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August 11, 2014

Dear Sirs:

**RE: British Columbia Hydro and Power Authority (BC Hydro)
Independent Review of the British Columbia Utilities Commission
(BCUC or the Commission)**

BC Hydro is writing to provide its Round 3 submission to the BCUC independent review task force (**Task Force**). On July 15, 2014 the Task Force sent an email advising that stakeholders would have the opportunity to make additional written comments that must be submitted no later than August 11, 2014 and limited to:

- 1) Issues raised in the British Columbia (**B.C.**) Minister of Energy and Mines and Minister Responsible for Core Review's (**Minister**) letter of July 15, 2014;¹ and
- 2) New issues brought forward by stakeholders in their Round 2 submissions. BC Hydro provides its comments on two aspects of Treaty 8 Tribal Association's (**T8TA**) Round 2 submission: (i) possible Task Force probing of the status of recommendations resulting from the 2011 Review of BC Hydro as part of questioning the regulatory review costs incurred by utilities; and (2) past use of the section 5 *Utilities Commission Act*² (**UCA**) inquiry power.

Issues Raised by Minister's Letter

For ease of reference BC Hydro grouped the issues raised by the Minister's letter under section 4 of the Task Force Terms of Reference (**ToR**). BC Hydro makes the following observations on the expanded scope of the ToR, with the exception of: (i) the potential efficiencies that could be gained from BCUC regulation of private sector water utilities; and (ii) whether different regulatory models should apply to Crown and investor-owned public utilities. BC Hydro has no comments on these two issues.

¹ <http://www.empr.gov.bc.ca/EEC/Strategy/EEA/Documents/Minister%27s%20Letter%20to%20Task%20Force.pdf>.

² R.S.B.C. 1996, c.473.

Mechanisms for Government to provide clear and timely policy direction:

In BC Hydro's view, there are existing mechanisms in place for the B.C. Government to provide clear and timely policy direction to the BCUC such as:

- 1) Energy Plans and other non-legislative policy documents;³
- 2) Legislation; and
- 3) Instructions to the BCUC in the form of section 3 *UCA* directions (**Directions**).

The scope of the power to direct granted under section 3 of the *UCA* is broad. Subsection 3(2) of the *UCA* makes it clear that Directions trump all other provisions of the *UCA* and previous BCUC decisions. Importantly, courts have held that quasi-judicial bodies such as the BCUC are not legally bound by government policy unless it has legal support (in this case, in the form of the *UCA*, the *Clean Energy Act*⁴ (**CEA**) or Directions). Courts have also held that quasi-judicial bodies can on their own determine how much weight should be given to government policies unsupported by legal instruments.⁵

The appropriate application of the energy objectives in the Clean Energy Act:

Section 2 of the *CEA* lists sixteen "British Columbia's energy objectives" (**Energy Objectives**). The majority of the Energy Objectives are not specific to BC Hydro. The four exceptions are:

- (1) Part of Energy Objective 2(b) which addresses demand-side measures (**DSM**), and specifically includes the objective of BC Hydro reducing its expected increase in demand for electricity by the year 2020 by at least 66%;
- (2) Energy Objective 2(e), which ensures that BC Hydro's ratepayers receive the benefit of the heritage assets;
- (3) Energy Objective 2(f), which ensures that BC Hydro's rates remain among the most competitive of rates charged by public utilities in North America; and

³ *Energy for Our Future: A Plan for BC* (November 25, 2002); *The BC Energy Plan: A Vision for Clean Energy Leadership* (February 27, 2007), copy available at <http://www.energyplan.gov.bc.ca/>. The listing of Energy Plans in 1) is not meant to be exhaustive. For example, policy direction to BC Hydro may also be evidence of B.C. Government policy. An example is Shareholder Letters of Expectations (A copy of the 2013/2014 'Government's Letter of Expectations Between The Minister of Energy, Mines and Natural Gas [As Representative of the Government of British Columbia] and The Chair of British Columbia Hydro and Power Authority [As Representative of the Corporation]' is available at <https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/accountability-reports/openness-accountability/governments-letter-of-expectations.pdf>).

⁴ S.B.C. 2010, c.22.

⁵ Refer to *Innisfil (Township) v. Vespra (Township)* (1981), 123 D.L.R. (3d) 530 at 533, 511 (Supreme Court of Canada).

- (4) Energy Objective 2(p), which ensures that the BCUC continues to regulate BC Hydro with respect to its rates but not with respect to expenditures for export, except as provided by the *CEA*.

BC Hydro also notes that Energy Objective 2(a) – self-sufficiency - is legally binding on BC Hydro through subsection 6(2) of the *CEA*.

BC Hydro submits that there may be opportunities to rationalize the 16 Energy Objectives.

