



ORDER NUMBER
G-368-21

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

and

Kyuquot Power Ltd.
Investigation into the Safety and Reliability of the KPL System

BEFORE:

D. M. Morton, Panel Chair
C. M. Brewer, Commissioner
T. A. Loski, Commissioner

on December 10, 2021

ORDER

WHEREAS:

- A. On May 15, 2020, by Order G-115-20, the British Columbia Utilities Commission (BCUC) established a hearing to review the safety and reliability of the Kyuquot Power Ltd. (KPL) system, following a complaint by a representative of the Ka:'yu:'k't'h' / Che:k'tles7et'h' First Nations (KCFN);
- B. The KPL power distribution system (KPL System) is interconnected to the British Columbia Hydro and Power Authority (BC Hydro) electric system and supplies customers, including KCFN, the Village of Hupsitas and others on the outer coast of Kyuquot Sound, with electricity;
- C. By Orders G-115-20, G-182-20, G-221-20, G-296-20, G-29-21, and G-39-21 the BCUC established, amended, and furthered a regulatory timetable to review the safety and reliability of the KPL System;
- D. On October 19, 2020, by Order G-261-20, the BCUC directed KPL to provide a vegetation management plan identifying urgent vegetation work on the KPL system (Vegetation Plan) and a maintenance plan identifying all outstanding maintenance work on the KPL system (Maintenance Plan). On January 27, 2021, by Order G-29-21, the BCUC directed KPL to file quarterly progress reports outlining the status of completion of the remaining items identified in the Vegetation and Maintenance Plans (Quarterly Report);
- E. In January 2020, KCFN installed a gang-operated load break Switch S3 (GOLB S3) on a KCFN-owned structure to respond to safety concerns;
- F. On March 1, 2021, KPL submitted its Final Argument, on March 8, 2021, KCFN submitted its Final Argument and on March 15, 2021, KPL submitted its Reply Argument;
- G. On March 8, 2021, the BCUC issued Order G-65-21, which, among other things, directed KPL, as soon as reasonably possible, but no later than March 12, 2021, to request the dispute regarding the locking

arrangement and terms of a joint operating order for GOLB S3 be referred to mediation, pursuant to Section 11 of the Right of Way Agreement;

- H. On March 12, 2021, KCFN submitted an application with the BCUC for reconsideration and variance of Directives 3 and 4 of Order G-65-21 (Reconsideration Application);
- I. On March 17, 2021, by Order G-79-21, the BCUC established a regulatory timetable seeking submissions from parties on the Reconsideration Application;
- J. After reviewing the submissions, the BCUC established an Oral Hearing on April 21, 2021 to receive further submissions from both parties;
- K. Crown Corridor is defined in Chapter 7 of the Maa-nulth First Nations Final Agreement and after considering the evidence and submissions made at the Oral Hearing, and because the GOLB S3 is on land that is within the Crown Corridor, the BCUC, on April 28, 2021, issued Order G-126-21, which rescinded Order G-65-21;
- L. At the Oral Hearing, KPL submitted that in the case of an emergency such as a short circuit, the fuses within the KPL system or the KCFN system would operate to de-energize the downstream line and that neither KPL nor KCFN would require emergency access to the GOLB S3;
- M. On April 28, 2021, by Order G-129-21, the BCUC established a regulatory timetable seeking submissions from parties on the need for access to GOLB S3, submissions on whether, with respect to the portion of the line on the Crown Corridor, KCFN meets the definition of a public utility and submissions on the applicability of section 27 of the *Utilities Commission Act* (UCA) on shared KCFN infrastructure;
- N. On May 28, 2021, pursuant to Order G-129-21, KCFN filed its submissions and stated that KCFN does not meet the definition of a public utility. KCFN further submitted that even if it did meet the definition of public utility under the UCA, the BCUC should recommend an exemption for KCFN from all portions of the UCA. On May 28, 2021, KPL filed its submissions pursuant to Order G-129-21;
- O. On June 2, 2021, KCFN submitted correspondence to KPL addressing a number of safety, reliability and legal matters, including concerns that KPL is transmitting power across KCFN's infrastructure on the Crown Corridor without appropriate legal agreements and KCFN's concerns over the safety of KPL's "fly-over" line through Houpsitas;
- P. On July 9, 2021, by Order G-212-21, the BCUC established a further regulatory regulatory timetable seeking submissions from parties on whether the BCUC has jurisdiction on treaty land, with respect to the fly-over line through Houpsitas on shared KCFN/KPL poles and KPL-owned poles and submissions on who is currently responsible for the maintenance of the fly-over line through Houpsitas on shared KCFN/KPL poles and KPL-owned poles. Order G-212-21 also directed KPL to follow Section 24 of its Electric Tariff with respect to providing notice to Customers when suspending service for repairs or improvements on the KPL system;
- Q. Section 88(3) of the UCA states: "the commission, may, on conditions it considers advisable, with the advance approval of the minister responsible for the 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 this Act or may limit or vary the application of this Act"; and
- R. The BCUC has reviewed the submissions made pursuant to Order G-129-21 and Order G-212-21 and determines that an amendment to the regulatory timetable and further regulatory process is warranted.

