limited to):
 - a. Review the use of stakeholder representation models in other jurisdictions and implications on the role of staff;
 - b. Recruitment, retention and compensation of BCUC staff and Commissioners, and staffing levels;
 - c. Organizational structure and BCUC composition, including:
 - c.i. Potential Vice-Chair and Executive Director positions;
 - c.ii. Full-time versus part-time Commissioners;
 - c.iii. Experience and knowledge;
 - c.iv. The need for regulatory process and utility expertise; and
 - c.v. Use of BCUC Counsel.
 - d. Efficiency (value for money) and effectiveness of operations and performance, including:
 - d.i. Identify standard (reported) performance measures to be reviewed or recommend measures to be developed;
 - d.ii. Identify operational impediments; and
 - d.iii. Identify specific opportunities for improvements.
4. In consultation with the Minister of Justice and the Minister Responsible for Core Review, any other matters arising over the course of the review that the Task Force considers significant.

Task Force Operations and Procedures

The Task Force will solicit input from stakeholders with an interest in the BCUC, including regulated utilities, interveners and current and former BCUC staff and Commissioners. While the Task Force has discretion over how it chooses to engage stakeholders, a consultation record is to be kept and will be made public unless input is explicitly requested to be kept confidential.

The Task Force will have access to technical expertise from the Ministry of Energy and Mines, and has the discretion to create any consultative bodies and/or retain independent technical advice it deems necessary to ensure it receives the information it requires to meet the objectives set out in these Terms of Reference, subject to available budget.

Reporting

The Task Force will report back to the Minister of Justice and the Minister Responsible for Core Review with the following:

1. A summary of consultations with stakeholders on matters contained in these Terms of Reference;
2. A summary of submissions from stakeholders;
3. An interim Report, due October 1, 2014; and
4. A final Report, due November 17, 2014, including suggestions for legislative and regulatory amendments.

Secretariat Support

The Ministry of Energy and Mines will provide secretariat support to the Task Force.



JUL 15 2014

Mr. Peter Ostergaard
Chair
BC Utilities Commission Review Task Force
4460 Houlihan Court
Victoria, BC V8N 6C6

Dear Mr. Ostergaard:

On April 28, 2014, Honourable Suzanne Anton, Minister of Justice and Attorney General and I issued a Terms of Reference (ToR) for the independent review (Review) of the BC Utilities Commission (BCUC). The ToR appointed a Task Force consisting of you, Mr. Michael Costello and Mr. Brian Wallace. I understand that the Task Force has recently completed its first round of consultations and would like to thank you for your efforts to date.

I have been briefed by Ministry staff on the first round of submissions from interested stakeholders and reviewed your interim Consultation Summary. I believe certain issues have been raised by stakeholders that were not explicit in the ToR for the Review, and that stakeholders and government would benefit from exploring these issues further. These issues include, but are not limited to:

- The potential efficiencies that could be gained from BCUC regulation of private sector water utilities.
- Issues that have been raised regarding the regulatory model in British Columbia, including:
 - Mechanisms for government to provide clear and timely policy direction;
 - The appropriate application of the energy objectives in the *Clean Energy Act*;
 - Options for clarifying the roles and mandate of the Province and the BCUC with respect to utility regulation; and
 - Whether a different regulatory model for Crown corporations should apply as compared to investor-owned utilities.

I would also like to clarify the deliverables that are required from the Task Force as per the ToR. Deliverables #1 and #2 require you to submit a summary of consultations with stakeholders on

Ministry of
Energy and Mines and
Minister Responsible
for Core Review

Office of the Minister

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Facsimile: 250 356-2965

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matters contained in the ToR followed by a summary of submissions from stakeholders. Given the available time for the Review to complete its work, and the issues identified above, it would be preferable for the Task Force to provide one general consultation summary based on the Task Force's discussions with stakeholders and written submissions rather than two separate summary documents.

Please contact Mr. Les MacLaren, Assistant Deputy Minister, Electricity and Alternative Energy Division, if you have any further questions. Mr. MacLaren can be reached at (250) 952-0204 or les.maclaren@gov.bc.ca.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bill Bennett', with a long horizontal flourish extending to the right.

Bill Bennett
Minister

Pc: Honourable Suzanne Anton

Appendix 2: Final Consultation Summary

Introduction

The Terms of Reference for the independent Core Review (Review) of the British Columbia Utilities Commission (BCUC, the Commission) direct the Review Task Force to solicit input from interested stakeholders and to prepare a summary of consultations with stakeholders on matters contained in the Terms of Reference¹. On July 15, 2014, the Minister of Energy and Mines sent the Task Force a letter (referred to as the Minister's letter²) which noted certain issues that were not explicit in the Terms of Reference and asked the Task Force to explore these issues further. The Minister's letter also clarified that only one general consultation summary was needed. This final consultation summary condenses the main points and themes of in-person meetings, conference calls and written submissions.

The Task Force met or spoke with any stakeholder who expressed interest, and asked its secretariat to seek meetings or calls with specific groups or individuals to attempt to ensure balanced input over four rounds of verbal and written consultation opportunities. The four rounds of consultation included:

- Round 1: Opportunity for stakeholders to provide verbal and written comment on the issues relevant to the Terms of Reference.
- Round 2: Opportunity for stakeholders to provide verbal and written comment on issues raised as a result of other stakeholder's submissions, or clarify a previous submission.
- Round 3: Provide comments on the issues raised in the Minister's letter to the Task Force or any new issues that were raised as a result of Round 2 submissions.
- Round 4: Opportunity for stakeholders to provide written comment on the Interim Report.

Between April 24 and August 11, 2014, the Task Force held over 30 meetings and 12 conference calls with over 50 people, representing energy utilities, First Nations, customer and industry groups, the Insurance Corporation of British Columbia (ICBC), private water utilities, gas marketers, and legal firms. These meetings and calls proceeded on the understanding that the comments and opinions would not be for attribution (i.e., nothing in subsequent Task Force reports would identify, implicitly or explicitly, "who said what"). Meetings and calls were generally framed around the Terms of Reference or the Minister's letter, and most lasted between 30 and 60 minutes.

¹ <http://www.empr.gov.bc.ca/EEC/Strategy/EEA/Documents/Terms%20of%20Reference.pdf>

² <http://www.empr.gov.bc.ca/EEC/Strategy/EEA/Documents/Minister%27s%20Letter%20to%20Task%20Force.pdf>

The Task Force also received 43 written submissions through the four rounds. These written submissions are available online³.

In addition, Task Force members, either individually or as a group, met with approximately 20 current and former BCUC staff and Commissioners. The Task Force also met or had calls with the National Energy Board, the Alberta Utilities Commission, the Alberta Utilities Consumer Advocate, the Washington Utilities and Transportation Commission, the Ontario Energy Board, Manitoba Public Utilities Board and individual experts from other jurisdictions. Table 1 provides a summary of the consultations the Task Force undertook.

Table 1: Task Force Consultations

	Round One Written and Verbal Comments on Terms of Reference Matters			Round Two Comment and Clarifications Round One Submissions			Round Three Water Utility Regulation and Other Minister's Letter Matters			Round Four Written Comments on Interim Report
	Meetings	Conference Calls	Written Submissions	Meetings	Conference Calls	Written Submissions	Meetings	Conference Calls	Written Submissions	Written Submissions
Major Energy Utility	3		3	1		2			2	2
Other Energy Utilities	3	3	4							
ICBC	1		1		1					1
ICBC Interveners			1							
First Nations			1		1	1			1	1
Consumer, Industry and Environmental Interveners	5		6	2		1			3	1
Legal Counsel Firms	3		2						1	1
BCUC Staff (Current and Former)	12	3	1			1			1	
Gas Marketers	2									
Water Utilities	1		1					4	1	
Water Regulation Staff							1		1	
Other			2							
Totals	30	6	22	3	2	5	1	4	10	6

This consultation summary is organized around four themes that emerge from the detailed topics listed in the Terms of Reference and the Minister's letter:

³ http://www.empr.gov.bc.ca/EPD/Electricity/BCUC_Review/Pages/default.aspx

1. **Governance:** matters affecting the BCUC that are external to it, including the legislative framework, regulations, directives, directions, and policies.
2. **BCUC Processes:** matters that are mostly within the BCUC's control as an administrative tribunal, including the ways it manages its proceedings.
3. **BCUC Performance:** matters largely associated with BCUC's management, including capacity, resource needs, and organizational efficiency and effectiveness.
4. **Other** matters raised by the Minister's letter or that stakeholders consider important.

The views in this consultation summary are intended to condense the main points raised in meetings and submissions by stakeholders as they were articulated, and as such they do not necessarily represent the Task Force's views. Despite diverging views on some topics, there was broad consensus that this Review is timely, and that the BCUC performs a service that is essential for British Columbians.

