



ORDER NUMBER
G-87-21

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

and

Nelson Hydro
Reconsideration of Complaint Regarding Allegations of Nelson Hydro's Abuse of Power

BEFORE:

A. K. Fung, QC, Panel Chair
E. B. Lockhart, Commissioner

on March 19, 2021

ORDER

WHEREAS:

- A. On January 18, 2020, B.L. filed a complaint with the British Columbia Utilities Commission (BCUC) (Complaint). B.L. requested that the BCUC inquire into an alleged abuse of power by Nelson Hydro regarding a Statutory Right of Way (SRW) on his/her property. In the Complaint, B.L. also raised concerns with Nelson Hydro becoming a co-petitioner in a petition filed in the BC Supreme Court by a neighbouring lot owner requesting access to a Nelson Hydro electrical pole located on B.L.'s property;
- B. On October 6, 2020, following a review of the Complaint, the BCUC issued Letter L-60-20 (Letter) dismissing the Complaint. In the Letter the BCUC found that Nelson Hydro's actions had been consistent with its duties and responsibilities set out in its Bylaw and the *Utilities Commission Act* (UCA), and the remaining matters concerning the interpretation of the SRW were outside of the BCUC's jurisdiction;
- C. On November 12, 2020, B.L. applied to the BCUC for a reconsideration of the BCUC decision dismissing the Complaint (Reconsideration Application). B.L. cites the following two reasons as the basis for the Reconsideration Application:
 - a. The BCUC neglected to review and rule on the key issue. The City of Nelson (City) petitioning the Court to obtain an interpretation of the SRW exceeds the UCA legislative authority and violates the language of the City Bylaw 2020 (Bylaw 2020); and
 - b. A new principle has arisen as a result of the Decision. According to B.L., Bylaw 2020, in particular the definitions and provisions related to Connection Point and Point of Delivery, demonstrates that the SRW on their property extends only to the electrical pole, located on one-quarter of their property, and not their entire property. B.L. further states that the City, by becoming a co-petitioner in a Court Petition filed in relation to the SRW, is in contravention of Section 28 of the UCA and numerous sections of Bylaw 2020;
- D. The BCUC has reviewed the Reconsideration Application and finds that a summary dismissal is warranted.

NOW THEREFORE pursuant to section 99 of the UCA, the BCUC Rules of Practice and Procedure, and for the reasons attached as Appendix A to this order, the BCUC dismisses the Reconsideration Application.

DATED at the City of Vancouver, in the Province of British Columbia, this 19th day of March 2021.

BY ORDER

Original signed by:

A. K. Fung, QC
Commissioner

Attachment

Nelson Hydro

Reconsideration of Complaint Regarding Allegations of Nelson Hydro's Abuse of Power

Reasons for Decision

March 19, 2021

Before:

A. K. Fung, QC, Panel Chair
E. B. Lockhart, Commissioner

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Executive summary

The Complainant applies for a reconsideration of the BCUC's decision to reject their complaint against Nelson Hydro. The complaint arises because Nelson Hydro and the owner of property adjacent to the Complainant have petitioned the BC Supreme Court for an interpretation of the statutory right-of-way that the Complainant granted to Nelson Hydro in 1988. The Complainant objects to Nelson Hydro being a co-petitioner in the judicial proceeding. In January 2020 they filed a complaint with the BCUC, claiming Nelson Hydro was acting in violation of its bylaws, which amounts to an abuse of process. The BCUC rejected their complaint, and the Complainant has now applied to the BCUC for a reconsideration. The BCUC Rules of Practice and Procedure permit the summary dismissal of an application for reconsideration where the applicant has failed to establish reasonable grounds for reconsideration. The Complainant has not established any error of law or new facts that would provide reasonable grounds for reconsideration and therefore their application for a reconsideration is rejected.

1.0 Introduction

These reasons for decision (Reasons) relate to a request for reconsideration of a British Columbia Utilities Commission (BCUC) decision dismissing a complaint from a Nelson Hydro customer, B.L. (Complainant). The Complainant filed their complaint pursuant to the *Utilities Commission Act* (UCA), and the BCUC rejected it by letter L-60-20 dated October 6, 2020. On November 12, 2020 the Complainant applied to the BCUC, pursuant to section 99 of the UCA, for a reconsideration of the BCUC's dismissal of their complaint (Reconsideration Application).