BC Hydro and the Energy Objectives - Subsection 3(1)(b) of the *CEA* mandates that BC Hydro's Integrated Resource Plan (**IRP**) include a description of what BC Hydro plans to do to achieve self-sufficiency and "to respond to" the other 15 Energy Objectives. In its 2013 IRP, BC Hydro grouped the 16 Energy Objectives into four categories – Ratepayer Impact, Economic Development, Clean/Renewable/DSM and Greenhouse Gas Impacts, and Exports.⁶

Commission and the Energy Objectives - The Commission must "consider and be guided" by the Energy Objectives in the context of BC Hydro's Certificate of Public Convenience and Necessity applications (*UCA*, subsection 46(3.3)(a)); expenditure determination requests (*UCA*, subsection 44.2(5.1)(a)); and energy purchase agreement (**EPA**) filings (*UCA*, subsection 71(2.21)(a)). The BCUC must "consider" the Energy Objectives in the context of other public utility CPCN, expenditure determination and EPA filings.

BC Hydro's most recent experience with the BCUC's treatment of the Energy Objectives illustrates the connection between the Energy Objectives and the *UCA*, and concerns the filing under section 71 of the *UCA* of an EPA between BC Hydro and Covanta Burnaby Renewable Energy, LC. The BCUC determined that the test is whether the filing "supports" the relevant Energy Objectives, and "does not generally detract from" other Energy Objectives.⁷ The BCUC rejected a checklist approach urged by some proceeding participants, whereby a resource must advance all relevant Energy Objectives. Such an approach would create a virtually insurmountable hurdle for any BC Hydro owned or acquired resource to clear.

Options for clarifying the roles and mandate of the Province and the BCUC with respect to utility regulation:

The issues BC Hydro addressed under section 2.7 of the BC Hydro Round 2 submissions filed on July 14, 2014, such as definitions of the various *UCA* public interest tests, appear now to be in scope as a result of the Minister's letter. BC Hydro relies on

⁶ Refer to section 1.2.3 and Table 1-1 of BC Hydro's 2013 IRP;
https://www.bchydro.com/energy-in-bc/meeting_demand_growth/irp.html.

⁷ Refer to Commission Order No. E-19-14, Appendix A ('Reasons for Decision, July 11, 2014), pages 15 and 16 of 18; http://www.bcuc.com/Documents/Orders/2014/DOC_41710_E-19-14_BCH-Covanta-SEEGEN2014EPA.pdf.

section 2.7 of its Round 2 submission to address that part of the Minister's letter seeking input on "options for clarifying ... the mandate of the BCUC".

New Issues Raised in Round 2 Submissions: T8TA

In addition to BC Hydro's Round 2 submission of July 14, 2014, Round 2 submissions were made by FortisBC, Canadian Association of Petroleum Producers, the Commission and T8TA. BC Hydro reviewed these submissions and addresses two issues raised by T8TA:

- (1) Contentions concerning costs incurred by BC Hydro in regulatory proceedings, and related T8TA recommendations such as Task Force follow-up on the status of the recommendations resulting from the 2011 Review of BC Hydro and "specific measures" the Commission could take; and
- (2) Prior use of the section 5 *UCA* inquiry power.

Utility Costs for Regulatory Reviews

T8TA at page 5 of its Round 2 submission makes assertions concerning the number and behaviour of BC Hydro personnel at specific Site C Joint Review Panel (**JRP**) hearing days. BC Hydro does not agree with T8TA's statements, and notes that the JRP requested certain information from BC Hydro and this required the presence of a number of experts. T8TA then concludes that utility regulatory costs are "excessive" and "require greater attention". In response, BC Hydro adopts FortisBC's Round 2 submission at pages 6 and 7 addressed at BC Public Interest Advocacy Centre's assertions about the number of public utility personnel at Commission proceedings and utility costs for regulatory reviews. FortisBC observes among other things that regulatory costs are not entirely within the control of public utilities, and public utilities "hold the evidentiary burden" (BC Hydro as the applicant bears the evidentiary onus whether in the Site C environmental assessment or the Commission context).

FortisBC further submits, and BC Hydro agrees, that the appropriate process for consideration of regulatory review costs incurred by public utilities is in the Revenue Requirement context, and that if such regulatory costs are prudently incurred, they are by law recoverable in the ordinary course. In contrast, T8TA appears to identify two avenues:

- The first, set out at page 6 of T8TA's Round 2 submission, is that "it may be worthwhile for the Task Force to investigate what progress, if any, has been made" in responding to the 2011 Review of BC Hydro⁸ on the basis that the 2011 Review is relevant to BC Hydro's operating costs, which would include costs of regulatory reviews. T8TA qualifies this by stating that it is unsure "of the latitude of the Task Force to probe the costs incurred by BC Hydro". In BC Hydro's submission, it is clear from the ToR that the Task Force is not charged with a review of BC Hydro's costs –

⁸ *Review of BC Hydro* (June 2011); Copy available at <http://www.newsroom.gov.bc.ca/downloads/bchydroreview.pdf>.

operating or otherwise - and accordingly Task Force investigation of responses to the 2011 Review is outside of its mandate.⁹

- The second, set out at pages 6 and 7 of T8TA's Round 2 submission, consists of a series of measures T8TA states the Commission could take as part of application reviews, such as: (i) keeping attendance records - utility witnesses and legal counsel are listed as part of Commission decisions, particularly for oral hearings; (ii) requiring daily and hourly billing rate and expense information for BC Hydro representatives participating in Commission proceedings to determine the reasonableness of rates - the Commission can request such information in the Revenue Requirement context; and (iii) requiring BC Hydro to report on costs on a proceeding-by-proceeding basis - BC Hydro submits that it is the Commission that should be reporting on regulatory review costs as part of its Annual Reports to the B.C. Lieutenant Governor in Council (**LGIC**), because as FortisBC notes, regulatory review costs are not entirely within the control of public utilities.