Governance

Independence of the BCUC

There was broad consensus that to be effective, the BCUC needs to have credibility and independence while working within the policy parameters set by government.

Clarity of roles and mandates

While many indicated that the underlying government-regulatory structure with respect to utility regulation is sound, others expressed the need to clarify the respective roles and mandates of the Government and the BCUC with respect to utility regulation. Some stakeholders suggested that the BCUC regulatory model might differ for a Crown corporation as compared to investor-owned utilities. For example, section 5 inquiries could be used to make recommendations to government, rather than decisions, on projects and plans, especially those of BC Hydro. Other stakeholders advocated that there should be no difference in the regulatory treatment of Crown owned utilities and investor owned utilities.

Clean Energy Act conflicting objectives

Some stakeholders noted that provincial energy objectives listed in the *Clean Energy Act* are competing and may conflict with one another or with the *Utilities Commission Act* (UCA), and that the requirement for the BCUC to consider these objectives in their decisions complicates decision making processes. Stakeholders have indicated that opportunities to rationalize or prioritize the energy objectives may exist.

Clearly articulated and pre-emptive policy directives

Numerous stakeholders advocated for government to provide policy clarity for the BCUC around general (high level) policies to be applied relating to utility regulation. Stakeholders also advocated for government, once it has set the policy context, to not interfere further in regulatory processes. Some felt government should register as an intervener in BCUC

proceedings more frequently as one way to provide policy clarity, for example, by answering information requests or providing submissions. It was suggested that when guidance comes from government, it is often after the fact and sometimes amounts to micromanagement of utilities. Many stakeholders indicated that the appropriate tools exist to provide policy guidance but how these tools are used may sometimes be problematic.

Appointment of Commissioners:

- *Selection process*
Several stakeholders questioned how BCUC Commissioners are selected. Some indicated that the BCUC Chair should have significant input into Commissioner selection. There was consensus among stakeholders that Commissioners should be selected based on appropriate skill sets and experience. Some noted that those responsible for recruitment and appointments may not have an appreciation of the specialized knowledge, skills, experience and abilities required to serve as a Commissioner. Many stakeholders asserted the importance of having well-rounded panels of Commissioners with recognized relevant experience, skills and knowledge. It was noted that, at present, only a few of the Commissioners have direct utility or energy related experience.
- *Full-time/ part-time Commissioners*
Most stakeholders said that the use of full-time Commissioners (three to five) is more favourable than the use of numerous part-time Commissioners. It was noted that scheduling issues occur with semi-retired, part-time Commissioners which would not occur as frequently with more full-time Commissioners. Some stakeholders said they are more interested in Commissioners' expertise and skill set rather than whether Commissioners are full- or part-time. It was expressed that there is value in bringing in part-time Commissioners with specialized expertise (e.g., cost of capital hearings). Written submissions from most stakeholders also supported the concept of more full-time Commissioners.
- *Term*
A few stakeholders expressed that appointment terms for Commissioners should be longer and staggered.

Compensation of Commissioners

Many stakeholders stated that current compensation ceilings are not sufficient to attract top quality candidates, especially for full-time positions. Most stakeholders supported having higher salaries and per diems for full-time and part-time Commissioners, respectively. Most written submissions addressed Commissioner compensation and those that did support a competitive compensation framework. It was expressed that BCUC decisions have economic significance to the Province as a whole, yet its Commissioners are paid far less than some others (e.g., the British Columbia Securities Commission). It was also noted that the Participant Assistance/Cost Award (PACA) per diem for the most junior consultants is higher than the part-time Commissioner per diem.

Staff remuneration

Several stakeholders noted that staff remuneration, determined via the Public Sector Employers' Council, is not competitive with utility salaries which make it challenging to recruit and retain qualified senior level utility expertise to the BCUC. Most stakeholders supported a more competitive compensation framework. Several observed that staff turnover seems high and linked this to compensation levels at the BCUC. Written submissions to the Task Force supported a competitive compensation framework for BCUC staff.

Legislative framework and mandate

Some stakeholders reported that the UCA is in need of updating. They suggested that the UCA gives a broader mandate to the BCUC than that of most other energy utility regulators, noting that the priority amendment would be to narrow the broad definition of public utility, especially with consideration of the changing energy market place (e.g., small thermal energy systems, biofuels).

Some stakeholders raised the issue of removing ICBC from BCUC oversight and perhaps using the existing provincial insurance regulator, the Financial Institutions Commission, to assume this role given the BCUC's focus on energy utilities. It was noted that when reviewing ICBC applications, the BCUC focuses on operating costs, which make up only five percent of ICBC's revenue requirement.

A couple of stakeholders suggested that there could be operational efficiencies achieved by incorporating the regulation of BC Ferries and private water utilities into the BCUC's mandate.

Process

There was recognition that the BCUC is generally effective at making good use of the application review processes available to it, including written and oral hearings, negotiated settlement processes and the streamlined review processes.

Several stakeholders expressed that strategically defining the issues and scope of proceedings before they begin would expedite reviews. This was supported in numerous written submissions by stakeholders who indicated that development of either an issues list or some form of BCUC panel scoping limiting the subject matter under review would lead to more effective and efficient BCUC review processes.

Oral and written processes

A few stakeholders favour periodic oral hearings, particularly for controversial issues, suggesting that oral hearings can be more effective and efficient for addressing ratepayer interests. In contrast, others criticized oral hearings for being more time consuming and costly. Some stakeholders indicated that written hearings are appropriate for applications for smaller systems, revenue requirements, rates, and infrastructure projects.

Views presented on the Certificate of Public Convenience and Necessity (CPCN) experiences varied from satisfied (fair, straightforward process; 6 to 7 month turnaround; staff helpful), to dissatisfied (a year-long process for \$3 million project).

Streamlined reviews, negotiated settlement processes

Utility stakeholders indicated that the streamlined review and negotiated settlement processes work well. In contrast, concern was expressed by some intervenor groups that expedited processes favour utilities and it can be problematic when there is minimal opportunity for intervenors to consult with experts.

Intervenor funding and standing

Several stakeholders noted that intervenor funding has led to more groups participating. There are differing opinions expressed by stakeholders about all participants being allowed to intervene versus setting criteria to limit standing. Some stakeholders suggested that BCUC policies to evaluate the contribution of intervenors, and deny funding to intervenors who do not add value, seem to be working.

From different perspectives, stakeholders acknowledged challenges associated with decisions awarding PACA funding occurring after the BCUC Decision is issued. One perspective presented is that assessing usefulness (making decisions on intervenor funding) at the outset would help streamline the process. Another perspective is that it would be easier to retain consulting expertise to provide evidence if there was assurance at the outset that a consultant will be paid.

Intervenor groups noted that PACA rates have not changed since 2007.

A few stakeholders expressed that business competitors of the regulated utility should not receive intervenor funding, which amounts to a subsidy of competitive interests by ratepayers. Other stakeholders indicated that PACA funding should be linked to ability to pay.

Consumer advocate

There were concerns expressed about the best method to get residential class input into BCUC processes. There was a variety of opinions on pursuing a consumer advocate model. Stakeholders who had experience in other jurisdictions cautioned that a consumer advocate can create an adversarial approach and that there are challenges of ensuring the independence of a consumer advocate. A few stakeholders expressed that a consumer advocate would need to be separated from the BCUC to ensure it remains independent. It was also suggested that a separate office may not be necessary; rather the Commission could hire external counsel for a specific term to fulfill this role. Some stakeholders indicated that any potential budget for a consumer advocate should reduce the total amounts awarded under the current PACA Guidelines, and continue to be funded by utility applicants, not by government.

A number of stakeholders said that BCUC staff could be assigned a consumer advocacy role for some proceedings. Some stakeholder groups said this would serve them well and that the BCUC does a good job balancing interests, while others said that by being advocates, staff had not always demonstrated the required impartiality and procedural fairness.

Written submissions generally did not support the creation of a separate utility consumer advocate and highlighted that issues surrounding independence, costs and relationship with existing interveners should be considered if any type of advocate function is considered.

Compliance and reporting

Some utilities reported that the Administrative Penalties Regulation is adding to their regulatory reporting burden. A few stakeholders acknowledged the importance of compliance enforcement for extreme measures and expressed the perception that the compliance monitoring focus was on less significant details such as rounding errors, rather than managing for important compliance matters. Some stakeholders believed that the Commission establishes too many conditions that require compliance monitoring and advocated for a more efficient way to address compliance matters.

It was noted that the BCUC has lacked internal expertise to set and enforce international Mandatory Reliability Standards in the electricity sector.

Timelines

Although some stakeholders did not raise concerns, many took issue with review timelines. A segment of stakeholders voiced the need for shorter turnaround times, suggesting that they seem to be extending. Several stakeholders expressed interest in having targeted decision dates in the regulatory timetable. Most stakeholders did not support establishing timelines in legislation although they did want to increase the BCUC's accountability to deliver timely decisions.

