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British Columbia Hydro and Power Authority

Complaint filed by Gitga'at First Nation Regarding  
Remote Community Electrification Program Fees

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Decision  
and Order G-247-23

September 18, 2023

Before:

C. M. Brewer, Panel Chair  
A. K. Fung, KC, Commissioner  
T. A. Loski, Commissioner

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### COMMISSION ORDER G-247-23

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## Executive summary

Gitga'at First Nation (GFN) is a remote Indigenous community located in Hartley Bay, British Columbia. Since 2014, the British Columbia Hydro and Power Authority (BC Hydro) has provided electricity service in Hartley Bay pursuant to the Remote Community Electrification Program (RCE Program).

On September 28, 2022, the British Columbia Utilities Commission (BCUC) established a hearing to review a complaint filed by GFN regarding a charge which BC Hydro billed GFN annually (Complaint). According to GFN, pursuant to the terms of an Electricity Servicing Agreement (ESA) between GFN and BC Hydro, in return for payment of an annual charge of \$85,000 (Annual Charge), customers in the community of Hartley Bay are entitled to receive electricity under Zone II rates as set out in BC Hydro's Electric Tariff.<sup>1</sup> GFN submits that the Annual Charge has "violated" section 63 of the *Utilities Commission Act* (UCA), as it is a term or condition of service that was not reviewed and approved by the BCUC.<sup>2</sup> GFN requests that the BCUC determine that the Annual Charge is an unapproved rate. If the Annual Charge is determined to be an unapproved rate, GFN requests a refund of the payments it made since the inception of the ESA, amounting to \$693,000, plus interest at a rate the BCUC considers to be reasonable in the circumstances.<sup>3</sup>

For the reasons set out in this decision, the Panel finds that the Annual Charge is a rate tied to the provision of electricity service by BC Hydro to GFN which is subject to review and approval by the BCUC. This charge is a fee for service above the scheduled Zone II rate paid by other customers in the same rate class. As such the Panel finds the following:

- i. The Annual Charge is a rate for electricity services which is unjust, unreasonable and unduly discriminatory contrary to section 59(1)(a) of the UCA; and
- ii. The ESA provisions relating to an Annual Charge, in particular section 6 and Schedule E, are contrary to section 59(2)(b) of the UCA, as they amount to an agreement that was not regularly and uniformly extended to all persons in the Zone II rate class or within the RCE Program that were under substantially similar circumstances and conditions for service of the same description.

Under section 61(1) of the UCA, BC Hydro is required to file schedules for rates it intends to collect from customers, and the rates filed in these schedules are the only enforceable and collectable rates of a public utility. BC Hydro did not file with the BCUC under section 61(1) of the UCA, a schedule showing the Annual Charge.

BC Hydro has an obligation under section 63 of the UCA to seek the consent of the BCUC "to directly or indirectly, in any way charge, demand, collect or receive from any person for a regulated service provided by it, or to be provided by it, compensation that is greater than, less than or other than that specified in the subsisting schedules of the utility applicable to that service and filed under this Act." As the payment collected and received by BC Hydro as compensation from GFN goes beyond that set out in BC Hydro's Electric Tariff and schedules, the Panel finds BC Hydro to have contravened section 63 of the UCA since the inception of the ESA,

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<sup>1</sup> GFN Final Argument, p. 1.

<sup>2</sup> Ibid.

<sup>3</sup> Exhibit C1-5, BCUC IR. 5.1; Exhibit C1-9, Panel IR 1.1.

and declares, pursuant to section 64(1) of the UCA that the provisions in the ESA requiring the payment of the Annual Charge to be unenforceable.

The Panel determines it has the authority to order a refund of the payments amounting to \$693,000 that BC Hydro collected unlawfully from GFN. Accordingly, the Panel directs BC Hydro to refund GFN, within 6 months of this order, the entirety of the Annual Charge paid since the inception of the ESA, amounting to \$693,000, plus interest at a rate equal to BC Hydro's weighted average cost of debt, calculated for BC Hydro's most recent fiscal year.

## 1.0 Introduction

### Background

On April 5, 2022, Gitga'at First Nation (GFN) filed a complaint with the British Columbia Utilities Commission (BCUC) concerning charges billed by British Columbia Hydro and Power Authority (BC Hydro) (Complaint). GFN is a remote community in Hartley Bay, British Columbia (BC) to which BC Hydro extended electrical service under the Province of BC's Remote Community Electrification (RCE) Program. In addition to paying Zone II rates as set out in BC Hydro's Electric Tariff (Tariff), GFN has been billed an annual charge of approximately \$85,000 (Annual Charge) in relation to an Electricity Service Agreement with BC Hydro dated February 3, 2014 (ESA).<sup>4</sup>

GFN requests that the BCUC:<sup>5</sup>

- Find that the Annual Charge is an unapproved rate contrary to section 63 of the *Utilities Commission Act* (UCA or Act);
- Declare the appropriate sections of the ESA pertaining to the Annual Charge unenforceable; and
- Direct BC Hydro to refund the entirety of the Annual Charge paid by GFN, plus interest at a rate the BCUC considers to be reasonable in the circumstances.<sup>6</sup>

The Complaint references the RCE Program and various agreements entered into between one or more of different levels of government, BC Hydro and First Nation communities. We set out below, the historical context of the Complaint, along with a summary of the relevant agreements.

### RCE Program

BC Hydro established the RCE Program in 2006 to implement BC Hydro electric utility service in eligible remote communities in BC.<sup>7</sup> In June 2007, the Government of BC enacted the *Remote Communities Regulation*,<sup>8</sup> which identified certain remote communities that would be eligible for participation in the RCE Program. The regulation required BC Hydro to provide electricity service to customers within 90 meters of a distribution system owned by BC Hydro, who applied for service and agreed to pay the rates established for BC Hydro's service under the UCA.<sup>9</sup> At the same time, the BC government also issued *Special Direction No. 10*,<sup>10</sup> which directed the BCUC, when setting rates for BC Hydro, to ensure that BC Hydro's "rates and classes of service available to customers in the non-integrated area [NIA]... are available to customers who receive electricity service under" the relevant provision of the *Remote Communities Regulation*.<sup>11</sup>

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<sup>4</sup> Exhibit A2-1, p. 13.

<sup>5</sup> GFN Final Argument, p. 9.

<sup>6</sup> Exhibit C1-5, BCUC IR 5.1; Exhibit C1-9, Panel IR 1.1.

<sup>7</sup> BC Hydro Toad River Electrification Project Application, p. 10; BC Hydro Final Argument, p. 4.

<sup>8</sup> *Remote Communities Regulation*, BC Reg. 240/2007.

<sup>9</sup> *Remote Communities Regulation* s. 2. The Panel notes that the regulation currently specifies a distance of 200 metres, but at the time it was enacted it specified a distance of 90 metres.

<sup>10</sup> *Special Direction No. 10 to the BCUC*, BC Reg. 245/2007.

<sup>11</sup> *Special Direction No. 10 to the BCUC*, BC Reg. 245/2007 s. 5(1).

In light of the provisions of the *Remote Communities Regulation* and *Special Direction No. 10*, customers in remote communities participating in the RCE Program would receive electricity service from BC Hydro in accordance with the same terms and conditions of BC Hydro's Tariff as other NIA customers, and thus pay Zone II electricity rates.<sup>12</sup>

According to BC Hydro, the costs of providing service to the communities in the RCE Program are recovered through the following three sets of contributions:

- "The applicable rates<sup>13</sup> paid by individual customers in the communities as per BC Hydro's Tariff;
- The Government of Canada's (Canada) contribution for on-reserve First Nation communities consistent with the *Remote Communities Regulation* and a 2009 Memorandum of Understanding (2009 MOU) between Canada, the Government of BC and BC Hydro. Canada's contribution is paid to the First Nations, which in turn provide some funding to BC Hydro under agreements like the ESA; and
- Any remaining balance is borne by other BC Hydro ratepayers."<sup>14</sup>

BC Hydro notes that it took over electricity service provision to other First Nations prior to the RCE Program, and that "[t]hese First Nations do not have ESAs or otherwise flow funding to BC Hydro for ongoing operations and maintenance in part because they became customers prior to the RCE Program and they are on micro-grids with Non-Indigenous customers, therefore they do not receive ISC [Indigenous Services Canada] funding for electricity".<sup>15</sup> Additionally, the two non-Indigenous communities for which BC Hydro took over service provision under the RCE Program, namely, Jade City (supplied from Good Hope Lake) and Toad River, also do not have ESAs.<sup>16</sup> Further, BC Hydro states that communities with ESAs (including GFN), "contribute a substantially higher percentage towards the total cost of service in their respective community than do the two non-Indigenous communities [in the RCE Program] [...] and other NIA communities who became customers prior to the RCE Program".<sup>17</sup>

Among the five First Nations that have entered into ESAs with BC Hydro, the annual ESA payment amounts to BC Hydro vary greatly and are based on ISC's payment formula or, in some cases, what BC Hydro was able to negotiate with those First Nations. The difference is due in part to the varied funding arrangements between the First Nations and ISC at the time of negotiations. BC Hydro states that GFN received block funding, which did not specify an amount of funding for electrification, so GFN relied on its 2012 audit to establish the Annual Charge to be paid to BC Hydro. This was not the case for other First Nations' ESAs, as their funding agreements with Canada specified the amounts received for electricity service.<sup>18</sup> BC Hydro notes that payment amounts under the ESAs are static and in all cases are not reflective of BC Hydro's actual cost of service for each community.<sup>19</sup>

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<sup>12</sup> BC Hydro Toad River Electrification Project Application, p. 9; BC Hydro Final Argument, pp. 4–5.

<sup>13</sup> The St'at'imc Nation communities (Port Douglas, Tipella, Baptiste Smith, and Skookumchuck), though part of the RCE Program, are connected to BC Hydro's electric grid and pay Zone I rates. Exhibit B-7, BCUC IR 1.4.1.2.

<sup>14</sup> Exhibit B-7, BCUC IR 1.4.1.2.

<sup>15</sup> Exhibit B-8, GFN IR 1.6.j Attachment 1, p. 3.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., footnote 15.

<sup>18</sup> Exhibit B-7, BCUC IR. 1.4.1.1.

<sup>19</sup> Exhibit B-8, GFN IR 1.6.j Attachment 1, p. 2.

Prior to its participation in the RCE Program, GFN operated its own utility and provided electricity to residents in the community of Hartley Bay.<sup>20</sup> In its Final Argument, BC Hydro notes that as a block funded community, there was no set annual amount of funding allocated to GFN from Canada for electricity services.<sup>21</sup> This is consistent with GFN's assertions.<sup>22</sup>

### *2009 MOU Between Canada, BC and BC Hydro*

In April 2009, Canada, the Government of BC and BC Hydro entered into the 2009 MOU,<sup>23</sup> which addresses the provision of federal funding to support the electrification of certain First Nation communities through the RCE Program. The 2009 MOU set out, amongst other things, the level of funding from Canada and the basis upon which BC Hydro would operate in the First Nation communities that were part of the RCE Program.<sup>24</sup>

The 2009 MOU further required First Nation communities participating in the RCE Program to upgrade and sell their electrical works to BC Hydro at no cost to BC Hydro.<sup>25</sup> Based on this requirement, and to alleviate the costs of running a diesel utility that posed reliability concerns along with the associated administrative burden, GFN sold its electrical works to BC Hydro, thereby becoming a participant in the RCE Program pursuant to an MOU entered into by the parties in 2011 as discussed below.

