



ORDER NUMBER
G-126-21

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

and

Ka:'yu:'k't'h' / Che:k'tles7et'h' First Nations
Application for Reconsideration and Variance of Order G-65-21
In the matter of Kyuquot Power Ltd. Investigation into the Safety and Reliability of the KPL System

BEFORE:

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

on April 28, 2021

ORDER

WHEREAS:

- A. On March 12, 2021, the Ka:'yu:'k't'h' / Che:k'tles7et'h' First Nations (KCFN) submitted an application with the British Columbia Utilities Commission (BCUC) for reconsideration and variance of Directives 3 and 4 of Order G-65-21 (Reconsideration Application);
- B. On May 15, 2020, by Order G-115-20, the BCUC established a hearing to review the safety and reliability of the Kyuquot Power Ltd. (KPL) system, following a complaint by a representative of KCFN;
- C. 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 governing gang-operated load break switch S3 (GOLB S3) be referred to mediation, pursuant to Section 11 of the Right of Way Agreement. Directives 3 and 4 of Order G-65-21 state:
 - 3. Until the dispute is resolved, the BCUC requests KCFN, as soon as reasonably possible, but no later than March 12, 2021, to provide KPL a copy of the key for GOLB S3.
 - 4. Until the dispute is resolved, KCFN and KPL are to notify each other prior to any operation of GOLB S3, although permission of the other party is not required.
- D. In the Reconsideration Application, KCFN requests that Directives 3 and 4 of Order G-65-21 be varied to include a requirement that KPL obtain the permission of KCFN prior to accessing the GOLB S3 and that only qualified personnel be permitted to access GOLB S3;
- E. Part V of the BCUC's Rules of Practice and Procedure, which are attached to Order G-15-19, sets out the Rules for the reconsideration process;

- F. On March 17, 2021, by Order G-79-21, the BCUC established a regulatory timetable seeking submissions from parties on the Reconsideration Application;
- G. On March 22, 2021, KPL submitted their response on the Reconsideration Application and on April 6, 2021, KCFN submitted their reply submission;
- H. On April 12, 2021, KPL requested the BCUC provide KPL with the right to sur-reply to address the matters raised by KCFN;
- I. After reviewing the submissions, the BCUC established an Oral Hearing on April 21, 2021 to receive submissions from both parties; and
- J. The BCUC, after considering the evidence and submissions made finds that the following determination is warranted.

NOW THEREFORE pursuant to section 99 of *the Utilities Commission Act* and the reasons attached as Appendix A to this order, the BCUC rescinds Order G-65-21, dated March 8, 2021.

DATED at the City of Vancouver, in the Province of British Columbia, this 28th day of April 2021.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

Attachment

Ka:'yu:'k't'h' / Che:k'tles7et'h' First Nations
Application for Reconsideration and Variance of Order G-65-21
In the matter of Kyuquot Power Ltd. Investigation into the Safety and Reliability of the KPL System

REASONS FOR DECISION

1. INTRODUCTION

On March 12, 2021, the Ka:'yu:'k't'h' / Che:k'tles7et'h' First Nations (KCFN), submitted an application with the British Columbia Utilities Commission (BCUC) for reconsideration and variance of Directives 3 and 4 of Order G-65-21 (Reconsideration Application). The Reconsideration Application requests that Directives 3 and 4 of Order G-65-21 be amended to require Kyuquot Power Ltd. (KPL) obtain the permission of KCFN prior to accessing the gang-operated load break Switch S3 (GOLB S3) and that only qualified personnel be permitted to access the GOLB S3.

1.1 Background

The Kyuquot Power Ltd. (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. By Order G-115-20, the British Columbia Utilities Commission (BCUC) established a regulatory timetable to review the safety and reliability of the KPL System.

On February 8, 2021, KCFN filed a submission with the BCUC stating that they have concerns with KPL completing certain directives of BCUC Order G-29-21, which directed KPL to complete the remaining priority 1 item as described by KPL's Maintenance Plan. KCFN identified that the remaining priority 1 item is to add locks to GOLB S3 restricting access to KPL personnel only. 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.

On February 12, 2021, KPL filed a submission with the BCUC, which stated, among other things, that if GOLB S3 is opened, KPL cannot supply its downstream customers. KPL further stated that operation of GOLB S3 should be limited to joint operation between KPL and KCFN by way of a two-key interlock device requiring both keys to operate. KPL stated its support for development of a joint operating order.

On February 16, 2021, KCFN filed a submission with the BCUC, reiterated that joint operating order should be drafted with respect to GOLB S3 and stated that a two-key system for GOLB S3, as proposed by KPL, will not be acceptable to KCFN. On February 22, 2021, KPL filed a submission with the BCUC stating that KPL is being denied access to the lock mechanism on GOLB S3 by KCFN. KPL stated that it objects to an arrangement that will allow KCFN to operate the KPL system without the attendance of a KPL representative.