Several stakeholders acknowledged that the BCUC's role in assessing the adequacy of First Nations consultations has affected timelines.

For facilities application reviews, a few stakeholders expressed the need for the BCUC to focus on alternatives that are realistic, adding that examining unreasonable alternatives adds cost and time with no benefit.

Information requests (IRs)

There was broad consensus amongst the major utilities that the number of IRs continues to increase which leads to long, drawn out processes. Some noted that the number of IRs have grown five- to seven-fold since the 1990's for similar reviews, with many IRs originating from BCUC staff, not interveners. Some stakeholders suggested that there are a variety of reasons for this, including the quality of the applications, more complex filings, expertise and experience of staff, the use of consultants unfamiliar with the utility under review, and excessive concern about the need to complete the evidentiary record.

It was noted that some IRs originate from competitive interests looking for information on non-regulated business that has no bearing on the application or process at hand.

A few stakeholders indicated that a strengthened pre-application phase that clearly identifies what needs to be in the formal application could resolve this issue. Some stakeholders indicated that a transcribed pre-application workshop could reduce the number of subsequent IRs and build the evidentiary record. Stakeholders also believed that strengthened senior level leadership and a more strategic approach by the BCUC would reduce the number of IRs.

Use of guidelines

Several stakeholders advocated for more guidance on application information requirements and provided examples relating to guidelines that have or can be used. For example, the former "Guide to the Energy Project Review Process" under Part 2 of a previous version of the UCA set out recommended steps prior to application submission.

Structure, Organization and Performance

Levy funding

Stakeholders did not suggest alternatives in meetings or in written submissions to the levy funding model. There was general agreement that the current levy funding model should continue. However, it was suggested by some that the funding model should better align cost recovery to cost causation, as some regulated entities pay nominal amounts yet occupy substantial BCUC resources. There was also concern expressed about escalating levy payments and the lack of notice of potential increases.

Capacity of the BCUC

Some stakeholders believed that the increase in the budget and number of employees at the BCUC has increased at a pace that is not commensurate with their responsibilities. Others believed that the BCUC's mandate has expanded significantly to address issues such as Mandatory Reliability Standards, assessing the adequacy of First Nations consultation, the Customer Choice program, and demand side management.

Executive Director

Many stakeholders emphasized that having strong staff leadership with a good grasp of the utility sector is important. Without a senior staff position, the Chair is responsible for ongoing management and administration of the Commission while also managing Commissioners and hearing processes.

There was universal support in meetings and written submissions for the recruitment of an Executive Director or Chief Operating Officer at the Commission. Some stakeholders felt that an Executive Director would enable the BCUC to have more effective engagement with the Province and ensure policy alignment.

Staff experience, turnover, and consultants

Several stakeholders expressed concerns with a lack of staff continuity on files with some wondering if staff are reassigned for training purposes. Similarly, some suggested that the IR process seems to be used to educate and inform inexperienced staff and consultants. Staff turnover was noted as an issue; possible reasons given included job dissatisfaction, inadequate pay, and opportunities for advancement in utilities.

Many stakeholders identified that a strong reliance on consultants can impair the BCUC in building its internal capacity and that the use of consultants can lead to scheduling issues and prolonged processes.

External versus internal legal counsel

There were no strong opinions shared on whether the BCUC would be best served by internal or external counsel. It was pointed out that having in-house counsel could save money, and recruiting internal counsel could be a challenge at current compensation levels. Many acknowledged that the use of legal counsel by the BCUC is critically necessary as the BCUC is quasi-judicial and that whether they are employees or contractors is not as important as ensuring that capable legal counsel is retained.

Information management

Many stakeholders complimented the BCUC website, document sharing capability, and the BCUC's contracted technical support and court reporting. It was expressed that expanded search capacity would be welcomed.

Other

Regulation of private water utilities

Some stakeholders noted the capital intensive similarities between water utilities and existing energy related utilities currently regulated by the BCUC. They suggest that transferring regulation to the BCUC may be more efficient as a result and could provide a better process for water utility complaints.

However, the majority of stakeholders who commented suggested that the existing regulatory environment works well and were not supportive of moving the regulation of private water utilities into the BCUC's mandate as the status quo is believed to be efficient.

Potential LNG economic regulatory role

Some stakeholders flagged the important role that the BCUC may play in the economic regulation of natural gas pipelines and upstream processing facilities. It was noted that if LNG development plans proceed, then the BCUC may need to equip itself appropriately to manage a potential increase in applications.

Appendix 3: Executive Summary from KPMG Report “Task Force: Performance and Operational Review of the British Columbia Utilities Commission”

1.0 Executive Summary

The Minister of Justice and the Minister Responsible for Core Review of the Government of British Columbia (the “Province”) authorized an independent Review of the British Columbia Utilities Commission (“BCUC” or the “Commission”) by a three-member task force (the “Task Force”). The Task Force’s directive is to complete an independent review of the resource needs, the processes and the performance of BCUC with the goal of ultimately increasing BCUC’s effectiveness and efficiency (the BCUC “Core Review”). In May 2014, the Task Force, through the Ministry of Finance, appointed KPMG to help with their BCUC Core Review.

1.1 Background

The BCUC is an independent regulatory agency of the British Columbia Government that operates under and administers the *Utilities Commission Act* (1980) (the “Act”) to regulate BC’s natural gas and electric utilities, intra-provincial pipelines (establishing tolls and conditions of service), district heating systems and universal compulsory automobile insurance (basic insurance) provided by the Insurance Corporation of British Columbia (“ICBC”) under the *Insurance Corporation Amendment Act*.

The Commission’s mandate is to ensure customers receive safe, reliable and non-discriminatory energy services at fair rates from the utilities it regulates and that respective shareholders of those utilities receive a reasonable opportunity to earn a fair return on their invested capital. The Commission is also responsible to ensure that Basic Insurance rates from ICBC are adequate, efficient, just and reasonable.

1.2 Understanding this Report

The purpose of this report is to outline certain matters that came to our attention during our work and to offer our comments and considerations for the Task Force. These comments, by their nature, are critical as they relate solely to opportunities for change or enhancement and do not address the many strong features of the BCUC’s current activities and undertakings.

As outlined below, our procedures consisted solely of inquiry, observation, comparison and analysis of BCUC-provided information, as well as information researched and received from other regulatory jurisdictions outside of British Columbia. Such work does not constitute an audit or a review of financial statements and accordingly, we express no opinion in this regard. As discussed in Section 3.2.2, KPMG has neither audited nor reviewed the underlying data that underpins the BCUC or other jurisdictional areas that forms part of the basis of this report.

KPMG’s work steps included:

Step 1 – Development of an Organizational Framework and Key Effectiveness Principles of a Regulator to use in our Review and Assessment of the BCUC.

Our first step was to develop a robust organizational framework for a regulator. This framework was used throughout this project to provide structure to our research and analysis and this structure is used in this report to communicate our findings.

To assess the BCUC against this organizational framework and specifically conduct a performance and operational review of the BCUC, we also required assessment principles to identify and describe performance and operational challenges of the BCUC. KPMG performed a literature review to identify

key effectiveness principles for both a service related organization and a regulator in developing these principles for our assessment and they are summarized below and more fully described in Section 3.4:

Principles of an Effective Regulator			
1.	Clarity of Mandate and Scope – includes Leadership and Governance	8.	Strong Practices, Policies, Procedures, Controls and Strategic Plans
2.	Good Communication with stakeholders	9.	Effectiveness and Efficiency of operating and regulatory processes
3.	Effective and early Consultation among regulators, customers, key stakeholders, utilities and those with unique standing (such as First Nations)	10.	Qualified, Skilled, Trained and Talented Commissioners and Staff
4.	Consistency in treatment of regulated entities	11.	Ability to Mobilize Others , including other businesses, consultants and government /government agencies
5.	Predictability of regulatory decisions	12.	Embracing Technology for Mission
6.	Flexibility in use of alternative and strategic regulatory processes	13.	Ethical, Accountable and Transparent
7.	Independence	14.	Resources Empowered

Step 2 – Review of the Organizational Framework of the BCUC, including their Structure, Key Processes, Operational Information and Current Challenges.

We collected BCUC operational information to understand BCUC's current performance and efficiency and effectiveness challenges. This included undergoing reviews of a number of recent BCUC regulatory hearings, as well as interviews with BCUC Commissioners, and BCUC staff. We refer to the reviews of the specific regulatory hearings as 'case examples' in the document, although the scope of our review was limited as we describe in Section 3 and Appendix C.

To compare BCUC against leading practice, we also obtained information on a select peer group of North American regulatory bodies to benchmark against BCUC. This included a search of publicly available metrics and information as well as collecting data and conducting interviews with regulatory staff from those jurisdictional bodies.