Notably, there is no evidence that any of the First Nation communities that participated in the RCE Program, and GFN in particular, were signatories to the 2009 MOU which addresses the provision of federal funding to First Nations or BC Hydro to support electrification under the RCE Program.<sup>26</sup>

### *2011 MOU between BC Hydro and GFN*

Following the 2009 MOU, GFN and BC Hydro entered into an MOU on February 14, 2011 (2011 MOU).<sup>27</sup> Amongst other things, the 2011 MOU states that:

- A. Gitga'at Nation wishes to participate [sic] in the RCE Program under which BC Hydro would provide electricity services to customers in the Community [of Hartley Bay] in accordance with BC Hydro's Tariff;
- B. ... and
- C. Gitga'at Nation and BC Hydro have agreed to enter into this non-binding MOU to record a common understanding of their respective responsibilities and the conditions necessary to proceed with, and implement, BC Hydro electricity service in the Community.<sup>28</sup>

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<sup>20</sup> Exhibit A2-1, p. 3.

<sup>21</sup> BC Hydro Final Argument p. 20.

<sup>22</sup> Exhibit C1-5, BCUC IR 1.1.1.

<sup>23</sup> Exhibit B-1, Attachment 1.

<sup>24</sup> BC Hydro Final Argument, pp. 7–10.

<sup>25</sup> Exhibit B-1, Attachment 1, Section 4.3, p. 4.

<sup>26</sup> GFN Reply Argument, p. 2.

<sup>27</sup> Exhibit B-1, Attachment 2.

<sup>28</sup> Ibid., Recitals, p. 1.

Section 5 of the 2011 MOU set out the responsibilities of GFN and BC Hydro, respectively.<sup>29</sup> For GFN, this included constructing or upgrading the distribution and generation works<sup>30</sup> and the existing customer electrical systems to BC Hydro's standards and applicable laws, community outreach and supporting BC Hydro's acquisition of necessary regulatory approvals required for BC Hydro to provide electricity to Hartley Bay.<sup>31</sup> BC Hydro was required to complete a community electricity plan for Hartley Bay. This was to determine the most cost-effective means of supplying electricity to Hartley Bay, including, if appropriate, the purchase of electricity supply by way of energy purchase agreements.<sup>32</sup> BC Hydro was also responsible for the project plans, drafting of agreements and seeking required regulatory approvals, such as a Certificate of Public Convenience and Necessity (CPCN) in relation to providing electricity services to residents of Hartley Bay.

### *Certificate of Public Convenience and Necessity (CPCN) for Hartley Bay*

On December 16, 2011, BC Hydro filed a RCE application for the community of Hartley Bay pursuant to sections 45 and 46 of the UCA and the *Remote Communities Regulation*. In the application, BC Hydro asked that the BCUC grant the CPCN conditional on BC Hydro taking over ownership of the distribution system from GFN, and for electricity tariff amendments to have Hartley Bay listed as a Rate Zone II community. BC Hydro also requested approval to carry out construction work for a diesel generating station and upgrades to the distribution system in advance of taking over and owning the distribution system to service customers in Hartley Bay.<sup>33</sup> GFN sent a letter of support for the application, which was considered under the streamlined regulatory review process for RCE communities which had been implemented following the final project report for Toad River.<sup>34</sup>

By Order C-4-12, dated March 22, 2012, BCUC granted the CPCN and amended the BC Hydro Tariff to expand the definition of Rate Zone II to include Hartley Bay in accordance with *Special Direction No. 10*.

### *Electricity Service Agreement Between BC Hydro and GFN*

Pursuant to the 2011 MOU and following the issuance of the CPCN for Hartley Bay, GFN and BC Hydro entered into the ESA on February 3, 2014.<sup>35</sup> The ESA sets out the terms and conditions upon which certain distribution assets and generation assets would be transferred from GFN to BC Hydro and under which the latter would become the electricity service provider to the Hartley Bay community.<sup>36</sup>

The ESA states:<sup>37</sup>

Gitga'at acknowledges that after the Service Commencement Date, BC Hydro shall provide, and customers in the Community (including Gitga'at) shall receive, Service in accordance with the Electric Tariff [BC Hydro's Tariff] and any applicable Laws. The price to be paid for the Service by

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<sup>29</sup> Exhibit B-1, Attachment 2, p. 3.

<sup>30</sup> "Works" in the 2011 MOU refers to the "Distribution Works and the Generation Works, or any part of them as the context may require", Exhibit B-1, Attachment 2, Schedule A, p. 7.

<sup>31</sup> Exhibit B-1, Attachment 2, p. 4.

<sup>32</sup> Ibid.

<sup>33</sup> BCUC Order C-4-12 dated March 22, 2012, Approval of CPCN for Hartley Bay Electrification Project.

<sup>34</sup> Ibid., footnote 31.

<sup>35</sup> BC Hydro Final Argument, p. 15.

<sup>36</sup> Exhibit B-7, BCUC IR 1.8.

<sup>37</sup> Exhibit A2-1, p. 15.



the customer(s) shall be the rates set out in the Electric Tariff, as may be replaced or amended from time to time. Nothing in this Agreement is intended to define the terms and conditions of Service between BC Hydro and customer(s) in the Community. Nothing in this Agreement amends, adds to, or takes away from any terms or conditions in the Electric Tariff. This agreement is not intended to be a rate or tariff under the *Utilities Commission Act*.

Section 6<sup>38</sup> of the ESA sets out the arrangement for the payment of federal funding from GFN to BC Hydro in relation to the Annual Charge. Section 6 of the ESA provides, in part:<sup>39</sup>

## **6. CANADA'S FINANCIAL CONTRIBUTION**

6.1 Gitga'at acknowledges that BC Hydro's agreement to takeover Service in the Community is based, in part, on the agreement by Canada (AANDC) to contribute funds toward the cost of Service consistent with the funding principles and formulas in the MOU<sup>40</sup>. Gitga'at acknowledges that the Block Funding it receives from Canada under the Funding Agreement includes funds to be allocated as part of Canada's Financial Contribution toward the cost of Service, as set out in Schedule E. During the term of this Agreement, Gitga'at shall make reasonable efforts to enter into, fulfil the terms and conditions of, and maintain a Funding Agreement which includes funds to be allocated as part of Canada's Financial Contribution toward the cost of Service, as set out in Schedule E. Gitga'at shall not unreasonably refuse to extend or renew any such Funding Agreement or place unreasonable conditions on such extension or renewal.

6.2 Gitga'at covenants and agrees to:

a) upon receipt by Gitga'at of the Block Funding under the Funding Agreement, allocate the amount as set out in Schedule E towards Canada's Financial Contribution, and promptly remit such amount as part of Canada's Financial Contribution to BC Hydro, in a manner that is acceptable to, and as directed by, BC Hydro, without abatement, set-off, deduction or delay;

[...]

6.3 If, during the term of this Agreement (as defined in section 2.1), Canada agrees to implement an arrangement by which Canada's Financial Contribution will be paid directly by Canada to BC Hydro, Gitga'at will consent to the arrangement, will not attach any unreasonable conditions to its consent, and will reasonably cooperate with BC Hydro and Canada to implement the direct payment of Canada's Financial Contribution to BC Hydro including, if appropriate, a written direction by Gitga'at to Canada instructing Canada to pay Canada's Financial Contribution directly to BC Hydro, if a direction to pay is requested by Canada or BC Hydro.

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<sup>38</sup> Exhibit A2-1, pp. 25–26.

<sup>39</sup> Ibid.

<sup>40</sup> 2009 MOU.

Schedule A of the ESA defines “Funding Agreement” as:<sup>41</sup>

the Block Funding agreement effective as of the effective date of this Agreement, and any subsequent Block funding agreement or its equivalent, between Canada and Gitga’at applicable to the payment of Canada’s Financial Contribution by Canada to Gitga’at.

BC Hydro initially sought confidential treatment for Schedule E of the ESA. However, in response to BCUC IRs, BC Hydro confirmed in a non-confidential filing the quantum of the Annual Charge as set out in Schedule E of the ESA, which provides, in part, that “Gitga’at and BC Hydro agree that the annual amount allocated from Gitga’at’s Block Funding under the Funding Agreement towards Canada’s Financial Contribution shall be \$85,000 (the ‘Annual Allocation Amount’).”<sup>42</sup> BC Hydro reports that the dollar value of the Annual Charge was established based on a 2012 audit respecting the proportion of GFN’s block funding from Canada that was allocated to electricity services, levelized based on an average index amount of 1.9 percent per year.<sup>43</sup>

GFN was not the only NIA community to sign an ESA. BC Hydro’s evidence shows that even among those First Nations that signed ESAs with BC Hydro, the amounts vary based on external factors and that notwithstanding, NIA communities, whether they are Indigenous or non-Indigenous, or whether they became customers before or during the RCE Program, receive the same level of service from BC Hydro. BC Hydro notes that “communities with ESAs contribute a substantially higher percentage towards the total cost of service in their respective community than do the two non-Indigenous communities and other NIA communities who became customers prior to the RCE Program.”<sup>44</sup> BC Hydro refers to Toad River as an example, noting “...revenues from customer accounts cover 11% of the total cost of service, whereas combined revenues and ESA payments from the five Indigenous communities average 42% of total costs. This raises significant questions of fairness as between Indigenous and non-Indigenous NIA communities.”<sup>45</sup> BC Hydro’s evidence also shows that in all cases the payments are not reflective of BC Hydro’s actual cost of service for each community.<sup>46</sup>

In the course of this proceeding and pending its outcome, BC Hydro has expressed an intention to terminate the ESAs.<sup>47</sup>

### *Regulatory Process*

By Order G-272-22, the BCUC established a written public hearing process and a regulatory timetable for review of the Complaint. The regulatory timetable consisted of, among other things, intervener registration, BC Hydro public notice, one round of BCUC, GFN and intervener information requests (IRs), and further process as outlined below.

No interveners registered to participate in the proceeding, while one entity, the Residential Consumer Intervener Association, registered as an interested party. The BCUC received two letters of comments from the public.

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<sup>41</sup> Exhibit A2-1, p. 26.

<sup>42</sup> Exhibit A2-1, pp. 26–27.

<sup>43</sup> Exhibit B-7, BCUC IR 1.1.11, 1.6.1, 1.6.2.

<sup>44</sup> Exhibit B-8, GFN IR 1.6.j, Attachment 1, p. 3.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Exhibit B-3, p. 2.

The regulatory timetable was subsequently amended to allow, amongst other things, a second round of BCUC IRs.<sup>48</sup>

GFN filed its final argument on April 24, 2023, and BC Hydro filed its final argument on May 17, 2023. GFN filed its reply argument on May 25, 2023.

By Order G-162-23, the BCUC re-opened the evidentiary record for the proceeding and issued Panel IR to GFN, seeking confirmation of the amounts paid by GFN to BC Hydro pursuant to the Annual Charge. GFN provided its responses on June 26, 2023.