These Reasons are organized as follows. First, we set out the background to B.L.'s complaint. Then we describe the law and procedure that guide how we approach this Reconsideration Application. Next, we outline the submissions of B.L. and Nelson Hydro. Finally, we consider the submissions to determine whether there are reasonable grounds on which to reconsider the decision. If there are no reasonable grounds for reconsideration, we will dismiss the application, and if there are reasonable grounds, the application will proceed to a hearing.

2.0 Background – the dispute

Nelson Hydro is an electric utility owned and operated by the City of Nelson. Nelson Hydro provides electrical service to customers who reside within and outside the City of Nelson. The Complainant lives outside the City, having bought a property (Lot 12) on Kootenay Lake to build a house in 1988. The BCUC regulates service to customers who live outside the City, hence the Complainant's complaint to the BCUC and our jurisdiction to review it.

When they began building their house, the Complainant contacted Nelson Hydro to arrange for electrical service. The Complainant granted a statutory right-of-way (SRW) in favour of the City of Nelson to allow for maintenance and repair of the installed power line.¹ (Nelson Hydro and the City of Nelson are referred to as Nelson unless the context requires otherwise). The SRW was authorized pursuant to City of Nelson bylaws that the BCUC had approved under the UCA.

¹ Original Complaint filed January 18, 2020.

Some twenty years later, their neighbour to the east subdivided his property and sold the subdivided lots. According to the Complainant, the neighbour failed to register an electrical easement when he subdivided his property, even though he had registered an easement for road access, sewer and water.² The owner of one of the subdivided lots, Lot 13, approached Nelson in 2015 to provide electrical service.³ The lack of an easement for this purpose underpins the dispute now before the BCUC.

The General Manager of Nelson Hydro summarized the relevant history in an email to the BCUC on November 1, 2016. He explained that the Lot 13 owner had applied for electric service to build a house; however, there were no easements in place to bring electric lines to Lot 13 and nor would the neighbours agree to provide an electric line easement. Nelson Hydro's legal counsel opined that the SRW on Lot 12 (Lot 12 SRW) could be used to serve Lot 13. The Complainant's legal counsel offered a different opinion indicating that the Lot 12 SRW could not be used to serve the adjacent property. Nelson Hydro stated that "If we serve the new customer using the existing SRW the lot [12] owner may file a complaint with BCUC or courts to seek to stop the utility from building. If we decline to serve the new customer then [Lot 13] may file a complaint saying we have an obligation to serve them. They both have good points, but they are at odds with each other."⁴

The Complainant submits that the Lot 12 SRW only authorizes service on their property, not anyone else's, and that the City of Nelson cannot now – decades later – come back and say this SRW permits something different. The wording and interpretation of the Lot 12 SRW is one of the contentious issues in this matter.

This dispute has resulted in extensive correspondence, including several legal opinions opining on various rights and obligations. In a legal opinion provided to the Complainant in 2015, counsel advised them that "the SRW does not clearly support the proposition that Nelson Hydro has the right to come on your property, Lot 12, to place or construct any facilities to provide electric servicing to Lot 13, and, in the event that Nelson Hydro sought declaratory relief from the Court, you have a valid and credible position to put forward in opposition."⁵

As a result of this dispute, Nelson and the owner of the subdivided Lot 13 became co-petitioners in a judicial proceeding (the Petition) to determine whether the Lot 12 SRW did in fact permit Nelson to use the Complainant's property to provide electricity to Lot 13.⁶ The Petition seeks the following:

1. A declaration that SRW XB022167 made September 7, 1988 is valid to allow the City of Nelson and Nelson Hydro to provide electrical service to Lot 13 across Lot 12; and
2. In the alternative, an order modifying the SRW to allow for such access.⁷

The Complainant objects to Nelson being a co-petitioner, and argues that Nelson does not have the authority to do so.⁸ Moreover, the Complainant submits Nelson is abusing its power by becoming a co-petitioner. It is primarily this issue – Nelson's alleged abuse of power – that has brought the Complainant to the BCUC.

