



ORDER NUMBER
G-91-24

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

and

Powell River Energy Inc.
Status as a Public Utility
Reconsideration of BCUC Order G-332-23

BEFORE:

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

on March 27, 2024

ORDER

WHEREAS:

- A. On December 29, 2023, Powell River Energy Inc. (PREI), filed an application for reconsideration of Order G-332-23 (Reconsideration Application) with the British Columbia Utilities Commission (BCUC) pursuant to section 99 of the *Utilities Commission Act* (UCA) and in accordance with Part V of the BCUC's Rules of Practice and Procedure;
- B. By Order G-332-23 dated December 6, 2023, the BCUC determined that PREI is a public utility as defined in section 1 of the UCA;
- C. In the Reconsideration Application, PREI requests the BCUC rescind Order G-332-23 and submits that the BCUC erred in law to reach its decision supporting the order;
- D. By Order G-22-24 dated January 24, 2024, the BCUC established a public hearing process for the review of the Reconsideration Application and directed PREI to, among other things, provide public notice of the proceeding to all registered interveners in the underlying PREI Status as a Public Utility Proceeding;
- E. By February 19, 2024, the BCUC received letters of comment from Energy Democracy for BC and the Council of Canadians;
- F. On March 5, 2024, PREI filed its Reply Argument; and
- G. The BCUC has reviewed the evidence and submissions filed in the proceeding and makes the following determination.

NOW THEREFORE for the reasons outlined in the decision accompanying this order and pursuant to section 99 of the UCA, the BCUC orders that the Reconsideration Application is dismissed.

DATED at the City of Vancouver, in the Province of British Columbia, this 27th day of March 2024.

BY ORDER

Original signed by:

C. M. Brewer
Commissioner

DECISION

1.0 Introduction

On December 29, 2023, Powell River Energy Inc. (PREI), filed an application for reconsideration of Order G-332-23 (Reconsideration Application) with the British Columbia Utilities Commission (BCUC) pursuant to section 99 of the *Utilities Commission Act* (UCA) and in accordance with Part V of the BCUC's Rules of Practice and Procedure. PREI requests that the BCUC rescind Order G-332-23 and find that PREI is not a public utility.¹

By Order G-22-24 dated January 24, 2024, the BCUC established a public hearing to review the Reconsideration Application. The regulatory timetable included, among other things, public notice of the proceeding to all registered interveners in the underlying PREI Status as a Public Utility Proceeding, and an opportunity for comment. Letters of comment were received from Energy Democracy for BC (ED4BC) and the Council of Canadians (COC) by February 19, 2024. PREI filed its reply to these letters of comment on March 5, 2024.

1.1 Background

PREI is a wholly-owned subsidiary of Brookfield Renewable Partners L.P. (Brookfield) that owns and operates two hydroelectric generating stations with an aggregate nameplate capacity of approximately 85 megawatts, as well as transmission and distribution facilities (together, the Power Facilities), located on Powell Lake and Lois Lake in Powell River, British Columbia (BC).

Output from the Power Facilities is exported to the United States through a chain of affiliated companies. Back-to-back sales transactions occur at the PREI-British Columbia Hydro and Power Authority (BC Hydro) interconnection point, where the title to the electricity generated at the Power Facilities is first transferred from PREI to Powell River Energy Limited Partnership (PRELP, a wholly-owned subsidiary of PREI), and then to Evolgen Trading and Marketing LP (ETM, a wholly-owned subsidiary of Brookfield). ETM then exports the power to customers in the United States using the BC Hydro transmission system under the Open Access Transmission Tariff.²

Section 1 of the UCA provides, in part, that “public utility” means:

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

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

but does not include...

¹ Exhibit B-1, pp. 1, 6.

² Order and Decision G-332-23, p. 2.

(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.

On December 6, 2023, the BCUC issued Order G-332-23 and accompanying reasons for decision (Decision) wherein the BCUC found that PREI's operations fall within the definition of a public utility, as set out in section 1 of the UCA. In making this determination, the panel held that:³

1. PREI owns and operates the Power Facilities, which are located in BC;
2. The electrical output from the Power Facilities is provided to PRELP (a separate corporation) for compensation; and
3. PREI is not captured within the part (d) exclusion (Exclusion) from the definition of a public utility.

Regarding the applicability of the Exclusion, the panel stated that by virtue of their independent incorporation, PREI and PRELP were both standalone "persons" under the UCA. The panel was not persuaded that use of the word person twice in the Exclusion required or empowered the BCUC to broaden the definition of person to include corporate affiliates. Rather, the panel concluded that "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."⁴

The panel also noted that the Exclusion requires that the service or commodity not be resold to or used by others and that, in PREI's case, following the sale of electricity from PREI and PRELP, the electricity is sold to ETM, who in turn exports it for use by end use customers.⁵

2.0 Reconsideration Application

PREI requests that the BCUC review and rescind Order G-332-23 on the grounds that the BCUC erred in law by:⁶

1. Improperly narrowing the definition of person;
2. Assuming an interpretation of the words of the Exclusion that has no legal support; and
3. Relying on an interpretation of the Exclusion that renders the relevant part to be without legislative purpose.