## 2.0 Legislative Authority

We review the following legislative provisions in this decision.

### *Relevant Definitions from the UCA*

Section 1(1) of the UCA defines “rate”, “compensation” and “service” as follows:

**“rate”** includes

- a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility,
- b) a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate, and
- c) a schedule or tariff respecting a rate.

**“compensation”** means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it.

**“service”** includes

- a) the use and accommodation provided by a public utility,
- b) a product or commodity provided by a public utility, and
- c) the plant, equipment, apparatus, appliances, property and facilities employed by or in connection with a public utility in providing service or a product or commodity for the purposes in which the public utility is engaged and for the use and accommodation of the public.

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<sup>48</sup> BCUC Orders G-350-22 dated December 5, 2022, G-376-22 dated December 19, 2022, G-3-23 dated January 11, 2023 and G-56-23 dated March 20, 2023.

### *Relevant UCA provisions*

The BCUC established the review of this Complaint pursuant to section 83 of the UCA, which states:

If a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken.

Additionally, sections 58 to 61 of the UCA confer broad discretion on the BCUC with respect to the setting and approval of rates. Excerpts of sections 59, 61, 63, and 64 of the Act are included for reference below.

Section 59(1) of the UCA provides, in part, that a public utility must not make, demand or receive an (a) “unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia” or (b) “a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.”

Additionally, sections 59(2) and 59(5) state:

(2) A public utility must not

(b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.

(5) For the purpose of this section of the Act, a rate is “unjust” or “unreasonable” if the rate is:

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,

(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or

(c) unjust and unreasonable for any other reason.

Sections 61(1)-(3) of the Act state:

(1) A public utility must file with the commission, under rules the commission specifies and within the time and in the form required by the commission, schedules showing all rates established by it and collected, charged or enforced or to be collected or enforced.

(2) A schedule filed under subsection (1) must not be rescinded or amended without the commission's consent.

(3) The rates in schedules as filed and as amended in accordance with this Act and the regulations are the only lawful, enforceable and collectable rates of the public utility filing them, and no other rate may be collected, charged or enforced.

Section 63 of the UCA provides that a public utility “must not, without the consent of the commission, directly or indirectly, in any way charge, demand, collect or receive from any person for a regulated service provided by it, or to be provided by it, compensation that is greater than, less than or other than that specified in the subsisting schedules of the utility applicable to that service and filed under this Act.”

Section 64(1) of the UCA provides that:

If the commission, after a hearing, finds that under a contract entered into by a public utility a person receives a regulated service at rates that are unduly preferential or discriminatory, the commission may

- (a) declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
- (b) make any other order it considers advisable in the circumstances.

Further, section 64(2) provides that:

If a contract is declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

Section 89 of the UCA provides that “[o]n an application under this Act, the commission may make an order granting the whole or part of the relief applied for or may grant further or other relief, as it considers advisable.”

### *Special Direction No. 10*

Section 5 of *Special Direction No. 10* to the BCUC states:

#### Rates

5 (1) In setting rates for the authority, the commission must ensure that the authority's rates and classes of service available to customers in the non-integrated area, including rates available to customers whose electricity demand is or is likely to be in excess of 45 kV.A [kilovolt amperes], are available to customers who receive electricity service under section 2 of the *Remote Communities Regulation*.

(2) In setting rates for the authority, the commission must ensure that those rates allow the authority to collect sufficient revenue in each fiscal year to enable the authority to

- (a) achieve energy and capacity self-sufficiency as described in section 3 of this Special Direction,
- (b) recover costs incurred as a result of the call for power, including costs incurred in purchasing electricity under a biomass contract, and
- (c) recover costs related to the provision of electricity service under section 2 of the *Remote Communities Regulation*.

### *Remote Communities Regulation*

Section 2 of the *Remote Communities Regulation* states:

2 To provide them with the benefits of the heritage resources, the authority must provide electricity service to persons

(a) whose premises are located within 200 metres of a distribution system in a remote community, and

(b) who apply to the authority for service and pay or agree to pay the rates established for that service under the *Utilities Commission Act* and the regulations made under that Act.

### 3.0 Is the Annual Charge a Rate?

In this section, the Panel reviews and summarizes parties' submissions with respect to whether the Annual Charge is a rate or a separate fee levied by BC Hydro for some other service not related to the provision of electricity in Hartley Bay.

#### *Positions of the Parties*

##### **GFN**

GFN submits that the Annual Charge is a rate and not a commercial contract term.<sup>49</sup> GFN asserts that as a public utility, BC Hydro is providing a regulated service when it sells electricity and that it must be sold according to rates approved by the BCUC and filed in tariff schedules.<sup>50</sup> GFN submits that the Annual Charge pertained only to First Nations and was devised without their involvement, and that BC Hydro had a legal obligation to seek BCUC approval of the RCE Program mechanics.<sup>51</sup> GFN argues that the Annual Charge is an indirect charge for electricity service, which is prohibited by section 63 of the UCA.<sup>52</sup>

GFN submits that the provisions in the ESA confirming that the Annual Charge is not a rate are not meaningful. GFN argues that "BC Hydro simply cannot agree with its customer to avoid the Act and a contractual provision that asserts the contrary is meaningless."<sup>53</sup> Further, GFN submits that GFN believed it had no choice but to sign the ESA due to BC Hydro's 'threats' to withhold service.<sup>54</sup>

Further, GFN states that the Annual Charge is discriminatory under section 59 of the UCA.<sup>55</sup> Specifically, GFN states that "because the Electricity Servicing Charge is RCE Program-based, and does not apply to all NIA communities (including First Nations communities) receiving BC Hydro electric service, it is discriminatory under section 59(2)(b) of the Act."<sup>56</sup> Further, GFN submits that the Annual Charge does not apply to similarly situated non-Indigenous communities participating in the RCE Program.<sup>57</sup>

GFN submits it receives block contribution funding (block funding) from ISC<sup>58</sup> to assist with the provision of services to its band members and for capital projects, but states that "INAC's [Indigenous and Northern Affairs

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<sup>49</sup> GFN Final Argument, pp. 2–3.

<sup>50</sup> *Ibid.*, pp. 1–2.

<sup>51</sup> *Ibid.*, p. 2.

<sup>52</sup> *Ibid.*, p. 3.

<sup>53</sup> *Ibid.*, p. 6.

<sup>54</sup> *Ibid.*, pp. 5–6.

<sup>55</sup> *Ibid.*, p. 2.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> This agency was known as Aboriginal Affairs and Northern Development Canada until 2017 and formerly Indigenous and Northern

Canada] O&M [Operations & Maintenance] funding failed to cover the actual costs of running the on-reserve energy systems resulting in annual shortfalls that were collected from other budget areas.”<sup>59</sup> Unlike other First Nations in the RCE Program, GFN’s block funding predates the RCE Program and the ESA and is a yearly contribution from the Government of Canada (Canada).<sup>60</sup> GFN states that there is no specified allocation of funds to electricity or reference to the ESA in its funding agreement with Canada, now called a “Comprehensive Funding Agreement NFR [new fiscal relationship] Grant (Block) (CFA) for First Nations”. Further, GFN notes there is no mention of the RCE Program, nor electrification, nor ‘flow-through,’ nor ‘Canada’s Financial Contribution toward the cost of service in its funding agreement’.<sup>61</sup>

GFN describes how the block funding model operates, noting that funding is “...allocated to various categories based on projected needs”<sup>62</sup> and further, that Canada does not specify any set amounts of the block funding that are to be used explicitly for electricity or electrification.<sup>63</sup> GFN had therefore supported BC Hydro’s request to have ISC provide the operations and maintenance funding contributions associated with the RCE program directly to BC Hydro, but ISC refused to do so for reasons unknown.<sup>64</sup> GFN notes that although its 2012 audit showed that the amount of block funded operations and maintenance payments allocated to electricity service was \$74,546, there was no actual amount allocated to electricity.<sup>65</sup> This was because into the early 2000s, the community was electrified under a municipal type service agreement (MTSA) with a third party. GFN states that the funding for the MTSA that had been included in its funding agreement with Canada, was taken out when the MTSA was terminated. GFN states that this funding was not replaced, so its electricity account was always in a deficit.<sup>66</sup> BC Hydro accepted GFN’s 2012 audited amount as the basis for the Annual Charge under the ESA.<sup>67</sup>

### **BC Hydro**

BC Hydro submits that neither the ESA nor the Annual Charge (which BC Hydro refers to as “the flow through of Canada’s Financial Contribution”) is a rate for the purposes of the ratemaking provisions of the UCA because it does not set out the terms for the provision of a regulated service to customers of BC Hydro, and GFN’s Complaint should be dismissed.<sup>68</sup>

Relying on the definition of a rate in the UCA and rate-related provisions, BC Hydro argues that a “rate” must necessarily be associated with the provision of a regulated service.<sup>69</sup> BC Hydro further argues that if the meaning of “rate” under the UCA was determined based solely on its definitions of “rate” and “compensation”, respectively, then “the term would capture nearly every payment of any nature and for any purpose received by a public utility, as well as the various rules, practices, measurements, classifications, contracts, schedules, and tariffs relating to these payments.”<sup>70</sup>

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Affairs Canada and Department of Indian Affairs and Northern Development.

<sup>59</sup> Exhibit C1-5, BCUC IR 1.2.

<sup>60</sup> Exhibit B-1, Attachment 3, pp. 7, 13; Exhibit B-7, BCUC IR 1.11.1.

<sup>61</sup> Exhibit C1-6, BC Hydro IR 1.2.

<sup>62</sup> Exhibit B-1, Attachment 3, p. 7.

<sup>63</sup> Exhibit C1-5, BCUC IR 1.5.

<sup>64</sup> Exhibit B-8, BCUC IR 1.5.e Attachment 1, pp. 40.

<sup>65</sup> Exhibit C-1-5, BCUC IR 1.1.1.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> BC Hydro Final Argument, pp. 2, 21.

<sup>69</sup> Ibid., p. 22.

<sup>70</sup> Ibid.

More specifically, BC Hydro argues that sections 58, 59, 60, 61 and 64 make it clear that rates must relate to a regulated service provided by public utilities. It notes that section 31 of the UCA, which provides the BCUC powers to make rules governing the conditions contained in agreements signed by public utilities for their regulated services, further supports its interpretation.<sup>71</sup> BC Hydro then cites examples of contracts related to the provision of a regulated service, such as franchise agreements, that are not contracts related to a rate. BC Hydro explains that this is because the contracts do not set out the terms for the provision of the service between the utility and customers.<sup>72</sup>

BC Hydro states that the terms of the ESA are clear in that, firstly, the ESA is regarding BC Hydro becoming the electricity service provider in the community and not the provision of regulated electricity service and, secondly, that GFN signed the ESA in its capacity as government for the community and not as a customer.<sup>73</sup> BC Hydro then submits that with regards to payment, the ESA is clear that the Annual Charge is the re-direction of funding from Canada that had been previously provided to GFN to put towards the cost of providing electricity service in the community.<sup>74</sup> Specifically, BC Hydro states that:<sup>75</sup>

The Annual Allocation Amount for participants in the RCE program was determined based on the Government of Canada's ongoing funding obligations for electricity services in these communities. The amounts differ for each community but were set so that the federal responsibilities toward each community would continue to be met as it had been in the past.

