

FORMER MEMBER QUESTIONS INDEPENDENCE OF THE BC UTILITIES COMMISSION

Despite assurances by the provincial government that it respects the independence of the BC Utilities Commission (BCUC), cabinet continues to use its legislative authority to interfere with the Commission’s discretion to set BC Hydro’s electricity rates. I have been critical of the current NDP (and the previous Liberal) governments’ use of cabinet orders to direct the BCUC decisions.¹

Now Richard Mason, a former BCUC commissioner, has criticized the government’s recent restrictions on the nominally independent BCUC.² Mr. Mason agreed to my posting of his article.

How Independent is the BCUC’s Oversight of BC Hydro?

Richard Mason July 23, 2024 <https://justandreasonable.com/how-independent-is-the-bcucs-oversight-of-bc-hydro/>

BC’s Auditor General recently warned that future government directions regarding BC Hydro’s net income are a “risk area” for the provincial accounts, which have twice been qualified as a result of the government overriding the independence of the BC Utilities Commission (BCUC).

On July 15, 2024, the BC government ordered the BCUC to allow BC Hydro’s regulated net income to remain at \$712 million a year for an additional two years – until March 31, 2027.

In this article, I take a look at how one might evaluate the BCUC’s regulatory oversight of BC Hydro.

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https://www.bcpolicyperspectives.com/media/attachments/view/doc/commentary_bcuc_independence_5_december_2022/pdf/commentary_bcuc_independence_5_december_2022.pdf Under national public sector accounting standards BC Hydro’s use of rate regulated deferral accounts must be overseen by an independent third-party tribunal.

² Mr. Mason focuses on developments within the last year, but the violations of the BCUC’s independent role are much more longstanding.

Independence cannot simply be asserted

The independence of the BCUC is critical to its role as an economic regulator. In the absence of competition, monopolies tend to provide lower quality service at higher prices, and may “cherry pick” profitable customers, refusing to serve others. A regulator exists to stand in for the forces of competition, and set prices that are just and reasonable; a regulator not acting independently cannot be trusted any more than an unregulated monopoly.

For ratepayers to accept the judgements of the BCUC, they must believe that its decisions are made independently. I doubt anyone would be satisfied with the BCUC setting their FortisBC gas or electricity rates if FortisBC shareholders got to appoint the commissioners and choose which ones made the decision.

But that’s exactly the situation we have with BC Hydro; the government appoints the BCUC chair and commissioners, who then set the rates for the utility owned by the government.

Since the BCUC is an arm of government, this problem can never be entirely eliminated. But both the government and the BCUC itself can and should take extra care with how BC Hydro decisions are made to avoid the perception that the government is exerting undue influence to benefit the utility which it owns.

There is nothing the BCUC can do when the government directly orders it to make a decision without an independent review (ordering the BCUC to allow BC Hydro to collect \$712 million in net income is one such example). While nobody would be fooled into thinking this was an independent decision by the BCUC, at least it’s transparent how the decision was made, and that it was not subject to an independent review.

But the BCUC does make some decisions about BC Hydro’s rates based on regulatory principles. What influences these decisions, and does the recent evidence suggest they are being made independently?

It starts at the top

[Section 2 of the Utilities Commission Act](#) calls for the government to appoint a [chair](#) after a “merit-based process”. The chair has considerable authority, for example deciding which commissioners will participate in each decision, and may appoint themselves as the sole commissioner to make decisions. If the government wanted a less independently minded BCUC, replacing the chair would be a good place to start. And it has done just that.

In September 2023 the government fired the BCUC chair over a year before the end of his term, with [no evidence](#) of a merit-based process to select his successor. As veteran political columnist Vaughn Palmer [observed](#) at the time, the new chair faces “a huge challenge in demonstrating the commission’s independence, given the circumstances surrounding his appointment.”

The firing of any appointed commissioner, never mind the chair, could have a chilling effect on other commissioners' decision making. They could be reluctant to criticize or reject BC Hydro applications if it meant they risked unemployment. Even if commissioners are not fired, they rely on the chair to assign them work and the government for their reappointment.

Judges have security of tenure to avoid this risk; it turns out BCUC commissioners do not have such protection.

Fair process

BCUC decisions should follow the rules of [procedural fairness](#), one of which is to ensure those affected by a decision the right to be heard. Since last September, the BCUC's "[efficiency drive](#)" appears to be reducing the involvement of public interest groups.

For example, some public interest groups are restricted from the BCUC's funding program by being limited to submitting letters of comment rather than being granted full intervention rights. In other cases, proceedings take place without even allowing letters of comment.

While these actions reduce costs to ratepayers, they also reduce the transparency and public credibility of the BCUC's decisions.

Recent decisions

Do the decisions made since hiring the new chair show the BCUC independently reviewing BC Hydro applications?