Nelson explained its decision to become a co-petitioner:

² Original Complaint filed January 18, 2020, see also email from Nelson Hydro to BCUC dated November 1, 2016.

³ Letter from Nelson Hydro, dated May 20, 2015 to [addressee redacted].

⁴ Email from Nelson Hydro to BCUC, dated November 1, 2016.

⁵ Letter from Swift Datoo Law Corporation to B.L., dated November 9, 2015 p. 3.

⁶ Original Complaint filed January 18, 2020, p. 5.

⁷ B.L. Response to Nelson Hydro, dated February 9, 2020

⁸ Letter from Swift Datoo, lawyers, dated January 16, 2018

When the owner of Lot 13 brought a petition to compel the Complainants to allow access, the Complainants sought to struck [sic] their petition on the grounds that the owners of Lot 13 were not the proper party to commence the petition, as the SRW was a bilateral agreement between Nelson Hydro and the Complainants. This argument by the Complainants meant that, if Nelson Hydro did not become a co-petitioner, the Complainants would apply to have the case dismissed. It was because of this procedural step by the Complainants that Nelson Hydro became co-petitioner in the action.⁹

On January 18, 2020 the Complainant filed a complaint (Complaint) with the BCUC alleging abuse of power by Nelson.¹⁰ In the Complaint, they requested that the BCUC review the matter and determine whether Nelson, among other things, had “demonstrated ‘abuse of power’ by acting beyond the authority provided to the Utility in Bylaw 3196, through the BC Community Charter Act and the BC Utilities Commission Act.” In their submission, a “municipality that exceeds its bylaw authority can be deemed to have acted illegally and in a manner that constitutes abuse of power.”

Nelson responded to the Complaint. In particular, it submitted:

...there has been no ‘abuse of power’ in this situation. The portions of Bylaw 3196 that are quoted by the Complainants indicate that the customer applying for power has the responsibility to obtain any statutory rights-of-way required to provide service. For the reasons set out above, the statutory right-of-way required to provide service was and is already in place in the form of the existing SRW over the Complainants lot. Accordingly, Nelson Hydro was acting within the authority of Bylaw 3196 and its duty to serve as set out in BC Utilities Commission Act in seeking to provide service to Lot 13 using the existing SRW.¹¹

As noted above, the BCUC rejected the Complaint, by Letter L-60-20 (the Decision) issued on October 6, 2020.¹² In the Decision, the BCUC confirmed that it had, “amongst other things, referred to Nelson Hydro’s approved Bylaw [Nelson Hydro Bylaw 3196], which contains the terms and conditions of service between Nelson Hydro and its customers to ensure Nelson Hydro’s actions were in accordance with the approved Bylaw.”

The Decision informed the Complainants that:

With regard to your complaint that Nelson Hydro is abusing its power by becoming a co-petitioner in a case commenced by your neighbour against you seeking access to the Hydro pole located on the SRW on your premises, the BCUC notes that the issue of access to your SRW is a property and contract law issue and is not within the jurisdiction of the BCUC to determine. As a party to the SRW there is no abuse of power by joining a lawsuit that has, as its subject matter, the very SRW you complain about. Further, the BCUC has limited jurisdiction over Nelson Hydro’s business practices, including how it conducts communications, so long as its actions comply with the approved Bylaw and the UCA.

The BCUC finds that Nelson Hydro’s actions have been consistent with its duties and responsibilities set out in its Bylaw and the UCA, and the remaining matters concerning the

⁹ Letter to BCUC from Pigott & Co., dated February 7, 2020

¹⁰ Original Complaint filed January 18, 2020

¹¹ Nelson Hydro response, dated February 7, 2020

¹² Decision L-60-20.

interpretation of the SRW are outside of the BCUC's jurisdiction. Accordingly, your file is now closed.¹³

In addition, the BCUC informed the Complainant that if they had concerns about how the BCUC had handled the Complaint, they could contact the Office of the Ombudsperson, whose role is to impartially investigate complaints to determine whether public agencies have acted fairly and reasonably, and whether their actions and decisions were consistent with relevant legislation, policies and procedures.

3.0 Applicable Law and BCUC Rules of Practice and Procedure Governing Reconsideration Applications

In this section we set out the framework that guides our process to determine whether to reconsider a BCUC decision.