BC Hydro notes that federal funding models for Indigenous communities have changed since the ESAs were negotiated. BC Hydro states that in the case of block funded communities like GFN, the amount of funding to meet the Government of Canada's electricity service obligations was not specified, so GFN relied on its 2012 audit to support the amount allocated to electricity services for the ESA.<sup>76</sup>

BC Hydro indicates that two non-Indigenous communities, who are also Zone II customers and part of the RCE Program, are not required to pay an annual charge, since Canada does not provide any contributions in relation to them under the 2009 MOU.<sup>77</sup> Additionally, BC Hydro submits that First Nations receiving service prior to the establishment of the RCE Program do not have ESAs or pay the annual charge "...in part because they became customers prior to the RCE Program and they are on micro-grids with Non-Indigenous customers, therefore they do not receive ISC funding for electricity."<sup>78</sup> BC Hydro submits "...the annual ESA payment amounts to BC Hydro vary greatly and are based on ISC's payment formula or, in some cases, what BC Hydro was able to negotiate. The difference is due in part to the varied funding arrangements between the First Nation and ISC at the time of negotiations."<sup>79</sup>

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<sup>71</sup> BC Hydro Final Argument, pp. 22–24.

<sup>72</sup> Ibid., p. 24.

<sup>73</sup> Ibid., pp. 2, 26.

<sup>74</sup> Ibid., pp. 2, 27.

<sup>75</sup> Exhibit B-7, BCUC IR 1.4.1.1.

<sup>76</sup> Exhibit C1-5, BCUC IR 1.4.1.1.

<sup>77</sup> Exhibit B-7, BCUC IR 1.4.1 and 1.4.1.2.

<sup>78</sup> Exhibit B-8, GFN IR 1.6.j, Attachment 1, p. 3.

<sup>79</sup> Ibid., p. 3.



BC Hydro continues with its argument with respect to the Annual Charge being separate from the provision of service, noting that Section 6.3 of the ESA contemplated Canada paying the Annual Charge directly to BC Hydro, and that this “makes it clear that Canada’s Financial Contribution was, in effect, a federal contribution provided to BC Hydro in exchange for it being the service provider in the community of Hartley Bay.”<sup>80</sup> Despite both BC Hydro and GFN’s request that RCE associated funding be provided directly to BC Hydro, Canada determined that it was appropriate to continue funding GFN directly, rather than providing contributions associated with the RCE Program directly to BC Hydro, in a January 2013 letter.<sup>81</sup> Notably, ISC was apparently of the view that the 2009 MOU was no longer in effect after the completion of the RCE Program by 2019.<sup>82</sup> Further, BC Hydro understands that ISC considers it is the responsibility of the First Nations to uphold their commitments to BC Hydro.<sup>83</sup>

BC Hydro points out that the ESA also contains provisions for adjustments to the Annual Charge, and that BC Hydro’s obligations would remain unchanged regardless of whether the contribution was changed or stopped by Canada.<sup>84</sup> According to BC Hydro, this demonstrates the degree to which the Annual Charge is “untied” from its provision of electricity services to customers in the community.<sup>85</sup> Finally, BC Hydro submits that had the Annual Charge “been paid to BC Hydro directly, there is no doubt that it would not be a ‘rate’ for the purposes of the ratemaking provision of the UCA.”<sup>86</sup>

BC Hydro states that the ESA is a commercial agreement for it to become a service provider for Hartley Bay and that “Canada’s Financial Contribution is not a payment from GFN as a customer for the provision of electricity, even indirectly as GFN suggests.”<sup>87</sup> BC Hydro argues that its relationship with customers in Hartley Bay, including GFN, “has been and continues to be separate and distinct from BC Hydro’s relationship with GFN as a local government.”<sup>88</sup> While GFN suggests that this is “a distinction without a difference,” BC Hydro argues that the difference is critical because “rate” within the meaning of the UCA necessarily concerns the provision of a regulated service to a customer.<sup>89</sup>

BC Hydro argues that the Annual Charge is not paid by customers in Hartley Bay and that its inability to discontinue the provision of service to customers in the community in the event it stops receiving the flow through of Canada’s Financial Contribution illustrates this point.<sup>90</sup> Further, BC Hydro submits, it would not initiate any disconnection process for customers in Hartley Bay even if GFN did not pay the Annual Charge. BC Hydro states, there is not “a customer” that it could disconnect for nonpayment of the Annual Charge, and that there are dispute resolution provisions in the ESA that it could use to address nonpayment by GFN.<sup>91</sup> Further, BC

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<sup>80</sup> BC Hydro Final Argument, pp. 27–28.

<sup>81</sup> Exhibit B-8, GFN IR 1.5e, Attachment 1, pp. 40–41.

<sup>82</sup> Ibid., GFN IR 1.6j, Attachment 1, p. 2.

<sup>83</sup> Ibid., GFN IR 1.6j, Attachment 1, p. 12.

<sup>84</sup> BC Hydro Final Argument, p. 28.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid., p. 25.

<sup>88</sup> Ibid., pp. 29–30.

<sup>89</sup> Ibid., p. 30.

<sup>90</sup> Ibid., pp. 28–29.

<sup>91</sup> Ibid., p. 30; Exhibit B-7, BCUC IR 1.1.6.

Hydro submits that it has an obligation to serve Hartley Bay since being granted its CPCN for the community, and it would be required to apply for the BCUC's permission to cease operations in the community.<sup>92</sup>

BC Hydro notes, the Annual Charge is "not included in its rate schedules, [BC Hydro's] Tariff or any other Tariff document"<sup>93</sup> and that its customers are Hartley Bay residents, including GFN, who applied for service, receive service, and are billed for electricity pursuant to BC Hydro's Tariff. BC Hydro also submits that although the Annual Charge is included in its revenue requirements, unlike revenue from the sale of electricity under its Tariff, the Annual Charge (along with revenue from other types of agreements) is not subject to BCUC approval or oversight.<sup>94</sup>

BC Hydro asserts that it provided the BCUC with information about the arrangement for a flow through of federal funds to BC Hydro prior to its application for a CPCN to serve Hartley Bay residents.<sup>95</sup> BC Hydro notes that notwithstanding this, the BCUC approved BC Hydro's CPCN application without any directions for BC Hydro to file agreements related to the federal funding for BCUC review and approval as a rate.<sup>96</sup>

In its submissions, BC Hydro rejects the notion that the Annual Charge is a payment of any kind related to an extension of service, as outlined in section 8.7 of its Tariff, or similar in nature to a Contribution in Aid of Construction (CIAC). BC Hydro argues that since Hartley Bay was not included in Zone 1B or Zone II at the time of the initial extension of service, the extension policy in section 8.7 of its Tariff was not applicable and the Annual Charge cannot be considered a payment required by that section.

With regards to the CIAC, BC Hydro states the Annual Charge is not CIAC "because the obligation to pay it is with regard to an obligation to flow-through to BC Hydro the funding received from the Government of Canada. A customer's obligation to contribute to the cost of an extension is not conditional on a third-party's willingness or ability to pay." BC Hydro submits that, if not for the RCE Program, the rate-setting principles that would have been applicable to an extension of service to an applicant in Hartley Bay are those set out in the BCUC's 1996 Utility System Extension Test Guidelines. Had the default extension test principles been applied to the extension of BC Hydro service to Hartley Bay, customers in Hartley Bay would have paid a BCUC-approved surcharge on their standard Zone II rates, which is not the case.<sup>97</sup>

Finally, BC Hydro submits that becoming the electricity service provider in the remote communities was consistent with BC Hydro's commitment to develop and improve relationships with Indigenous communities and to advance reconciliation.<sup>98</sup> BC Hydro further submits that it intends to terminate the ESA (and other similar servicing agreements), subject to the outcome of this proceeding, and that this intention reflects, in part, BC Hydro's commitment to advance reconciliation, develop and maintain mutually respectful relationships with Indigenous communities, and honour Indigenous perspectives. BC Hydro is also working with Indigenous

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<sup>92</sup> BC Hydro Final Argument, p. 30.

<sup>93</sup> Ibid., p. 26.

<sup>94</sup> BC Hydro Final Argument, pp. 26, 30.

<sup>95</sup> Ibid., p. 31.

<sup>96</sup> Ibid.

<sup>97</sup> Exhibit B-7, BCUC IR 1.3.5.

<sup>98</sup> Ibid., BCUC IR 1.7.4.

communities to implement the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and has requested that GFN provide input into its draft UNDRIP implementation plan.<sup>99</sup>

### ***GFN Reply***

GFN states, “there is no question that a rate must pertain to a regulated service.”<sup>100</sup> GFN submits that with respect to BC Hydro’s own description of the Annual Charge, “it concerns selling electricity service to customers – which, of course, aligns precisely with BC Hydro’s own, and correct, definition of a rate.”<sup>101</sup>

GFN reiterates its position that the Annual Charge is a rate, as it is “a partial payment in respect of the provision of electricity service to BC Hydro customers.”<sup>102</sup> GFN argues that this is evident in that the RCE Program and the 2011 MOU refer to the provision of electricity or electrical service to BC Hydro customers.<sup>103</sup> GFN submits that there is nothing in the record of this proceeding that suggests that the ESA pertains to any good or service other than electricity service, which is a regulated service.<sup>104</sup>

GFN further argues that the Annual Charge is a “claw-back” of federal funding directed to GFN.<sup>105</sup> Additionally, GFN submits that if the Annual Charge were “judged as a potential rate, it would be a discriminatory one – pertaining as it does only to First Nations customers.”<sup>106</sup> GFN submits, among other things, that BC Hydro’s determination that the customer’s money is not their own does not waive its obligations under section 63 of the UCA.<sup>107</sup> GFN goes on to state that “BC Hydro illegally violated section 63 of the UCA when it demanded payments to which it had no legal right.”<sup>108</sup>

GFN disagrees with BC Hydro’s view that the terms of the ESA indicate that the Annual Charge to GFN is in GFN’s capacity as a local government.<sup>109</sup> Rather, GFN argues, “the record clearly shows that BC Hydro is charging its customers indirectly through GFN, a manner of charge expressly prohibited by section 63 of the UCA.”<sup>110</sup> Further, in its final argument, GFN notes that Band Administration, acting on behalf of GFN, is the largest single ratepayer in Hartley Bay, paying for many commercial and some residential accounts.<sup>111</sup>

With regards to the Annual Charge not being included in BC Hydro’s Tariff, GFN argues that “Canada’s Financial Contribution is not in BC Hydro’s Tariff because, in GFN’s view, BC Hydro has illegally kept it from being there. GFN submits that BC Hydro cannot claim the product of its violation of section 63 of the UCA as evidence that it has not violated that section.”<sup>112</sup> In reference to BC Hydro’s argument that the Annual Charge is treated

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<sup>99</sup> BC Hydro Final Argument, pp. 20–21; Exhibit B-7, BCUC IR 1.7.4.

<sup>100</sup> GFN Reply Argument, p. 5.