Step 3 – Research Global and Other Alternative Metrics and Processes.

We considered globally other known alternative efficiency and effectiveness metrics and processes that may be relevant in benchmarking, and conducted a literature review.

Step 4 – Analysis of Information and Resulting Considerations.

This includes preparation of our report, which summarizes our findings, including views on the BCUC, for consideration by the Task Force and discussion on next steps.

A detailed description of KPMG's project steps is included in Section 3.2 and in Appendix C.

Our field work was conducted during the period from May 14, 2014 to September 5, 2014.

1.3 Key Findings

Regulation is, at its core, a question of balance. For example, in the case of process and performance, there may be tension between process efficiency and the depth and breadth of regulatory review. In a rate hearing, the requirement to provide for a full and comprehensive investigation of issues can work against the desire for timely decision making and for lesser regulatory burden and related costs. Regulators have always faced the problem of "information asymmetry". Regulated entities have more information on their cost structure and management processes than the regulator and they may not have an incentive to disclose this information.

Regulators like the BCUC need to find the right balance and maintain an open and accessible process while, in addition, searching for process improvements that reduce the tension between the competing objectives noted above.

The peer group jurisdictions reviewed have different mandates and are of different sizes to the BCUC, but their regulatory models and processes are very similar. They are therefore useful to provide a reference point and insight in addressing the BCUC matters identified below.

Our review overall highlighted a number of efficiency and effectiveness challenges and related opportunities for change at the BCUC and they are discussed below.

Key Findings	Related Effectiveness Principles
<p>■ Mandate and Scope</p> <p>The BCUC has experienced significant growth in certain areas of the scope of its mandate, which is consistent with other peer jurisdictions. Interviews performed and BCUC metrics over the last five years highlight the growth, complexity and expanded types of applications, new laws and other special directives from Government and a general heightened interest by outside parties, particularly regarding infrastructure development. Examples of some of the specific topic areas raised include utility business model complexity, evolving customer relationships, and infrastructure investment complexity.</p> <p>Conversely, although overall levels of activity and scope have grown, the BCUC has had some reduction in scope and work-load as BC Hydro ("BCH") rates have been set by the Province until April 2016, then capped for an additional three years. Also, many BCH capital projects have been exempted from BCUC review.</p> <p>BCUC has struggled to effectively manage its scope and scope changes</p>	<ul style="list-style-type: none">• Flexibility of strategic processes• Clarity of Mandate and Scope• Leadership and Governance• Flexibility of strategic processes

<p>through strategic resource re-allocation, strategic direction, interaction with the Province and the implementation of necessary efficiency and effectiveness improvements discussed more fully below. Other peer jurisdictions articulate a more strategic and proactive approach to the constantly changing regulatory environment than is apparent at the BCUC. Examples of other jurisdiction's more strategic approaches include using more risk-based and performance-based approaches to regulation. BCUC needs to become more flexible in the regulatory processes it considers and utilizes. This includes for example, initiatives such as moving to more risk-based or performance based or self-regulatory approaches, among others.</p>	
<p>■ Interaction with Government</p> <p>BCUC is not resource empowered and this currently impacts its ability to be an effective regulator.</p> <p>There has been a strain on the quality, the mix and in certain areas, the quantity of human resources at the BCUC, as well as a lack of investment into available technologies at the Commission. The low compensation levels relative to market of Commissioners and professional staff, short terms of Commissioners and a high ratio of part-time Commissioners negatively impacts the specialized knowledge and skill available at the BCUC.</p> <p>The strain on the BCUC is increased by the fiscal restraints imposed on the organization by operating within the budgetary confines of the Province regarding compensation levels. This restraint also includes limitations on investment in information technology and tools, as the BCUC is financially and resource restricted to using only BC Shared Services Information Technology providers and Province compliant and supported software programs.</p>	<ul style="list-style-type: none"> • Strong Practices, Policies, Procedures and Controls • Resource Empowerment • Qualified and Talented Commissioners and Staff
<p>There appears a lack of direction from the Province to the BCUC, particularly when Provincial energy plans and policy positions are being introduced. As a result, when changes to policies are being considered and when matters are already before the BCUC, the approach at present between the Province and BCUC appears reactive. This results in, at times, inconsistent or insufficient direction from the Province, causing delays in proceedings.</p> <p>There is also a current practice of Utilities going directly to the Province in areas that are new or potentially contentious. This approach brings inconsistency in scope application and also in applicant's interactions with the BCUC (and the Province) over policy direction. As a result, BCUC lacks clarity in its mandate and scope due to interaction processes with the Province not being more formally defined.</p>	<ul style="list-style-type: none"> • Clarity in Mandate and Scope • Good Communication and Consultation with stakeholders
<p>■ Strategy and Governance</p> <p>Executive leadership of BCUC vests primarily in one individual, being the current CEO/Chair of the BCUC. This is unusual compared to the peer jurisdictions. Currently, all directors and Commissioners report to the CEO/Chair. Under this structure, the CEO/Chair's time and expertise is split between his role as the sole full-time Commissioner and leading the day-to-day operations of the BCUC. This stretches the capacity of any individual to effectively run the Commission. For example, strategic initiatives of the BCUC have been documented and are aimed to improve efficiency and effectiveness of processes. However, there is little evidence of prioritization or</p>	<ul style="list-style-type: none"> • Leadership and Governance • Qualified and Talented Commissioners and Staff

accountability to get these strategic aims implemented. As a result, these initiatives are not being completed as expected.	
As an independent regulatory agency within the Province, the BCUC should be accountable and transparent in its operations to its stakeholders. However, documented strategic initiatives, the measurement of performance of operations and assessment against strategic initiatives, does not appear to be fully performed and disclosed. Such activities are seen as leading practice.	<ul style="list-style-type: none"> • Leadership and Governance • Ethical, Accountable and Transparent
<p>■ Operating Model: Use of Commissioners</p> <p>Other peer jurisdictions have a higher proportion of full-time Commissioners in their operating model. The BCUC has only one full time Commissioner, being the CEO/Chair, with the rest all part-time Commissioners. Interviews with other regulators highlighted that full-time Commissioners provide greater flexibility and simpler interactions with staff. Furthermore, the part-time availability and use of up to 10 part-time Commissioners at the BCUC was felt to be a cause of some inconsistency and inefficiency in hearing processes. Lacking consistency and predictability in regulatory process outcomes hampers BCUC's ability to be efficient and effective.</p> <p>Other jurisdictions (e.g. Alberta and Ontario) which had a high number of part-time commissioners, had commissioners with deeper and more relevant energy-related experience assisting in their abilities to be effective. Our view from the profiles of the BCUC Commissioners was there was less utility-specific experience than profiles in other jurisdictions.</p>	<ul style="list-style-type: none"> • Consistency • Predictability of decisions
<p>■ Interaction with Stakeholders and Related Regulatory Processes</p> <p>The Province does not have a formal public advocacy body or department that is involved in BCUC's hearing processes to-date and it is common for broad public interests not to be fully represented in BCUC proceedings in general. Intervenor currently represent special interests or subsections of the customer group, e.g. industrial customer, old age pensioners, etc. As a result, BCUC Commissioners and staff look to ensure that the interests of unrepresented groups (often the general public as a consumer) are represented in the regulatory hearing processes.</p> <p>BCUC staff acknowledges that, given the sensitivity of regulating utilities in the public interest, their role 'blurs the line' between an advocacy role and the role as an independent regulator, when intervenors collectively do not represent all customers.</p> <p>Staff consciously do not offer solutions and negotiate on behalf of consumers, as found in a full public advocate role, due to the sensitivities of their role for the benefit of the broad public interest. Other jurisdictions have a formal public advocate entity that functions outside of the regulatory body. Independence, including the perception of independence, is required to sustain the trust of stakeholders. Furthermore, without strategic guidance to Commissioners and staff in this area, the "zeal" and focus with which this inquiry "in the consumer's interest" advocacy is undertaken will vary, and at times may be construed as "special interest" advocacy.</p>	<ul style="list-style-type: none"> • Ethical, Accountable and Transparent • Independence

