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## VIA E-MAIL

**Patrick Wruck**  
Commission Secretary  
British Columbia Utilities Commission  
Sixth Floor, 900 Howe Street,  
Vancouver, BC  
V6Z 2N3

Dear Mr. Wruck:

**Re: CB Powerline Ltd. Application for an Exemption from Part 3  
of the *Utilities Commission Act***

We are counsel to FortisBC Inc. Further to the Regulatory Timetable established by the BCUC in this proceeding, we enclose FortisBC's Final Submissions.

Yours truly,

**FASKEN MARTINEAU DuMOULIN LLP**



David Both

DB/sh

Encl.

**BRITISH COLUMBIA UTILITIES COMMISSION**  
**IN THE MATTER OF THE *UTILITIES COMMISSION ACT***  
**R.S.B.C. 1996, CHAPTER 473**

**CB Powerline Ltd. Application for an Exemption from Part 3 of the *Utilities Commission Act***

**Final Argument of FortisBC Inc.**

**February 6, 2020**

**TABLE OF CONTENTS**

**1.0 INTRODUCTION.....1**

**2.0 CBP’S APPLICATION .....1**

**3.0 CBP HAS FAILED TO MEET ITS BURDEN UNDER SECTION 88(3) OF  
THE UCA .....3**

**4.0 A BALANCE CAN BE STRUCK BETWEEN CBP’S COST CONCERNS  
AND THE NEED TO PROTECT THE PUBLIC INTEREST .....8**

**5.0 CONCLUSION .....9**

## **1.0 Introduction**

1. FortisBC Inc. (**FBC**) provides these submissions in respect of the CB Powerline Ltd. (**CBP**) application for an exemption from Part 3 of the *Utilities Commission Act* (the **UCA**). The exemption is sought to allow CBP to construct (ie. no CPCN approval) a combination overhead, submarine and underground power line from a British Columbia Hydro and Power Authority (**BCH**) point of connection to the community of Cosens Bay, Regional District of North Okanagan, British Columbia, and exclusively sell the electricity (ie. no financial/rate oversight) to the Cosens Bay community members (the **Project**).
2. FBC's interest in this proceeding is not to stand in the way of the Community of Cosens Bay receiving electric service, but rather a general interest in seeing that the BCUC's discretion to grant exemptions from regulation to parties that otherwise fit the definition of a public utility is exercised consistently, only when warranted and that in all cases the public interest is protected. Having reviewed CBP's application, responses to information requests and written argument, FBC is of the view that CBP has not demonstrated a justification for the exemption applied for.
3. In this case, FBC submits that CBP should be required to exhaust all service options with BCH. If after that, BCH is truly unwilling or unable to provide service to Cosens Bay, FortisBC would support some form of "light handed" regulation or partial exemption that included, at a minimum, the requirement to obtain a CPCN for the Project, basic rate/financial oversight and a means for customers to bring complaints to the BCUC for resolution.

## **2.0 CBP's Application**

4. CBP does not dispute that it falls within the UCA's definition of a "public utility",<sup>1</sup> being a "person ... that owns or operates equipment or facilities ... for the production, generation, storage, transmission, sale, delivery or provision of [an] agent for the

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<sup>1</sup> Exhibit B-1, *CB POWERLINE LTD. (CBP) - Application for Exemption from Part 3 of the Utilities Commission Act* at p. 1.

production of light, heat, cold or power to or for the public or a corporation for compensation.”<sup>2</sup> Indeed, unlike many exemption applications that come before the BCUC, CBP is going to look very much like a “traditional” public utility in that it intends to:

- (a) Design, construct and operate the physical utility plant for the provision of electric service to the community of Cosens Bay, including overhead, submarine and underground 25 kV power lines, transformers, secondary service cables, fibre optic cables and revenue meters<sup>3</sup>; and
  - (b) Manage the provision of electric service to its customers, including all billing operations.
5. This is not a case where the applicant tangentially falls within the public utility definition. CBP will look no different than any other provider of electricity service in the province (other than its relatively small scale).
6. Against this backdrop, the BCUC must determine whether CBP has demonstrated that it should be exempt from regulation under section 88(3) of the UCA. The BCUC has affirmed that an exemption may be appropriate when the exemption serves the objects and purposes of the UCA:
- ... a section 88(3) exemption order should be issued, with the advance approval of the LGIC, when such exemption serves the objects and purposes of the [UCA] and it is in the public interest to do so.<sup>4</sup>
7. FBC’s concern with exempting the Project from regulation arises for three primary reasons:
- (a) CBP’s primary justification for its requested exemption is that it does not want to incur “increased administrative, reporting and compliance costs” that it believes will come with regulatory oversight of the BCUC, and which are now only necessary because it considers that BCH has declined to provide service to Cosens

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<sup>2</sup> *Utilities Commission Act*, RSBC 1996 c 473, s 1.

<sup>3</sup> Exhibit B-1, *CB POWERLINE LTD. (CBP)* - Application for Exemption from Part 3 of the *Utilities Commission Act*, s. 88(3) at pp. 4-5.

<sup>4</sup> BCUC Order G-175-16, *Spirit Bay Utilities Ltd.* - Application for an Exemption s. 88(3) of the *Utilities Commission Act* or Declaration s. 72; Reasons for Decision at p. 8.

Bay. However, BCH has not in fact refused to serve Cosens Bay and CBP has provided no evidence as to the scale of costs it would incur if it were regulated.<sup>5</sup>

- (b) CBP has largely confined its justification for an exemption to a discussion of monopoly risk, however this ignores that if an exemption is granted, no CPCN application would be filed and therefore the Commission would have no visibility over the project need, alternatives and justification, matters of public consultation environmental matters, and the setting of rates.
- (c) The Project is proposed to be ‘regulated’ by a self-governed not-for-profit corporation consisting of community member shareholders. The evidence in this proceeding provides an insufficient basis from which to determine whether CBP has adequate resources and expertise to operate its utility in a manner that provides its customers with service that is safe, adequate and fair at just and reasonable rates. If a problem were to arise, the proposed mechanism by which customers could bring complaints about service or rates is insufficient to provide meaningful protection.

- 8. For these reasons, FBC submits that there is inadequate information from which to assess the justification of an unconditional exemption from Part 3 of the UCA. In reaching this conclusion, FBC observes that the regulation of the Project and CBP is not an all or nothing proposition<sup>6</sup> and CBP has not supported its claim that an exemption is necessary, or serves the object and purpose of the UCA.

### **3.0 CBP has Failed to Meet its Burden Under Section 88(3) of the UCA**

*There is no evidence of how the regulation of the Project would be burdensome to CBP*

- 9. CBP seeks its exemption to avoid the costs that regulation would bring with it.<sup>7</sup> The BCUC and FBC sought further clarification as to what these costs would be, and how they would be unjustifiably burdensome. CBP responded:

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<sup>5</sup> Exhibit B-3, CBP Response to FBC Information Request No. 1.2.7.

<sup>6</sup> Order G-201-12, Inquiry into the Offering of Products and Services in Alternative Energy Solutions and other New Initiatives Report, at s. 2.2.

<sup>7</sup> Exhibit B-1, *CB POWERLINE LTD. (CBP)* - Application for Exemption from Part 3 of the *Utilities Commission Act*, s. 88(3) at s. 3.3.