Section 99 of the UCA provides "the commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

Part V of the BCUC Rules of Practice and Procedure (Rules)¹⁴ establishes the rules regarding a reconsideration. Specifically, Rule 26.05 provides:

26.05 An application for reconsideration of a decision must contain a concise statement of the grounds for reconsideration, which must include one or more of the following:

- a. the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision;
- b. facts material to the decision that existed prior to the issuance of the decision were not placed in evidence in the original proceeding and could not have been discovered by reasonable diligence at the time of the original proceeding;
- c. new fact(s) have arisen since the issuance of the decision which have material bearing on the decision;
- d. a change in circumstances material to the decision has occurred since the issuance of the decision;
or
- e. where there is otherwise just cause.¹⁵

Rule 28.01 of the Rules provides that "Upon the filing of an application for reconsideration of a decision, the BCUC may, without further process, summarily dismiss the application, in whole or in part, on the basis that it fails to establish, on its face, any reasonable grounds for reconsideration of the decision."¹⁶

¹³ Decision L-60-20 p. 2.

¹⁴ BCUC Rules of Practice and Procedure, Order G-15-19, dated January 22, 2019, Appendix A.

¹⁵ Ibid., pp. 15–16.

¹⁶ Ibid., p. 16.

Rule 29.01 of the Rules provides that “In the event the BCUC does not dismiss the whole application for reconsideration pursuant to Rule 28.01, the application for reconsideration or the portion of the application that is not dismissed will proceed to a hearing.”¹⁷

4.0 Submissions of the Complainant and Nelson Hydro

In this section we outline the submissions of both parties. Due to their unrepresented status, we extended latitude to the Complainant in procedural matters, as described below, to ensure we afforded them a fair opportunity to present their case.

4.1 Summary of Reconsideration Application and Relief Sought

On November 12, 2020 the Complainant filed their Reconsideration Application.¹⁸ Although they did not present their grounds in the manner set out in Rule 26.05, we recognize that not all complainants are lawyers or represented by lawyers and form should not prevail over substance. The Complainant seeks a reconsideration on two grounds.

The first ground arises because, according to the Complainant, the BCUC neglected to review and rule on the key issue presented in the Complaint,¹⁹ which they describe as follows:

... it is the action of the City of Nelson taking the step of petitioning the Court to obtain an interpretation of the SRW that clearly exceeds the Utilities Commission Act (UCA) legislative authority and violates the language of Bylaw 2020 (approved by BCUC) which gave the City the authority to require a SRW to be registered on our property with a defined scope, purpose and limitations. We are seeking a ruling on the City and Nelson Hydro being bound to uphold the conditions of a contract (SRW) signed under the authority of the Utilities Commission Act and the City/ BCUC approved Bylaw 2020. We believe the City has placed itself in contravention of the UCA and Bylaw 2020 by acting as a co-petitioner in a Court Petition that is seeking to get an interpretation of a SRW that is contrary to the requirements of the UCA and Bylaw 2020 and what we were told at the time of signing.

The Complainant acknowledges that whether Nelson can use the Lot 12 SRW for the benefit of Lot 13 is a matter for judicial interpretation. In response to the statement in the Decision that “the issue of access to your SRW is a property and contract law issue and is not within the jurisdiction of the BCUC to determine” the Complainant states this is “not the issue we sought a ruling on in our Complaint. We have never asked the BCUC to provide an interpretation of the SRW registered on our property by Nelson Hydro. We realize that this is a property law issue and will need to be determined by a court of law.”²⁰

The Complainant summarizes their position as follows: “Either the SRW registered on our property is strictly for “service to the customer” as authorized by Bylaw 2020, or the City has registered an SRW on our property that far exceeds what they were legally authorized to do by Bylaw 2020 and 3196 (both of which were approved by the BCUC).”²¹

¹⁷ Ibid., p. 16.

¹⁸ Reconsideration Application, dated November 12, 2020.

¹⁹ Ibid., p. 1.

²⁰ Ibid., p. 1.

²¹ Response from B.L. to Nelson Hydro Response Submission, dated November 5, 2020, p. 5.