<p>The special interests of intervenors may not always align with the issues in the application, and comments from Commissioners indicate the ‘pendulum’ has, perhaps, swung too far towards the pursuit of intervenor interests. Out-of-scope intervenor interactions in hearings is a common issue both at the BCUC and other peer jurisdictions. Management of scope is best addressed initially and during the proceeding through management by the Commission Panel and Applicant.</p> <p>“Standing” of intervenors has become an increasing concern of late, in particular related to proceedings related to capital projects. For example, other jurisdictions have tightened standing legislation and from discussions with BCUC staff, rarely does the BCUC reject an application from an intervenor to participate in a hearing.</p> <p>Generally, intervenors have a right to participate. However, the common issue is that they have both in-scope and out-of-scope issues. The BCUC professional staff and Commissioners need training and improved formalized processes and strategies to determine appropriate standing and to manage out-of-scope items for those with standing, which lead to burdening the hearing process.</p>	<ul style="list-style-type: none"> • Strong Practices, Policies, Procedures and Controls and strategic planning • Good Communication with stakeholders
<p>BCUC Information Requests (“IR”s) are growing significantly on applications. Interviews with BCUC staff highlight that some of these Information Requests are not subject to material or relevance reviews and are issued without adequate consideration, planning and monitoring controls (e.g. lead staff pre-issuance review). Inappropriate Information Requests can and do significantly increase the costs and time of hearings by increasing the process burden on all participants without material benefits.</p>	<ul style="list-style-type: none"> • Strong Practices, Policies, Procedures and Controls and strategic planning
<p>Application pre-screening undertaken by the BCUC lacks consistency of approach, including policies, procedures and controls to be effective and promote efficiency. For example, there is no checklist of minimum quantity, quality or format of information to be filed.</p> <p>Furthermore, there is limited and inconsistent pre-application planning or consultation with the utility applicant and other stakeholders to review the key issues and agree on the minimum information that will be required for the proceedings. Other jurisdictions do provide more guidance to proponents for their applications.</p> <p>Even once an application is filed, there appears to be limited planning and agreement on what the key issues of the case are, in order to guide subsequent inquiry and focus Information Requests through the interrogatory stages of the application.</p>	<ul style="list-style-type: none"> • Consistency • Strong Practices, Policies, Procedures and Controls and strategic planning • Key issue identification
<p>■ Operational Processes including Staffing and Information Technology</p> <p>Basic project and process management appears to be inconsistently applied across the BCUC functions on different application hearings. Consistency and predictability of regulation are important to the effectiveness of the BCUC. While each application is unique, it was noted by staff that process was not consistently executed.</p> <p>BCUC currently does not have fully documented internal process documentation for staff to adhere to as found at other peer group regulators. Effective process documentation would be expected to cover all of its operational and regulatory processes and be written strategically to promote process efficiency and effectiveness. These documents would cover best practice policies and procedures and related controls, and explain key roles, key responsibilities and accountabilities for Commissioners, Chair of</p>	<ul style="list-style-type: none"> • Leadership • Strong Policies, Procedures and Controls, Training • Consistency • Predictability

<p>Commissioners, directors, professional and support staff.</p> <p>Regular training over key processes were stated as needed by staff and is a key component of effective process execution.</p> <p>Comparative analysis to other jurisdictions shows that on a total cost basis (or on a per regulated customer or a percentage regulated revenue basis), the Commission's operating costs are low compared to other regulators. BCUC's resources are constrained, actual costs are rising and have exceeded budget levels in recent periods. On its own this rise in expenditure, or peer group comparison, does not indicate that the BCUC is overall efficient or could not be more cost effective, as there are specific examples where proceedings and processes could be more efficient and effective.</p> <p>The efficiency and effectiveness challenges we note highlight that operating costs may be too low and are insufficient to support needed efficiency and effectiveness measures. However, as we note below in the 1.4 Considerations section, it is difficult to state what an appropriate cost base is for the BCUC until a review over BCUC scope and strategic direction, combined with an assessment of appropriate resource allocation, is undertaken. Only after this realignment is done, would revisiting the cost efficiency be recommended.</p>	
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1.4 Considerations for Course of Action

In the following sections, we offer considerations for the Task Force to review relating to the BCUC that can, if appropriately implemented, assist the BCUC to strengthen its practices including efficiencies and effectiveness in a number of areas.

We have grouped our recommended course of actions under the following themes:

■ Mandate and Scope

- Consider a strategic review over current BCUC scope and regulatory approach (e.g. moving to more of a principle or risk-based regulatory oversight model(s)). This may include a review of "low risk" or "low value-add" regulatory processes to identify those which may be stopped or managed more effectively.
- In addition, consideration should be given to the articulation of a philosophy of regulation. As an example, the regulator could consider regulatory intervention when there is a demonstrated failure of market mechanisms which either comes to light through its compliance activities or customer complaints. This could also lead to a greater focus by the BCUC on regulatory economics rather than solely regulatory process compliance.
- This strategic review should include an assessment of resources currently utilized and recommend where resources should be re-directed and where investments in either quality or quantity of resources are needed (i.e. human resource capital plan). BCUC should prioritize regulatory resources on risk areas and use greater discretion on strategies to achieve a set of targeted broader based objectives.
- The proposed strategic review should include the assumption that full-rate regulation over the BCH's rates and capital projects will return to the scope of the BCUC.

■ Interaction with Government

- The roles, responsibilities and authority levels of both the BCUC and the Province need to be more clearly agreed and described in ways that promote consistent, effective and efficient interactions. These guidelines should cover reporting requirements of the BCUC to the Province, as well as protocols of interaction and updates of regulated market developments. This interaction includes, for example, when more urgent financial and operational needs exist or policy changes are anticipated, and when new policy guidance or assistance is required.

■ Strategy and Governance

- The BCUC's executive leadership requires restructuring to assist both oversight of regulatory policy and also broader operational responsibilities related to strategy, governance, performance monitoring, executive operations and decision making at the BCUC.
- BCUC leadership, including directors, needs to provide better strategic guidance to the organization. This guidance must identify actions that meet BCUC strategy and develop suitable metrics to monitor the Commission's performance, identify issues and resource needs; generally manage the efficiency and effectiveness of the operations of the BCUC; and communicate its financial and operational performance to the Province and stakeholders.

■ Operating Model: Use of Commissioners

- BCUC should consider transitioning to more full-time Commissioners from part-time Commissioners to ease process inconsistencies and inefficiencies. Part of this transition to more full-time Commissioners should include a revisit, with the Province, of the mix of backgrounds and qualifications with regard to any changes to the BCUC's mandate and scope.

■ Interaction with Stakeholders and Related Regulatory Processes

- The need for a formal public advocacy body in British Columbia, that is independent from the Commission, should be reviewed. The roles, responsibilities, funding and governance of a public advocate, including the ability to negotiate positions on behalf of the general consumer should be documented.
- A consistent and more rigorous intervenor screening process should be considered, with updated 'Recognition of Standing' criteria applied. This consideration may require Government legislation or directives to achieve its aims.
- Intervenor participation processes need to be improved, documented and supported through the training of Commissioners and professional staff on techniques to keep intervenor involvement on scope, including (1) communication of the expected scope through a standard scope development step, with the applicant and stakeholders before (or early in) the application process (2) reinforcing communication at the application stage that funding will not be extended to out-of-scope participation and (3) management of scope during the hearing process. Review of intervenor funding requests should explicitly address out-of-scope matters and the Commission should reinforce the importance of keeping the proceedings within the agreed scope.
- Commissioners, with input from lead staff, should confirm strategic priorities for inquiry at the beginning of an application review. IRs drafted by staff should then focus inquiry on these matters. Commissioners, lead staff and staff require additional training to issue effective IRs. The basic goal and information needs of IRs should be evident and discussed and agreed upon by lead staff and the Commissioners at the planning stages of the application and as required during

the hearing process. Consideration should include expanding the involvement of Commissioners in the review of IRs before they are issued.

- A consistent and rigorous utility application screening process needs to exist internally and communicated externally to applicants for each type of application. Current guidelines which exist on the website need updating and require more detail clearly showing what is expected and how it is to be presented, depending on the actual facts and circumstances. As each application is unique, requiring new or alternative focus and information, a more formalized and standard pre-application strategic planning process with the utility applicant (and stakeholders) is needed. This screen should summarize the key issues, as well as communicate the expected and/or agreed upon information required in applications so as to avoid rejection or avoid recommendation of re-submission. This process could also support informal reviews of applications where discussions and comments on draft applications could be provided, where appropriate.
- Commission staff should initiate more structured post-decision reviews of the process, with input from applicant and intervenors, in order to identify process elements which worked effectively so they can be repeated and those elements which can be improved.
- Operational Processes including Staffing and Information Technology
 - Consider strengthening the leadership capacity of the organization with the appointment of a Chief Operating Officer (COO) and providing more formal leadership development for Directors and senior staff.
 - As part of the proposed strategic review of the Commission, review the skills competencies and identify skill areas which could better support the efficiency and effectiveness of the Commission. Examples may include, a senior staff legal position and strengthening the market economics and regulatory economics capabilities in the staff complement. This would provide more capability within the Commission to leverage market factors to fulfill its mandate while also ensuring that it is meeting all of its legislative obligations.
 - Documented strategic guidelines, using efficient and effective policies and procedure and control requirements should be in place for all hearing process types and topics covered (e.g. revenue requirements, rate design, capital applications ('CPCN'), etc.). Many of the existing guidelines used internally and published externally for stakeholders are outdated and not written with this in mind. These guidelines should document leading practice policies and procedure requirements and ensure consistency for all staff levels and Commissioners and stakeholders.