NOW THEREFORE pursuant to the *Utilities Commission* Act and the reasons attached as Appendix B to this order, the BCUC orders the following:

1. KCFN is a public utility as defined in Section 1(1) of the UCA.
2. KPL and KCFN are directed to negotiate an agreement concerning the joint use of the facilities within the Crown Corridor within three months of the issuance of this order. KPL and KCFN are directed to file the completed agreement with the BCUC.
3. KPL is directed to respond to the Panel Information Request No. 1 attached as Appendix C to this order in accordance with the regulatory timetable.
4. KCFN and KPL are directed to provide submissions on reasons why an exemption granted to KCFN from each of the specific sections of the UCA is warranted.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of December 2021.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

Attachment

Kyuquot Power Ltd.
Investigation into the Safety and Reliability of the KPL System

REGULATORY TIMETABLE

Action	Date (2021)
KPL reply to Panel Information Request No. 1	Thursday, December 23, 2021
Action	Date (2022)
KCFN submissions as to why exemption from part 3 and section 71 of the UCA is warranted, including specified sections	Friday, January 14, 2022
KPL response on reasons why KCFN exemption from part 3 and section 71 of the UCA is warranted, including specified sections	Monday, January 17, 2022
KCFN reply response (if required)	Friday, January 21, 2022
Further process	To be determined

Kyuquot Power Ltd.

Investigation into the Safety and Reliability of the KPL System

Reasons for Decision

December 10, 2021

Before:

D. M. Morton, Panel Chair
C. M. Brewer, Commissioner
T. A. Loski, Commissioner

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1.0 Introduction

By Orders G-129-91 and G-212-21, the British Columbia Utilities Commission (BCUC) sought submissions from the Ka:'yu:'k't'h' / Che:k'tles7et'h' First Nations (KCFN) and Kyuquot Power Ltd. (KPL) on jurisdictional considerations over portions of the KPL system where KCFN and KPL share infrastructure, including whether KCFN meets the definition of a public utility as defined in section 1(1) of the *Utilities Commission Act* (UCA).

2.0 Background and Regulatory Process

The KPL power distribution system (KPL System) is interconnected to the British Columbia Hydro and Power Authority (BC Hydro) electric system and supplies customers, including KCFN, the village of Houpsitas and others on the outer coast of Kyuquot Sound, with electricity. The KPL System is located, in part, on KCFN Treaty Lands. KCFN is a self-governing Nation and a signatory to the *Maa-Nulth First Nations Final Agreement* between KCFN, Canada and British Columbia, a tri-partite comprehensive land claim agreement within the meaning of s. 35 of the *Constitution Act, 1982*¹, and became effective in 2011 (MFA).² The village of Houpsitas is on lands included in the MFA.³ The BCUC established a regulatory timetable to review the safety and reliability of the KPL System.⁴

On October 19, 2020, the BCUC directed KPL⁵ to provide a system maintenance plan identifying all outstanding maintenance work on the KPL System approved by a qualified professional engineer (Maintenance Plan).⁶ On February 8, 2021, KCFN filed a submission with the BCUC stating that they have concerns with KPL adding locks to gang-operated load break switch S3 (GOLB S3) restricting access to KPL personnel only.⁷ When GOLB S3 is opened, the KPL System downstream of GOLB S3 is de-energized.⁸ KCFN stated that GOLB S3 is installed on a KCFN-owned structure and connected to KCFN-owned conductors, and that locks restricting access to KPL personnel only should not be applied. KCFN recommended a joint operating order and that once signed by both parties, personnel from both KPL and KCFN could be issued keys to GOLB S3.⁹

After reviewing the submissions from KCFN and KPL regarding GOLB S3, the BCUC found that a dispute has arisen out of or in connection with GOLB S3 and directed KPL to request the dispute regarding GOLB S3 be referred to mediation, pursuant to Section 11 of Right of Way (ROW) Agreement (ROW Agreement) between KCFN and KPL.¹⁰ The ROW Agreement between KCFN and KPL pertains to KPL infrastructure within KCFN Treaty Lands.¹¹ KCFN was also ordered to provide KPL with a copy of the key for GOLB S3,¹² and KCFN and KPL were ordered to notify each other prior to any operation of GOLB S3, although permission of the other party was not required.¹³

¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

² Exhibit C2-9, p. 2.

³ Exhibit C2-14, p. 1.

⁴ Order G-115-20.

⁵ Order G-261-20.

⁶ Order G-261-20.

⁷ Exhibit C2-5.

⁸ Exhibit D-26, p. 2.

⁹ Exhibit C2-5, Attachment 1 from TE Burns Engineering dated February 8, 2021, pp. 1–2.

¹⁰ Order G-65-21 dated March 8, 2021, Recital P; Directive 1.

¹¹ Exhibit C2- 3, KCFN response to BCUC IR 1.6.1; Transcript Volume 1 dated April 21, 2021, p. 55.

¹² Order G-65-21 dated March 8, 2021, Directive 3.

¹³ Order G-65-2, dated March 8, 2021, Directive 4.

On March 12, 2021, KCFN submitted an application with the BCUC for reconsideration and variance of Directives 3 and 4 of Order G-65-21 (Reconsideration Application). The Reconsideration Application requested that Directives 3 and 4 of Order G-65-21 be amended to require that KPL obtain the permission of KCFN prior to accessing GOLB S3 and that only qualified personnel be permitted to access GOLB S3.¹⁴ The BCUC established a regulatory timetable seeking submissions from parties on the Reconsideration Application.¹⁵ On March 22, 2021, KPL submitted their response,¹⁶ and on April 6, 2021 KCFN submitted their reply submission.¹⁷

On April 21, 2021, the BCUC held an oral hearing to receive further submissions from KCFN and KPL, and invited submissions on the underlying assumption of Order G-65-21 and whether the ROW Agreement between KCFN and KPL applies to the lands upon which GOLB S3 is located (Oral Hearing).¹⁸

At the Oral Hearing, KCFN submitted that under the executed ROW Agreement, KCFN grants KPL different types of access over two types of areas as defined in the ROW Agreement – the “Right of Way Area” and the “Lands.” KCFN submits that neither of these areas included “Excluded Crown Corridor.”¹⁹ Excluded Crown Corridor is land owned by the Province of British Columbia. KCFN further submitted that because of the imprecise sketches on the ROW Agreement, the initial impression was that KCFN had somehow granted KPL a right of way over the lands on which GOLB S3 reside and upon further review, KCFN determined that this was not the case as GOLB S3 is located within the “Excluded Crown Corridor.”²⁰