Notwithstanding their agreement that the interpretation of the SRW is a matter for the courts, the Complainant maintains that the BCUC should consider their complaint because even if a court found in Nelson's favour, i.e. that the Lot 12 SRW can be used to connect power to Lot 13, the "question of whether the City has violated the UCA and Bylaw 2020 will still remain outstanding and would require a ruling at that time."²² Therefore, the issue for the BCUC in this reconsideration, according to the Complainant, is whether Nelson's actions have exceeded what its Bylaw and the UCA authorize.

In addition to their assertion that the legal interpretation being sought by the City of Nelson conflicts with the language of Bylaw 2020 the Complainant also submits that it contravenes section 28 of the UCA.²³ Insofar as section 28 provides that the only condition that a utility can impose before supplying electrical service is "to require the owner or occupier to give reasonable security for repayment of costs of making the connection," the Complainant submits that requiring a customer to relinquish their private property ownership rights [which is an implied consequence of Nelson's interpretation of the Lot 12 SRW] would never be interpreted by any reasonable person or court as "reasonable security".

The second issue on which the Complainant seeks a reconsideration is that "A new principle has arisen as a result of the decision"²⁴, which they explain as follows:

As a result of the BCUC written decision/report we have done further analysis of the language contained in Bylaw 2020 and have found that in the second to last paragraph of Section 14 (a) it states that, "The Customer will provide and maintain a cleared right-of-way, where necessary, through the Customer's Premises to the Connection Point." We reviewed the Bylaw to determine the definition of the "Connection Point". In the Definitions section of the Bylaw it states, "The Connection Point means the point at which the City's electrical system is physically joined to the Customer's electrical system." ... This definition, along with the statement that the right-of-way ends at the Connection Point, confirms that the right-of way (SRW) on our property only extends to the electrical pole which is in the top quarter portion of our property. ... The City is taking a position in contravention of Bylaw 2020 by being a co-petitioner to a Court Petition that is seeking a legal interpretation that the right-of-way/SRW covers our entire property. Once again, the City by taking this position in a formal court proceeding has put the City in contravention of Bylaw 2020. [*emphasis in original*]

4.2 Review Process – sequence of events once Complainant applied for reconsideration

Pursuant to Rule 28.01, the Panel may review the Reconsideration Application and summarily dismiss it if the Panel determines that it does not, on its face, establish any reasonable grounds for reconsideration.

Instead of considering the matter solely based on the Reconsideration Application as filed, however, on December 18, 2020 the BCUC issued a letter requesting Nelson Hydro to review the Reconsideration Application and provide its response by January 4, 2021, and for the Complainant to respond to Nelson Hydro's submission by January 18, 2021.²⁵

²² Reconsideration Application dated November 12, 2020, p. 2.

²³ Ibid., p. 2.

²⁴ Ibid., p. 2.

²⁵ BCUC Letter dated December 18, 2020.

Nelson Hydro responded to the Reconsideration Application on January 8, 2021.²⁶ A summary of Nelson Hydro's submission is as follows:

1. The points raised by the [Complainant] "do not differ materially from those in their previous submissions in this matter, both of which have already been considered and rejected by the BCUC".
2. The [Complainant's] submissions are based on events that occurred in 1988, and the passage of time makes it difficult for Nelson Hydro to challenge their evidence. Furthermore, a determination of this type of evidence is more properly done in a court of law rather than a regulatory proceeding.
3. There is a settlement agreement between Nelson Hydro, the owner of Lot 13 and the [Complainant], which addresses all of the issues raised by the [Complainant], and which, in its submission, the [Complainant] now seem to be attempting to avoid.
4. The [Complainant] has argued that Nelson Hydro has exceeded its authority by having the [Complainant] sign an SRW that allows Nelson Hydro to provide service through their lot to a lot owned by another owner. However, the [Complainant] is aware that the Nelson Hydro equipment on their property is already being used to service a neighbouring lot [Lot 11] since Nelson Hydro brought service to both lots at the same time.
5. The [Complainant's] interpretation of Bylaw 2020 is not correct. In particular, the phrase that there are 'no other... representations...' means that there are no collateral agreements and does not mean that Nelson Hydro is not allowed to make submissions as to the interpretation of the SRW.