<sup>101</sup> *Ibid.*

<sup>102</sup> GFN Reply Argument, p. 2.

<sup>103</sup> *Ibid.*

<sup>104</sup> GFN Reply Argument, pp. 3–4.

<sup>105</sup> *Ibid.*, pp. 1–2.

<sup>106</sup> *Ibid.*, p. 4.

<sup>107</sup> *Ibid.*, p. 6.

<sup>108</sup> *Ibid.*, p. 4.

<sup>109</sup> *Ibid.*, p. 6.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, p. 3.

<sup>112</sup> *Ibid.*, p. 5.

differently in revenue requirements compared to revenue from sale of electricity under BC Hydro's Tariff, GFN submits that based on the record in this proceeding the Annual Charge "is blended with regulated revenues, as it should be, because it should be regulated revenue, recovered by means of a filed and approved tariff."<sup>113</sup>

GFN disagrees with BC Hydro that service to Hartley Bay is "untied" from the payment of the Annual Charge. GFN considers that, while BC Hydro may be willing to terminate the Annual Charge now, provision of electricity service to Hartley Bay was contingent on GFN paying the charge at the start of the RCE Program.<sup>114</sup>

With regards to BC Hydro's argument that the BCUC has already considered the Annual Charge during the Hartley Bay CPCN proceedings, GFN submits that in establishing this proceeding, the BCUC has demonstrated that it has not already determined that the Annual Charge is not a rate. In GFN's view, a far more plausible explanation is that the BCUC did not turn its mind to the rate question at that time, as it was considering something quite different.<sup>115</sup> Further, the BCUC "could have ruled on the matter without engaging a full proceeding into GFN's complaint," if it were confident that its prior decisions were determinative.<sup>116</sup>

### *Panel Determination*

We begin with an analysis of our jurisdiction under the UCA to consider the provisions of the ESA. We consider whether the Annual Charge is a "flow-through" arrangement to assist with BC Hydro's cost of providing electrical services to GFN and how this affects the BCUC's oversight. We then consider whether the Annual Charge amounts to a rate. Once we have determined this, we consider whether it was approved in accordance with the UCA, and if not, if it is unjust, unreasonable, or unduly discriminatory or otherwise not in accordance with the provisions set out in the UCA. Finally, we review the potential remedies for such contravention.

#### **Relevant provisions**

The Panel examines the BCUC's jurisdiction over public utility contracts as outlined in the UCA. The BCUC's jurisdiction is set out in several provisions of the UCA and is broad and sweeping in relation to the regulation of public utilities. The general supervisory powers conferred on the BCUC pursuant to sections 23(1) and 24 of the UCA authorize the BCUC to make examinations and conduct inquiries necessary to keep itself informed about the conduct of public utility business, compliance by public utilities with this Act, regulations or any other law, and any other matter in the BCUC's jurisdiction. These powers alone would likely be sufficient to authorize the BCUC to consider the ESA, but other provisions of the UCA give the BCUC further regulatory authority in this regard.

Beyond the supervisory powers outlined above, the BCUC has exclusive jurisdiction to set rates, as well as oversee a wide range of contractual and other matters, including the supply and price provided in agreements with ratepayers or customers.

Section 58(1)(b) of the UCA gives the BCUC the jurisdiction to review complaints such as the one before us. Briefly stated, the BCUC may, on complaint by a public utility or an interested person that the existing rates in effect and collected or any rates charged or attempted to be charged for service by a public utility are unjust,

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<sup>113</sup> Ibid., p. 7.

<sup>114</sup> Ibid., p. 6.

<sup>115</sup> GFN Reply Argument, p. 3.

<sup>116</sup> Ibid., pp. 7–8.

unreasonable, insufficient, unduly discriminatory or in contravention of the UCA, after a hearing, determine the just, reasonable and sufficient rates to be observed and in force.

### **BCUC's Jurisdiction to Consider the ESA**

**The Panel finds that that the provisions of the ESA are subject to BCUC review under the UCA** for the following reasons.

BC Hydro argues that the ESA is not an agreement respecting the provision of electricity services to a customer, but rather is a commercial agreement for BC Hydro to become a service provider for Hartley Bay, and that the Annual Charge is not a payment from GFN as a customer for the provision of electricity, but a mechanism by which the Government of Canada can flow funding indirectly through GFN to BC Hydro as a condition for BC Hydro agreeing to become GFN's electricity service provider. In addition, BC Hydro views the ESA to be an agreement with GFN as a government for the community, not as a customer within the meaning of the UCA or BC Hydro's Tariff applicable to Zone II customers, even indirectly as GFN suggests, which BC Hydro argues places the ESA outside of the BCUC's jurisdiction. The Panel disagrees.

The Panel accepts that the ESA may have been intended as a mechanism to flow federal money for electricity service from GFN to BC Hydro, but this does not alter its nature as an agreement respecting the provision of electricity to GFN. The Panel understands the commitments set out in the 2009 MOU but notes that the ESA is a different agreement. The 2009 MOU, in which Canada makes funding commitments respecting the provision of electricity to First Nations, was not an agreement which was reviewed or approved by the BCUC. Similarly, the 2011 MOU which discusses the arrangements between GFN and BC Hydro leading up to BC Hydro's provision of electricity services to GFN, was not an agreement that was reviewed by the BCUC. Any obligations that may have arisen for any parties to those agreements at this point, are a matter of history and not determinative of the issue before us: whether the Annual Charge being collected by BC Hydro from GFN to date under the ESA, which deals with the provision of electricity services by BC Hydro to GFN in Hartley Bay, is and remains an unsanctioned rate.

BC Hydro argues that the ESA was entered into with GFN as a government, not as a customer and that this is a commercial agreement and a mechanism to flow money from Canada to BC Hydro as a condition of BC Hydro becoming the service provider for GFN. The Panel disagrees. BC Hydro underlines the fact that the ESA is providing the terms for BC Hydro to become the service provider for the community,<sup>117</sup> comparing it to a franchise agreement "in that it is an agreement between a public utility and a local government that sets out the terms under which the utility will become the service provider in a community."<sup>118</sup> At the same time, however, BC Hydro specifically states that the ESA is not a franchise agreement since BC Hydro is not paying for the right to carry on business in Hartley Bay but rather is receiving federal funds for doing so.<sup>119</sup> BC Hydro then offers the example of the BCUC's decision in respect of BC Hydro's application for Shore Power Rate which states, "the

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<sup>117</sup> BC Hydro Final Argument. p. 25.

<sup>118</sup> Ibid.

<sup>119</sup> BC Hydro Final Argument, p. 25, footnote 62.

BCUC determined that a contract governing the day-to-day operations and interaction of the BC Hydro system with generators on board the cruise ships was not a 'rate'."<sup>120</sup>

In the Panel's view, neither of these situations cited by BC Hydro parallel the one before us. The ESA deals with, among other things, the provision of electricity service to GFN, and as BC Hydro points out, it is the reverse of a franchise agreement whereby BC Hydro is paying for the right to become the service provider. In BC Hydro's Application for Shore Power Rate, BC Hydro asked for approval of a rate, but felt the agreement relating to the technical mechanism related to the service did not require approval.<sup>121</sup> The panel in that proceeding agreed that it was not necessary in that case to approve the agreement.<sup>122</sup> Here, in contrast, there is no evidence that BC Hydro sought approval of the ESA or the Annual Charge, and while some provisions of the ESA may not be of concern to the BCUC, in general, the ESA relates to the provision of electricity services to a community and is therefore subject to review. Unlike the examples cited by BC Hydro, the ESA sets out the terms upon which BC Hydro will become the electricity service provider for the community and accordingly is subject to review by the BCUC.

Whether the ESA is made with GFN as a government or not, its status as an agreement regarding the provision of electricity service was unlike the examples BC Hydro provided. It was not a commercial agreement akin to a franchise agreement or an agreement brought before the BCUC in a rate hearing respecting operations and interaction on board a customer's vessel. It is an agreement relating to the provision of electricity to a community by BC Hydro, an entity which is subject to BCUC regulation. As such, the Panel is satisfied that the ESA is subject to review under the UCA, and that the BCUC has the exclusive jurisdiction to review the terms of the ESA governing the provision of electricity, a regulated service.

### **Nature of the Annual Charge**

**The Panel finds that the Annual Charge is a rate within the meaning of the UCA for the following reasons.**

The definition of rate as described in section 1(1) of the UCA is set out in Section 2 of our decision above. The definition includes a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility; a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate; and a schedule or tariff respecting a rate.

This definition is broad and inclusive and contemplates most charges and forms of payments made to a public utility in relation to the provision of a good or service. The UCA definition refines the common understanding of rate, being the price paid for a good or service, to include most kinds of compensation paid to a public utility as the provider of the regulated good or service.

BC Hydro argues that the \$85,000 Annual Charge under the ESA is not a charge relating to a regulated service, as it is not tied to the provision of electricity to the community, but rather is a payment under the ESA which sets out terms upon which GFN is able to access electricity under the RCE Program.<sup>123</sup> BC Hydro also points out that the Annual Charge is not a CIAC.

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<sup>120</sup> BC Hydro Final Argument, p. 25.

<sup>121</sup> BCUC Order G-111-15 dated June 25, 2015.

<sup>122</sup> Ibid p. 10.

<sup>123</sup> BC Hydro Final Argument, p. 30.

The Panel accepts BC Hydro's position that the Annual Charge was not a CIAC of construction. As BC Hydro points out, the CPCN application for Hartley Bay noted that \$4.5 million estimate of AANDC Funding was considered an expected CIAC to offset the capital costs to facilitate the construction and acquisition of the Diesel Generating Station and distribution system in the community of Hartley Bay.<sup>124</sup> Similarly, we note that there are provisions in BC Hydro's Tariff that apply specifically to extensions in non-integrated areas and would likely have resulted in a surcharge to customers in Hartley Bay had the CIAC provisions been considered.<sup>125</sup> BC Hydro also points out that a customer's obligation to contribute to the cost of an extension is not conditional on a third-party's willingness or ability to pay. While we agree with these points, the Panel notes that BC Hydro's arguments underline that the Annual Charge is a payment for the cost of electricity which, as a regulated service, clearly falls within the BCUC's exclusive rate-making authority under the UCA.

The Panel accepts BC Hydro's evidence that the Annual Charge was intended to offset the cost of servicing the community by flowing federal money for operation and maintenance through GFN. However, the Panel does not agree that BC Hydro's intent to flow the federal contribution through GFN by way of an Annual Charge means that the Annual Charge is not a rate. We note that GFN contested that arrangement from the beginning and the evidence indicates that GFN continuously disputed the concept that there was federal money to flow through. Notwithstanding BC Hydro's interpretation of its intent relating to the Annual Charge under the ESA, we find that the Annual Charge represents an ongoing payment for the provision of electricity to GFN. As such, the Annual Charge is compensation relating to the provision of electricity, which is a regulated service, and payments received for that regulated service are subject to BCUC's review and approval.

The Panel notes that the obligation to pay falls to the customer, and whether or not the payment is paid by a third party on the customer's behalf is irrelevant. Notwithstanding the various agreements which BC Hydro entered into with the federal or provincial governments, the Annual Charge was imposed on GFN as the customer, and because that charge related directly to the provision of electricity as a regulated service, it was and remains an unsanctioned rate to date.