At this stage of the Project (i.e., design/development), CBP has not estimated the cost of administrative, reporting, and compliance associated costs with on-going regulation by the BCUC. This is based upon the view that such regulation is unnecessary given that CBP is a Buyer owned, not for profit, corporation where the Seller and Buyer are identical.<sup>8</sup>

10. CBP continued in confirming that it views those costs as “unnecessary”, despite not having assessed what those costs might actually may be.
11. Although cost is the primary basis that CBP relies on to justify its request to be exempted from Part 3 of the UCA, it has declined to ascertain what they would be, or present those costs to its potential customers. In this respect, CBP appears to be seeking an exemption to avoid a consequence that it has not quantified and that it has not demonstrated is necessary to avoid. In determining whether to exempt an entity that looks like a public utility in every way, FBC submits the BCUC must conclude that the basis for the applicant’s requested relief warrants granting it. In this case, there is no way to determine whether the costs associated with the regulation of CBP would be significant or not. As there is no evidence of what the cost-burden of regulation might be for CBP, it follows that it is impossible to assess whether that burden outweighs the benefits of operational and rate oversight that regulation provides. This is particularly critical given that CBP does not have any established history of utility operation.
12. In addition, CBP maintains as a basis of its application that BCH has “declined to provide service”<sup>9</sup>, however BCH has directly contradicted that assertion. BCH’s evidence is that its discussions with CBP about serving Cosens Bay are ongoing:

BC Hydro continues to collaborate with CBP, as it has done since 2017, to explore potential options to provide service to the community of Cosens Bay. BC Hydro’s assistance includes discussions and preliminary investigations on the following topics:

...

As discussed in BC Hydro’s responses to BCUC IR 1.1.3 and 1.1.5, BC Hydro has been unable to undertake detailed design work until CBP meets the requirements of BC Hydro’s Electric Tariff.

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<sup>8</sup> Exhibit B-3, CBP Responses to FBC Information Request 2.7; See also, Exhibit B-2, CBP response to BCUC Information Requests 1.1.1 and 1.3.

<sup>9</sup> Exhibit B-2, CBP Response to BCUC Information Request 4.9.

13. FBC understands (and does not oppose) the longstanding desire to have electric service in Cosens Bay. However, that BCH may not be moving on the urgent timeframe that CBP desires is not a basis for an exemption from regulation, in FBC's submission.
14. Finally, CBP has declined to adequately address its refusal of a secondary metering alternative proposed by BCH. CBP has declined such a proposal on the basis that it would result in increased costs borne by its customers and would result in an unnecessary duplication of efforts.<sup>10</sup> Despite this assertion, CBP has not provided any evidence demonstrating the magnitude of the costs associated with BCH's secondary metering proposal.

***An exemption forecloses any public interest oversight of the public convenience and necessity of the Project***

15. A key component of Commission oversight of public utilities is the CPCN process. Absent an exemption, CBP could not construct or operate the Project without first obtaining a CPCN.<sup>11</sup> To obtain a CPCN, a public utility must justify the need for the project, and establish that its proposed solution to meet that need is appropriate and will be carried out in accordance with the public interest.<sup>12</sup> CBP's application is silent with respect to many of the components an applicant would be required to include in a CPCN application that would allow the Commission to assess whether the project itself is justified and in the public interest.
16. CBP has not provided adequate information to address various unresolved issues and questions as they relate to the design of the Project.<sup>13</sup> These gaps include:
  - (a) CBP has yet to finalize a location to take service from BCH;
  - (b) CBP does not yet have the necessary property rights on the west shore of Kalamalka Lake;
  - (c) CBP does not have its permit for connection from Technical Safety BC, as well as a permit to operate as a utility;<sup>14</sup>

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<sup>10</sup> Exhibit B-5, CBP Responses to BCUC Information Request No. 22.1.

<sup>11</sup> *Utilities Commission Act*, RSBC 1996 c 473, s 45(1).

<sup>12</sup> Order G-20-15, 2015 - Certificate of Public Convenience and Necessity Application Guidelines (February 20, 2015).

<sup>13</sup> Exhibit C1-3, BCH Response to BCUC Information Request No. 1.3.1.

