



ORDER NUMBER
G-175-16

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

and

Spirit Bay Utilities Ltd.
Application for Exemption pursuant to section 88(3) of the *Utilities Commission Act*

BEFORE:

D. M. Morton, Commissioner/Panel Chair
D. J. Enns, Commissioner
R. I. Mason, Commissioner

on December 1, 2016

ORDER

WHEREAS:

- A. On June 1, 2016, Spirit Bay Utilities Ltd. (Spirit Bay Utilities) filed an application (Application) with the British Columbia Utilities Commission (Commission) for an exemption pursuant to section 88(3) of the *Utilities Commission Act* (UCA) from the application of Part 3, Regulation of Public Utilities, with respect to the proposed provision of a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems (Energy Services) to the Spirit Bay Community;
- B. As an alternative request to the above noted exemption, Spirit Bay Utilities requests the Commission direct, pursuant to section 72 of the UCA, that the Beecher Bay First Nation (Scianew) (Beecher FN) is a municipality or regional district for the purposes of the UCA which would, by way of the exclusions to the definition of public utility there within, exempt it from the provisions of the UCA solely applicable to public utilities;
- C. Spirit Bay Utilities is a new entity that proposes to provide the above noted Energy Services along with water and sewer services;
- D. At present, all utility assets are owned by Spirit Bay Developments Limited Partnership (Spirit Bay Developments), an entity 51 percent owned by the Beecher FN and 49 percent owned by Omnibus. Spirit Bay Utilities states that the assets will be transferred to Spirit Bay Utilities, whose ownership mirrors that of Spirit Bay Developments, in exchange for a note, or similar debt instrument, payable by the utility company to Spirit Bay Developments;
- E. The Spirit Bay Community is a staged new town development planned to have 400 to 600 homes, 50,000 square feet of commercial space, a spa resort, and a light industrial site. It is located approximately 20 kilometers southwest of Victoria, BC on Beecher FN reserve land;

- F. Pursuant to the *Beecher Bay First Nation Land Code*, the Beecher FN allows 99-year leases to members of the general public within a 100-acre economic development zone within which the Spirit Bay Community is located. The Beecher FN maintains control and governance of the lands within the economic development zone;
- G. On June 24, 2016 by Order G-95-16, the Commission established a written hearing to review the Application and required Spirit Bay Utilities to provide notification of the hearing to affected parties and potentially affected parties including existing and potential leaseholders. The hearing involved one round of written information requests and an opportunity for interested parties to submit letters of comment followed by a written argument phase;
- H. All participating parties indicated that they found the evidentiary record adequate and they preferred a written hearing process. Accordingly, by Order G-125-16, the Commission cancelled the procedural conference scheduled for Tuesday, August 2, 2016;
- I. FortisBC Energy Inc. and FortisBC Inc. (collectively FortisBC) and British Columbia Hydro and Power Authority (BC Hydro) participated as interveners and submitted final arguments. No leaseholders or other parties submitted letters of comment;
- J. The UCA defines a “public utility”, in part, as “a person, or the person’s lessee...who owns or operates in British Columbia, equipment or facilities for the production, generation, storage, transmission, sale, delivery or provision of electricity... or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation”;
- K. Section 88(3) of the UCA provides that the Commission may, on conditions it considers advisable, with the advance approval of the Minister responsible for administration of the *Hydro and Power Authority Act*, exempt a person, equipment or facilities from the application of all or any of the provisions of the UCA or may limit or vary the application of the UCA;
- L. On November 14, 2016, the Commission issued a letter to the parties in the proceeding requesting consent, pursuant to section 4(11) of the UCA, to form a new panel consisting of Commissioners David Morton, Richard Mason and Douglas Enns to proceed with making final determinations based on the existing evidentiary record and written arguments;
- M. On November 21, 2016, letters were received by the Commission from Spirit Bay Utilities and all registered interveners providing written consent for this panel to proceed with making final determinations based on the existing evidentiary record already filed as part of the proceeding; and
- N. On November 25, 2016, pursuant to section 4 of the UCA, David Morton, Richard Mason and Douglas Enns were appointed to the panel to complete the review of the Application.

