



ORDER NUMBER
G-332-23

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

and

Powell River Energy Inc.
Status as a Public Utility

BEFORE:

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

on December 6, 2023

ORDER

WHEREAS:

- A. Powell River Energy Inc. (PREI), a wholly-owned subsidiary of Brookfield Renewable Partners L.P. (Brookfield), owns and operates two hydroelectric generating stations, constructed in the early 1900s, with an aggregate nameplate capacity of approximately 85 megawatts, and transmission and distribution facilities located on Powell Lake and Lois Lake in Powell River;
- B. By Orders G-38-23 and G-43-23 dated February 24, 2023 and March 7, 2023, respectively, the British Columbia Utilities Commission (BCUC) established a public hearing process for the review of PREI's status as a public utility and established a regulatory timetable directing PREI to, among other things, provide public notice of the proceeding to potentially affected parties;
- C. By July 6, 2023, Paper Excellence Canada, the Council of Canadians – Powell River Branch, and Energy Democracy for BC filed requests to intervene;
- D. By November 8, 2023, the BCUC received Final Arguments from PREI and Energy Democracy for BC. On November 16, 2023, PREI filed its Reply Argument; and
- E. The BCUC has reviewed the evidence and submissions filed in the proceeding and makes the following determination.

NOW THEREFORE pursuant to the *Utilities Commission Act*, and for the reasons attached to this order, the BCUC orders that PREI is a public utility as defined in section 1 of the *Utilities Commission Act* and is therefore subject to regulation by the BCUC.

DATED at the City of Vancouver, in the Province of British Columbia, this 6th day of December 2023.

BY ORDER

Original signed by:

T. A. Loski
Commissioner

Attachment

Powell River Energy Inc.
Status as a Public Utility

REASONS FOR DECISION

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1.0 Introduction

On February 24, 2023, the British Columbia Utilities Commission (BCUC) established a public hearing to review Powell River Energy Inc.'s (PREI) status as a public utility under the *Utilities Commission Act* (UCA).

1.1 Background

PREI is a wholly-owned subsidiary of Brookfield Renewable Partners L.P. that owns and operates two hydroelectric generating stations with an aggregate nameplate capacity of approximately 85 megawatts, as well as transmission and distribution facilities (Power Facilities), located on Powell Lake and Lois Lake in Powell River, British Columbia (BC). PREI operates as a public utility and is subject to BCUC regulation. Pursuant to section 45(2) of the UCA, PREI is deemed to have a Certificate of Public Convenience and Necessity as the Power Facilities were constructed and began operation before September 11, 1980.¹

Pursuant to long-term power purchase agreements (PPAs) with Catalyst Paper Corporation (Catalyst) entered into in 2001, 2011, and 2016, PREI sold electricity generated at the Power Facilities to Catalyst for use at its Powell River pulp and paper mill.²

By Ministerial Order M-22-0101 deposited January 30, 2001, PREI was exempted from regulation as a public utility under Part 3 and section 71 of the UCA with respect to electricity generated at the Power Facilities and sold to Catalyst. Further, Ministerial Order M-22-0101 allowed PREI to sell any electricity not purchased by Catalyst to participants in the wholesale electricity market.³

Following the execution of PREI and Catalyst's 2016 PPA, PREI was granted two complementary exemptions issued concurrently on February 7, 2017:

- i. By Ministerial Order M039 (BC Reg. 26/2017), the Minister of Energy, Mines, and Low Carbon Innovation (Minister) granted PREI a partial exemption from Part 3 and section 71 of the UCA on the condition that the electricity generated at the Power Facilities was provided to Catalyst per the terms of the PPA, with any surplus electricity available to PREI for sale in the wholesale electricity market; and
- ii. By Order G-17-17 pursuant to section 88(3) of the UCA, the BCUC, having been granted advance approval by the Minister, exempted PREI from section 71 and Part 3 of the UCA, except for sections 25, 38, 42, and 43, for the duration of Ministerial Order M039.⁴

In May 2021, PREI and Catalyst terminated the 2016 PPA.⁵ Since then, PREI has sold electricity to an affiliated company that exports 100 percent of the output from the Power Facilities to the United States through a chain of affiliated companies. Specifically, PREI reports that back-to-back sales transactions occur at the PREI–British Columbia Hydro and Power Authority (BC Hydro) interconnection point, where PREI first transfers the title to the electricity to Powell River Energy Limited Partnership (PRELP) (by way of an energy sales agreement⁶), which in

¹ Exhibit B-5, p. 6.

² Exhibit A2-2, p. 1; Catalyst Paper Corporation, Electricity Export Permit (2022), retrieved from <https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90466/94151/4195297/4195298/4202608/C17491->

³ [1 Catalyst Submission re Powell River Energy Inc. Electricity Export Permit Application - A8A6D5.pdf?nodeid=4202313&vernum=-2.](https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90466/94151/4195297/4195298/4202608/C17491-1_A8A6D5.pdf?nodeid=4202313&vernum=-2)

⁴ Ministerial Order M-22-0101, deposited January 30, 2001.

