

IN THE MATTER OF the Utilities Commission  
Act, S.B.C. 1980, c. 60

and

IN THE MATTER OF British Columbia Hydro and  
Power Authority Transmission Rates

DECISION

February 1, 1982

BEFORE:

M. Taylor, Chairman;  
M.W. Mulligan, Deputy Chairman;  
J.D.V. Newlands, Deputy Chairman;  
D.B. Kilpatrick, Commissioner; and  
B.M. Sullivan, Commissioner

## REASONS FOR DECISION

On September 11, 1980, the Utilities Commission Act ("the Act") was proclaimed in force. By Sections 146 through 151 the British Columbia Hydro and Power Authority ("B.C. Hydro") is, for the first time in its corporate history, brought under the regulatory control of the Commission. One of the means of ensuring a smooth transition of B.C. Hydro from unregulated to regulated status is provided by Section 141(4):

"The rates of the British Columbia Hydro and Power Authority that are in effect immediately before this Act comes into force shall be deemed to have been filed with the Commission under this Act and are the lawful, enforceable and collectable rates of the authority."

The first general overview of B.C. Hydro rates arose out of the imposition by the Lieutenant Governor in Council of an increase in fees for the use of water in hydroelectric plants, effective January 1, 1981. In early 1981, B.C. Hydro applied for, and received, Commission approval to pass the increased water rental fees on to all of its customers excepting those in the "transmission rate" category.

In B.C. Hydro terminology a transmission rate customer is one which receives electric service at transmission voltage and then, through its own transformer facilities, converts it to the voltage of 60 kv or greater appropriate to its particular industrial process. The transmission rate category is further subdivided into "Bulk" customers and "Schedule 1821" customers.

One of the provisions of the contracts between B.C. Hydro and transmission rate customers requires that B.C. Hydro serve

notice on the customer of any increase in rates at least one year prior to the effective date of the increase. Although notice had been given to transmission rate customers of a rate change and increase to become effective April 1, 1981, the water rental increase had not been included because it was not known at the time the notice was given. It was contended therefore, more strongly by the transmission rate customers who made submissions than by B.C. Hydro, that B.C. Hydro was prevented by contract from passing on the water rental increase to the transmission rate customers. The Commission decided that it was not in the public interest to override the one year notice provision in the contracts so as to enable B.C. Hydro to pass on the water rental increase.

In the meantime, while the Commission had the matter of the water rental increase to transmission rate customers under consideration, a dispute developed between B.C. Hydro and certain of the transmission rate customers over the rate change and increase which B.C. Hydro had advised would become effective April 1, 1981. The disputing transmission rate customers took the position that, until changed by order of the Commission, under Section 141(4) of the Act, previously quoted, the only lawful, enforceable and collectable rates of B.C. Hydro were those being charged, enforced and collected when the Act was proclaimed on September 11, 1980.

The Commission concluded that the issue between the parties was a question of law, namely the construction to be placed upon Section 141(4) of the Act, in the light of the facts, and accordingly issued instructions that a case in writing be prepared for the opinion of the Court of Appeal pursuant to Section 122 of the Act.

On March 27, 1981, prior to the Commission decision that a stated case for the opinion of the Court of Appeal was appropriate, B.C. Hydro, by letter, requested the Commission to consider issuing an Order the effect of which would be to declare the rate B.C. Hydro had advised would become effective April 1, 1981, to be "...the only lawful, enforceable and collectable rate for all B.C. Hydro's Transmission Rate customers." On April 14, 1981, the Commission replied to the March 27, 1981 letter from B.C. Hydro saying, in part:

"It has not been Commission practice to issue rate increase Orders without a public hearing, other than under Sections 67(4) or 106 of the Act. As your letter makes no reference to either of those two provisions, the Commission concludes that you did not intend that it exercise its powers thereunder.

Accordingly, the Commission does not propose to act upon your request, unless you make application for amendment of the transmission rate schedules, which would bring about a public hearing process, or, unless you specifically apply under either of Sections 67(4) or 106, providing, at the same time, the supporting evidence upon which you would justify the necessity for Commission action under the section selected."

(emphasis added)

On May 21, 1981, the Commission advised the disputing parties of its decision to proceed by way of stated case to the Court of Appeal.

On May 27, 1981, B.C. Hydro applied to the Commission under Section 106 of the Act for an interim order approving the transmission rate which was in dispute, to take effect on June 1, 1981, upon condition that if the opinion of the Court of Appeal were in B.C. Hydro's favour the interim order would

be rescinded. The Commission was not provided with any evidence of need or necessity or that there were special circumstances which required the making of an interim order. The application has not therefore been acted upon heretofore.