NOW THEREFORE for the reasons attached as Appendix A, the British Columbia Utilities Commission orders as follows:

1. .If Spirit Bay Utilities Ltd. were to provide the proposed Energy Services to the Spirit Bay Community for compensation it would be a public utility as defined by the *Utilities Commission Act* (UCA).
2. Spirit Bay Utilities Ltd.'s application for an exemption pursuant to section 88(3) of the UCA is denied.
3. Spirit Bay Utilities Ltd.'s alternative request that it be declared a municipality or regional district for purposes of the UCA is denied.
4. Spirit Bay Utilities Ltd. is to produce a plan, including proposed filings and timing, which will ensure Spirit Bay Utilities Ltd.'s and Spirit Bay Developments Limited Partnership's compliance with the UCA on a prospective basis. This plan should be prepared in consultation with Commission staff and must be filed with the Commission, for approval, no later than Friday, March 31, 2017.

DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of December 2016.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

Attachment

Spirit Bay Utilities Ltd.
Application for Exemption pursuant to section 88(3) of the *Utilities Commission Act*

REASONS FOR DECISION

1.0 INTRODUCTION

1.1 Background

Spirit Bay Utilities Ltd. (Spirit Bay Utilities) proposes to provide utility services including a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems to the Spirit Bay Community. The Spirit Bay Community is a staged new town development comprising of 400 to 600 homes, 50,000 square feet of commercial space, a spa resort and a light industrial site. It is located approximately 20 kilometers southwest of Victoria, BC on Beecher Bay First Nation (Beecher FN) reserve land within a 100-acre Economic Development Zone.¹ Spirit Bay Utilities is currently majority owned by the Beecher FN. It plans to become wholly owned by the Beecher FN.

Currently, thermal energy system infrastructure is installed for 53 lots and the initial electrical system infrastructure (conduit, kiosks, meter boxes) for 16 lots. No propane utility assets have been placed in the ground at the time of the application.²

At present, all utility assets are owned by Spirit Bay Developments Limited Partnership (Spirit Bay Developments), an entity 51 percent owned by the Beecher FN and 49 percent owned by Omnibus. Spirit Bay Utilities states that the utility assets will be transferred to Spirit Bay Utilities, whose ownership mirrors that of Spirit Bay Developments, in exchange for a note, or similar debt instrument, payable by the utility company to Spirit Bay Developments. Spirit Bay Utilities also states that “[a]t the point of transfer there is no effective change in percentage ownership of the utility assets between Spirit Bay Developments and Beecher FN.”³

Beecher FN manages Beecher FN reserve lands and resources pursuant to the *First Nations Land Management Act* and Framework Agreement on First Nation Land Management and has enacted the *Beecher Bay Land Code* May 25, 2003 (Beecher Land Code). Pursuant to the Beecher Land Code, the Beecher FN allows for 99-year leases to the general public within the Economic Development Zone and has created zoning laws, registry laws and property taxation laws.

1.2 Approvals sought

Spirit Bay Utilities is seeking an exemption pursuant to section 88(3) of the *Utilities Commission Act* (UCA) from the application of Part 3, Regulation of Public Utilities, with respect to the proposed provision of a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems to the Spirit Bay Community (the Application). The exemption request excludes

¹ As defined in the *Beecher Bay First Nation Land Code*, May 25, 2003 as amended June 15, 2003, Exhibit B-1, Annex 1.

² Exhibit B-3, BCUC IR 1.1.

³ Exhibit B-1, p. 3; Exhibit B-3, BCUC IR 1.2, 1.4.

section 42: Duty to obey orders, of the UCA in relation to safety orders of the British Columbia Utilities Commission (Commission). Spirit Bay Utilities' request would reduce regulatory requirements, the most germane of which relate to the acquisition and disposition of property and corporate securities, resource planning, construction and operation approvals and rate setting. Though not formally requested in the Application, Spirit Bay Utilities makes it clear in its reply argument to British Columbia Hydro and Power Authority (BC Hydro) that it is seeking exemption from section 83 of the UCA that would otherwise allow complaints to be brought before the Commission.