KCFN further submitted that given GOLB S3 is located on a section of KCFN-constructed and KCFN-owned power line, which is within the Excluded Crown Corridor, and because the ROW Agreement between KCFN and KPL does not apply to Crown Corridors, the mediation provisions of the ROW Agreement do not apply to the dispute regarding GOLB S3 as KPL has no right of way access to KCFN’s infrastructure on the Crown Corridor.²¹

After considering the evidence and submissions made by both parties, on April 28, 2021, the BCUC issued Order G-126-21 and determined that GOLB S3 is on land that is within the Crown Corridor, on infrastructure owned by KCFN, and within the lands identified by the KCFN ROW Agreement with the Province of BC and not subject to the ROW Agreement between KCFN and KPL. Further, because the directives in Order G-65-21 were all premised on the assumption that GOLB S3 is located on land subject to the ROW Agreement, the BCUC rescinded Order G-65-21 in its entirety.

3.0 Issues Relating to the use of KCFN-owned Infrastructure

On April 28, 2021, the BCUC issued Order G-129-21 and established a regulatory timetable seeking submissions from parties on:

- a. The need for access to GOLB S3;

¹⁴ Exhibit C2-7, pp. 1–3.

¹⁵ Order G-79-21.

¹⁶ Exhibit D-30.

¹⁷ Exhibit C2-9.

¹⁸ Transcript Volume 1, April 21, 2021.

¹⁹ Transcript Volume 1, April 21, 2021, pp. 30, 36.

²⁰ Exhibit C2-9, pp. 9–10.

²¹ Exhibit C2-9, p. 10.

- b. With respect to the portion of the line on the Crown Corridor, whether KCFN meets the definition of a public utility and, if so, whether it is appropriate that the BCUC recommend an exemption for KCFN from all or portions of Part 3 of the UCA, pursuant to section 88(3) of the UCA; and
- c. Submissions on the applicability of Section 27 of the UCA on shared KCFN infrastructure.

On June 2, 2021, KCFN submitted a letter to KPL and raised a number of safety, legal and jurisdictional issues. KCFN submitted that they will require KPL to enter into a formal legal agreement with KCFN with respect to KPL's infrastructure, including KPL's 'fly-over line' (fly-over line) through the village of Houpsitas and clear terms respecting liability and communication. KCFN also submitted that they remain concerned about the safety of KPL's fly-over line through Houpsitas and expect KPL to bring its fly-over line to a safety standard acceptable to KCFN's Engineer of Record. KCFN also submitted that KPL is currently distributing power across KCFN's power infrastructure on the Crown Corridor without a legal agreement with KCFN or a legal tenure from the Province of BC and that it expects KPL to develop a plan to install its own conductor to transmit power through the Crown Corridor to downstream customers.²²

On July 9, 2021, the BCUC issued Order G-212-21 and established a further regulatory timetable seeking further submissions on:

- 1. Whether the BCUC has jurisdiction on treaty land, with respect to the fly-over line through Houpsitas on shared KCFN/KPL poles and KPL-owned poles; and
- 2. Who is currently responsible for the maintenance of the fly-over line through Houpsitas on shared KCFN/KPL poles and KPL-owned poles respectively.

4.0 Panel Determinations

The Panel makes a number of determinations below within the wider context of the investigation into the safety and reliability of the KPL System. At a later date, the Panel may make further determinations with respect to the outcome of the BCUC's investigation into KPL's System.

4.1 Jurisdiction

A public utility is defined in section 1(1) of UCA, in part, as:

A person, or the person's lease, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for the (a) 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 corporation for compensation.

Positions of the Parties

KCFN

²² Exhibit C2-13, p. 2.

KCFN submits that with respect to the Crown Corridor described in Chapter 7 of the *Maa-nulth First Nation Final Agreement* or otherwise, it does not meet the definition of a public utility under the UCA.²³ KCFN submits that the relevant part of the definition of a public utility is whether a person who owns or operates in BC, equipment or facilities for the production, generation, storage, transmission, sale, delivery or provision of electricity for compensation.²⁴

KCFN submits that although they own equipment located on the Crown Corridor for transmitting electricity including conductor equipment, KCFN does not transmit power over the Crown Corridor to the public and certainly not for compensation.²⁵ KCFN notes that there are three conductors on the KCFN power line in the Crown Corridor:²⁶

- One conductor is used by KCFN to transmit power to its water facilities;
- One is not energized; and
- One is used by KPL to transmit energy from its point of interconnection with BC Hydro to the village of Houpsitas, the School District 84 property and downstream customers.

KCFN submits that they do not receive any compensation from KPL for KPL's transmission over KCFN's conductor equipment. KCFN further submits that it currently pays a bulk KPL power bill from the primary meter at the KPL-KCFN point of interconnection, which encompasses all Houpsitas residents, and that KCFN only collects an administrative fee from its citizens to partly offset KCFN's administrative costs. This administrative fee is not based on energy consumption or derived from meter readings; rather it is a flat fee for each home.²⁷

KCFN submits that this administrative fee cannot reasonably be considered compensation within the meaning of the UCA and that KCFN pays KPL significant monthly compensation for electrical energy and supports power to its citizens at a major loss.²⁸

KCFN also submits that a core role of the BCUC is ensuring that rate payers are treated fairly and that a public utility is not charging disproportionately high or discriminatory amounts for services and this purpose of the UCA is reflected in the definition of a public utility. KCFN submits that under a purposive interpretation of the UCA, the inclusion of compensation in the definition of a public utility relates to the BCUC's role of protecting ratepayers. KCFN submits that protecting ratepayers is not an issue for KCFN since they have no profit motive in its distribution of power and that KCFN is simply performing a government function by delivering power to its community, power for which KCFN pays KPL.²⁹

KCFN submits it recognizes and supports the BCUC's role in regulating KPL's activities and welcomes the BCUC's regulation of KPL, in particular on public safety related issues. KCFN notes it was KCFN's recognition of the BCUC's jurisdiction over the safety and reliability of KPL that resulted in the complaint to the BCUC. KCFN submits that the BCUC be mindful of KCFN's authority as a self-governing Nation and focus on what is necessary to regulate KPL's activities.³⁰

²³ Exhibit C2-11, p. 1.