PREI submits that the Decision errs in stating that the use of the word person twice in the Exclusion does not empower the BCUC to broaden the definition to include corporate affiliates, and that the panel's finding misconstrues the legal issue on the definition of person.⁷ In PREI's view, the use of the word person in the Exclusion must include a corporation (which may also include affiliated corporate entities) to be in accord with the guidance in the *Interpretation Act* and the context in which the term is used in the UCA.⁸

³ Order and Decision G-332-23, pp. 8–9.

⁴ *Ibid*, p. 9.

⁵ *Ibid*, p. 9.

⁶ Exhibit B-1, pp. 2–6.

⁷ *Ibid*, p. 2.

⁸ *Ibid*.

PREI states that PREI, PRELP, and ETM are all subsidiaries of the same parent company, Brookfield, and that the electricity sales within BC are solely within the same corporate organization, i.e., within the same person. PREI argues that since the sale between the affiliates is to facilitate the export of power to the United States, there is no resale to others for end-use in BC within the jurisdiction and mandate of the UCA.⁹

PREI continues that the Decision fails to provide an explanation of how the panel concluded the relevant words of the Exclusion are simply for clarity. In PREI's view, the fact that the UCA has a broad definition of compensation does not support that panel's interpretation as, in all cases, the entity providing the service or commodity and the entity paying the compensation must be separate. PREI submits that the BCUC should have presumed the legislature knew the law and intended to give the Exclusion a purpose, rather than assuming it added superfluous words to the definition of a public utility to clarify a well understood legal principle.¹⁰

Additionally, PREI submits that the panel's interpretation was inharmonious with section 8 of the *Interpretation Act* and the modern principle of statutory interpretation, which require the BCUC to interpret the words of the UCA in a manner that gives them substantive purpose. PREI states that for the panel's interpretation to be correct, the legislature would have needed to include similar clarifying words in each of the other exclusions set out in parts (c), (e), (f), and (g) of the public utility definition. PREI considers that a reading of the Exclusion where the sale from PREI (a person) to its affiliate PRELP (the person) reconciles the inherent ambiguity in the words of the Exclusion and gives the relevant words a purpose that is consistent with the legislative intent of the UCA.¹¹

Letters of Comment

ED4BC submits that PREI's Reconsideration Application adds nothing of substance to PREI's previous submissions and is without merit.

In ED4BC's view, the Decision makes the basis for the determination that PREI is a public utility clear. ED4BC states that:¹²

...it is perverse that PREI criticizes the Decision for failure to cite legal authority to negate PREI's novel assertions about the fundamental concepts of corporate "personhood" (or the way PREI relies on those assertions to modify, in turn, the meaning of "compensation").

The Commission's well-grounded observations about the distinct status of related corporations, and specifically as it applies within the energy utility sector, reflect commonplace – one might say trite – legal principles. (emphasis omitted)

ED4BC notes that PREI cited no legal authority in support of its position that the BCUC should treat related corporations as though they were a single person for the purposes of the UCA. Rather, PREI simply asserts that the BCUC is empowered to "spin its own modifications of legal principles that are thoroughly laid down by statute and judicial authority" and argues that "unwillingness to engage in flights of that nature is a reversible error in law".¹³

⁹ Exhibit B-1, pp. 2–3.

¹⁰ Ibid, p. 4.

¹¹ Ibid, pp. 4–6.

¹² Exhibit D-1, pp. 1–2.

¹³ Ibid, p. 2.

ED4BC considers that there is “no gap, ambiguity or absurdity in the UCA’s mechanisms that determine which entities will be treated as distinct utilities subject to BCUC oversight”. ED4BC submits that legislature has provided a specific avenue for PREI to seek redress under section 22 of the UCA, which allows the Minister to grant public utilities an exemption from BCUC regulation.¹⁴

The COC similarly asks the BCUC to uphold its ruling that PREI is a public utility.¹⁵

The COC expresses concern with the risk of “regulatory arbitrage” should the BCUC accept PREI’s interpretation of the Exclusion. Further, the COC submits that the power that PREI produces is “indisputably ‘used by others,’ disqualifying [PREI] from the exclusions in the definition of a public utility.”¹⁶

Finally, the COC notes that safe operation of the Power Facilities is critical to those in the community and highlights the BCUC’s role in the regulation of public utility safety under the UCA.¹⁷