The Panel accepts GFN's evidence that the Annual Charge was a precondition for BC Hydro's provision of electricity service to GFN. The Panel also accepts BC Hydro's explanation that the Annual Charge was meant to offset the cost of providing electricity services to eligible communities under the RCE Program as set out in the 2009 MOU.<sup>126</sup> However, that does not alter the nature of the Annual Charge as a fee that relates specifically to BC Hydro's provision of electricity, which is a regulated service, to GFN. As such, it is a rate within the meaning of the UCA which is subject to BCUC review and approval.

### **Section 59 – Unduly Discriminatory Rate**

**The Panel finds that with respect to the Annual Charge, GFN as a customer, was charged rates for electricity services which are unjust, unreasonable and unduly discriminatory contrary to section 59(1)(a) of the UCA for the following reasons.**

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<sup>124</sup> Exhibit B-7, BCUC IR 1.3.3.

<sup>125</sup> Ibid., BCUC IR 1.3.5.

<sup>126</sup> BC Hydro Final Argument, pp. 15, 26.



The Panel considered the rates applied to other customers receiving electricity under the Zone II rate schedule. BC Hydro Special Direction No. 10 directs BCUC to ensure NIA rates are available to remote communities and any charges or fees should apply consistently across the entire rate class. However, the Panel notes that an Annual Charge equivalent was not demanded or received from all customers in the Zone II rate class, nor from all customers in the RCE Program, and this payment is not authorized under BC Hydro's Tariff. Furthermore, because the annual charge was linked to federal funding in the case of Indigenous communities, even amongst the Indigenous communities within the NIA, the amount of the applicable annual charge was not applied consistently and varied greatly.

BC Hydro acknowledges that the "flow-through" amounts differ for each First Nation community. BC Hydro did not require First Nations that received electricity prior to the RCE Program to sign ESAs or to otherwise flow funding to BC Hydro for ongoing operations and maintenance. BC Hydro explains that those First Nations that became customers prior to the implementation of the RCE Program are on micro-grids with non-Indigenous customers, therefore, they do not receive ISC funding for electricity. First Nations that received electricity prior to the RCE program were similarly not required to sign ESAs or pay an annual fee. The ESAs applied only to those First Nations that obtained electricity pursuant to the RCE Program after the 2009 MOU took effect.

Because GFN has been charged a rate that exceeds the rate charged to customers in substantially similar circumstances receiving the same level of service without an approved justification, and is more than the approved Tariff for Zone II customers, the Panel finds that compared to other Zone II customers, GFN paid more than a fair and reasonable charge for service of the same nature and quality provided by BC Hydro.

**The Panel also finds that, contrary to section 59(1)(b) of the UCA, BC Hydro demanded and received from GFN a rate that otherwise contravenes this Act, the regulations, BCUC orders or any other law.**

As will be discussed later in this decision, the Annual Charge was not put before the BCUC for approval as is required by section 61(1) of the UCA. The Panel finds that in demanding the Annual Charge, an unapproved rate from GFN, BC Hydro contravened section 59(1)(b) of the UCA. **Further, the Panel finds that the ESA was not regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description, contrary to section 59(2)(b) of the UCA.**

It is clear that not all Zone II customers, and not all RCE Program customers, were asked to sign an agreement requiring an additional fee to obtain electricity service. As noted above, BC Hydro did not require First Nations receiving electricity prior to the RCE Program to sign ESAs or to otherwise flow funding to BC Hydro for ongoing operations and maintenance in part because they are on micro-grids with non-Indigenous customers, so they do not receive ISC funding for electricity. Special Direction No. 10 establishes the basis for setting rates for RCE customers as rates for customers in NIA communities. Zone II rates do not include any additional charges beyond the rates applied to each class of customer. However, BC Hydro notes that prior to the RCE Program, the rate-setting principles would have required customers to pay BC Hydro's incremental costs of providing service to the customer, which would have meant including a surcharge to all customers in Hartley Bay. BC Hydro did not seek to apply a surcharge to Hartley Bay customers because it was collecting the Annual Charge. However, since the Annual Charge resulted from a form of agreement that applied to GFN, but not to other customers that were in substantially similar circumstances and conditions receiving similar services within the same program, it contravenes section 59(2)(b) of the UCA.



## **Section 61(1) – Filing of Rate Schedules**

**The Panel finds that BC Hydro did not file under section 61(1) of the UCA a rate schedule showing the Annual Charge with the BCUC.**

Section 61(1) of the UCA requires that BC Hydro file with the BCUC schedules showing all rates it established and collected, charged or enforced or to be collected or enforced. Section 61(2) specifies that a schedule filed under subsection (1) must not be rescinded or amended without the BCUC's consent. It then goes on to state in section 61(3) that the rates in schedules, as filed and as amended in accordance with the Act and the regulations are the only lawful, enforceable, and collectable rates of the public utility filing them, and no other rate may be collected, charged, or enforced. BC Hydro has filed a tariff and rate schedule for NIA Remote Communities but did not include the Annual Charge in these filings.<sup>127</sup> In failing to include the Annual Charge in a rate schedule, BC Hydro did not comply with section 61(1) of the UCA.

### **Annual Charge Not Approved with Hartley Bay CPCN**

BC Hydro submits that because the RCE 20-year plan and the 2009 MOU were put before the BCUC together with the Hartley Bay CPCN application, the BCUC has already considered the flow through arrangement. The Panel notes that there is no evidence that the ESA was appended to the Hartley Bay CPCN application, nor that BC Hydro sought specific approval of the ESA when it applied for the CPCN to add Hartley Bay to the RCE Program. However, one can reasonably conclude that because BC Hydro filed the Hartley Bay CPCN with the BCUC in 2011 and the ESA was not finally executed until 2014, the BCUC could not have considered the final form of the ESA when it approved the Hartley Bay CPCN.

BC Hydro submits further that no direction was given to BC Hydro to file agreements related to the federal funding as a rate. The absence of such direction does not absolve BC Hydro of its obligations under section 61(1) of the UCA. The RCE Program is a generic description of a specific program which could be accessed by eligible communities. It would follow that the approved rate schedule related to that program would apply equally to all customers receiving services under that rate schedule unless the BCUC specifically approved a variance of that rate. Since the program applied to various communities, unless BC Hydro applied to the BCUC for approval of the Annual Charge as set out in the ESA, there would be no way to determine whether, as in this case, the ESA and the Annual Charge could be approved.

Although the Toad River CPCN mentions federal funding for electricity for First Nation communities, the decision did not discuss this in any detail,<sup>128</sup> nor did the BCUC consider the Annual Charge in the Hartley Bay CPCN Decision.<sup>129</sup> Therefore, the Panel finds no evidence suggesting BC Hydro ever sought or received consent or approval to charge an amount over and above that in the approved Zone II Rate Schedules as required by section 61(1) of the UCA.

### **Annual Charge Not Authorized**

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<sup>127</sup> Zone II Rate Schedules 1107 or 1127 (Residential), Schedule 1234 (Small General Service), Schedule 1255, 1256, 1265, or 1266 (General Service Rate) of the BC Hydro's Electric Tariff.

<sup>128</sup> BCUC Order C-4-09A dated September 15, 2009 Reasons for Decision p. 1.

<sup>129</sup> BCUC Order C-4-12 dated March 22, 2012.

BC Hydro has an obligation under section 63 of the UCA to seek the consent of the BCUC “to directly or indirectly, in any way charge, demand, collect or receive from any person for a regulated service provided by it, or to be provided by it, compensation that is greater than, less than or other than that specified in the subsisting schedules of the utility applicable to that service and filed under this Act.”

The Annual Charge that BC Hydro collected and received as compensation goes beyond that set out in BC Hydro’s filed Tariff and rate schedules and BC Hydro did not seek the consent of the BCUC to collect or receive the Annual Charge. While BC Hydro submitted its Tariff and rate schedules for approval, BC Hydro did not seek or obtain approval for the Annual Charge. As a result, BC Hydro’s approved Tariff and rate schedules did not include the Annual Charge. **Therefore, the Panel finds that in respect of the Annual Charge, BC Hydro charged, demanded, collected, or received from GFN compensation for electricity service greater than that specified in BC Hydro’s approved Zone II Rate Schedules.**

#### **Annual Charge is Unenforceable**

Since the Annual Charge is compensation that is greater than that specified in the Zone II Rate Schedules, and BC Hydro did not seek to file or include the Annual Charge in its rate schedules for BCUC review, the Annual Charge was not approved in accordance with sections 58 to 61 of the UCA. In addition, BC Hydro did not receive the consent of the BCUC under section 63 of the UCA to directly or indirectly, in any way charge, demand, or collect the Annual Charge. As a charge that exceeds the approved Zone II rate, the Annual Charge payable by GFN but not by other Zone II customers in substantially similar circumstances and conditions is therefore unjust, unreasonable and unduly discriminatory pursuant to section 59(1)(a) of the UCA.

Accordingly, the **Panel finds that the provisions of the ESA relating to the Annual Charge are unenforceable.**

#### **4.0 Treatment of Historical Amounts of the Annual Charge**

Having found in Section 3.0, above, that by imposing the Annual Charge on GFN, BC Hydro charged GFN an unduly discriminatory rate under section 59 of the UCA and contrary to section 63, the Panel now considers the appropriate remedy in respect of that overpayment.<sup>130</sup>

#### *Positions of the Parties*

##### **GFN**

GFN submits that in the event that the Annual Charge is found to be a rate, the BCUC “should direct BC Hydro to return all money it has inappropriately collected from GFN under the ESA,”<sup>131</sup> plus “interest, paid at a rate the Commission judges to be reasonable in the circumstances.”<sup>132</sup> GFN affirms BC Hydro’s submissions that it has paid BC Hydro \$693,000 to date.<sup>133</sup>

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<sup>130</sup> Exhibit C1-9, Panel IR 1.1.; Exhibit B-7, BCUC IR 1.1.2.

<sup>131</sup> GFN Final Argument, p. 9.

<sup>132</sup> Exhibit C1-9, Panel IR 1.1.

<sup>133</sup> Ibid.