In the event that the section 88(3) exemption is denied, Spirit Bay Utilities is requesting, pursuant to section 72 of the UCA, that the Commission find the Beecher FN to be a municipality or regional district for the purpose of the UCA.

1.3 Regulatory process

On June 24, 2016, by Order G-95-16, the Commission established a written hearing to review the Application and required Spirit Bay Utilities to provide notification of the hearing to affected parties and potentially affected parties including existing and potential leaseholders. The hearing involved one round of written information requests and an opportunity for interested parties to submit letters of comment followed by a written argument phase. FortisBC Energy Inc. and FortisBC Inc. (collectively FortisBC) and BC Hydro registered and participated as interveners, which included the submission of final arguments. No letters of comment were received from leaseholders or other potentially affected parties.

2.0 ISSUES

2.1 Jurisdiction

The Commission's jurisdiction over public utilities stems from the UCA and specifically the definition of public utility contained therein:

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

- (a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation

.....

but does not include

- (c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,
- (d) a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or commodity is not resold to or used by others,
- (e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,

- (f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the Geothermal Resources Act, or
- (g) a person, other than [BC Hydro], who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the Hydro and Power Authority Act, in respect of anything done, owned or operated under or in relation to that agreement;

Despite the approvals sought by Spirit Bay Utilities outlined in section 1.2 above, it states it is very confident that the Beecher FN “has the power to provide Utility Services through Spirit Bay Utility Ltd. and to establish Laws in this respect.”⁴ It states it is seeking an exemption for legal certainty and that rather than engaging in a lengthy discussion over regulatory jurisdiction they are taking a practical approach to regulatory oversight by requesting a section 88(3) exemption.⁵

The Beecher FN enacted the Beecher Land Code pursuant to the *First Nations Land Management Act SC 1999, chapter 24* (FNLMA). The FNLMA allows a First Nation to opt out of 32 sections of the *Indian Act RSC 1985, chapter I-5* relating to land management upon the First Nation’s enactment of a Land Code.

Spirit Bay Utilities submits that the Beecher Land Code is a duly enacted First Nation law which has the force of federal law but that the courts have ultimate jurisdiction over the utility.⁶ It further submits that sections 20(1) and 20(2)(d) of the FNLMA provide Beecher FN the authority to regulate and provide utility services.⁷ Section 20(1) of the FNLMA states that:

The council of a First Nation has, in accordance with its land code, the power to enact laws respecting

- a) interests or rights in and licences in relation to First Nation land;
- b) the development, conservation, protection, management, use and possession of First Nation land; and
- c) any matter arising out of or ancillary to the exercise of that power.

In addition, paragraph 20(2)(d) of the FNLMA states that “Without restricting the generality of subsection (1), First Nation laws may include laws respecting:... d) the provision of local services in relation to First Nation land and the imposition of equitable user charges for those services...”

Spirit Bay Utilities is of the view that “[r]egulating utilities and acting as a utility are at the very least ‘a matter arising out of or ancillary to the exercise of that power’ and considers s. 20(2)(d) to be ‘an example of law-making powers to provide local services, including utilities.’”⁸

⁴ Exhibit B-1, p. 7.

⁵ *Ibid.*; Spirit Bay Final Argument, p. 2.

⁶ Exhibit B-4, BC Hydro IR 1; Spirit Bay Final Argument, p. 2.

⁷ *Ibid.*, BC Hydro IR 1.1.

⁸ *Ibid.*

On the matter of the Commission's jurisdiction, FortisBC submits that Spirit Bay Utilities has not demonstrated that the UCA does not apply and has acknowledged that the UCA may apply.⁹ BC Hydro submits that the Commission's jurisdiction over Spirit Bay Utilities has not been questioned by any party in this proceeding.¹⁰

BC Hydro "understands that the Commission's jurisdiction to consider this matter has not been questioned by any party; neither did Spirit Bay [Utilities] make an argument contradicting the Commission's jurisdiction. As such, BC Hydro confirms that it does not take a position on this issue."¹¹ However, in reply, Spirit Bay Utilities asserts that "BC Hydro has mischaracterized Spirit Bay [Utilities'] view of the jurisdiction that the [BCUC] has to regulate the Spirit Bay [Utilities]", stating that "the BCUC may have regulatory jurisdiction or it may not. Taking the pragmatic approach, Spirit Bay [Utilities] has not investigated the matter in any detail which does not equate with agreeing that the BCUC has jurisdiction."¹²