On June 18, 1981, B.C. Hydro applied to the Commission for interim and permanent rate relief, to be effective August 1, 1981 and April 1, 1982, respectively, for electric service, mainland gas service and Greater Victoria gas service. In addition to the information supplied with the application, further information was supplied at the request of the Commission. In respect of the request for interim rate relief for electric service, which would have included the proposed April 1, 1981 transmission rate, in Order No. G-63-81 dated August 6, 1981, the Commission ordered, in part as follows:

"The Commission rejects the tariff schedules for electric service proposed for August 1, 1981, and April 1, 1982, and directs B.C. Hydro to file revised tariff schedules, taking into account increased revenue derived from electric export sales and water storage rentals in the amount of \$56,821,000 in the fiscal year ending March 31, 1982, and electric export sales of \$50 million in the fiscal year ending March 31, 1983."

Subsequently, B.C. Hydro requested the Commission to vary Order No. G-63-81. No compelling reasons for variation having been given, the Commission has not heretofore acted upon the request to vary.

The Court of Appeal handed down its opinion on the stated case on December 29, 1981, saying, in the last paragraph:

"It follows that our opinion on the question is that the rates being charged and collected on September 11, 1980 were the lawful, enforceable and collectable rates of the British Columbia Hydro and Power Authority, effective April 1, 1981, for each of "Bulk" Customers with contracts, "Bulk" Customers without contracts, "Schedule 1821" Customers with contracts and "Schedule 1821" Customers without contracts."

Pending the resolution of the question of the lawful, enforceable and collectable transmission rate, the disputing parties agreed, by exchange of letters, that the rate which B.C. Hydro charged and collected commencing April 1, 1981, would be paid, provided that if the resolution of the dispute were not in B.C. Hydro's favour, B.C. Hydro would refund the increase, with interest. B.C. Hydro concedes that whatever order the Commission might make in this regard should apply to all transmission rate customers, notwithstanding that there are some who did not formalize the agreement by exchange of letters.

Upon receipt of the opinion of the Court of Appeal, it was evident to the Commission that further action might be necessary to carry out its terms. The Commission was reinforced in this view by representations from some of the parties. In particular it appeared that the implementation of the opinion of the Court of Appeal was inextricably linked to a final disposition of the B.C. Hydro May 27, 1981 application for an interim order, and furthermore, that the application of B.C. Hydro to vary Order No. G-63-81 might be conveniently dealt with at the same time.

Being of the view that it would be in the public interest to hear from the interested parties before final disposition, the Commission invited B.C. Hydro and all transmission rate customers to make submissions on the following three questions:

- "First: Whether the opinion of the Court affects the jurisdiction of the Commission to deal with B.C. Hydro's May 27, 1981 application for interim rate relief in respect of its transmission rate customers and, if so, in what way.
- Second: Whether and, if so, in what manner, the Commission should modify the arrangement between B.C. Hydro and its transmission rate customers to refund the rates collected in excess of those prevailing on September 11, 1980.
- Third: Whether the Commission should modify the arrangement made to provide that in respect of such refunds B.C. Hydro should pay interest."

All parties who wished to be heard appeared and made submissions in the form of advice, opinions and recommendations, as requested by the Commission, in formal hearing sessions on January 14, 1982, and January 25, 1982, respectively. At the conclusion of the proceedings on January 25, 1982, the Commission advised the parties that it would consider the issues and the points made in argument and deal promptly with the outstanding matters.

At issue is the difference between what B.C. Hydro charged and collected from transmission rate customers under the April 1, 1981 rate and what it would have collected under the rate in effect on September 11, 1980. B.C. Hydro concedes that it has no grounds upon which it can claim that it should not be

obliged to refund the amount of the increase attributable to the period April 1, 1981 to June 1, 1981, the date upon which it requested that the interim order for which it made application on May 27, 1981, become effective. Therefore, it is the disposition of the difference, or increase, for the period commencing June 1, 1981, which is to be resolved.

B.C. Hydro argues that if it is required to refund the increase the substantial sums involved will cause a serious impact upon its revenue requirements; that the transmission rate customers succeeded in establishing their right to a refund on a "technicality"; that a refund will exacerbate an already favourable rate advantage transmission rate customers enjoy relative to other customer categories; and that the Commission can and should relieve them of the obligation to refund by granting the interim relief requested in the May 27, 1981 application by an Order having retroactive effect to June 1, 1981.

The transmission rate customers, on the other hand, contend that the substantial export revenues received by B.C. Hydro nullify any adverse effect which might otherwise result if a refund were ordered; that they established their position not on a technicality but upon a proper interpretation of the law; that they should not be denied the fruits of victory by the device of an order having retroactive effect; and that B.C. Hydro should not be allowed to avoid carrying out the agreements reached by exchange of letters that if the dispute were not resolved in favour of B.C. Hydro the difference or increase would be refunded with interest.



The disputing parties also argued the pros and cons of an interest component, B.C. Hydro saying that it would be "adding insult to injury", while the transmission rate customers asserted that it was no more than repayment of a benefit B.C. Hydro had enjoyed arising out of the collection of "unlawful" rates.