²⁴ Ibid.

²⁵ Exhibit C2-11, p. 2.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid, pp. 2–3

³⁰ Exhibit C2-14, p. 2.

KCFN asserts that the BCUC does not need to assert or exercise jurisdiction under the UCA in the Crown Corridor to address safety and reliability of KPL's System or to resolve the joint use of KCFN infrastructure.³¹ In respect of the BCUC's jurisdiction over the fly-over line, KCFN recognizes and supports the BCUC's role in regulating KPL's activities.³² Further, KCFN recognizes, supports and welcomes the BCUC's regulation of KPL and of the safety and reliability of the KPL System.³³

KCFN submits that it and the BCUC should act collaboratively, respecting each other's jurisdiction to ensure KPL's System is operated in a safe and reliable manner. KCFN submits that it would be improper for the BCUC to exercise its jurisdiction over KPL in a manner that could impact KCFN jurisdiction over its lands, infrastructure or rights and doing so may result in an unjustified infringement of KCFN's Treaty and Aboriginal rights. KCFN submits that any order made by the BCUC in this proceeding about KPL's System must not impact KCFN without KCFN's free, prior and informed consent.³⁴

KPL

KPL states that if the MFA does not provide the authority for KCFN to pass laws paramount to the UCA, or it does and the KCFN chooses not to exercise it, then the UCA applies.³⁵ KPL further asserts that the BCUC does not have jurisdiction over the fly-over line because of the MFA but that if the KCFN were to exercise any of its authority to make laws in respect of public utilities on Maa-Nulth First Nation Lands, then the KCFN laws would be paramount to the exercise of the powers of the BCUC.³⁶ KPL also submits that KCFN could exercise its powers in relation to the fly-over line on shared KCFN/KPL poles and KPL-owned poles, in which case the exercise of this power would be paramount to the exercise of the powers that the BCUC has pursuant to the UCA.³⁷

Panel Determination

As a creature of statute, the BCUC cannot act where it does not have the jurisdiction to do so. The MFA states that Provincial laws apply, in part, to the Maa-Nulth First Nations and Maa-Nulth First Nation Lands amongst other Maa-Nulth First Nations' institutions and entities.³⁸ The Panel finds that to date, the Maa-Nulth First Nations have not enacted legislation regulating public utilities. Therefore, the BCUC does not need to determine whether any KCFN law purporting to regulate utilities is paramount to the UCA. As such, Provincial laws continue to apply regulating public utilities in the area covered by the MFA.

The Panel therefore finds that the UCA applies on Maa-Nulth First Nation Lands within the area covered by the MFA.

In BC, the UCA defines a public utility in section 1(1) for the purposes of regulation and oversight, unless the BCUC, pursuant to section 88(3) of the UCA, exempts a person from the application of all or any provisions of the UCA.

³¹ Exhibit C2-11 at p. 5.

³² Exhibit C2-14 at p. 2.

³³ Ibid.

³⁴ Exhibit C2-14, pp. 2–3.

³⁵ Exhibit D-37, p. 3.

³⁶ Exhibit D-42 at p. 2.

³⁷ Exhibit D-42, p. 1.

³⁸ Chapter 1.5.1, Chapter 7, Chapter 29, and Appendix D of the *Maa-Nulth First Nations Agreement*.

Although the citizens within the village of Houpsitas are not charged based on energy consumption, KCFN acknowledges that it collects an administrative fee from its citizens to partly offset KCFN's costs of electricity. The Panel disagrees with KCFN that this administrative fee cannot be considered compensation within the meaning of the UCA.

The UCA further defines the following, in part, at section 1(1):

"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;

The Panel finds that the KCFN administrative fee is remuneration provided by citizens to KCFN for the provision of a service. **Therefore, the Panel finds that the KCFN administrative fee is compensation within the meaning of the UCA and finds that KCFN meets the definition of a public utility as defined in Section 1(1) of the UCA.**

In making this determination, we note that a portion of KCFN's utility infrastructure is located in the Crown Corridor. Crown Corridor is defined in the MFA as land that is owned by the Province within the territory covered by the MFA but are not part of Maa-nulth First Nations' Lands.³⁹ As the UCA is applicable on all provincial crown land, this portion of the KCFN utility infrastructure is also subject to the UCA.

4.2 Technical Matters

This section addresses specific technical matters associated with KPL's fly-over line and GOLB S3.