⁵ BCUC Order G-17-17 dated February 7, 2017.

⁶ Exhibit A2-2, p. 1.

⁷ Exhibit B-8, p. 2.

turn transfers the title to Evolgen Trading and Marketing LP (ETM).⁷ ETM, having been granted an electricity export permit by the Canada Energy Regulator, exports the power to customers in the United States using the BC Hydro transmission system under the Open Access Transmission Tariff.⁸

PREI states that PRELP is a wholly-owned subsidiary of PREI, and that ETM, like PREI, is a wholly-owned subsidiary of Brookfield Renewable Partners L.P.⁹ Figure 1 below provides a simplified organization chart illustrating the relationships of these corporate entities.

Figure 1 - Simplified Organization Chart¹⁰



Following the change in PREI's sales arrangement, Ministerial Order M039 was repealed, thereby rescinding PREI's partial exemption from the UCA.¹¹

In anticipation of Ministerial Order M039 being repealed, PREI filed, in September 2021, an application with the BCUC seeking partial exemption from regulation under the UCA. PREI subsequently withdrew its application in February 2022.¹²

In response to a BCUC request for an update on PREI operations, PREI stated that its current operating arrangement is such that it falls within the exclusion set out in part (d) of the definition of public utility in the UCA (Exclusion).¹³

The BCUC established this proceeding to examine whether the change in PREI's circumstances and operations results in a change to PREI's current public utility status.

1.2 Regulatory Process

By Orders G-38-23 and G-43-23, dated February 24, 2023 and March 7, 2023, respectively, the BCUC established a public hearing process and regulatory timetable for the review of PREI's status as a public utility. The regulatory timetable consisted of, among other things, public notice of the proceeding, submission of letters of comment, and one round of BCUC information requests (IRs).

⁷ Exhibit B-8, p. 2.

⁸ Exhibit B-5, p. 20, 23.

⁹ Exhibit A2-2, p. 1; Exhibit B-5, p. 2.

¹⁰ Exhibit B-5, p. 25.

¹¹ Ministerial Order M5 (BC Reg. 3/2022) deposited on January 12, 2022.

¹² 2021 PREI Exemption Application, Exhibit B-7.

¹³ Exhibit B-5, p. 17.

On March 20, 2023, PREI filed a request to reconsider and amend Order G-43-23 with respect to the public notice requirements.¹⁴ Following a review by the BCUC, PREI's request was summarily dismissed on May 3, 2023.¹⁵

On May 26, 2023, the Tla'amin Nation filed a letter with the BCUC requesting intervener status given its interests over the waters that feed PREI's hydroelectric generating facilities.¹⁶ The BCUC granted the Tla'amin Nation intervener status and amended the regulatory timetable to allow general intervener registration and established further regulatory process.¹⁷ Tla'amin Nation subsequently withdrew its request for intervener status following a reassessment of its need to participate in the proceeding.¹⁸

By June 6, 2023, Paper Excellence Canada, the Council of Canadians – Powell River Branch, and Energy Democracy for BC (ED4BC) had registered as interveners.

On August 23, 2023, the BCUC amended the regulatory timetable to accept a submission from ED4BC to the evidentiary record and established further regulatory process that included, among other things, one additional round of BCUC and PREI IRs, and PREI submission of rebuttal evidence.¹⁹

The BCUC received 34 letters of comment for this proceeding. Among the letters of comment filed, 29 were from individuals, two from municipalities (City of Powell River and qathet Regional District), two from third-party advocacy organizations (Townsite Ratepayers Society and Clean Energy Research Group), and one from the Tla'amin Nation. PREI filed its response to the letters of comment on July 14, 2023.²⁰

PREI and ED4BC filed final arguments on October 25, 2023 and November 8, 2023, respectively. PREI filed its reply argument on November 16, 2023.

2.0 Legislative Framework

Section 1 of the UCA states:

"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, or

[...]

but does not include

[...]

¹⁴ Exhibit B-1.

¹⁵ BCUC Order G-104-23 with Reasons for Decision, dated May 3, 2023.

¹⁶ Exhibit C1-1, p. 1.

¹⁷ Order G-161-23 dated June 22, 2023.

¹⁸ Exhibit C1-2, p. 1.

¹⁹ Order G-224-23 dated August 23, 2023.

²⁰ Exhibit B-6.

- 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.

Section 1 of the UCA defines compensation as:

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;

Section 29 of the *Interpretation Act* states:

In an enactment:

[...]

"person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law.