BC Hydro submits that the better course is for the Task Force to recommend review of the Participation Assistance/Cost Awards Guidelines, as opposed to suggesting measures to 'cap' utility costs for preparing and undertaking regulatory reviews which are likely to be unfair given the evidentiary onus and lead to unintended consequences (lengthened proceedings due to lack of information).

Section 5 UCA Inquiry Power

T8TA advances at page 2 of its Round 2 submission that a Task Force review of section 5 of the *UCA* is relevant to develop "future similar review processes, whether in relation to Site C" or other green-field large hydroelectric projects. BC Hydro relies on its letter found at Attachment 1 to its Round 2 submissions for its position that the Task Force is not empowered to opine on a possible Commission review processes for Site C. BC Hydro is fortified in its view by the Minister's letter, which states that the Task Force is to address "certain issues" raised by Round 1 submissions "not explicitly" in the ToR; noticeably the Minister's letter does not reference a possible Commission review process for Site C, even though several stakeholders, including T8TA, made comments on this topic as part of Round 1 submissions.

BC Hydro sets out the following information concerning prior use of section 5 *UCA* inquiry powers as such information likely compliments the Task Force review of BCUC review processes enumerated in section 2 of the ToR (conventional oral and written public hearings, alternatives review processes).

Subsection 5(1) of the *UCA* provides that on the request of the LGIC, the Commission is to provide advice "on any matter, whether or not it is a matter in respect of which the Commission otherwise has jurisdiction". Section 5 inquiries are generally initiated by LGIC Terms of Reference questions to the Commission. Typically inquiries require

⁹ The 2011 Review is addressed to the B.C. Government. BC Hydro notified the B.C. Government that as of March 31, 2014 BC Hydro had completed all 50 of the recommendations that were directed to it.

BC Hydro and/or other public utilities make a 'proposal' (i.e., submission with evidence) with respect to the LGIC Terms of Reference questions, involve an oral hearing, allow for submissions and evidence from interested participants, and require the Commission to make recommendations to the LGIC, including what proposed changes, if any, are required to legislation affecting the particular utilities and/or Commission.

The section 5 *UCA* referral power has been used twice – one which was generally viewed as a success (2003 Heritage Contract Inquiry) and one which was not (2008/2009 Transmission Inquiry). The difference was largely the result of the former having a relatively narrow focus, with a discrete set of questions the BCUC was to address; refer to the Heritage Contract Terms of Reference.¹⁰ In BC Hydro's view, section 5 inquiries are most effective if the scope of the inquiry is strongly focused through LGIC Terms of Reference questions. The major 'pro' of a section 5 *UCA* inquiry is the transparency of the regulatory review process. The major 'con' is the potential to expand the scope, breadth of participation and timeline to complete the review if the LGIC questions are not specific (relatively narrow in scope).

High level policy questions do not in BC Hydro's view engage BCUC expertise, and are not likely amenable to an evidentiary-style setting with cross-examination on facts, in a quasi-judicial hearing. In the past, the B.C. Government has referred high level policy questions to ad hoc task forces and not the BCUC, such as the 2001 Energy Policy Task Force¹¹ and the 2009/2010 Clean Energy Advisory Task Force,¹² with members appointed by the B.C. Government and opportunities for stakeholder input.

¹⁰ Order in Council No. 0253, March 25, 2003; copy found at Appendix A to the Commission's Report and Recommendations: In the Matter of British Columbia Hydro and Power Authority and An Inquiry into a Heritage Contract for British Columbia Hydro and Power Authority's Existing Generation Resources and Regarding Stepped Rates and Transmission Access, copy available at <http://www.bcuc.com/Documents/Decisions/2003Dec/Heritage%20LGIC%20Rpt-Recommend.pdf>. The Terms of Reference for the 2008/2009 Transmission Inquiry were issued by the then Minister on December 17, 2008 under what was then subsections 5(4) to 5(9) of the *UCA*, which have been repealed by the *CEA*. A copy of the 2008/2009 Transmission Inquiry Terms of Reference can be found at http://www.bcuc.com/Documents/Proceedings/2009/DOC_21019_12-11_Terms%20of%20Reference.pdf.

¹¹ On November 30, 2001 this task force issued Strategic Considerations for a New British Columbia – Interim Report of the Task Force.

¹² Public reports by sub-groups of the Clean Energy Advisory Task Force issued in January 2010.

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For further information, please contact the undersigned.

Yours sincerely,



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