## **BC Hydro**

BC Hydro submits that if the Annual Charge is determined to be a rate, the BCUC lacks the necessary jurisdiction to order a refund of the Annual Charge.<sup>134</sup> BC Hydro states that GFN's complaint is restitutionary in nature and for the "BCUC to order BC Hydro to refund the payments, it must be empowered to grant restitution for unjust enrichment resulting from an unlawful contract."<sup>135</sup>

BC Hydro submits that traditionally, common law principles were such that "restitutionary relief is not available where a contract is found unenforceable by reason of illegality."<sup>136</sup> BC Hydro explains that the current approach for an unlawful contract is that "it is open to a court to make a restitutionary order based on unjust enrichment, which places the parties in the position it would have been in had the contract never been entered into."<sup>137</sup> BC Hydro advances its position, noting that courts can determine if there has been unjust enrichment by applying a "principled framework" that requires consideration of questions of justice and fairness.<sup>138</sup> BC Hydro states that while courts have jurisdiction to grant restitutionary relief, the UCA does not provide the BCUC with such jurisdiction.<sup>139</sup> BC Hydro argues that the BCUC's "powers are limited to those either explicitly granted to it under the UCA, or those that arise by necessary implication"<sup>140</sup> and that "the BCUC's powers must be exercised within its statutory limitations."<sup>141</sup>

BC Hydro submits that, although subsection 23(g)(i) of the UCA provides the BCUC with the general jurisdiction to make orders for the "safety, convenience or service of the public", it does not give the BCUC jurisdiction to order BC Hydro to issue a refund.<sup>142</sup> BC Hydro also references subsection 61(3) and section 63 of the UCA, noting that neither provision contains language empowering BCUC to order restitutionary recovery in instances of noncompliance.<sup>143</sup> Further, BC Hydro states that the interpretation of section 64(1)(b) of the UCA cannot be broad to include "the ordering of a restitutionary remedy like a refund of payments made under an un-filed rate"<sup>144</sup> and that it applies "only to contracted rates that were filed with the BCUC."<sup>145</sup> BC Hydro references various case authorities to support its view that the BCUC lacks jurisdiction to order BC Hydro to issue a refund.<sup>146</sup>

Finally, BC Hydro submits that in the instance the BCUC determines the Annual Charge is a rate, the *Limitation Act* establishes a basic limitation period of two years for most claims, and that section 6 of the *Limitation Act* requires that claims must be filed within two years of its discovery.<sup>147</sup> BC Hydro notes that since GFN was

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<sup>134</sup> BC Hydro Final Argument, pp. 31–32.

<sup>135</sup> *Ibid.*, p. 32.

<sup>136</sup> *Ibid.*, p. 33.

<sup>137</sup> BC Hydro Final Argument, p. 34.

<sup>138</sup> *Ibid.*

<sup>139</sup> BC Hydro Final Argument, pp. 34–35.

<sup>140</sup> *Ibid.*, p. 35.

<sup>141</sup> *Ibid.*

<sup>142</sup> BC Hydro Final Argument, p. 36, citing *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 46.

<sup>143</sup> BC Hydro Final Argument, p. 37.

<sup>144</sup> *Ibid.*, p. 38.

<sup>145</sup> *Ibid.*

<sup>146</sup> BC Hydro Final Argument, pp. 35–36, 38–39.

<sup>147</sup> *Ibid.*, pp. 39–40.

involved in the process leading up to the signing of the ESA in 2014, it had full knowledge of its terms and it is reasonable to infer that GFN was or ought to have been aware of the claim.<sup>148</sup>

However, BC Hydro also acknowledges that the Annual Charge could be considered a “continuing wrong” where each time GFN paid the Annual Charge, a two-year limitation period would begin for that particular payment.<sup>149</sup> In that case, BC Hydro submits, the refund of the Annual Charge should be limited to “those payments made within two years before GFN filed its Complaint.”<sup>150</sup>

### **GFN Reply**

With regard to BC Hydro’s discussion of common law principles, specifically, that in an illegal contract, all parties to the illegal contract were culpable, GFN notes that there is no evidence it was culpable for the illegality of the ESA.<sup>151</sup> GFN notes that it objected to the Annual Charge and did not conspire with BC Hydro, and that it was clearly unhappy with the outcome.<sup>152</sup>

With respect to the BCUC’s jurisdiction to order a refund of the Annual Charge, GFN states that the BCUC “is best positioned to evaluate the merits of BC Hydro’s arguments in this respect.”<sup>153</sup> However, GFN disagrees with BC Hydro’s opinion that the UCA, specifically sections 63 and 64, do not provide the BCUC with jurisdiction to provide GFN the relief it seeks.<sup>154</sup> GFN instead, asserts that section 64 of the UCA is not limited to rates filed with the BCUC and that it “provides exactly that jurisdiction, by stipulating that the Commission may make any order it considers advisable on finding that a contract in respect of a regulated service should be unenforceable.”<sup>155</sup>

With regard to the *Limitation Act*, GFN states that it only discovered the legal claim, as it pertains to section 63 of the UCA, approximately one year ago, at which time it filed the Complaint with the BCUC.<sup>156</sup> GFN submits that accordingly, it meets the test that claims must not be commenced more than two years after discovery as set out in section 6(1) of the *Limitation Act*.<sup>157</sup>

### **Panel Determination**

#### **Jurisdiction of BCUC with Respect to Remedies**

The Panel finds that **the BCUC has broad authority with respect to rates and ratemaking, including the authority to order restitution.**

In arriving at this determination, the Panel considered section 64 of the UCA which states:

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> BC Hydro Final Argument, p. 41.

<sup>151</sup> GFN Reply Argument, pp. 8–9.

<sup>152</sup> Ibid., p. 9.

<sup>153</sup> Ibid., p. 8.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> GFN Final Argument, p. 9.

<sup>157</sup> Ibid.

64 (1) If the commission, after a hearing, finds that under a contract entered into by a public utility a person receives a regulated service at rates that are unduly preferential or discriminatory, the commission may

(a) declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(2) If a contract is declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

Section 64(1)(b) provides the BCUC with broad authority to order the return of monies unlawfully paid under section 64(1)(a). This aligns with the fundamental principle of fairness and enables public utilities to collect underpayments or return overpayments to a ratepayer where these do not accord with the rates in approved tariffs.

In this case, we are contemplating the appropriate remedy following a hearing in which we have determined that the contract provisions relating to the payment of the Annual Charge by GFN to BC Hydro are unenforceable from the outset due to the rate being unduly discriminatory. The Panel does not find the cases cited by BC Hydro to be of assistance, as they interpret different circumstances or legislative provisions enacted in other provinces. In each instance, the complaint must be considered and applied within the context of the legislation in question, and none of the decisions cited pertain to or have provisions that parallel those in the UCA. As such, they cannot be considered authoritative with respect to the interpretation of the UCA nor do they provide substantive guidance to the Panel in this instance.

The Panel does not agree with BC Hydro that the essential nature of the Complaint is outside the jurisdiction of the BCUC, nor does it agree that in order to refund the payments the BCUC must be specifically empowered to grant restitution under the UCA. As outlined above, the essential nature of the Complaint is whether the Annual Charge that GFN pays to BC Hydro is a rate for electricity service, a matter that is clearly within the jurisdiction of the BCUC. The authority granted to the BCUC under section 64(1)(b) of the UCA to make an order it considers advisable in the circumstances permits the Panel to put the parties back in the position they would have been in had the illegal provisions of the contract not been entered into. While this may not be an unlimited power, when read in the context of sections 58 to 64 of the UCA, and the UCA as a whole, there is a clear intent to bestow sufficient authority on the BCUC to determine and enforce matters related to utilities, and in particular, matters related to rates over which it has exclusive authority. The ability to order the collection of underpayments or the repayment of overcharges is routinely exercised in favour of customers and the utility alike. Further, the BCUC has exclusive jurisdiction to determine rates. Therefore, it is reasonable to infer that such authority would also extend to the reimbursement of monies paid which were found to be unjust, unreasonable and unduly discriminatory because they were unauthorized from the outset.

In this case the BCUC is simply exercising its jurisdiction to the extent necessary to put the ratepayer back into the position it ought to have been in had the public utility adhered to its approved rate schedule as it is required to do under the UCA. Accordingly, **the Panel finds that it has the jurisdiction to order that the Annual Charge**

**payments be returned in full to GFN.** We address the specific issue of interest applicable to the reimbursement further on in our decision.

### **Does the Limitation Period Apply to Restrict the Amount to be Repaid?**

In considering BC Hydro's argument to limit the refund to two years as specified in the *Limitation Act*, **the Panel finds that the *Limitation Act* does not apply to restrict GFN's claim.** The Panel notes that the application of the *Limitation Act* is limited to court proceedings rather than proceedings before administrative tribunals. The BCUC is an administrative body which draws its authority from the UCA and applicable provisions of the *Administrative Tribunals Act*. Unlike the courts, the BCUC is not authorized to consider claims related to matters not specified in the UCA. Since the BCUC has powers only as prescribed by the UCA, it is clearly not a court; therefore, the *Limitation Act* does not apply to restrict GFN's claim in this BCUC proceeding.

Similarly, **the Panel finds that the two-year limitation period set out in BC Hydro's Tariff does not apply to amounts unlawfully collected by a regulated public utility outside of its Tariff.**

In arriving at this determination, we considered the broad authority in the UCA specifically, sections 59 to 64, including 64(1)(b), together with section 83, which reads as follows:

83 If a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken.

As already noted, the UCA establishes the BCUC as the primary regulator of public utilities with exclusive authority over rate-setting. In the conduct of the BCUC's regulatory duties, the protection of the public interest is paramount. The broad authority under section 64(1)(b) of the UCA to make decisions and orders, and the rate-setting provisions which confer exclusive jurisdiction on the BCUC to determine just and reasonable rates, read together with section 83 of the UCA, confer the BCUC with broad regulatory jurisdiction over the rates public utilities charge for regulated services.

Section 83 authorizes the BCUC to inquire into, hear and determine matters arising in complaints and determine the actions to be taken. When a complaint concerns payments over and above an approved rate, the BCUC must exercise its broad discretion in such a manner to ensure that rates are not unjust or unduly discriminatory, and to put customers in the position they should have been in had they not been subjected to such rates. When considered as a whole, sections 59 to 64 and section 83 confer upon the BCUC the discretion to make orders, including restitution, that deter public utilities from benefiting from their intentional or unintentional avoidance of applicable regulatory requirements.

Since the Annual Charge was unapproved and therefore unlawful from the outset, the Panel need not consider the limitation period specified in BC Hydro's Tariff. To allow BC Hydro to benefit from its failure to obtain approval of the Annual Charge would simply be unjust.

BC Hydro has pointed out that the amounts received from GFN on account of the Annual Charge were included in revenue, and if it is required to repay the amounts collected, this will impact rates for others. Other customers have benefited from BC Hydro's collection of the Annual Charge, a charge that ultimately should not have been collected in the first instance. The collection of the Annual Charge meant that GFN was, in effect,

bearing a greater share of the electricity costs than other Zone II ratepayers. To allow a benefit from the unapproved collection of the Annual Charge would, in our view, perpetuate an injustice as would denying GFN repayment of those amounts for that reason. Furthermore, **the Panel finds that since the payments not only contravene the UCA's rate-making provisions, but are also unjust, unreasonable and unduly discriminatory, interest should be applied on the amounts paid since the inception of the ESA.**

**BC Hydro is directed to refund to GFN, within six months of the date of this order, the entirety of the Annual Charge paid since the inception of the ESA, amounting to \$693,000, plus interest at a rate equal to BC Hydro's weighted average cost of debt, calculated for BC Hydro's most recent fiscal year.**

**Recommendation**

The Panel acknowledges and applauds BC Hydro's statement of its intention to terminate the ESA (and other similar servicing agreements), subject to the outcome of this proceeding, and that this intention reflects, in part, BC Hydro's commitment to advance reconciliation, develop and maintain mutually respectful relationships with Indigenous communities, and honour Indigenous perspectives. However, the Panel notes that there are other Indigenous communities within the RCE Program that have paid or are still paying fees of a similar nature under similar agreements. In the meantime, the BCUC may wish to review all BC Hydro agreements with impacted Indigenous communities under the RCE Program to determine if further action should be taken to address this issue.