3.0 PREI's Status as a Public Utility

Position of PREI

PREI argues that its current operations and circumstances fall within the Exclusion from the definition of a public utility, where a public utility does not include "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."²¹

PREI submits that the only issue before the BCUC in this proceeding is the legal interpretation of the Exclusion, and that consideration of issues other than the interpretation of the relevant text in the UCA would be an error in law and jurisdiction. Specifically, PREI states that "the issue is not whether PREI should be a public utility based on a policy analysis, but rather whether the Exclusion applies to PREI's sale of electricity to PRELP based on a legal analysis."²² PREI submits that the sale of electricity from PREI to PRELP is the specific sale that is relevant to this proceeding, as PREI is the only entity which owns and operates facilities in BC and therefore would be captured within the definition of a public utility under the UCA.²³

PREI states that PREI, PRELP and ETM are subsidiaries of the same parent company – Brookfield Renewable Partners L.P. – and that neither PREI, PRELP nor ETM sell to the public or an end-use customer in BC. PREI refers to the sales arrangement between PREI and PRELP as an "intra-organization sale" and argues that while PREI and PRELP are separate legal entities for the purpose of the sale, they are part of the same overall organization for the purpose of the Exclusion.²⁴

²¹ Exhibit A2-2, p. 3.

²² PREI Final Argument, p. 7.

²³ Ibid., p. 2.

²⁴ Ibid., pp. 2–3.

PREI submits that the intra-organization sale between PREI and PRELP falls within the Exclusion because the dual use of the word “person” in the Exclusion (i.e., a person not otherwise a public utility who provides the service or commodity only to the person [...]) must reasonably be read as referring to circumstances where the seller and buyer are affiliated entities within the same corporate organization. In PREI’s view, because the definition of public utility requires compensation, no other interpretation gives purpose to the words of the Exclusion.²⁵

PREI further submits that the fact that neither PREI, PRELP nor ETM sell to the public or an end-use customer in BC is relevant to “the qualifying words in the Exclusion about the ultimate use of the electricity.”²⁶ PREI argues that if it directly exported electricity then it would fall outside the BCUC’s jurisdiction under the UCA.²⁷

Further, PREI states that its sale to PRELP is a transaction between sophisticated, commercial parties which do not require the protection of the UCA, and that no public interest within the UCA’s mandate is affected by the sale.²⁸ PREI states that the BCUC has established principles related to its mandate that emphasize these points and references the BCUC Report to the *Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives* (AES Decision):

- (i) Only regulate when required.
- (ii) Regulation should not impede competitive markets.

[...]

Regulation exists to protect consumers against the abuse of monopoly power but, in the Commission Panel's view, the superior protection for consumers is the competitive marketplace This is consistent with the first principle outlined in this Section, to only regulate where required. Competitive forces are generally accepted as providing societal benefits and consumer protection more efficiently and effectively than economic regulation.

[...]

Regulation is costly, time-consuming, and limited by informational asymmetries. It is only in natural monopoly situations where consumer protection is needed that these limitations are outweighed by the benefits of regulation.

Based on the above, the Commission Panel finds as a fundamental principle that regulation is only appropriate where required and is driven by the inability of competitive forces to operate with greater efficiency and effectiveness than a sole service provider.²⁹

Finally, PREI submits that application of the Exclusion does not affect the regulation of PREI by other responsible government agencies, and that PREI would remain subject to “a comprehensive suite of regulatory regimes that govern the use and protection of the water resources, the safety and integrity of the hydropower facilities, public safety, environmental protection and workplace safety.”³⁰

²⁵ PREI Reply Argument, p. 2.

²⁶ PREI Final Argument, p. 6.

²⁷ Ibid., pp. 6–7.

²⁸ Ibid., p. 6.

²⁹ Ibid., p. 7.

³⁰ Ibid., pp. 7–8.

Position of ED4BC

ED4BC takes the opposing view to PREI and argues that PREI is “clearly a ‘public utility’ as defined in section 1 of the UCA.”³¹

ED4BC submits that the metaphor of a corporate family tree is apposite in this circumstance, stating:

in many respects, the law (including the *Utilities Commission Act*) treats corporations on a similar footing to living, breathing individuals. But to look at the other side of that equation, the intimate familial relationship between siblings, or between a parent and child, does not affect the identity of each child as a distinct person. The corporate analogue to the parent and child and other intimate familial relationships is that between affiliated companies.

PREI and PRELP constitute two “persons”. PREI is a distinct corporation from its customer. Therefore, PREI is a “public utility”. QED.³²

ED4BC argues that PREI’s core argument is not only wrong in law, but if adopted could result in serious unintended consequences, explaining:

The corporate family tree that includes PREI and PRELP, as described in the record of this proceeding, describes a series of closely-related individual corporate “persons”, not a single, multi-headed corporate Hydra, for regulatory purposes. PREI’s argument would call into question the way British Columbia’s largest privately-owned utilities are governed and regulated.