Spirit Bay Utilities also believes that "any matters of jurisdiction would be best be dealt with by the Province of British Columbia. Under Section 88(3) of the Utilities Commission Act advance approval of the minister responsible for the administration of the Hydro and Power Authority Act will be required before any exemption is granted. This will afford the Province of British Columbia an opportunity to consider any jurisdictional matters."¹³

Commission determination

The Panel finds that the UCA applies to the Energy Services proposed by Spirit Bay Utilities. **If Spirit Bay Utilities were to provide the proposed Energy Services to the Spirit Bay Community for compensation it would be a public utility as defined by the UCA.**

Spirit Bay Utilities is of the view that the Beecher Land Code, enacted pursuant to the *First Nations Land Management Act* provides Beecher FN with authority to regulate and provide utility services. The Panel disagrees.

Section 88 of the *Indian Act* states that "provincial laws of general application continue to apply in respect of Indians in the province unless those laws are inconsistent with the provisions of the *Indian Act*." The FNLMA is enacted pursuant to the *Indian Act* and it allows a First Nation to opt out of 32 sections of the *Indian Act* on the enactment of a First Nation Land Code, but section 88 is not one of those sections. Therefore, there is nothing inconsistent between the UCA and the *Indian Act*. The UCA is a provincial law of general application and, as such, applies to the proposed utility services.

The Energy Services Spirit Bay Utilities proposes to provide - a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems - meet the definition of public utility under the UCA. Therefore, the Panel finds that if Spirit Bay Utilities were to provide

⁹ FortisBC Final Argument, p. 4.

¹⁰ BC Hydro Final Argument, p. 2.

¹¹ Ibid., p. 2.

¹² Spirit Bay Utilities Reply Argument, p. 1.

¹³ Spirit Bay Utilities Final Argument, p. 2.

the proposed Energy Services to the Spirit Bay Community for compensation it would be a public utility as defined by the UCA.

With regard to Spirit Bay Utilities' belief that the jurisdictional matter does not need to be considered by the Panel, we do not agree. An exemption is only required if the UCA applies and an exemption is granted pursuant to the UCA. Accordingly, we must determine that the jurisdiction to grant an exemption exists, before we can make any recommendation to grant an exemption. If the Commission has no jurisdiction under the UCA, no exemption would be warranted.

The Panel notes that currently the utility assets are owned by Spirit Bay Developments. Therefore, Spirit Bay Developments may already be a public utility as defined by the UCA for the reasons outlined above.

2.2 Declaration as a regional district or municipality

As an alternative request to the section 88(3) exemption, Spirit Bay Utilities requests the Commission direct, pursuant to section 72 of the UCA, that Beecher FN is a municipality or regional district for the purposes of the UCA.¹⁴ This would, by way of the exclusions to the definition of public utility there within, exempt it from the provisions of the UCA solely applicable to public utilities.

Spirit Bay Utilities submits that Beecher FN "is not a municipality or regional district as those terms are used in the *Interpretation Act* (British Columbia) but the Federal Government has conferred powers to it which it has exercised in relation to Utility Services."¹⁵

However, Spirit Bay Utilities also states that "[i]t is the substance and not the form that determines whether an entity is a municipality or regional district. The Beecher Bay First Nation as majority owner of [Spirit Bay Utilities] easily qualifies with the authority it has been granted under federal legislation."¹⁶ Spirit Bay Utilities stated that Spirit Bay Utilities customers who are not members of the Beecher FN cannot vote in Beecher Bay Council elections, because "[r]esidency does not create political rights."¹⁷

When asked what opportunity Spirit Bay lease holders have to participate in the process required for Beecher FN Council to approve terms, conditions and rates set by Spirit Bay Utilities, Spirit Bay Utilities replied:

Currently, Beecher FN Council meetings where resolutions are passed are not automatically open to the public or to interest-holders. The usual practice is to invite delegations or representations from potentially affected individuals to raise any concerns they have regarding specific agenda items. If the approval of terms, conditions and rates is carried out by Council Resolution, Beecher FN Council has stated that they willing to invite interest-holders to the meeting to make comments and ask questions.¹⁸

¹⁴ Ibid., p. 1.