PREI Reply Argument

PREI submits that neither ED4BC nor the COC have responded to the basic point of its argument, which is that PREI has offered the only interpretation of the relevant part of the Exclusion that gives the words a purpose.¹⁸

PREI argues that the words “a person not otherwise a public utility who provides the service or commodity only to the person” in part (d) of the public utility definition describe an exclusion that is distinct from a person selling to its employees or tenants. PREI continues that “[f]or a person to provide the service or commodity to the person for compensation, two separate legal entities must be involved. The unifying person in the PREI case is the corporate entity that owns the affiliates. The sale is within the same corporate entity and is a form of self-supply.”¹⁹

Further, PREI states that, contrary to ED4BC’s submission, it is not arguing that the BCUC should treat related corporations as though they were a single person for the purposes of the UCA. Rather, “PREI and PRELP are separate legal entities, but they are part of the same overall organization – i.e., wholly owned by the same *person* for the purpose of the Exclusion.”²⁰ (emphasis in original)

PREI reiterates its view that a determination of the applicability of the Exclusion is purely a question of law, and not a matter of whether PREI should be a public utility based on policy considerations.²¹

Finally, PREI submits that at no point does an end-use customer in BC receive PREI electricity, and that the export of power falls within federal jurisdiction. As such, PREI considers the sale of electricity to its affiliate to be within the ambit of the Exclusion.²²

¹⁴ Exhibit D-1, p. 2.

¹⁵ Exhibit D-2, p. 2.

¹⁶ Ibid, p. 2.

¹⁷ Ibid, pp. 2–3.

¹⁸ PREI Reply Argument, p. 1.

¹⁹ Ibid, p. 1.

²⁰ Ibid, p. 2.

²¹ Ibid, pp. 2–3.

²² Ibid, p. 3.

Panel Determination

For the reasons discussed below and pursuant to section 99 of the UCA, the Panel dismisses the Reconsideration Application and confirms the finding in the Decision 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 Panel notes that PREI's Reconsideration Application hinges on PREI's assumption that it must be possible to divide the Exclusion into, functionally, two separate exclusions: one which applies to "a person not otherwise a public utility who provides the service or commodity only to the person", and another which applies to "a person not otherwise a public utility who provides the service or commodity only to... the person's employees or tenants".²³ PREI then argues that the first of these purported exclusions (regarding the provision of the service or commodity "to the person") only has a purpose if it is interpreted to apply when two affiliated entities are involved.²⁴

The Panel does not agree that the Exclusion should be divided into the two sub-parts proposed by PREI. The Exclusion, on its face, is a single exclusion which applies when a person not otherwise a public utility provides a 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. In the Panel's view, the phrase "only to the person or the person's employees or tenants" should be interpreted to include circumstances where a person provides a service or commodity to both itself and its employees or tenants. Put another way, the word "or" in the phrase "only to the person or the person's employees or tenants" should be read to include the circumstance where a person provides a service or commodity to both "the person" and "the person's employees or tenants". The word "or" is frequently used in this manner in the UCA. For instance, the definition of "public utility" also refers to a "person... who owns or operates... equipment or facilities". This clearly includes a person who both owns and operates equipment for the provision of electricity.

In the Panel's view, the words "to the person" were included in the Exclusion to make it clear that the Exclusion still applies to a person who is providing a service or commodity to the person's employees or tenants, for compensation, and not to other third parties, even if that person uses some of the service or commodity for its own purposes.

There are various instances where such a circumstance may occur. For example, the operator of a ski resort may own accommodations that it leases to tenants using the resort facilities, and may have a generator on site to produce electricity. The operator may use some of the electricity it produces for its own operations at the resort, and sell some of the electricity to its tenants (and no other third parties). The Panel expects that the Exclusion would apply in these circumstances. Similarly, the owner of a pulp mill may have accommodations on site for its employees, and run a generator to provide electricity for its operations. The owner may use some of the electricity it produces to run its pulp mill, and sell some of the electricity to its employees (and no other third parties). The Panel expects that the Exclusion would likewise apply in these circumstances.

Consequently, the Panel is not persuaded that the Exclusion must be interpreted to include circumstances where an entity provides a service or commodity to an affiliated entity, in order to provide all of the words in the Exclusion a purpose.

PREI owns and operates the Power Facilities, which are located in BC, and provides the electrical output of the Power Facilities to PRELP (a separate legal person) for compensation. Further, the applicant, PREI, does not fall within the Exclusion. Therefore, PREI meets the definition of public utility set out in section 1 of the UCA.

²³ For instance, see the PREI Reply Argument, p. 1.

²⁴ PREI Reply Argument, p. 2.

DATED at the City of Vancouver, in the Province of British Columbia, this 27th day of March 2024.

Original signed by:

C. M. Brewer
Panel Chair

Original signed by:

M. Jaccard
Commissioner

Original signed by:

T. A. Loski
Commissioner