The Complainant responded to Nelson on January 12 and January 17, 2021.²⁷ The Complainant submits that Nelson does not directly counter the facts and arguments that they raise. Nevertheless, they reply to Nelson's points.

In responding to the points raised by Nelson, in particular that the BCUC has considered and rejected both issues, the Complainant states that "Obviously the BCUC agrees that the information and arguments we have presented represent new issues that have not yet been decided, since our application for reconsideration was reviewed and accepted under Section 99 and 100 of the BC Utilities Act [sic]." To be clear, in providing an opportunity for Nelson to comment and for the Complainant to provide a response to Nelson's submissions regarding their Reconsideration Application, we have not made any determination as to whether the Reconsideration Application should be dismissed summarily for failure to establish on its face any reasonable grounds for reconsideration pursuant to Rule 26.05, nor any determination on the merits of the Reconsideration Application.

In response to Nelson's concern about the passage of time, the Complainant maintains that they clearly recall the events of 1988, especially because this involved such a significant event as building a house. Furthermore, in their submission, their recollection more closely aligns with the wording of the Lot 12 SRW than with Nelson's interpretation of the Lot 12 SRW.

In response to Nelson's reference to a settlement agreement, the Complainant notes that they "are still in the process of trying to reach a suitable agreement, however, whether we are able to achieve this is irrelevant to the issues outlined in our BCUC complaint and, per Section 81 of the UCA, should have no bearing on the review of our complaint resubmission."²⁸

²⁶ Letter from Pigott & Co., counsel to Nelson Hydro, dated January 8, 2021.

²⁷ Letters from B.L. dated January 12 and 17, 2021.

²⁸ B.L. reply dated January 12, 2021.

The Complainant disputes the facts on which Nelson relies to suggest that the Complainant previously permitted Nelson Hydro to use their SRW to service their neighbour on Lot 11.²⁹

Lastly, the Complainant disagrees with Nelson Hydro's summary of their interpretation of Bylaw 2020:

[w]e have never said that, 'Nelson Hydro is not allowed to make submissions as to the interpretation of the wording of the SRW'. What we are saying is that the two orders sought by Nelson Hydro/the City as a co-petitioner in a legal Court Petition contravene the language, intent and authority of the UCA, Bylaw 2020 and the current Bylaw 3196 and therefore the action of being a co-petitioner puts Nelson Hydro in a position of contravention of provincial legislation i.e. the UCA and Bylaws that derive their authority from the overarching legislation of the UCA and that were approved by the BC Utilities Commission.³⁰

5.0 Analysis of Grounds for Reconsideration

Having explained above the applicable law and the Rules regarding reconsiderations, we now set out our analysis of whether the Complainant has established reasonable grounds for reconsideration of the Decision.

The Reconsideration Application sets out two issues upon which reconsideration is sought. The question for the Panel at this time is that set out in Rule 28.01, namely, whether either of these issues establishes a reasonable ground for reconsidering the Decision.

5.1 First Ground of Reconsideration – do Nelson's actions amount to an abuse of process?

The Complainant states that the BCUC did not review or rule on the key issue in the Complaint, namely, the alleged abuse of process. The key components of the Complaint that the BCUC did not decide, in their submission, are:³¹

- a. The City of Nelson has taken steps to become a co-petitioner, without proper authority or authorization,³² in a judicial proceeding regarding the interpretation of the SRW;
- b. The City, as co-petitioner, is pursuing an interpretation of the SRW that directly conflicts with the language of the UCA and Bylaw 2020 as well as what the [Complainant] was told when they signed the SRW; and
- c. A ruling that the City and Nelson Hydro are bound to uphold the conditions of a contract (SRW) signed under the authority of the *Utilities Commission Act* and the City/ BCUC approved Bylaw 2020.

Although the Complainant asserts that the Decision overlooked the substance of their complaint – abuse of process – in fact the Decision directly addressed the very heart of it: “As a party to the SRW **there is no abuse of power** by joining a lawsuit that has, as its subject matter, the very SRW you complain about.”³³ [emphasis added]

²⁹ Letters from B.L. dated January 12 and 17, 2021.

³⁰ Reconsideration Application, dated November 12, 2020 p. 2.

³¹ Ibid., p. 2.

³² Letter from the B.L. to BCUC dated February 28, 2020, p. 3.