¹⁵ Exhibit B-1, p. 6.

¹⁶ Spirit Bay Utilities Reply Argument, p. 2.

¹⁷ Exhibit B-3, BCUC IR 1.4.4.

¹⁸ Ibid., BCUC IR 1.4.1.1.

Commission determination

Spirit Bay Utilities' alternative request that it be declared a municipality or regional district for purposes of the UCA is denied.

Section 2(1) of the *Interpretation Act* states that “[the *Interpretation Act*] applies to every enactment, whether enacted before or after the commencement of [the *Interpretation Act*], unless a contrary intention appears in [the *Interpretation Act*] or in the enactment.”

Municipality and regional district are defined in the *Interpretation Act* as follows:

‘municipality’ means, as applicable,

- (a) the corporation into which the residents of an area are incorporated as a municipality under the Local Government Act, the Vancouver Charter or any other Act,
- or
- (b) the geographic area of the municipal corporation...

‘regional district’ means a regional district as defined in the Local Government Act.

Thus the exclusion to the definition of public utility in the UCA that applies to “a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries” only applies to municipalities and regional districts that meet those definitions in the *Interpretation Act*. Beecher FN does not meet either of these definitions and thus the Panel cannot find it to be a municipality or regional district for the purposes of the UCA.

The evidence shows that Spirit Bay Utilities is a corporation¹⁹ and is therefore not a municipality and is also not excluded from the definition of public utility in the UCA. The Panel also notes that Spirit Bay Developments is a limited partnership and is therefore not a municipality.

The Panel also notes that generally speaking, ratepayers of a municipal utility are entitled to vote in a municipal election. Thereby, municipal councils are accountable to ratepayers for the performance, including rates, of the municipal utility. However, for ratepayers of Spirit Bay Utilities who are not members of Beecher FN, participation in the ratemaking process of Spirit Bay Utilities appears to be limited to making comments and asking questions of Beecher FN Council.

2.3 The exemption request

Spirit Bay Utilities states that the basis for the exemption request “is that the Beecher Bay First Nation (Scianew) (“Beecher FN”) will exercise its legal authority under the FNLMA, Framework Agreement on First Nations Land Management (“Act and Agreement”) and the comprehensive Beecher FN land code enacted in 2003, as amended (“Land Code”) and regulate the Utility Services provided by the Spirit Bay Utility.”²⁰

¹⁹ Exhibit B-1, p. 1.

²⁰ Exhibit B-1, p. 1.

Spirit Bay Utilities argues that “[t]here are third party checks and balances on the Spirit Bay Utility and the Beecher FN’s oversight of utilities. Voluntary arbitration will be an option to settle disputes. Ultimately, the Courts have jurisdiction over the Spirit Bay Utility and the Beecher Bay FN cannot exclude this jurisdiction.”²¹

Spirit Bay Utilities cites the exemption granted by the Commission to Templeton LP.²² It states that in that proceeding, “[a]lmost no technical or operating concerns were raised in the BCUC’s review of Templeton LP’s section 88(3) application to distribute electricity to tenants in the McArthurGlen Designer Outlet mall at the Vancouver Airport. The Templeton LP has responsibility for constructing and operating the electrical distribution system which is what the Spirit Bay [Utilities] would have in relation to its electrical system. This utility would have the same responsibilities in relation to the less technically complex propane and district heating systems.”²³

The applicant provides no other justification for being granted an exemption.