The Commission is indebted to all the parties for their careful and well reasoned submissions. They were extremely helpful to it in its deliberations during which all were weighed and carefully taken into account.

The Commission is mindful of the words of Section 122 of the Act which make the opinion of the Court of Appeal "...binding on the Commission and on all the parties". It is doubtful of the legality, and even more of the propriety, of issuing an Order the effect of which would be to make lawful what the Court of Appeal, by implication, has found to be unlawful by way of an opinion on a question the Commission itself put before the Court.

Also, the Commission is persuaded by the submissions that it ought not to deprive the transmission rate customers of the rights which accrued to them under the opinion of the Court of Appeal and that it ought not to relieve B.C. Hydro of the obligation to perform in accordance with the refund arrangements concluded in good faith through the letter exchanges.

Apart from these considerations there is the matter of evidence. Although the Commission, in the letter of April 14, 1981, quoted earlier in these reasons, stressed the need for

"supporting evidence upon which you would justify the necessity for Commission action", none has been filed in support of the May 27, 1981 application for an interim order. Neither has B.C. Hydro satisfied the Commission that there are the "special circumstances" contemplated by Section 106 of the Act. Therefore, even if there were no questions of legality or jurisdiction or propriety, the absence of evidence of need or necessity or special circumstances leaves the Commission with no foundation upon which it can base an interim order of the nature requested by B.C. Hydro.

It was said in argument on this point that the Commission could have regard to the evidence in support of the June 18, 1981 application (the rate case application) to determine need. The Commission is not convinced that it can take other evidence into account for that purpose, but even if it can, as was conceded, it should also look at all of the evidence in the rate case application some of which, notably the substantial revenues from export sales of electricity, would negate the need for interim relief. Accordingly, the same end result would obtain.

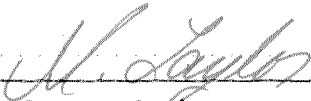
With respect to interest, the Commission is satisfied that the justice of the case requires that any refund ordered should bear interest at the going rates from time to time.

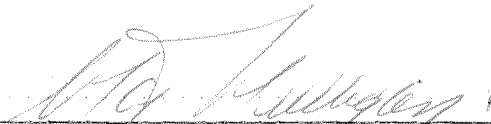
In the result, it is the Commission's decision, and it will so order:

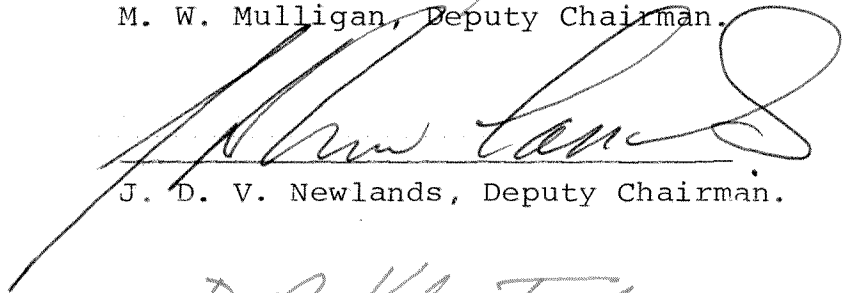
1. That the application of May 27, 1981, by B.C. Hydro for interim rate relief be denied.


2. That the application of B.C. Hydro for variation of Order No. G-63-81 be denied, no compelling reasons for variation having been given.
3. That B.C. Hydro pay to each "Bulk" customer and each "Schedule 1821" customer in full by March 31, 1982, the difference between what each such customer paid for electricity under the rate charged and collected effective April 1, 1981, and what each such customer would have paid if B.C. Hydro had charged and collected the rate in force on September 11, 1980.
4. That payments made to "Bulk" and "Schedule 1821" customers in accordance with clause 3 above shall include interest calculated monthly from April 1, 1981, until payment is made, at the prime rate charged to B.C. Hydro on borrowings from the Canadian Imperial Bank of Commerce over the same time period.
5. That commencing February 1, 1982, the rate which B.C. Hydro must implement with the "Bulk" and "Schedule 1821" customers is the rate which was in force on September 11, 1980, as changed or as may be changed from time to time by order of the Commission and there shall be no other lawful, enforceable or collectable rates for such customers.

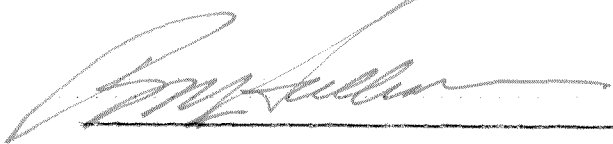
DATED at Vancouver in the Province of British Columbia,  
this 1st day of February , 1982.

  
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M. Taylor, Chairman.

  
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M. W. Mulligan, Deputy Chairman.

  
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J. D. V. Newlands, Deputy Chairman.

  
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