4.2.1 KPL's Fly-over Line

Positions of the Parties

KCFN

KCFN and KPL agree that KPL is responsible for the maintenance of the fly-over line that runs through Houpsitas. KCFN submits that while they do not have the responsibility to maintain KPL infrastructure, they are responsible for the lands through which the fly-over line passes and have had numerous safety concerns brought to their

³⁹ Exhibit C2-9, pp. 9–10; Transcript Volume 1, p. 31.

attention by engineers.⁴⁰ KCFN submits that the BCUC should respect and value the feedback provided by the KCFN experts as they are best positioned to identify safety risks. KCFN further submits that no formal joint operation agreement or asset management agreement has been entered into by KCFN and KPL in respect to this fly-over line.⁴¹

KCFN submits that it has a duty to ensure its community is safe and therefore submits that the BCUC and KCFN should collaborate on how best to ensure the KPL System is safe and well-maintained. KCFN also submits that it supports KPL's plan to remove the components of its system from KCFN infrastructure and replace the fly-over line with a new power line located off Treaty Settlement Lands.⁴²

Panel Discussion

The Panel having reviewed the evidence with respect to the fly-over line, determines further clarification on several issues is required. **Accordingly, the Panel requests KPL to respond to the Panel Information Request No. 1 as attached to Appendix C by December 23, 2021.**

4.2.2 The GOLB S3 Switch

Positions of the Parties

KCFN

KCFN submitted that it installed GOLB S3 on January 11, 2020 on a KCFN-owned power pole to facilitate timely isolation in the event of an emergency.⁴³ KCFN submitted that the primary objective of this installation was to provide a ground-operated safe means of isolating the downstream power system in the case of a life-threatening emergency.⁴⁴ KCFN further submitted that it cannot accept a dual key system for GOLB S3 as suggested by KPL as this would defeat the purpose of rapidly isolating the line because it will require a KPL field representative travelling to site. Such a delay would pose an unacceptable risk to the public safety of KCFN's community.⁴⁵

KPL

KPL submitted that while it does not agree with KCFN's position with respect to the dual key system, KPL is choosing not to pursue this option and would therefore not require a joint operating order for GOLB S3.⁴⁶

⁴⁰ Exhibit C2-13, p. 2.

⁴¹ Exhibit C2-14, p. 3.

⁴² Exhibit C2-14, p. 3.

⁴³ Exhibit C2-3, BCUC IR 1.1.1 to KCFN.

⁴⁴ Exhibit C2-10, p. 2.

⁴⁵ Exhibit C2-10, p. 3.

⁴⁶ Exhibit D-36, p. 2.

Panel Discussion

In light of KPL's position that it no longer requires access to GOLB S3 installed by KCFN on KCFN-owned poles, the Panel declines to make a determination on this matter.

4.3 The Applicability of Section 27 of the UCA on Shared KCFN Infrastructure

Positions of the Parties

KCFN

KCFN submits that section 27 of the UCA does not apply because KCFN does not meet the definition of a public utility. Further, KCFN submits that even if the BCUC determines KCFN meets the definition of a public utility with respect to the section of the line through the Crown Corridor, KCFN should be exempt from the UCA.⁴⁷

KCFN also submits that no matter what the BCUC determines from this proceeding, the BCUC need not assert nor exercise jurisdiction under the UCA respecting the Crown Corridor. KCFN submits that its primary concern is the safety and reliability of KPL's System and is mindful of the general public interest in maintaining KPL's System. KCFN further submits that any issues between KCFN and KPL respecting any jointly used infrastructure can be addressed through a negotiated agreement.⁴⁸

KPL

KPL had previously submitted that the practical solution to resolve any the legal issues over shared infrastructure would be for KCFN and KPL to enter into a wheeling agreement for the movement of KPL electricity in the Crown Corridor over KCFN's infrastructure.⁴⁹

KPL revised its earlier position and submitted that given KCFN's long-term plans and the certainty KPL requires for long-term operation of the KPL System, it now believes the optimal solution is for the separation of the two systems. Therefore, KPL submit that it expects to file an application with the BCUC for a Certificate of Public Convenience and Necessity for the work required to affect this separation, including the placement of KPL poles and lines in the Crown Corridor and a powerline/submarine cable extension that would replace the fly-over line with an extension that would not be on Treaty Lands. In the interim, KPL submit that it will seek to negotiate a limited term agreement with KCFN for the continued movement of electricity in the Crown Corridor and Treaty Lands in the vicinity of Houpsitas.⁵⁰

KPL also submit that, as an alternative to the significant capital investment required to separate the two electrical systems, KPL is prepared to sell the KPL System to KCFN. KPL notes that KCFN has not provided a response to this proposal.⁵¹

⁴⁷ Exhibit C2-11, p. 5.

⁴⁸ Ibid, p. 5.

⁴⁹ Exhibit D-37, p. 2.

⁵⁰ Exhibit D-38, p. 3.

⁵¹ Exhibit D-39, p. 4.

Panel Determination

Crown Corridor is defined in the MFA as land that is owned by the Province within the territory covered by the MFA but are not part of Maa-nulth First Nations' Lands.⁵² The Panel notes that KCFN owns conductor equipment, located within the Crown Corridor that is used by KPL to transmit electricity to the village of Houpsitas, the School District and downstream customers. The KCFN has a right-of-way agreement with the Province in respect of this portion of the Crown Corridor for its infrastructure while KPL does not.⁵³ KCFN has a ROW Agreement with KPL, which provides KPL access to the KPL System within the ROW area, but this area is not included in the Crown Corridor and is instead on Maa-Nulth First Nations' Lands adjacent to the Crown Corridor.⁵⁴ Currently there is no agreement between KCFN and KPL for KPL's use of KCFN land and infrastructure for the KPL System; however, KCFN has indicated in this proceeding that it requires KPL to enter into a formal agreement with KCFN to govern this.⁵⁵

Earlier in this decision, the Panel found KCFN to be a public utility as defined in section 1(1) of the UCA. Section 27 of the UCA provides, in part, that the BCUC may make any orders it considers reasonable directing joint use of equipment by public utilities where it finds that public convenience and necessity require it. As discussed above, KPL and KCFN share certain infrastructure, both are public utilities for the purposes of the UCA. **The Panel therefore directs, pursuant to section 27 of the UCA, KPL and KCFN to negotiate an agreement concerning the joint use of the facilities within the Crown Corridor.** KPL and KCFN are directed to file the agreement with the BCUC within three months of the issuance of this order.