[...]

If PREI’s reasoning is correct, then, because they are all affiliated, FortisBC Inc., FortisBC Energy Inc. and FortisBC Alternative Energy Services Inc. must all constitute one “person” and therefore constitute a single “public utility”. Transactions between the electric, gas and alternative energy services operations would all be intra-utility. Transfer pricing rules and codes of conduct would lose much of their rationale. [The Retail Markets Downstream of the Utility Meter] would need to be rewritten. These and other consequences would spill far beyond the edges of this proceeding.³³

ED4BC addresses PREI’s reference of the AES Decision and argues that it “points in a totally different direction than the one PREI attempts to extract from it” as, in the AES Inquiry, the BCUC considered the application of its regulatory jurisdiction over *public utilities* that lack monopoly power and identified the available remedy of exemption in these circumstances.³⁴ ED4BC concludes that the BCUC should not reconsider the AES Decision and that “[a]ffiliated corporations are distinct corporate entities and distinct ‘persons’ for the purposes of the definition of ‘public utility’”³⁵

ED4BC contends that PREI’s argument relies on a “blurring of corporate boundaries that business corporations and regulators alike rely heavily upon” and that PREI’s arguments belong in a “renewed

³¹ ED4BC Final Argument, p. 1.

³² *Ibid.*, p. 6.

³³ *Ibid.*, p. 7.

³⁴ *Ibid.*, p. 7.

³⁵ *Ibid.*, p. 8.

pitch for exemption” not a pursuit for exclusion from BCUC oversight through the definition of public utility under the UCA.³⁶

PREI's Reply

PREI submits that ED4BC's argument fails to address how the Exclusion might apply to a sale from a person to the person for compensation.³⁷ In PREI's view, for this portion of the Exclusion to have any application it must relate to an intra-organization sale of electricity.³⁸

Further, PREI submits that it refers to the AES Decision to emphasize the BCUC's fundamental principles underpinning its mandate and that the BCUC has cited these principles many times as to how it interprets the intent of the UCA.³⁹ PREI reiterates that neither the seller nor the buyer requires the protection offered by public utility regulation under the UCA.⁴⁰

In PREI's view, ED4BC has misconstrued PREI's argument about the affiliate relationship between PREI and PRELP. PREI has explained that they are separate legal entities and must be separate for there to be a sale, and ED4BC's "argument about Fortis and its affiliates misses this point."⁴¹

PREI agrees with ED4BC that the "the metaphor of a corporate family tree is apposite" and states that "[t]he PREI sale to PRELP is within the same corporate family, even though they are separate corporate entities. That's the point, and why the Exclusion applies to the sale."⁴²

Panel Determination

For the reasons discussed below, the Panel finds that PREI meets the statutory definition of a public utility set out in section 1 of the UCA and does not fall within the Exclusion.

The definition of a public utility in section 1 of the UCA provides, in part, that "public utility" means a person who owns or operates in BC, equipment or facilities for 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. The record in this proceeding demonstrates that PREI owns and operates the Power Facilities, which are located in BC. The electrical output from the Power Facilities is provided to PRELP (a corporation) for compensation. As such, PREI meets the definition of a public utility under the UCA.

While the term "person" is not defined in the UCA, it is defined in other relevant legislation, specifically section 29 of the *Interpretation Act*, which states:

"person" includes a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law.

³⁶ ED4BC Final Argument, pp. 6, 10.

³⁷ PREI Reply Argument, p. 2, 4.

³⁸ *Ibid.*, p. 2.

³⁹ *Ibid.*, pp. 2–3.

⁴⁰ *Ibid.*, p. 3.

⁴¹ *Ibid.*, p. 3.

⁴² *Ibid.*, p. 3.

There is no dispute in this proceeding that PREI and PRELP are separate corporate entities. The Panel considers that by virtue of their independent incorporation, each is a standalone “person” under the UCA. Absent such legal distinction, the real or perceived benefits associated with establishing affiliate/subsidiary relationships would be lost.

The Panel is not persuaded that the use of the word person twice in the Exclusion requires, or in any way empowers the BCUC to broaden the definition of person to include corporate affiliates. Rather, the language of the Exclusion simply makes clear that a person is not a public utility if it is solely providing the service or commodity to itself, without the burden of having to demonstrate that no compensation (which has broad meaning under the UCA) has occurred.

Finally, the Panel notes that the Exclusion also requires that the service or commodity “is not resold to or used by others”. In PREI’s case, following the sale of electricity from PREI and PRELP, PRELP sells the power to ETM, who in turn exports the power to customers in the United States. As such, even if PREI and PRELP were to be considered a single “person” under the UCA, the service or commodity in question is ultimately used by others and PREI would therefore fail to meet the conditions of the Exclusion.