**DATED** at the City of Vancouver, in the Province of British Columbia, this        18<sup>th</sup>        day of September 2023.

*Original signed by:*

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C. M. Brewer  
Panel Chair / Commissioner

*Original signed by:*

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A. K. Fung, KC  
Commissioner

*Original signed by:*

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T. A. Loski

Commissioner





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**ORDER NUMBER  
G-247-23**

IN THE MATTER OF  
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

British Columbia Hydro and Power Authority  
Complaint filed by Gitga'at First Nation regarding  
Remote Community Electrification Program Fees

**BEFORE:**

C. M. Brewer, Panel Chair  
A. K. Fung, KC, Commissioner  
T. A. Loski, Commissioner

on September 18, 2023

**ORDER**

**WHEREAS:**

- A. On April 5, 2022, Gitga'at First Nation (GFN) filed a complaint with the British Columbia Utilities Commission (BCUC) concerning charges billed by British Columbia Hydro and Power Authority (BC Hydro) (Complaint);
- B. In the Complaint, GFN details that it is a remote community to which BC Hydro extended electrical service under the Province of British Columbia's Remote Community Electrification Program, and that in addition to paying Zone II rates as set out in BC Hydro's Electric Tariff, GFN has had to pay to BC Hydro an annual charge of approximately \$85,000 in relation to an Electricity Service Agreement with BC Hydro dated February 3, 2014 (Annual Charge). GFN submits that the Annual Charge violates section 63 of the *Utilities Commission Act* (UCA), as it is a term or condition of service that was not reviewed and approved by the BCUC;
- C. By Order G-272-22 dated September 29, 2022, the BCUC established a regulatory timetable for the review of the Complaint. The regulatory timetable was subsequently amended by Orders G-350-22, G-376-22, G-3-23, G-56-23 and G-78-23;
- D. On April 24, 2023, the BCUC received GFN's final argument, followed by BC Hydro's final argument on May 17, 2023, and GFN's reply argument on May 25, 2023;
- E. By Order G-162-23 dated June 26, 2023, the BCUC reopened the evidentiary record for the proceeding and issued a Panel Information Request to GFN seeking confirmation of the amounts paid by GFN to BC Hydro pursuant to the Electricity Service Agreement. GFN's response followed that same day;
- F. The BCUC has considered the Complaint, evidence and submissions in this proceeding and finds, for the reasons set out in the decision issued concurrently with this order, that the Annual Charge, set out in the

Electricity Service Agreement between BC Hydro and GFN, is a rate tied to the provision of electricity service for which BC Hydro did not file a rate schedule or obtain BCUC consent, and is also unjust, unreasonable and unduly discriminatory;

- G. The BCUC also finds that the Electricity Service Agreement provisions relating to the Annual Charge, in particular section 6 and Schedule E, are contrary to section 59(2)(b) of the UCA, as they amount to an agreement that was not regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description;
- H. In billing GFN for electricity service, BC Hydro is required to adhere to the charges as outlined in its Electric Tariff, which it failed to do in the case of the Annual Charge; and
- I. The BCUC finds that the following determinations are warranted.

**NOW THEREFORE** for the reasons provided in the decision, pursuant to sections 59, 61, 63, 64 and 83 of the UCA the BCUC orders as follows:

- 1. Section 6.2 and Schedule E of the Electricity Service Agreement are not enforceable.
- 2. BC Hydro is directed to refund GFN, within 6 months of the date of this order, the entirety of the Annual Charge paid from the inception of the Electricity Service Agreement to the present, amounting to \$693,000, plus interest at a rate equal to BC Hydro's weighted average cost of debt, calculated for BC Hydro's most recent fiscal year.
- 3. The Electricity Service Agreement, excluding the portions included in the public versions of the exhibits in this proceeding and the information requests and responses filed confidentially, are to be held confidential as they contain commercially sensitive information and names of individuals protected for privacy.

**DATED** at the City of Vancouver, in the Province of British Columbia, this 18<sup>th</sup> day of September 2023.

BY ORDER

*Original signed by:*

C. M. Brewer  
Commissioner

**GLOSSARY AND ACRONYMS**

ACRONYM / GLOSSARY	DESCRIPTION
2009 MOU	2009 Memorandum of Understanding between Canada, the Government of BC and BC Hydro
2011 MOU	2011 Memorandum of Understanding between Gitga’at First Nation and BC Hydro
AANDC	Aboriginal Affairs and Northern Development Canada, later INAC
BC	British Columbia
BC Hydro	British Columbia Hydro and Power Authority
BCUC	British Columbia Utilities Commission
Block Funding	Block Contribution Funding
CFA NFR	Comprehensive Funding Agreement New Fiscal Relationship
CIAC	Contribution in Aid of Construction
CPCN	Certificate of Public Convenience and Necessity
ESA	Electricity Servicing Agreement
GFN	Gitga’at First Nation
INAC	Indigenous and Northern Affairs Canada , now ISC
IR	Information Request
ISC	Indigenous Services Canada
MTSA	Municipal Type Service Agreement
NIA	Non Integrated Area
O&M	Operations and Maintenance
RCE Program	Remote Community Electrification Program
UCA	<i>Utilities Commission Act</i>
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

IN THE MATTER OF  
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

British Columbia Hydro and Power Authority  
Complaint filed by Gitga'at First Nation regarding Remote Community Electrification Program Fees

**EXHIBIT LIST**

Exhibit No.	Description
<i>COMMISSION DOCUMENTS</i>	
A-1	Letter dated August 30, 2022 – Appointment of Panel for the review of Complaint filed by Gitga'at First Nation regarding Remote Community Electrification Program fees
A-2	Letter dated August 30, 2022 – BCUC Request for Information from BC Hydro
A-3	Letter dated September 29, 2022 – BCUC Order G-272-22 establishing the regulatory timetable
A-4	Letter dated October 4, 2022 – BCUC submitting Request for Submissions
A-5	Letter dated October 18, 2022 – BCUC Order G-290-22 granting eligibility to GFN for Participation Cost Award
A-6	Letter dated November 7, 2022 – BCUC submitting Request for Submissions
A-7	Letter dated December 5, 2022 – BCUC Order G-350-22 amending the regulatory timetable
A-8	Letter dated December 9, 2022 – BCUC issuing Information Request No. 1 to BC Hydro
A-9	Letter dated December 19, 2022 – BCUC Order G-376-22 amending the regulatory timetable
A-10	Letter dated January 11, 2023 – BCUC Order G-3-23 amending the regulatory timetable
A-11	Letter dated February 13, 2023 – BCUC issuing Information Request No. 1 to GFN
A-12	Letter dated March 20, 2023 – BCUC Order G-56-23 with further Regulatory Timetable
A-13	Letter dated March 20, 2023 – BCUC issuing Information Request No. 2 to BC Hydro
A-14	Letter dated March 20, 2023 – BCUC issuing Information Request No. 2 to GFN

- A-15 Letter dated April 11, 2023 – BCUC Order G-78-23 with further regulatory timetable
- A-16 Letter dated June 26, 2023 – BCUC Order G-162-23 establishing the regulatory timetable
- A-17 Letter dated June 26, 2023 – BCUC submitting Panel IR No. 1 to GFN

#### *COMMISSION STAFF DOCUMENTS*

- A2-1 Letter dated November 8, 2022 – BCUC Staff providing submissions
- A2-1-1 **CONFIDENTIAL** - Letter dated November 8, 2022 – BCUC Staff providing confidential submissions

#### *APPLICANT DOCUMENTS*

- B-1 **BRITISH COLUMBIA HYDRO AND POWER AUTHORITY (BC HYDRO)** – Letter dated September 13, 2022 – BC Hydro submitting confirmation of compliance with Exhibit A-2
- B-2 Letter dated October 21, 2022 – BC Hydro submitting confirmation of compliance with Order G-272-22
- B-3 Letter dated November 4, 2022 – BC Hydro submitting intention to terminate Electricity Service Agreements
- B-4 Letter dated November 21, 2022 – BC Hydro submitting reply submission to GFN response on proposed amendments
- B-5 Letter dated December 16, 2022 – BC Hydro submitting extension request to file responses to BCUC information Request No. 1
- B-6 Letter dated January 9, 2023 – BC Hydro submitting reply response to GFN on additional request
- B-7 Letter dated January 12, 2023 - BC Hydro submitting public response to BCUC Information Request No. 1
- B-7-1 **CONFIDENTIAL** - Letter dated January 12, 2023 - BC Hydro submitting confidential response to BCUC Information Request No. 1

- B-8            **REDACTED** - Letter dated February 6, 2023 - BC Hydro submitting redacted response to GFN Information Request No. 1
- B-8-1        **CONFIDENTIAL** - Letter dated February 6, 2023 - BC Hydro submitting confidential response to GFN Information Request No. 1
- B-9            **REDACTED** - Letter dated February 15, 2023 - BC Hydro submitting redacted Information Request No. 1 to GFN
- B-9-1        **CONFIDENTIAL** - Letter dated February 15, 2023 - BC Hydro submitting confidential Information Request No. 1 to GFN
- B-10          Letter dated April 5, 2023 - BC Hydro submitting response to BCUC Information Request No. 2 and Submission on Further Process

#### *INTERVENER DOCUMENTS*

- C1-1          **GITGA'AT FIRST NATION (GFN)** – Letter dated September 29, 2022 submitting request for participation cost award by Teresa Robinson
- C1-2          Letter dated November 8, 2022 – GFN submitting response to Exhibit A-6
- C1-3          Letter dated December 16, 2022 – GFN submitting response on additional request
- C1-4          Letter dated January 16, 2023 – GFN submitting Information Request No. 1 to BC Hydro
- C1-5          **REDACTED** - Letter dated March 1, 2023 – GFN submitting redacted response to BCUC Information Request No. 1
- C1-5-1       **CONFIDENTIAL** - Letter dated March 1, 2023 – GFN submitting confidential response to BCUC Information Request No. 1
- C1-6          **REDACTED** - Letter dated March 1, 2023 – GFN submitting redacted response to BC Hydro confidential Information Request No. 1
- C1-6-1       **CONFIDENTIAL** - Letter dated March 1, 2023 – GFN submitting confidential response to BC Hydro confidential Information Request No. 1

- C1-7 Letter dated March 27, 2023 – GFN submitting response to Exhibit A-12
- C1-8 Letter dated March 29, 2023 – GFN submitting response to BCUC Information Request No. 2
- C1-9 Letter dated June 26, 2023 – GFN submitting response to Panel Information Request No. 1

*INTERESTED PARTY DOCUMENTS*

- D-1 **ABOMAZID, A. (ABOMAZID)** - Submission dated September 20, 2022 request for Interested Party Status on behalf of Residential Consumer Intervener Association (RCIA)

*LETTERS OF COMMENT*

- E-1 **STEIN, G. (STEIN)** – Letter of Comment dated November 2, 2022
- E-2 **YOUNG, J. (YOUNG)** – Letter of Comment dated November 6, 2022