- (d) the failure of CBP to design adequate protection at the point of delivery to address any hazardous backfeed risks introduced BCH's upstream system from CBP's proposed net metering program;<sup>15</sup> and
  - (e) there are unresolved issues regarding the likely presence of unexploded military ordinance in the Project area.
17. BCH has also observed that CBP's proposal remains insufficiently developed to assess whether it would meet its technical standards.<sup>16</sup>

In this case, BC Hydro is not certain that CBP would be able to design and construct the submarine cable to have the equivalent operating life or maintainability as a submarine cable designed and constructed by BC Hydro.

18. Surely the BCUC would not grant a CPCN to FBC or BCH if they were unable to demonstrate that a proposed project was designed and would be operated in accordance with their typical design standards.
19. Granting an exemption in this case would be equivalent to granting a CPCN, without having the opportunity to properly test whether the project has met the requirements every other public utility in the province would be required to meet. As the Project is public utility infrastructure to serve public needs, FBC submits that an exemption application that does not permit the BCUC to consider whether the construction and operation of the project itself is warranted, should not be approved.

***CBP's Dispute Resolution Process is an Inadequate Substitute for BCUC Oversight***

20. In the Spirit Bay proceeding, the BCUC adopted the description of some of the circumstances under which an exemption might be justified:<sup>17</sup>

In the AES Inquiry Report, the Commission concluded that regulation is required when "natural monopoly characteristics are present and there is a need to regulate to protect the public interest..." We agree with this public interest consideration and find it to be an appropriate public interest test.

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<sup>14</sup> Exhibit C1-3, BCH Response to BCUC Information Request No. 1.3.2.

<sup>15</sup> Exhibit C1-3, BCH Response to BCUC Information Request No. 1.3.3.

<sup>16</sup> Exhibit C1-3, BCH Response to BCUC Information Request No. 1.2.5

<sup>17</sup> BCUC Order G-175-16, Spirit Bay Utilities Ltd. Application for an Exemption at s. 88(3) of the *Utilities Commission Act* or Declaration Pursuant to s. 72; Reasons for Decision, pp. 8-9.

Therefore, if monopoly characteristics are not present, or are somehow mitigated, for example by an alternative regulatory body, an exemption from regulation under the UCA may be warranted. [Emphasis added]

21. CBP argues that the risk of monopolistic behaviour arising in respect of the Project is mitigated by its community structure,<sup>18</sup> arguing that the public interest will be protected by the following features of its organization:
  - (a) CBP is a community member founded and administered not-for-profit corporation;
  - (b) the directors and officers of CBP will be members of the Cosens Bay community;
  - (c) the Buyers are members of the Cosens Bay community; and
  - (d) the service area is limited to Cosens Bay.<sup>19</sup>
  
22. While FBC does not doubt CBP's genuine commitment to the Project and that it has the best interests of the residents of Cosens Bay in mind, by its very nature CBP will be operating a natural monopoly<sup>20</sup> and its governance structure does not eliminate the possibility that there will be instances where the best interests of CBP are not aligned with the interests of some or all of its customers.
  
23. The contractual dispute resolution process does not mitigate these concerns. Regulation by the BCUC introduces an impartial third party decision maker with specific public utility expertise as the arbiter of disputes. In contrast, the dispute resolution process contemplated in the IPP will:
  - (a) see a CBP director serve as the mediator of the dispute;<sup>21</sup> (a conflict of interest<sup>22</sup>)
  - (b) impose an obligation on the complainant to pay for 50% of the cost of mediation; (a barrier to advancing a complaint); and
  - (c) result in a non-binding outcome (promoting uncertainty).

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<sup>18</sup> Exhibit B-2, CBP Response to BCUC Information Request No. 1 at pp. 12-13.

<sup>19</sup> Exhibit B-2, CBP Response to BCUC Information Request No. 1 at p. 12, s. 3.1.

<sup>20</sup> BCUC Order G-175-16, Spirit Bay Utilities Ltd. Application for an Exemption Pursuant to s. 88(3) of the *Utilities Commission Act* or Declaration s. 72; Reasons for Decision at p. 9.