2.3.1 Setting of rates

Spirit Bay Utilities states it will be governed by the *Beecher Bay Spirit Bay Utilities Law*. The draft law was published for public comment on June 16, 2016.²⁴ Under section 6.4 of the draft law utility service terms, conditions and rates established by Spirit Bay Utilities shall be approved in writing by the Beecher FN Council. This approval could take the form of a Law, Regulation or Resolution.²⁵

Spirit Bay Utilities states it does not intend to reference or index its rates to Commission approved rates. It notes that BC Hydro rates for electricity are currently set by the government and Spirit Bay Utilities’ financial requirements are not necessarily symmetric with those of BC Hydro.²⁶

Spirit Bay Utilities states that its rates will be determined by Beecher FN, and should not exceed market rates. It points out that Beecher FN is working on a long term new town development of which it is a majority owner and it would be counter-productive to have high, above-market rates for potential new home buyers and future tax paying residents.²⁷

Spirit Bay Utilities states that there are no formal requirements for the Beecher FN Council to notify lease-holders of upcoming decisions on terms, conditions and rates. However, the Beecher FN Council is willing to consider incorporating a formal notice and comment requirement into the Beecher Utilities Law to require

²¹ Spirit Bay Utilities Final Argument, p. 2

²² Order G-131-15, Templeton Designer Outlet Centre Limited Partnership Exemption Pursuant to Section 88(3) of the Utilities Commission Act, for its Proposed Supply of Electricity at McArthurGlen Designer Outlet Vancouver Airport.

²³ Spirit Bay Utilities Final Argument, p. 1.

²⁴ Exhibit B-3, BCUC IR 3.2.

²⁵ Ibid., BCUC IR 4.1.

²⁶ Ibid., BCUC IR 4.2.1.

²⁷ Ibid., BCUC IR 4.2.

notice and comment opportunities for all potentially affected individuals prior to passing a resolution, regulation or law to approve terms, conditions and rates.²⁸

2.3.2 Spirit Bay Utilities' ratepayers process for resolving complaints

Spirit Bay Utilities is seeking exemption from section 83 of the UCA that would otherwise allow complaints to be brought before the Commission. In the event of a complaint or dispute raised by a utility ratepayer, Spirit Bay Utilities has set out the following processes that would be available to deal with these matters:

1. Bring the complaint/dispute to Beecher FN administration or Beecher FN Council;²⁹
2. If the complainant does not find the result satisfactory, and all parties to the complaint/dispute agree to the process, they can apply for dispute resolution under Part 8 of the Beecher Land Code;³⁰
3. The complainant could appeal a decision rendered under the Beecher Land Code to the Federal Court of Canada;³¹ and
4. The complainant, instead of applying for dispute resolution under the Beecher Land Code can seek civil remedies directly through the courts.³²

In addition, there is a 30-day limitation period for referring a dispute to the resolution process pursuant to the Beecher Land Code.³³

Commission determination

For the reasons outlined below, the Panel finds that an exemption is not warranted and Spirit Bay Utilities' application for an exemption pursuant to section 88(3) of the UCA is denied.

When considering whether an exemption is warranted, we consider the reasons for decision issued for the Canal Plant Agreement Exemption, where the Commission laid out an appropriate test for an exemption order: "a section 88(3) exemption order should be issued, with the advance approval of the LGIC, when such exemption serves the objects and purposes of the [UCA] and it is in the public interest to do so."³⁴

In the AES Inquiry Report,³⁵ the Commission concluded that regulation is required when "natural monopoly characteristics are present and there is a need to regulate to protect the public interest..." We agree with this public interest consideration and find it to be an appropriate public interest test. Therefore, if monopoly

²⁸ Ibid., BCUC IR 4.1.2.

²⁹ Exhibit B-3-1, BCUC IR 5.2.

³⁰ Ibid., BCUC IR 5.3, 5.4.

³¹ Ibid., BCUC IR 5.3.1.

³² Ibid., BCUC IR 5.2.

³³ Exhibit B-1, Attachment *Beecher First Nation Land Code*, Part 8 – Dispute Resolution.

³⁴ *In the Matter of An Application by FortisBC Inc. for an Exemption from the Act regarding the Canal Plant Agreement Subagreement*, Order G-41-06, Appendix A, p. 6.

³⁵ *British Columbia Utilities Commission Report In the Matter of the FortisBC Energy Inc. Inquiry Into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives* dated December 27, 2012.

characteristics are not present, or are somehow mitigated, for example by an alternative regulatory body, an exemption from regulation under the UCA may be warranted.

