

July 31, 2014

E-MAIL: bcucreview@gov.bc.ca

Peter Ostergaard (Chair)
Michael Costello
R. Brian Wallace, Q.C.

(together the “**Task Force**”)

Dear Sirs:

BCUC Review - Comments of Lawson Lundell LLP

We write further to the BCUC Review Task Force’s communication of July 15, 2014 inviting further comments in response to Minister Bennett’s letter to you of the same date.

Minister Bennett’s letter invited further analysis with respect to potential efficiencies that could be gained from BCUC regulation of private sector water utilities and certain issues that have been raised regarding the regulatory model in BC in the course of your review to date.

We will comment on the water utility issue and the first three sub-issues that have been raised in connection with the regulatory model. We have no comment to make on the fourth sub-issue in that connection.

BCUC Regulation of Private Sector Water Utilities

The Comptroller of Water Rights has the powers and responsibilities of the BCUC in regard to the myriad private water utilities in the Province, and the consolidation of the two could result in some efficiency gains. The vast majority of the water utilities under the Comptroller’s jurisdiction are quite small and under-capitalized, and accordingly the Comptroller has had to develop efficient regulatory processes and substantive rules that recognize the lack of resources on both the customer and the utility side of the equation. We think the Comptroller has largely achieved that goal, and thus achieving the desired efficiencies from a consolidation would only be possible to the extent that the Comptroller’s institutional knowledge and practices were largely kept intact.

1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604 685 3456
Facsimile 604 669 1620
www.lawsonlundell.com
Vancouver
Calgary
Yellowknife

The Regulatory Model in British Columbia

In our view, there is a link between the first three sub-issues that the Minister has identified under this heading. That is, the mechanisms for government to provide policy direction, the energy objectives in the *Clean Energy Act* and the options for clarifying the roles of the Province and the BCUC all involve the development of a framework that clearly delineates where government policy making stops and BCUC implementation of policy begins.

Because there is often no bright line between policy direction and policy implementation, there is a strong temptation for government to dictate outcomes and for the BCUC to set policy. In our view, these understandable tendencies must be controlled and it is government that must be the controller. Government may do that in two ways:

1. By clearly, unambiguously and in a legally effective manner setting out the policy goals that the BCUC is obligated to advance ; and
2. By permitting the BCUC to determine individual outcomes by applying its discretion as directed by the unambiguous policy goals identified under point (1).

This model will require discipline from the BCUC to follow the government's policies as best it can and from the government to respect the BCUC's *bona fide* efforts in that regard even where they lead to unanticipated outcomes.

The mechanism by which government provides policy direction is less important than adhering to the two principles above and providing direction in clear and unambiguous language. The BCUC needs flexibility to make decisions that respond to the particular circumstances of individual cases. However, overly broad direction provides insufficient guidance to the decision makers. As well, policy direction that requires decision makers to consider too many factors can become self-defeating as the regulator struggles with potential conflicting objectives. To avoid these pitfalls, we suggest that whatever mechanism is used, government adhere to the following principles:

- (1) Consistent with well-established principles of administrative law, policy direction to the BCUC should be fully transparent and accessible to all interested parties¹;
- (2) Policy direction to the BCUC should be employed only where existing legislation does not adequately establish policy parameters. In particular, where the principles to be applied by the BCUC are well established under the *Utilities Commission Act* (“UCA”), no further direction should be required unless government wishes the BCUC to apply policies that are either in addition to or not consistent with general utility regulatory policy established by the BCUC²;
3. Policy direction should focus on policy, not results. 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. In our view, a good example of a policy-oriented direction was the 2002 Energy Plan policy to implement new rate structures to provide better price signals to large electricity consumers so as to encourage conservation and efficiency (policy action 21);
4. Where government has objectives that are unrelated to the BCUC’s traditional mandate and it is not confident that the BCUC is institutionally capable of effecting those objectives, decision making authority should be removed from the BCUC proactively rather than in response to a BCUC decision; and
5. Policy direction should not seek to be all things to all people. Overly ambitious direction inevitably risks becoming internally inconsistent.

Currently, in addition to legal requirements set out in the UCA, the BCUC is required to consider British Columbia’s energy objectives as set out in the *Clean Energy Act* when it reviews long term resource plans (other than BC Hydro’s), approves expenditure schedules, issues CPCNs and reviews energy supply

¹ Any engagement, of the nature suggested on page 11 of FortisBC Utilities’ June 13, 2014 submission to the Task Force, between the BCUC and the government concerning the interpretation and application of policy needs to be equally transparent.

² For example, the energy objective set out in section 2(1) of the *Clean Energy Act* encourages the BCUC, when exercising certain powers, to consider the objective of fostering the development of first nation and rural communities through the use and development of clean or renewable resources. Such considerations would not normally bear on the BCUC’s deliberations under the UCA.

contracts. The energy objectives in the *Clean Energy Act* are transparent and accessible and thus meet the first requirement set out above. However, many of the energy objectives conflict with the other criteria set out above. For example, objectives 2(e) and (f) repeat objectives already set out in the UCA or in clear interpretations of it by the BCUC . Similarly, objectives 2(a) and 2(p) largely repeat provisions of the *Clean Energy Act*. Many of the objectives conflict with objective 2(f). We believe that the government would be well served by re-examining the energy objectives and clearly indicating which ones it wishes the BCUC to prioritize in exercising the discretion it has otherwise provided under the UCA.

More generally, we think there is scope for the government to set clear, transparent energy policy in the Province and then reflect those policies in clear, legally binding directions to the BCUC. Those directions could be given through legislation or regulation (including by direction under section 3 of the UCA). As discussed above, the mechanism is less important than the clarity with which the directions are expressed and the need to refrain from prescribing outcomes for issues within the BCUC's traditional mandate.

Yours very truly,

LAWSON LUNDELL LLP*



*Contributions to this letter were made by Chris W. Sanderson, Q.C., Jeff Christian, Ian Webb and Jennifer Champion.

/tss