<sup>21</sup> Exhibit B-2, CBP Response to BCUC Information Request No. 2.11.

<sup>22</sup> As a director of CBP, the mediator will be obligated by law to act in the best interests of CBP, which could be misaligned with the interests of the complaining customer.

24. While CBP's ambition and intentions are no doubt positive, the Project is by definition a natural monopoly. That a dispute resolution mechanism exists is CBP's acknowledgment that interests may not always be aligned between CBP and its customers. Given this fact, the means by which those disputes are to be resolved needs to act as a meaningful counterbalance to the natural monopoly CBP would enjoy. In FBC's submission, the dispute resolution provisions of the IPP fall short of that standard.

#### **4.0 A Balance can be struck between CBP's Cost Concerns and the need to protect the Public Interest**

25. While the question of whether an entity is a "public utility" is binary, the way in which public utilities are regulated by the Commission is not. The UCA permits partial exemptions and 'light handed' regulation in circumstances where an applicant can demonstrate that consumers and the broader public interest are adequately protected. FBC submits that CBP has not provided adequate justification for an unconditional exemption from all of Part 3 of the UCA.

26. This is consistent with the examples that CBP highlighted to the BCUC as precedents for the type of operation that CBP proposes. CBP points to: (1) Barriere Ridge Power Inc; (2) Yoho Power Ltd.; and (3) McNair Creek and Tyson Creek hydro plants. However, these examples do not provide validation for the approach CBP proposes:

- (a) Barriere Ridge Power Ltd., if it is operating, appears to be a "public utility" subject to no regulatory oversight, without an exemption from the BCUC;<sup>23</sup>
- (b) Yoho Power Ltd. was fully regulated by the BCUC and had been granted a CPCN for its utility plant;
- (c) McNair Creek & Tyson Creek hydro plants were not distribution systems with captive customers.

27. FBC's research indicates that the scope and scale of the exemption sought by CBP would be unprecedented. In the closest analog that FBC could identify to the proposed Project and its ongoing operation, Synex Energy Resources was required to obtain a CPCN and

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<sup>23</sup> FBC could find no reference to an exemption applied for by Barriere Ridge Ltd. or granted by the BCUC.

conduct itself largely in a regulated manner. In approving Synex's application for a CPCN, the BCUC directed that Synex:

- (a) maintain separate accounts and file annual reports which summarize the results of its utility operations;
- (b) file for Commission approval of proposed rates and terms and conditions of service upon completion of construction; and
- (c) provide a copy of the order to each new customer and maintain a copy of the approved rate schedules and terms and conditions of service to be available for inspection by customers.<sup>24</sup>

28. FBC submits that the Project proposed by CBP does not meaningfully differ from the Synex project and that there is no basis to apply less stringent regulatory standards than were required in that case.

## **5.0 Conclusion**

29. FBC does not want to stand in the way of Cosens Bay receiving electric service. Given that BCH appears willing to work with the community to identify a workable solution, FBC submits that it would be prudent to ensure those efforts are exhausted prior to contemplating CBP "going it alone", regardless of whether it is regulated or not. Should there truly be no prospect of BCH providing service, FBC would support CBP's Project, subject to CPCN approval and ongoing "light handed" regulation.

30. Until then, FBC submits that CBP's application is premature and that CBP has failed to meet its burden to qualify for a section 88(3) exemption. It has not demonstrated that the objects and purpose of the UCA would be served if an exemption were granted, or that an exemption would be in the public interest.

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<sup>24</sup> BCUC Order C-18-01, An Application by Synex Energy Resources Ltd. for Approval to Construct and Operate an Electric Distribution Extension to Kyuquot.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6<sup>th</sup> DAY of February, 2020.**

*[original signed]*

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**David Both**

**Counsel to FortisBC Energy Inc.**