The documentation of guidelines should formally address, among other things, the requirement to apply project management skills into processes undertaken by the BCUC, including for example:

- Clarify roles, responsibilities and accountabilities.
- Establish consistent interaction between staff and Commissioners.
- Establish responsibilities to budget, monitor and report hearing statistics, including performance against planned timelines.
- Ensure appropriate review of Commission communications and deliverables (e.g. review of BCUC information requests for quality and relevancy).
- Provide direction, documentation and consistency over the use of risk and materiality thresholds when considering hearings requirements.
- Undertaking formal debriefing sessions.

- Compensation levels (including incentive schemes) for both staff and Commissioners should be reviewed to be more competitive. For example, target remuneration levels should be compared with current market levels in the staff and Commissioner recruiting process.
- Commissioners should be formally monitored and be subject to individual performance appraisal processes.
- Organizational data and performance metrics should be developed, monitored and performance results reported and periodically assessed against peers.
- A robust IT strategy for the BCUC should be developed and implemented. This includes tools, systems and information networks which support the information needs for regulatory applications and decisions, compliance monitoring, interacting with interested parties in the regulatory processes, providing public access and communication, internal financial management, internal process management and the management of the organization's human resources. This includes, for example, an understanding of tools and database search engines used by other regulators. The IT review should include knowledge-management improvements as a priority to address risks of loss of hearing precedent data, which is often vested with key individuals in the BCUC. There may also be a need to have in-house IT resources to support such changes. This strategy and implementation plan should align with and to the extent feasible, leverage the IT system capabilities of the Province.
- The BCUC should continue to strive to implement technology to allow on-line applications and continue to allow video conferencing to encourage expanded participant participation by those that would otherwise incur or be deterred by travel costs for themselves and/or expert witnesses etc. Such technology will help increasing accessibility of the Commission and thus its credibility in the eyes of the public.

1.5 Next Steps

The Commission is a key component to the effective and fair operation of British Columbia's power and utility and basic automobile insurance industry. A very effective regulator has to be a high achiever of all of the Principles of an Effective Regulator as discussed in Section 3.4.

The Task Force's next steps should be:

- 1) As a priority, the BCUC should be refocusing its scope and mandate, developing a strategy to meet these goals and implementation of improvements in both tools and processes.
- 2) All subsequent recommended efficiency improvements for the BCUC would then need to be prioritized and also categorized between short-term (i.e. immediately or within one year) and long-term (more than one year or over a number of years) recommendations; and
- 3) Only once the above steps are taken, should there be consideration to either increasing resources or pursuing further efficiencies in its operations.

Given our findings to date, it is not currently possible to estimate the magnitude of the expected changes required in budgeted BCUC operating costs over current levels in the short-term and long-term until these strategic steps are completed. However, our expectations would be that costs will need to be incurred to undertake the proposed strategic review. Recommended efficiency improvements would be expected show cost reduction benefits over time.

1.6 Acknowledgement

KPMG has appreciated:

- The opportunity to serve the BCUC and the Task Force.
- The excellent level of cooperation from the project participants for pulling together background materials and their participation in our interview process, and
- The frank and open input received from all interviewees.

Vancouver, Canada
September 17, 2014

Appendix 4: Rowland J. Harrison, Q.C. “Independence and the British Columbia Utilities Commission”

INDEPENDENCE AND THE BRITISH COLUMBIA UTILITIES COMMISSION

A Report Prepared for the

BC Utilities Commission Review Task Force

by

Rowland J. Harrison, Q.C.*

This report reviews principles of independence in the context of energy regulation tribunals, with reference to examples in three other Canadian jurisdictions, and discusses how those principles apply to the British Columbia Utilities Commission (BCUC).

The Terms of Reference (TOR) for the Task Force do not refer explicitly to the “independence” of the BCUC as an issue. Addressing the degree of independence of the Commission is, however, integral to the discussion of other issues that are directly before the Task Force. The Minister’s supplementary letter to the Task Force describes issues that have been raised, in submissions to the Task Force, “regarding the regulatory model in British Columbia” as including:

- Mechanisms for government to provide clear and timely policy direction;
* * *
- Options for clarifying the roles and mandate of the Province and the BCUC with respect to utility regulation....¹

* Visiting TransCanada Chair in Administrative and Regulatory Law, University of Alberta, Edmonton. Member of the National Energy Board from 1997 to 2011.

¹ July 15, 2014.

The concept of “independence” – specifically, the degree to which the BCUC is independent of the provincial government – is at the core of addressing these issues: the greater the ongoing role of the government in directing the Commission, the less independent is the Commission in making its own decisions.

The essence of tribunal independence is that a tribunal, when considering an individual matter before it (whether its role is to make an actual decision or to make a recommendation for final decision by another authority, usually cabinet), is free from influence, either implicit or explicit, that is external to its own process. In the context of statutory tribunals, however, “independence” is not an absolute concept but, rather, is a matter of degree. It is for the legislature to decide what the mandate of a tribunal is to be and the extent to which the tribunal is to be independent in fulfilling its mandate. What should be avoided is representing a tribunal as being independent – giving rise to expectations that the tribunal will perform its functions at arm’s length from government – while at the same time adopting mechanisms that undermine its independence. Such an approach is likely to erode confidence in and respect for the integrity of the overall regulatory process.

A particular challenge that arises in the area of energy regulation (and other spheres of economic regulation) is designing mechanisms that balance, on the one hand, the independence of a tribunal – leaving it to “get on with the job,” free of external influence – with, on the other hand, the legitimate role of government in ensuring that regulatory outcomes are supportive of broader policies. It is frequently said in this context that it is the role of government to set policy and the role of the regulator to implement that policy. That, however, is a simplistic approach, masking the fact that there is rarely a bright line dividing policy from implementation. This report briefly describes three Canadian examples of different approaches to the challenge.

NATIONAL ENERGY BOARD

Prior to extensive amendments to the *National Energy Board Act* in 2012,² the National Energy Board’s decision-making role with respect to pipeline certificates was exercised independently of the federal government, at full arm’s length in both form and substance. A

² RSC 1985, c. N-7 (as amended) (*NEB Act*).

decision by the Board to issue a certificate required the approval of the Governor in Council (the federal cabinet), but cabinet's only authority was to approve or reject the Board's decision.³ Cabinet could not change the decision, nor could it refer the matter back to the Board. If the Board denied an application for a certificate, no further approval from cabinet was required and the Board's decision was final. Cabinet had no authority to issue directions to the Board with respect to its pipeline certificate jurisdiction.

The independence of the Board in this decision-making role was further entrenched by the structure of the Board as a court of record and by the tenure of Board members, who can only be removed from office by a joint address of the House of Commons and the Senate (the same procedure as for the removal of justices of the Supreme Court of Canada).

In 2012, the *NEB Act* was amended to change the Board's role with respect to pipeline certificates to that of making a recommendation to the cabinet.⁴ The decision to issue or deny a certificate is now vested directly in the federal cabinet.⁵ Cabinet is free to accept or reject the Board's recommendation, although it may not vary any certificate conditions that are recommended by the Board.⁶

The institutional structure of the NEB and the tenure of Board members, however, were not changed by the 2012 amendments. As a result, although the Board's function was changed fundamentally, its independence within its recast role of making a recommendation, rather than a decision, was largely preserved. Certain procedural changes that were introduced at the same time as the substantive change in the Board's role have raised concerns about the **potential** for erosion of the Board's independence in future cases. For example, the federal cabinet can direct the Board to reconsider a recommendation, taking into account factors specified by cabinet.⁷ The

³ Section 52 of the *NEB Act* as in force prior to its amendment in 2012.

⁴ Amended by the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

⁵ *NEB Act*, section 52, as amended in 2012. It is widely accepted that the change was enacted in anticipation of the possibility that the regulatory review process for the Enbridge Northern Gateway Project could result in a denial of a certificate by the NEB, in which case, prior to the amendment of the *NEB Act*, the federal government would have had to introduce legislation to overrule the decision in the event it wished to do so in the national interest.

⁶ Where the Board recommends that a certificate be denied, it is nevertheless required to recommend conditions to be included in a certificate if cabinet should direct that a certificate be issued, contrary to the Board's recommendation.

⁷ *NEB Act*, section 53.

then chairman of the Board said at the time of the 2012 amendments, however, that they would not affect the way in which the Board conducted itself as an independent quasi-judicial tribunal.

From the perspective of delineating the respective roles of the government and the regulator, the recent changes to the *NEB Act* establish a clear dividing line between decision-making and recommendation-making. However, in exercising its redefined responsibility, the Board continues to be largely independent, although not as independent as it was prior to the 2012 amendments to the *NEB Act*, when its decisions were essentially final⁸ and it was the master of its own procedure, operating at full arm's length from the federal cabinet.