You be the judge.

The reconsideration requests

BC Hydro issued four [reconsideration requests](#) to the BCUC immediately following the change in leadership, an unprecedented number in such a short time. Did BC Hydro think it was a good opportunity for a second kick at the can?

Well, the BCUC approved every one of them. In no case did BC Hydro allege that the BCUC had made an error of fact or law, which, if sustained, would have been a strong reason for approving a reconsideration. Rather, BC Hydro cited changes in circumstances since the decision, or "other just cause."

The [most egregious](#) of the reconsideration decisions was to undo BC Hydro's transition to performance-based regulation. This scheme, already in use for decades to regulate FortisBC, would have provided an incentive for BC Hydro to manage the growth in its operating costs. Reversing this decision risks losing the opportunity to save millions of dollars for ratepayers, as FortisBC has done.

In approving these reconsideration requests, the BCUC undid years of work, undermining the finality of its decisions, which as the Supreme Court of Canada

has [warned](#) “may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings.”

Directly relevant to the Auditor General’s “risk area”, BC Hydro’s March 19th request to delay its cost of capital application from March 31st to the end of August was approved by the BCUC in two days, with no public interest group involvement, and was made by just one commissioner. While this was not formally a [fifth reconsideration request](#), in fact it was exactly that. BC Hydro requested the delay to consider “potential alternative approaches to establishing its cost of capital.” We now know what “alternative approach” was chosen – another government direction to the BCUC.

And there’s more...

In March this year, the BCUC approved a request from BC Hydro to adjust its residential rates, and as a result the 6.42 percent overall increase became a 12.51 percent increase for those customers paying the “Step 1” rate (usage below 1,350 kWh bi-monthly). This impactful decision, as [I noted at the time](#), was made by the BCUC in 10 days, dramatically quicker than the corresponding decisions in recent years, and with none of the public consultation which had been typical in the past. The decision was made by only one commissioner: the new chair.

Also in March, the BCUC issued its decision on BC Hydro’s Integrated Resource Plan. This plan contained serious deficiencies, not least being [disconnected from the province’s climate policy](#), and failing to consider that we might need electricity to both reduce carbon emissions and support the province’s LNG industry. Despite this, the BCUC approved the plan.

The BCUC hasn’t approved every BC Hydro application since September last year. In January, it [rejected](#) a BC Hydro request to spend \$100 million on a system upgrade, due primarily to poor analysis and insufficient evidence of the true cost of the recommended alternative.

A lack of curiosity?

Independence is not just about the decisions the regulator makes, it’s also about the questions it chooses to ask. [Section 24 of the Utilities Commission Act](#) states that the BCUC “must make examinations and conduct inquiries necessary to keep itself informed” about any matters in its jurisdiction. Note the Act’s use of the word “must” – this is a legal obligation on the BCUC, not a discretionary power.

Since September last year, the BCUC has initiated no inquiries. This is quite a contrast to the last five years, when it conducted inquiries into cybersecurity, hydrogen, thermal energy systems, municipal energy utilities and public electric vehicle charging, to name just five. Are there no matters the BCUC considers worthy of inquiry? Or does it not want to raise any awkward questions?

One matter I think is definitely worthy of an inquiry is the overrun of BC Hydro’s Site C project, now almost double its \$8.335 billion budget.

If a public utility capital project goes significantly over budget, the BCUC can, and should, conduct a “prudency review” to determine whether the overrun should be incurred by the ratepayer. If the utility acted imprudently, the shareholder may be directed to take responsibility for some of the cost. A truly independent BCUC would surely conduct a prudency review into the almost \$8 billion overrun on BC Hydro’s Site C dam project.

Conclusion

The possible conflict of interest between the government’s ownership of BC Hydro and its ability to influence the BCUC means the relationship between the three parties must be closely scrutinized; the Auditor General is one of the few institutions that has the power to hold the government to account.

The BCUC asserts it is an “independent agency” of the government of BC, but I fear the evidence shows the BCUC’s ability to provide independent oversight of BC Hydro has declined in the last year. I look forward to hearing what the Auditor General thinks.

But the BCUC’s independence is about more than proper financial reporting by the government. The energy transition to a greener economy is going to become ever more challenging, and needs to balance the interests of ratepayers, taxpayers, BC Hydro and investor-owned utilities. We need to have confidence that the BCUC’s decisions are being made fairly and transparently, and not unduly influenced by the government to further the interests of the utility it owns.

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The writer is a retired senior BC government public servant whose paper describing the BC government’s manipulation of the finances of BC Hydro from 2008 to 2014 was published by BC Studies in November 2016. BC Studies published his paper on the 40-year financial history of ICBC in 2013. He is an intervener in the BC Utilities Commission’s reviews of ICBC’s and BC Hydro’s rate requests.