³³ Decision L-60-20, p. 2.

The Complainant did not dispute the authority of the two bylaws relevant to this matter – Bylaw 2020 which was in force in 1988 when they granted the Lot 12 SRW, and Bylaw 3196, which is the successor to Bylaw 2020. Rather, they allege that Nelson is acting in contravention of the bylaws as well as section 28 of the UCA.

According to the Complainant, if the SRW means what Nelson claims and permits Nelson to use it to extend power to Lot 13, this is contrary to what they were told in 1988 regarding the purpose of the SRW. Alternatively, if the SRW means what they claim and does not permit Nelson to use it to extend power to Lot 13, but the court nonetheless grants Nelson's request to modify the SRW to permit such use, the Complainant would still oppose this because it is not what they agreed to in 1988. In other words, they are opposed to any interpretation or modification of the existing SRW to be used to provide service to Lot 13.

What the Complainant has not addressed, however, is that the court might find in their favour, and reject Nelson's petition entirely. This is speculation, of course, but it highlights the impossibility of moving forward in the absence of a definitive judicial interpretation of the SRW which would bind both parties.

Fundamentally, the Complainant's dispute rests with the interpretation of the Lot 12 SRW and the circumstances under which it was obtained. Their dispute is not with the validity of Bylaw 3196 (or its predecessor Bylaw 2020), the UCA or even with the fact that Nelson Hydro's tariff sets out the right to require an SRW from a customer. In our view, the Complainant is overlooking the fact that Nelson Hydro is authorized to provide service pursuant to the UCA, Bylaw 3196 (previously Bylaw 2020), as well as the applicable tariff.

The Decision clearly states that the interpretation of the SRW as between Nelson and the Complainant is a contract matter that is outside the jurisdiction of the BCUC. The BCUC is not a party to the SRW; nor does the BCUC grant, review, approve or enforce terms of SRWs. Moreover, Nelson Hydro is entitled to do whatever it needs to do, including being a co-petitioner in a judicial proceeding, to enforce its rights and those of its owner and operator (the City) under an SRW. The Decision is equally clear that Nelson's actions are not an abuse of process. Nothing in the UCA or the applicable tariff prevents Nelson from pursuing its legal rights to enforce the terms of the SRW.

Therefore, we disagree with the Complainant that there has been an abuse of process by Nelson Hydro, and find that this allegation does not amount to a reasonable ground for reconsidering the Decision.

We have the following comments regarding the applicability of section 28 of the UCA. The Complainant has misunderstood its application. This section is generally considered to be the legislative source of a utility's 'obligation to serve'. Section 28(1) imposes the following obligation on a public utility:

On being requested by the owner or occupier of the premises to do so, a public utility must supply its service to premises that are located within 200 metres of its supply line or any lesser distance that the commission prescribes suitable for that purpose.³⁴

In the initial Complaint, the Complainant wrote that Nelson Hydro insisted that section 28 (1) of the UCA provided the requisite authority for it to serve the neighbouring lot. The Complainant disagreed, submitting instead that Nelson Hydro is absolved of this obligation based on Section 28 (3) of the UCA and the wording of Nelson Bylaw 3196, because the customer (i.e. their neighbour on Lot 13) was unable to meet the criteria set out in the Bylaw that would trigger the obligation to serve.³⁵

³⁴ UCA, Section 28.

³⁵ Original Complaint filed January 18, 2020, p. 2.

The Complainant states in the Reconsideration Application that “[W]hen we applied to Nelson Hydro for electrical service we did so under the conditions and terms of Section 28 of the UCA.”³⁶ In fact, however, the utility’s tariff, not section 28 of the UCA, provides the terms and conditions of service, and it is the tariff that requires customers to provide SRWs, where necessary. The BCUC approves tariffs under sections 58 to 60 of the UCA and requiring customers to provide the SRW is a typical element of public utility tariffs approved by the BCUC. In our view, Nelson Hydro has complied with section 28 by providing service to its customers in that area of Nelson pursuant to its obligation to serve.