ALBERTA ENERGY REGULATOR

In Alberta, the Alberta Energy Regulator (AER), established by the *Responsible Energy Development Act*⁹ enacted in 2012, is intended to be independent of the provincial government, with a mandate defined in broad terms to include providing for “the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta...”¹⁰

However, the *REDA* includes mechanisms that are directed at what the provincial government refers to as a “policy assurance function” for the AER.¹¹ The Minister is explicitly empowered to give directions to the AER for the purposes of:

- (a) providing priorities and guidelines for the Regulator to follow in the carrying out of its powers, duties and functions, and
- (b) ensuring the work of the Regulator is consistent with the programs, policies and work of the Government in respect of energy resource development, public land management, environmental management and water management.¹²

In addition, the Lieutenant Governor in Council is authorized to make regulations prescribing “factors that the Regulator must consider in considering an application or conducting

⁸ There has been only one identified instance in the NEB's more than 50 year history in which the federal cabinet withheld its approval of a Board decision to issue a certificate.

⁹ SA 2012, c. R 17.3 (*REDA*).

¹⁰ *REDA*, subsection 2(1).

¹¹ See “Enhancing Assurance, Enhanced Policy Development and Policy Assurance: Report and Recommendations of the Regulatory Enhancement Task Force to the Minister of Energy,” (31 December 2010), online: Alberta Energy<<http://www.energy.alberta.ca/Initiatives/2788.asp>>.

¹² *REDA*, subsection 67(1).

a regulatory appeal, reconsideration or inquiry...”¹³ It is not clear whether this authority is intended to be restricted to prescribing generic factors or might be used to prescribe factors to be considered in a specific case. If the latter, its use could raise a concern about the independence of the AER with respect to that specific case, although even as applied to a specific case, the authority only extends to prescribing factors that must be “considered” – the authority clearly does not extend to requiring the AER to do anything more, leaving the AER to come to its own conclusion after having duly considered the factor.

On their face, these provisions of the *REDA* authorize broad directions or prescribing generic factors that the AER must consider. As such, they do not themselves directly compromise the independence of the AER. However, any attempt to give directions that would apply to an individual application could directly compromise the AER’s independence (as well as, in the case of ministerial directions under subsection 67 (1), likely being beyond the scope of the wording in the *REDA* prescribing that such directions must be for the purpose of “ensuring the work of the Regulator is consistent with the programs, policies and work of the Government...”¹⁴

ALBERTA UTILITIES COMMISSION

The *Alberta Utilities Commission Act*,¹⁵ by contrast, does not include any provision equivalent to the policy assurance function that is the basis of subsection 67(1) of the *REDA*. The *AUC Act* establishes the Alberta Utilities Commission (AUC) as an arm’s length tribunal, independent from the provincial government.

Some provisions of the legislation administered by the AUC do provide for the possibility of limited directions to the AUC. For example, under the *Gas Utilities Act*,¹⁶ regulations may be promulgated respecting matters that the AUC “must or may consider or must not consider...” This formulation, however, stops short of authorizing prescriptive directions as to outcomes and leaves the AUC, having considered any matter that

¹³ *REDA*, para 78(f).

¹⁴ *REDA*, subsection 67(1).

¹⁵ SA 2007, c. A-37.2 (*AUC Act*).

¹⁶ RSA 2000, c. G-5, para 28.1(1)(n).

may be prescribed, to come to its own conclusion, thus preserving the Commission's independence within its mandate.

ONTARIO ENERGY BOARD

The *Ontario Energy Board Act*¹⁷ establishes the Ontario Energy Board (OEB) with a broad mandate and sets out broad objectives to guide the Board in carrying out its responsibilities. These explicitly include the protection of the interests of consumers with respect to prices and reliability of service, the promotion of economic efficiency and cost effectiveness and the promotion of conservation, demand management and energy efficiency. On first reading, it appears that the OEB is intended to be independent in performing its responsibilities and furthering these objectives.

The *OEB Act*, however, includes mechanisms by which the provincial government can direct the Board. Under subsection 27(1) of the *OEB Act*, the Minister may issue, and the Board shall implement, "policy directives that have been approved by the Lieutenant Governor in Council concerning general policy and objectives." Starting from this broad authority, the Act proceeds to provide in some detail for the issuance of directives in several specific areas, such as promoting "energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources"¹⁸ and even to amend conditions in licences already issued by the Board.¹⁹ A directive may require the Board to hold, or to not hold, a hearing with respect to certain matters.²⁰

The *OEB Act* institutes a scheme that begins with statements of broad objectives, or policies, to guide the Board, but then authorizes, with increasing specificity, the issuance of binding directives to the Board to take or refrain from taking a particular course of action and, in the case of licence conditions, even to change decisions already taken by the Board.

These provisions undermine the independence of the OEB inasmuch as the Board may in effect be told what to do, including even being directed to change a decision already taken.

¹⁷ SO 1998, c 15 (*OEB Act*).

¹⁸ *OEB Act*, subsection 27.1(1).

¹⁹ *OEB Act*, subsections 28.1(1)-28.3(2).

²⁰ *OEB Act*, subsection 28(2).

Indeed, the scheme raises questions, not only with respect to the independence of the OEB, but also regarding the respective roles of the provincial government and the Board.

SUMMARY

This brief survey of models in other Canadian jurisdictions illustrates differing approaches to the issue of independence in the context of energy regulation tribunals.

The model closest to establishing a truly independent tribunal was the NEB prior to the 2012 amendments to the *NEB Act*, which provided no role for the federal government in the Board's decision-making process on individual certificate applications,²¹ nor for the federal government to issue any form of policy directives to the Board.

As seen, the federal government's desire to ensure that final certificate decisions would be congruent with broader economic and other policies resulted in the relegation of the Board's role to that of making a recommendation, with actual certificate decisions now to be taken directly by cabinet. In the writer's view, certain procedural elements of the new NEB model raise concerns about the potential erosion of the Board's independence in the future, certainly when compared to the near total independence that the Board enjoyed prior to the amendments. However, the model does, to a large degree, uphold the independence of the NEB **within its redefined role**. Further, the respective roles of the Board and the government are clearly delineated: the Board recommends, the cabinet decides.

In Alberta, the *REDA* largely leaves the Alberta Energy Regulator to perform its functions independently of the provincial government, subject to the possibility of ministerial directives. However, such directives must be for the purpose of "ensuring the work of the Regulator is consistent with the programs, policies and work of the Government..."²² and therefore, if not abused, do not allow for interference in individual matters before the AER. In addition, regulations may be promulgated by the Lieutenant Governor in Council prescribing factors that the AER must take into account in considering applications. If restricted to

²¹ Federal government departments could, and frequently did, participate in NEB proceedings as intervenors, in open hearings.

²² *REDA*, subsection 67(1).

prescribing generic factors, the exercise of this power would not impinge upon the independence of the AER within the performance of its functions.

The scheme under the *OEB Act* providing for specific directives, extending even to directions to change conditions in licences (that is to say, to override decisions already taken by the OEB), directly denies the independence of the Board and, indeed, raises a question as to the Board's role. When subjected to directions, is the OEB, rather than being independent of the provincial government, merely its agent?

This review of the role and structure of energy regulation tribunals in three jurisdictions illustrates that there is no single model for defining a tribunal's mandate. Nor is there a single approach to adopting mechanisms for government oversight of the outcomes of a tribunal's regulatory process to ensure consistency with broader economic and other policies. The review suggests that the more intrusive or prescriptive the exercise of such mechanisms, the less independent the tribunal is. Where government can give directions to a tribunal with respect to the processing or outcomes of individual applications, the tribunal becomes little more than an agent, without authority to act independently.

More broadly, it might be asked what is the purpose of a "regulatory" tribunal if in reality it must act at the direction of government?

BCUC

The British Columbia Utilities Commission (BCUC) is described in the Terms of Reference for the Task Force as "an independent regulatory agency" and as "a quasi-judicial tribunal that makes decisions..." This description, on its face, suggests that the Commission should not, in considering a specific matter before it, be subject to any explicit or implicit direction or external influence with respect to that matter.