If KCFN and KPL are unable to negotiate an agreement concerning the joint use of the facilities within the Crown Corridor after three months from the issuance of this decision, the BCUC may exercise its jurisdiction under section 27 of the UCA directing that the use of facilities in the Crown Corridor be allowed and establishing compensation for the joint use of these facilities.

4.4 Should the BCUC Recommend an Exemption for KCFN from all or portions of the UCA?

Section 88(3) of the UCA provides that the BCUC may, with the advance approval of the minister responsible for the administration of the *Hydro and Power Authority Act* (Minister) exempt a person, class of persons, 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.⁵⁶

By Order G-129-21 dated April 28, 2021, the BCUC sought submissions from KPL and KCFN on whether, with respect to the portion of the line on the Crown Corridor, KCFN meets the definition of a public utility, and if so, whether it is appropriate that the BCUC recommend an exemption for KCFN from all or portions of Part 3 of the UCA, pursuant to section 88(3) of the UCA. KCFN's and KPL's submissions are summarized below.

Positions of the Parties

KCFN

⁵² Exhibit C2-9, p. 9.

⁵³ Exhibit C2-7, p. 2 and Exhibit C2-9, Appendix A

⁵⁴ Exhibit C2-3, pp. 14–25.

⁵⁵ Exhibit C2-13, p. 2.

⁵⁶ *Utilities Commission Act*, R.S.B.C. 1996, c. 473 (altogether, UCA), s. 88.

KCFN states that if KCFN were to meet the definition of public utility under the UCA, there are a number of reasons the BCUC should recommend an exemption for KCFN from all portions of UCA.⁵⁷

First, KCFN considers that an exemption would be consistent with the purpose and intent of the UCA.⁵⁸ KCFN references the following from BCUC's Indigenous Utilities Regulation Inquiry Final Report:⁵⁹

The rationale for [public utilities] regulation is the need for an independent arbiter to balance the competing interests of ratepayers with those of the utilities, while taking into account the broader public interest. The UCA gives the BCUC, a third party independent regulatory agency, which has expertise in energy regulation, the mandate to regulate all public utilities in British Columbia. The BCUC ensures that utility rates are not unjust, unreasonable, unduly preferential or unduly discriminatory while at the same time giving utility shareholders an opportunity to earn a reasonable rate of return on their investments. The need for an independent regulator is seen as providing a safeguard against the tendency of monopolies to act in their own self-interest in terms of rate setting and capital investment.⁶⁰ [emphasis added by KCFN]

KCFN states that none of the concerns respecting utility rates or balancing the interests of ratepayers with those of utility shareholders arise here. KCFN states that it is already acting in the public interest in covering electricity costs for its community. KCFN also notes that it does not distribute metered energy to Hupsitas residents and that KCFN distributes electricity on Maa-Nulth First Nations' Land as a part of its services as a government and at a significant cost.⁶¹

Second, the KCFN states that the BCUC has already determined that KCFN has a right to regulate utilities operated by Indigenous peoples on KCFN land. KCFN states that in BCUC's Indigenous Utilities Regulation Inquiry Final Report, the BCUC acknowledges that this right is set out in Articles 3 and 20(1) of UNDRIP:⁶²

Article 20(1): Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."⁶³ [emphasis in original]

KCFN states that the BCUC further recommended, as part of its Indigenous Utilities Regulation Inquiry Final Report that modern treaty First Nations determine the means of regulation of an Indigenous utility providing services on that First Nations' former reserve lands.⁶⁴ KCFN states that it does not raise this to suggest that KCFN is an Indigenous utility providing services rather to illustrate that the BCUC has already determined that a modern treaty First Nation is entitled to determine regulation of Indigenous utilities on its own lands. KCFN states that to the extent that it is considered to be providing electricity on its own lands, it should be exempt from any regulation.⁶⁵

⁵⁷ Exhibit C2-11, p. 3.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ BCUC's Indigenous Utilities Regulation Inquiry Final Report, p. 22.

⁶¹ Exhibit C2-11, p. 4.

⁶² Ibid.

⁶³ BCUC's Indigenous Utilities Regulation Inquiry Final Report, p. 41.

⁶⁴ Exhibit C2-11, p. 4. KCFN references to section 4.6.2.4 of BCUC's Indigenous Utilities Regulation Inquiry Final Report.

⁶⁵ Ibid.

Third, KCFN considers the BCUC's oversight or regulation respecting the 1.6 km portion of KCFN line and assets running through the Crown Corridor is unnecessary. KCFN notes that it does not receive any compensation related to electricity transmission over this portion of the line. KCFN further states that Technical Safety BC already regulates KCFN's operations and infrastructure in the Crown Corridor and throughout the KCFN system.⁶⁶

KCFN states that it would be unnecessarily complicated and burdensome to subject KCFN to a patchwork of regulation in different parts of its system. KCFN states that this would be particularly unfair on the portion of the line within the Crown Corridor, as KCFN would be subject to duplicate regulatory schemes, which may lead to situations where KCFN is unable to comply with directives or orders from Technical Safety BC and the BCUC at the same time in the event of a conflict. KCFN states that such an approach would be antithetical to principles of administrative fairness, good governance, and reconciliation.⁶⁷

KPL

KPL does not object to KCFN being granted an exemption from the UCA with respect to its transmission of electricity on the Crown Corridor.⁶⁸

KPL states that if the MFA does not give KCFN the ability to pass laws that are paramount to section 27 of the UCA, or KCFN has this ability and does not exercise it, then section 27 applies in accordance with its terms. KPL states that if KCFN is exempt from Part 3 of the UCA, then section 27, which is within Part 3, would not be applicable to the Crown Corridor Infrastructure. KPL submits that a Part 3 exemption could be structured so that it is not applicable to section 27, i.e. the Crown Corridor infrastructure is exempt from Part 3 except for section 27.⁶⁹

Panel Determination

In the BCUC's reasons for decision attached to Order G-167-07 (Unocal Decision),⁷⁰ the BCUC affirmed the test for granting a section 88(3) exemption order, which was set out in Order G-41-06 and states that "a section 88(3) exemption order should be issued, with the advance approval of the LGIC [Lieutenant Governor in Council]⁷¹, when such exemption serves the objects and purposes of the Act and it is in the public interest to do so."⁷²

The Unocal Decision also considered the following issues:⁷³

- Does the Unocal Application for an exemption from all provisions of the Act satisfy the test for exemption?
- Should Unocal, in its operation of the Storage Facility, be actively regulated?