5.2 Second Ground of Reconsideration – has a new principle arisen?

The Complainant states that a new principle has arisen as a result of the BCUC Decision, which they explain is “information that is additional to the information provided in our original complaint submission.”³⁷ They state that as:

a result of the BCUC written decision/report we have done further analysis of the language contained in Bylaw 2020 and have found that in the second to last paragraph of Section 14 (a) it states that, “The Customer will provide and maintain a cleared right-of-way, where necessary, through the Customer’s Premises to the Connection Point.”” Bylaw 2020 defines ‘Connection Point’ as “the point at which the City’s electrical system is physically joined to the Customer’s electrical system.” Section 5 of Bylaw 2020 states that “Unless otherwise specifically agreed, the point of delivery is the Connection Point. The City’s liability ceases at this point of delivery and, except for equipment owned and maintained by the City, the Customer assumes all other liability beyond the point of delivery.

The Complainant further submits:

this definition [of Connection Point], along with the statement that the right-of-way ends at the Connection Point, confirms that the SRW on our property only extends to the electrical pole which is in the top quarter portion of our property. The SRW does not extend over the remaining three quarters of our property as is alleged in the Court Petition.³⁸

A ‘new principle’ is not an enumerated ground for reconsideration under Rule 26.05. Moreover, there is nothing new about the Complainant’s discovery of the words in Bylaw 2020. The opportunity to argue about the meaning of Bylaw 2020 arose when they brought the Complaint; a reconsideration is not intended to be a second ‘kick at the can.’ Nevertheless, rather than standing on technicalities, we evaluate the Complainant’s submission to determine whether it reveals an error of law or new facts which would support reasonable grounds for reconsideration. In our view, their submission does not reveal an error of law nor does it give rise to new facts. We do so find for the following reasons.

While the Complainant’s further analysis of the language in the Bylaw is an interpretation of the Bylaw, which is a matter within the BCUC’s jurisdiction, we disagree with the Complainant’s conclusion that the language in Section 14(a) of the Bylaw means that the right-of-way ends at the Connection Point. In our view, Section 14(a) simply describes the Customer’s obligation to provide a **cleared** path (i.e. no trees or obstacles) to the Connection Point [*emphasis added*], when read in the context of the entirety of Section 14(a) of the Bylaw. We

³⁶ Reconsideration Application dated November 12, 2020, p. 1.

³⁷ B.L. response to Nelson Hydro submission dated January 12, 2021.

³⁸ Reconsideration Application dated November 12, 2020 p.2.

find support for this interpretation in the first paragraph of Section 14(a) preceding the statement quoted above by the Complainant, which provides:

The Customer shall grant to the City such right of-way over or under the Customer's property as may be necessary for the installation, maintenance, repair, inspection or removal of facilities for service to the Customer.³⁹

Regardless, the interpretation of Section 14 is tangential to the fundamental issue in the Complainant's dispute, namely, the scope of the Lot 12 SRW, which is a contractual matter outside the jurisdiction of the BCUC. In other words, whether the SRW only extends to the electrical pole according to the Complainant's interpretation of the effect of Bylaw 2020, or over the entirety of Lot 12 as alleged in the Court Petition filed by Nelson, remains properly a matter for judicial interpretation. Therefore, we disagree with the Complainant that their further analysis of Bylaw 2020 gives rise to an error of law.

Nor does their further analysis of the language in the Bylaw constitute new facts. Specifically, with reference to the fact-related grounds for reconsideration enumerated in Rule 26.05, the Complainant's analysis of the language in the Bylaw is not:

- a. facts material to the decision that existed prior to the issuance of the decision [and] were not placed in evidence in the original proceeding and could not have been discovered by reasonable diligence at the time of the original proceeding;
- b. new fact(s) [that] have arisen since the issuance of the decision which have material bearing on the decision; or
- c. a change in circumstances material to the decision [that] has occurred since the issuance of the decision.

Therefore, we find that the Complainant's further analysis of the language in the Bylaw does not establish any new principles or facts. Accordingly, it is not a reasonable ground for reconsideration.

6.0 Conclusion

Having considered the evidence and submissions of both the Complainant and Nelson Hydro, we find that the Complainant's Reconsideration Application does not disclose on its face any reasonable grounds on which to reconsider the Decision, and accordingly, we summarily dismiss the Complainant's Reconsideration Application.

³⁹ Nelson Hydro Bylaw 2020.