However, section 3 of the *Utilities Commission Act*²³ expressly empowers the Lieutenant Governor in Council (the provincial cabinet) to promulgate regulations directing the Commission "with respect to the exercise of the powers and the performance of the duties of the commission,

²³ RSBC 1996, c 473.

including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.” The Commission is bound to comply with such directions notwithstanding any other provision of the *Utilities Commission Act*, any provision of the *Clean Energy Act*²⁴ or any previous decision of the Commission.²⁵ Such directions may not, however, nullify or rescind an order or decision of the Commission.²⁶

A random sampling of Directions issued under section 3 indicates that they have been issued for a variety of purposes, ranging from measures to ensure consistency in the implementation of government policies to detailed, prescriptive directions to be followed by the BCUC in considering specific applications. An example of the former is found Special Direction #7 directing the BCUC not to review an agreement that has been approved under the *Job Protection Act*.²⁷ Special Direction #8 directs the Commission to ensure that rates contribute to conservation and efficient electricity use. This might be considered as policy guidance aimed at ensuring regulatory outcomes are supportive of, or at least not inconsistent with, broader government policies. It is noted, however, that Special Direction #8 proceeds from its initial broad direction to prescribe more detailed instructions to the Commission with respect to matters that might normally be expected to be left for the Commission to determine. To that extent, Special Direction #8 starts to cross the line between general policy guidance and giving directions as to specific matters.

The use of Special Directions for purposes other than giving broad policy guidance is seen in Special Direction #6,²⁸ which spells out in extensive detail (including specifying actual dollar amounts) matters that the BCUC must apply with respect to BC Hydro. The Commission is expressly directed that it must accept specific schedules of expenditures and must approve specified forecasts and expenditures.

²⁴ SBC 2010, c 32.

²⁵ *Utilities Commission Act*, subsection 3(2).

²⁶ *Utilities Commission Act*, subsection 3(3). This particular limitation addresses the objection to the power of the Ontario government to direct the OEB to change licence conditions *ex post facto*.

²⁷ RSBC 1996, c. 240.

²⁸ See, for example, Direction No. 6, March 5, 2014.

This use of Special Directions directly contradicts the independence of the Commission, which, rather than making independent decisions in such circumstances, is merely implementing decisions made by cabinet.

In addition to contradicting the principle of Commission independence, the practice of issuing prescriptive directions in the context of specific matters before the Commission also begs the question of exactly what the role of the Commission is *vis-à-vis* the provincial cabinet.

Finally, it is noted that an issue has been raised before the Task Force as to whether a different regulatory model might be adopted for Crown corporations as compared to private sector utilities.²⁹ This particular issue might not go directly to the question of the independence of the Commission. There is, however, a relationship between the two: the practice of issuing government directives to the Commission with respect to how the Commission must deal with certain Crown corporation matters begs the question of what exactly is the purpose of proceeding through the Commission when the government could presumably achieve much the same purpose through its role as owner. This further points to the need to clarify the respective roles of the BCUC and the provincial government, and to adopt a framework that supports the independence of the Commission within its defined role.

CONCLUSION

Governments have a legitimate interest in ensuring that the outcomes of “independent” regulatory processes are congruent with and supportive of broader economic and other policies, which evolve and change over time. There is, however, also a public interest in upholding the principle of independence, which engenders respect for the integrity of the regulatory process and hopefully leads to broader acceptance of regulatory outcomes.

The first opportunity for government to establish the policy framework in which a tribunal is to fulfill its mandate is to address the matter in the tribunal’s constituting statute. In addition to defining the tribunal’s mandate, the statute can include a statement of purposes and objectives to guide the tribunal, such as is found in the objectives section of the *OEB Act*, discussed above. Such statements not only clarify the mandate of the tribunal, but also can assist

²⁹ Minister’s supplementary letter to the Task Force, July 15, 2014.

the tribunal in better understanding its own responsibilities. Statements of broad objectives by statute, however, can only go so far and, by definition, require legislative amendment to be changed.

A mechanism for balancing independence with a degree of ongoing policy oversight by government is to allow government to issue broad policy directives that do not intrude into the tribunal's consideration of individual cases.

From an independence point of view, the model found in the Alberta *REDA* provides a formula whereby the provincial government can issue broad directives to the AER that stop short of authorizing the government to direct the AER with respect to individual cases before it. The AER continues to be independent in the exercise of its specific decision-making responsibilities.

Consideration should be given to replacing the authority of the Lieutenant Governor in Council under section 3 of the *Utilities Commission Act* with a more restricted authority, along the lines of the “policy assurance function” of the Alberta Energy Regulator, as found in the *Responsible Energy Development Act*. The Alberta model strikes a reasonable balance between upholding the independence of the Regulator and providing the government with some means of oversight to ensure that regulatory outcomes are supportive of broader government economic and other policy objectives.

In introducing this paper, it was stated that independence in the context of energy regulatory tribunals is not an absolute, but is a matter of degree. As such, independence must be considered in the context of the specific mandate of any individual tribunal. There cannot be a “one size fits all” approach. It should also be borne in mind that a specific tribunal may have several functions and that the appropriate degree of independence, and ultimate decision-making authority, might vary from function to function, as for example between the functions of approving projects, on the one hand, and, on the other, financial regulation of tolls and tariffs. Governments may be inclined to retain a greater degree of oversight (even final approval authority) with respect to the former.³⁰ The fundamental principle is to respect the independence of tribunal **within the exercise of its mandate.**

³⁰ An example is found in the *NEB Act*, as amended in 2012 when the NEB's role was changed from making decisions on new pipeline projects to making a recommendation to Cabinet, which now has direct decision-making

The fundamental question is this: Is the BCUC truly intended to be “an independent regulatory agency...a quasi-judicial tribunal that makes decisions...”³¹ or is it an agent that, to a large degree, implements decisions made by cabinet? Currently, the Commission is described as the former, but is closer to being the latter when it is subject to detailed and prescriptive directives issued by the provincial cabinet.

authority. The Board’s independence in the performance of its new role is, however, essentially maintained. The Board’s role and independence in financial regulation were left untouched by the 2012 amendments.

³¹ As it is described in the Terms of Reference for the Task Force.

Appendix 5: Clean Energy Act Energy Objectives

2 The following comprise British Columbia's energy objectives:

- (a) to achieve electricity self-sufficiency;
- (b) to take demand-side measures and to conserve energy, including the objective of the authority reducing its expected increase in demand for electricity by the year 2020 by at least 66%;
- (c) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity;
- (d) to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources;
- (e) to ensure the authority's ratepayers receive the benefits of the heritage assets and to ensure the benefits of the heritage contract under the *BC Hydro Public Power Legacy and Heritage Contract Act* continue to accrue to the authority's ratepayers;
- (f) to ensure the authority's rates remain among the most competitive of rates charged by public utilities in North America;
- (g) to reduce BC greenhouse gas emissions
 - (i) by 2012 and for each subsequent calendar year to at least 6% less than the level of those emissions in 2007,
 - (ii) by 2016 and for each subsequent calendar year to at least 18% less than the level of those emissions in 2007,
 - (iii) by 2020 and for each subsequent calendar year to at least 33% less than the level of those emissions in 2007,
 - (iv) by 2050 and for each subsequent calendar year to at least 80% less than the level of those emissions in 2007, and
 - (v) by such other amounts as determined under the *Greenhouse Gas Reduction Targets Act*;

- (h) to encourage the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia;
- (i) to encourage communities to reduce greenhouse gas emissions and use energy efficiently;
- (j) to reduce waste by encouraging the use of waste heat, biogas and biomass;
- (k) to encourage economic development and the creation and retention of jobs;
- (l) to foster the development of first nation and rural communities through the use and development of clean or renewable resources;
- (m) to maximize the value, including the incremental value of the resources being clean or renewable resources, of British Columbia's generation and transmission assets for the benefit of British Columbia;
- (n) to be a net exporter of electricity from clean or renewable resources with the intention of benefiting all British Columbians and reducing greenhouse gas emissions in regions in which British Columbia trades electricity while protecting the interests of persons who receive or may receive service in British Columbia;
- (o) to achieve British Columbia's energy objectives without the use of nuclear power;
- (p) to ensure the commission, under the *Utilities Commission Act*, continues to regulate the authority with respect to domestic rates but not with respect to expenditures for export, except as provided by this Act.

Appendix 6: Abbreviations

AUC	Alberta Utilities Commission
AMPC	Association of Major Power Customers
BCUC	British Columbia Utilities Commission
CPCN	Certificate of Public Convenience and Necessity
CEA	<i>Clean Energy Act</i>
CEO	Chief Executive Officer
COO	Chief Operating Officer
CEC	Commercial Energy Consumers Association of BC
EAO	Environmental Assessment Office
FTE	Full-Time Equivalent
GJ	Gigajoule
IRs	Information Requests
ICBC	Insurance Corporation of British Columbia
MRS	Mandatory Reliability Standards
MOU	Memorandum of Understanding
NEB	National Energy Board
NSP	Negotiated Settlement Processes
NERC	North American Electricity Reliability Council
PACA	Participant Assistance Cost Award Guidelines
PMCC	Performance Monitoring, Conduct and Compliance
PSEC	Public Sector Employers' Council
OEB	Ontario Energy Board
SRP	Streamlined Review Processes

UCA	<i>Utilities Commission Act</i>
WUTC	Washington Utilities and Transportation Commission