⁶⁶ Ibid.

⁶⁷ Exhibit C2-11, p. 4

⁶⁸ Exhibit D-37, p. 2

⁶⁹ Exhibit D-37, p. 3

⁷⁰ Order G-167-07, Appendix B

⁷¹ Effective November 17, 2015, section 88(3) of the UCA was amended by changing the approving body from the Lieutenant Governor in Council to the minister responsible for the administration of the *Hydro and Power Authority Act*.

⁷² Order G-167-07, Appendix B, p. 6.

⁷³ Order G-167-07, Appendix B, p. 3

- What is an appropriate exemption for the Storage Facility in the circumstances?

As noted above, the Panel finds that KCFN is a public utility as defined in section 1(1) of the UCA. However, the Panel acknowledges the merit of exempting KCFN from certain sections of Part 3 and section 71 of the UCA. Such an exemption would be consistent with the recommendation of the Regulation of Indigenous Utilities Inquiry Report that First Nations should have the option to regulate utilities they own, provided they have appropriate customer complaint management processes in place.

Typically, an exemption is only granted from Part 3 and section 71 of the UCA, save and except appropriate provisions. Therefore, the Panel seeks submissions from parties by the dates established in the regulatory timetable attached as Appendix A to this order as to why exemption to KCFN from part 3 and section 71 of the UCA is warranted. In particular, please address whether exemption from the following sections, contained in Part 3, is warranted:

- Section 24 – BCUC must make examinations and inquiries
- Section 25 – BCUC may order improved service
- Section 27 – Joint use of facilities
- Section 38 – Public utility must provide service
- Section 39 – No discrimination or delay in service
- Section 41 – No discontinuance without permission
- Section 42 – Duty to obey orders
- Section 43 – Duty to provide information
- Section 52 – Restraint on disposition
- Section 53 – Consolidation, amalgamation and merger
- Section 54 – Reviewable interests

Original signed by:

D. M. Morton
Panel Chair/Commissioner

Original signed by:

C. M. Brewer
Commissioner

Original signed by:

T. A. Loski
Commissioner

Kyuquot Power Ltd.
Investigation into the Safety and Reliability of the KPL System

PANEL INFORMATION REQUEST TO KYUQUOT POWER LTD.

- 1.0 Reference: KYUQUOT POWER LTD. INFRASTRUCTURE MAINTENANCE
Order G-261-20; Exhibit A2-3; Exhibit D-16, Appendix 3B; Exhibit D-27; Exhibit D-39;
Exhibit D-43; Exhibit C2-13; Exhibit C2-14; April 21, 2021 Transcript Volume 1;
Scope of System Maintenance Plan**

By Order G-261-20, the BCUC directed Kyuquot Power Ltd. (KPL) to provide a system maintenance plan identifying all outstanding maintenance work on the KPL power distribution system (KPL system) approved by a qualified professional engineer.

By Appendix 3B to Exhibit D-16, KPL submitted a system maintenance plan approved by Primary Engineering & Construction (Primary).

On page 3 of Appendix 3B to Exhibit D-16, Primary states:

The documented observations are limited to KPL maintained distribution equipment from the one (1) point of interconnection to BC Hydro and ending at multiple customer owned transformations inclusive. While secondary poles were excluded from this report, no significant deficiencies were observed on these assets. No pad-mount transformers were opened during this inspection.

In Exhibit C2-13, KCFN submits that it remains concerned for the safety of the 'fly-over line' (fly-over line) through Housitas.

On page 3 of Exhibit C2-14, KCFN submit that KPL should be responsible for the maintenance of the fly-over line. A report from TE Burns Engineering dated July 29, 2021 and attached to Exhibit C2-14, identified numerous deficiencies with the fly-over line. Further, the report identified that the submarine cable at Housitas is exposed on the beach, which KCFN states presents a public safety hazard as the cable is accessible to the public and exposed to potential damage from logs or boats.

On page 1 of Exhibit D-42, KPL state it has the responsibility for the maintenance of the fly-over line through Housitas on shared KCFN/KPL poles and KPL-owned poles, respectively.

The Transcript dated April 21, 2021, mentions the term "excluded crown corridor" as it pertains to the KPL system.

- 1.1 Please explain the full scope of Primary's system maintenance plan submitted in Appendix 3B to Exhibit D-16.**
- 1.1.1 Please explain whether Primary inspected the line through the excluded crown corridor, the fly-over line through treaty lands in Housitas and all KPL-owned submarine cables. If the scope of inspection included the fly-over line and submarine cables, please provide the outcomes of Primary's inspection. If the scope of Primary's inspection did not include all infrastructure maintained by KPL, please explain why not.**

- 1.1.2 If Primary's system maintenance plan did not include some of the infrastructure maintained by KPL, please submit a mark-up of the record drawings of the KPL system provided in Exhibit A2-3 of this proceeding clearly showing all KPL-maintained infrastructure out of scope in the Primary system maintenance plan, referenced by pole number.
- 1.2 Please explain whether there is any infrastructure owned and maintained by KCFN that is used to transmit KPL power.
- 1.3 Please explain whether KPL considers there to be any outstanding maintenance issues or safety concerns regarding the condition of the fly-over line.
- 1.4 Please explain whether KPL has concluded that there is a problem or public safety issue with the current state of the submarine cable.
 - 1.4.1 If yes, please explain what steps KPL is taking to address the situation.
 - 1.4.2 If no, please explain why not.