After reviewing the submissions, the Panel found that a dispute had arisen out of or in connection with this GOLB S3. The BCUC issued Order G-65-21 dated March 8, 2021, which directed KPL to request the dispute regarding the locking arrangement and terms of a joint operating order governing GOLB S3 be referred to mediation, pursuant to Section 11 of Right of Way (ROW) Agreement between KCFN and KPL. Directive 3 states

that until the dispute is resolved, the BCUC requests KCFN, as soon as reasonably possible, but no later than March 12, 2021, to provide KPL a copy of the key for GOLB S3. Directive 4 states that until the dispute is resolved, KCFN and KPL are to notify each other prior to any operation of the GOLB S3, although permission of the other party is not required.

2. LEGISLATIVE AND REGULATORY FRAMEWORK

Pursuant to section 99 of the *Utilities Commission Act* (UCA), the BCUC 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 5 of the BCUC Rules of Practice and Procedure establishes the process for requests for reconsideration of a decision, an order, a rule or regulation of the BCUC. Pursuant to Rule 26.04 of the Rules of Practice and Procedure, an application for reconsideration must be filed in accordance with the rules pertaining to document filing and must:

- a) Be in writing and, unless prior permission of the BCUC is obtained, not longer than 30 pages (excluding appendices and/or attachments);
- b) Identify the decision affected;
- c) State the applicant's name and the representative's name (if applicable);
- d) Describe the impact of the decision and how it is material;
- e) Set out the grounds for reconsideration in accordance with Rule 26.05; and
- f) Set out the remedy the applicant is seeking.

3. RECONSIDERATION APPLICATION

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 the Directives 3 and 4 of Order G-65-21 be amended to require that KPL obtain the permission of KCFN prior to accessing the GOLB S3 and that only qualified personnel be permitted to access the GOLB S3.

By Order G-79-21, the BCUC established a regulatory timetable seeking submissions from parties on the Reconsideration Application. On March 17, 2021, KPL submitted their response and on April 6, 2021, KCFN submitted their reply submission.

By letter dated April 12, 2021, KPL requested that the BCUC provide KPL with the right to sur-reply to address the matters raised by KCFN. After consideration of the submissions and KPL's request for a sur-reply, the BCUC determined that the establishment of an Oral Hearing to receive submissions from both parties was warranted.

4. ORAL HEARING

On Wednesday, 21 April 2020¹, the BCUC held an Oral Hearing to receive KPL's sur-reply and KCFN's reply to KPL's sur-reply. The Panel also invited parties to provide 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 the GOLB S3 is located.

5. PANEL DETERMINATION

KCFN submit 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 submit that neither of these areas included “Excluded Crown Corridor.” Excluded Crown Corridor is land owned by the Province of British Columbia. KCFN further submit 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 the GOLB S3 is located within the “Excluded Crown Corridor.”¹

KPL submit that although the term “Excluded Crown Corridor” appears in the legend of Figures in the ROW Agreement between KCFN and KPL, the term is not defined nor is the term used in the ROW Agreement.² KPL also submit that it does not know what the Excluded Crown Corridor consists of, what its basis in law is and why it has any impact on KPL’s right of way as set out in the rest of the remainder of the ROW Agreement.³

KCFN submit that the definition of a Crown Corridor is included in Chapter 7 of the Maa-nulth First Nations Final Agreement⁴. The Maa-nulth First Nations Final Agreement⁵ (Final Agreement) is a comprehensive land claim agreement within the meaning of Section 35 of the *Constitution Act of 1982* between the Maa-nulth regional government of British Columbia and Canada. The Final Agreement was signed in 2007, became effective in 2011, and has been given the full force of law through both provincial and federal legislation.

KCFN submit that in accordance with Chapter 7.1.1 of the Final agreement, Crown Corridors are excluded from Treaty Lands, the title did not pass from the Crown to KCFN, and Crown Corridors continue to be owned by the Province of BC.⁶ KCFN also submit that it has a separate Right of Way agreement with the Province to access this Crown Corridor.⁷

KCFN submit that given the 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.⁸

After considering the evidence and submissions made by both parties, **the Panel finds that the 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 therefore not subject to the ROW Agreement between KCFN and KPL.**

Because the directives in Order G-65-21 are all premised on the assumption that switch GOLB-53 is located on land subject to the ROW agreement, the Panel is therefore persuaded to rescind Order G-65-21 in its entirety. The Panel makes no other determinations at this time around other issues over jurisdiction on the distribution line that runs through the Crown Corridor.

¹ Exhibit C2-9, pp. 9–10.

² Transcript Volume 1, p. 14.

³ Transcript Volume 1, p. 15.

⁴ Transcript Volume 1, p. 30.

⁵ <https://www.bclaws.gov.bc.ca/civix/content/complete/statreg/1325524918/07043/?xsl=/templates/browse.xsl>

⁶ Transcript Volume 1, p. 31.

⁷ Transcript Volume 1, p. 52.

⁸ Exhibit C2-9, p. 10.

However, with regard to Directives 3 and 4 of Order G-65-21, we note that KPL maintain that there is no reason for either party to require emergency access to the GOLB S3.⁹ Further, KCFN installed the GOLB S3 in 2020 to respond to safety concerns and KCFN continue to have access to it.

⁹ Transcript Volume 1, p. 25.