Under the proposed *Beecher Bay Spirit Bay Utilities Law* the Beecher FN grants Spirit Bay Utilities the exclusive right to provide utility services to all premises within the Economic Development Zone.³⁶ By their very nature, propane, electricity and thermal distribution systems have elements of a natural monopoly. Further, Spirit Bay Utilities is proposing mandatory connection to, and mandatory end-use of, Energy Services provided by Spirit Bay Utilities.³⁷ Mandatory connection and mandatory use extend that natural monopoly into a “legal” monopoly. In this Application, the onus is on the applicant to demonstrate that these monopolistic elements have been mitigated, and in this case they have failed to do so. In addition, the exemption scheme proposed by Beecher FN, which is the majority owner of Spirit Bay Utilities,³⁸ has the effect of making the regulator the owner of the utility. For these reasons, the Panel finds that there is a potential for abuse of monopoly power and therefore exemption from regulation does not serve the objects and purposes of the UCA and is not in the public interest.

The Panel disagrees with Spirit Bay Utilities’ comparison of its own circumstances to those of Templeton LP. Recitals F and G to Order G-131-15 state:

- F. Templeton LP proposes to resell electricity to its Lessees using a rate setting mechanism whereby the selling price will not exceed the price which BC Hydro would have charged, if the Lessee were a customer of BC Hydro (Rate Cap). This Rate Cap is in accordance with the provisions of BC Hydro Electric Tariff Section 9.2 – Resale of Electricity. The proposed rate setting mechanism and the Rate Cap are explained within the lease agreements to be signed by Lessees;
- G. Templeton LP proposes that if it is exempted from certain provisions within Part 3 of the UCA such that it is able to supply electricity to the Lessees on a non-metered basis, the costs of installing meters will be avoided;

The rate cap mitigates concerns about monopoly abuse, thereby providing justification for granting an exemption to Templeton LP. In the Spirit Bay Utilities’ application, there is insufficient evidence concerning the rate and how the utility intends to set it. These circumstances distinguish the Templeton LP exemption from the exemption applied for by Spirit Bay Utilities.

With regard to Spirit Bay Utilities’ argument that complaints are subject to voluntary arbitration and ultimately to the courts,³⁹ the Panel notes that generally speaking regulated utilities are expected to manage their own complaint processes. In addition, complainants have access to the Commission’s complaint resolution process. Ultimately, complainants have recourse to the courts in the event that they feel their complaint has not been dealt with fairly by the utility and the Commission. For Spirit Bay Utilities to state that a dispute resolution process is in place and that civil remedies are available through the courts does not distinguish Spirit Bay Utilities

³⁶ Exhibit B-1, Annex 2, *Beecher Bay Spirit Bay Utilities Law*, section 6.1.

³⁷ Exhibit B-3, BCUC IR 4.7.

³⁸ “The Spirit Bay Utility will be initially majority owned by the Beecher FN and ultimately wholly owned.” Exhibit B-1, p. 3.

³⁹ Spirit Bay Utilities Final Argument, p. 1.

from any other regulated utility in the province, except that it underlines that there is no independent regulator to whom complainants can turn.

3.0 COMPLIANCE WITH THE UCA

Commission Determination

Section 45(1) of the UCA states:

Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

As the Panel has denied Spirit Bay Utilities' request for an exemption pursuant to section 88(3) of the UCA, it is required to comply with section 45 of Part 3 of the UCA. As such, Spirit Bay Utilities and Spirit Bay Developments must not begin the construction or operation of a public utility plant or system without first obtaining a certificate of public convenience and necessity (CPCN) from the Commission. At the time of this application, the Panel notes that infrastructure of the thermal energy system and the initial electrical system is in place; however, no propane utility assets have been placed in the ground.⁴⁰ Each of these systems may require a CPCN from the Commission. As well, before services can be provided and charged to customers, Spirit Bay Developments and/or Spirit Bay Utilities will require approval of tariffs under sections 59-61 of the UCA. Therefore, **the Panel directs Spirit Bay Utilities to produce a plan, including proposed filings and timing, that will ensure Spirit Bay Utilities' and Spirit Bay Developments' compliance with the UCA on a prospective basis. This plan should be prepared in consultation with Commission staff and must be filed with the Commission, for approval, no later than Friday, March 31, 2017.**

⁴⁰ Exhibit B-3, BCUC IR 1.1.