Page 3 of the TE Burns report attached to Exhibit C2-14 states:

There is also a concern that there is not a submarine ROW for where the cable traverses Walters Cove between Houpsitas and Walters Island, (See attached iMapBC for Walters Cove). If the iMapBC information is in error, KPL should have a record of this ROW available [sic] for the BCUC to review.

- 1.5 Please discuss whether KPL has a right of way (ROW) for its submarine cable between Houpsitas and Walters Island.
 - 1.5.1 If yes, please provide a copy.
 - 1.5.2 If not, please explain why not.
- 1.6 Please discuss whether KPL has a ROW for its submarine cable for any and all other crossings.
 - 1.6.1 If yes, please provide a copy.
 - 1.6.2 If not, please explain why not.

In Appendix A to Appendix 3B to Exhibit D-16, Primary provides the "KPL Line Maintenance Plan" dated November 30, 2020. Primary describes "potential low ground clearance" or "very low ground clearance" on 18 spans. For example, for Pole 13, the deficiency identified by Primary is "potential low ground clearance – span 13-14" and immediate remedial action identified is: "Temporary signage to be installed on adjacent poles indicating low clearance. Ground clearance and potential remedial action to be determined." And, for Pole 130: "Very low ground clearance – span 130 – 131. Can reach conductor from ground. Taller poles needed."

Exhibit D-27 KPL submitted Primary's report of completion of identified priority 1 items. On pages 2–3, Primary states: "Potential ground clearance and phase to neutral clearance issues which were identified during initial site inspection have now had further investigation and can move toward final design in the next three months."

Exhibit D-39 details KPL's quarterly progress report to June 30, 2020. On pages 1–2, KPL states:

As of June 30, 2021, KPL has completed most of the Priority 2 and Priority 3 work items

identified in the Maintenance Plan. In addition, there were 18 span locations identified as potential low ground clearance. Design engineering has been completed for all of the 18 span locations with the electrical upgrades completed for 5 span locations. Completion of the remaining 13 span locations are awaiting contractor and equipment availability. A final inspection by Primary of the completion of all work times identified in the Maintenance Plan will be scheduled soon after completion of the remaining work items.

Exhibit D-43 details KPL's quarterly progress report to September 30, 2021 and contains Primary's Priority 2-3 Completion Report. On page 2 of Primary's report, Primary states:

Potential ground clearance and phase to neutral clearance issues which were identified during initial site inspection have now been remedied in full through the design and construction of reframing structures appropriately." An itemized list is provided. For example, for Pole 13, the Final Remediation Action identified is: "Construction of engineer designed low clearance mitigation.

Exhibit A2-3 contains the record drawings of the KPL system. On pdf page 5, the Legend states the Pole Numbers as "see attached pole schedule."

- 1.7 Please provide the pole schedule referred to in the Exhibit A2-3 record drawings.
- 1.8 Please provide further details of the issues on the 18 identified low clearance spans. For each, please provide the original pole height, describe the nature of the low clearance issue and whether the low clearance has existed since the original construction of the KPL system.
- 1.9 Please provide details of the 'engineer designed low clearance mitigation' work undertaken by Primary, as referenced in Exhibit D-43 above. In the response, please provide the current pole height and clearance.
 - 1.9.1 Please provide reference to the standard that the 'engineer designed low clearance mitigation' adheres to, if applicable.
 - 1.9.2 Please provide the total cost to implement the 'engineer designed low clearance mitigation' for the 18 low-clearance spans.

On page 4 of Primary's KPL Line Maintenance Plan dated November 30, 2020, which is included as Appendix 3B to Exhibit D-16, Primary states:

The KPL distribution powerline was originally engineered based on BC Hydro and CSA standards. Although BC Hydro standards are not a specific requirement as KPL is its own utility, the inspection has considered the BC Hydro Standards and CSA Standards to be applicable.

The following standards are applicable: BC Hydro Standards - Overhead ES43, Underground ES53 and Civil ES54. Canadian Safety Authority – CSA 22.3 1-15 (Overhead), CSA 22.3 7-15 (Underground) Canadian Electrical Code 22.1-18

- 1.10 Please confirm, or explain otherwise, that KPL's system was originally designed to the BC Hydro and CSA Standards referred to in the above preamble.
 - 1.10.1 If not confirmed, please explain the engineering oversight and technical design of the

original construction of the KPL system.

- 1.10.2 Please also explain, with rationale, all deviations of the KPL system as-built from the original design.
- 1.10.3 If confirmed, please explain: a) why Primary's KPL Line Maintenance Plan found spans with low clearance; and b) the safety concerns of KCFN related to the flyover line.
- 1.11 Please discuss whether the flyover line was and is constructed in accordance with KPL's record drawings, as provided in Exhibit A2-3.
 - 1.11.1 If not, please explain, with rationale, all deviations from the original design.
- 1.12 Please confirm, or explain otherwise, whether the fly-over line was originally constructed in accordance with accepted engineering standards for electrical distribution infrastructure and was constructed as designed.
 - 1.12.1 Please provide reference and a copy of the standard used to design the fly-over line.

Page 1 of the TE Burns Engineering Report attached to Exhibit C2-14 states the following with respect to pole-top extensions used in the fly over line:

This application of cross-arms for pole top extensions are used in the utility industry for emergency storm repair situations, however, are not intended for permanent installations.

- 1.13 Please discuss, in KPL's view, the use of cross-arms for pole top extensions in permanent installations. In the response, please reference, and provide copies of, specific engineering standards relating to pole top extensions, if applicable.