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BRITISH COLUMBIA UTILITIES COMMISSION  
INQUIRY INTO THE REGULATION OF MUNICIPAL ENERGY UTILITIES  
SUBMISSIONS OF SSL-SUSTAINABLE SERVICES LTD.  
DATED: OCTOBER 24, 2019

## 1. Introduction

SSL-Sustainable Services Ltd. (“SSL”) has recently been through a hearing process, Order Number G104-18 (the “SSL Proceeding”), initiated by BCUC, under which it was found that SSL, as the provider of a municipal energy service established by the City of Langford (the “City”) under the Community Charter, was a “public utility” under section 1 of the *Utilities Commission Act* (the “Act”). Being found to be a public utility, SSL was found to be subject to BCUC regulation and was ordered to apply to BCUC for required regulatory approvals. SSL has made the appropriate applications to BCUC, and is awaiting the response to those applications. In SSL’s opinion, BCUC has already made the determination, in the SSL Proceeding, that a utility affiliated with a local government through enabling bylaws establishing a municipal service, or a utility that has their rates set or approved by a municipality is still – under the current definition in the Act and BCUC’s interpretation of it - a public utility. For this reason, SSL’s submissions are not directed so much at whether such entities are public utilities, but rather more at why BCUC should, at the conclusion of its enquiry, and as stated in the advertisements inviting participation in this process:

1. either seek advance approval from the Government of BC to offer a class of cases exemption to municipalities and regional district energy systems in certain circumstances and/or
2. make a recommendation to the Government of BC to review the definition of a “public utility” within the UCA as it relates to such entities.

SSL’s position is that BCUC should do 1 and 2 above, for the following reasons.

## 2. Public Policy Considerations

BCUC states on its About the BCUC webpage: “we are responsible for ensuring you receive safe, reliable energy... at fair rates from the businesses we regulate. We balance that responsibility with the need to ensure service providers are afforded a reasonable opportunity to earn a fair return on their investments.” Given this description of BCUC’s purpose, one can only presume that the reason for the municipal exemption to the definition of “public utility” is that where a municipality is providing a service for which it is also providing regulation and rate-setting, then where that service is provided within the limits of the municipality’s boundaries (meaning that the Council must answer to its residents either directly or through likelihood of re-election), there is no need for BCUC to provide a second layer of regulation. While the SSL Proceeding was designed to look at the narrow issue of whether the existing definition of “public utility” applied to SSL, we understand that the purpose of the current proceeding is



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to look at the broader issue of whether utilities such as SSL that are affiliated with local governments should fall under the definition of “public utility.”

The issue of when BCUC regulation is necessary has come up in prior BCUC proceedings. In fact, in the SSL Proceeding, the Commission said “The scheme of the UCA acknowledges that there may be circumstances where an entity is caught by the definition of public utility yet the rationale for regulation is not compelling because the public utility has little or no ability to exercise monopolistic behaviour to the detriment of ratepayers and the public interest.” And in the Alternative Energy Solutions (AES) Inquiry Report, BCUC said: “The Commission Panel agrees that the purpose of the UCA is to regulate natural monopolies and protect consumers from the exercise of economic power. The Commission Panel is of the view that a reasonable interpretation should consider the market context within which the proposed service or facility will exist, the degree to which natural monopoly characteristics are present and whether the consumer requires protection.” It is these things that must be considered in looking at the issue of whether a certain class of entities should be offered exemptions without needing Ministerial approval in each instance, and/or whether the definition of “public utility” should be modified to except from that definition certain utilities affiliated with local governments.

There are several issues that come into play in considering natural monopoly characteristics and the need for consumer protection. These have mostly been considered by BCUC in the context of applications for exemptions, and some of the important ones are:

#### **(a) Rate Setting**

One of the issues most commonly considered by BCUC in exemption proceedings is how rates are set, approved, and/or controlled. In Templeton LP, Order Number G-131-15, the commission granted an exemption from regulation in part because Templeton was intending “to resell electricity to its Lessees using a rate-setting mechanism whereby the selling price will not exceed the price which BC Hydro would have charged if the Lessee were a customer of BC Hydro.” The Commission said of this: “The rate cap mitigates concerns about monopoly abuse, thereby providing justification for granting an exemption to Templeton LP.” In a contrary case, in the decision in Spirit Bay Utilities Ltd., Order Number G-175-16, the Commission did not grant an exemption, citing among other things that Spirit Bay did not intend to reference or index its rates to Commission-approved rates such as BC Hydro’s.

#### **(b) Independent Regulator**

In considering exemptions, the Commission has also looked at whether there is an independent regulator to whom the utility must answer. In the Spirit Bay case, it was found that referral of complaints to arbitration or ultimately to the courts was not a complaint process that would favour exemption, and in fact “underlines that there is no independent regulator to whom complainants can turn.” This can be contrasted with cases where municipalities are regulating affiliated utilities, whether through partnership agreements, or because they are providing municipal services. In the Spirit Bay decision, the Commission said: “generally speaking, ratepayers of a municipal utility are entitled to vote



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in a municipal election. Thereby, municipal councils are accountable to ratepayers for the performance, including rates, of the municipal utility.”

### **(c) Public Interest & Monopoly Characteristics**

In making its decision in the Spirit Bay decision, the Commission said the following, citing its own decision regarding the Canal Plant Agreement Extension: “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.”

The Commission in the Spirit Bay decision also cited its 2012 AES Inquiry Report, which stated – as referenced above - that regulation is required when “natural monopoly characteristics are present and there is a need to regulate to protect the public interest...” and went on to say “We agree with this public interest consideration and find it to be an appropriate public interest test. 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.”

### **3. The downside of double regulation**

Another public interest consideration before the Commission is the issue of increased costs for the utility and its ratepayers. Any state of “double regulation” (i.e. oversight by both BCUC and a local government body) undoubtedly adds new overhead and administrative expenses. Similarly, in a case like SSL’s, where the utility came into being before BCUC contemplated regulation of thermal energy systems, any transition away from an existing regulatory regime to a new model under BCUC would raise a number of complicated legal questions and ultimately become a lengthy and costly process. In the case of smaller utilities with a limited customer base such as SSL’s, the distribution of any such costs among those customers could mean drastic increases in rates, or in extreme cases, for these alternate energy source utilities to cease operations. Neither of these things would seem to be in the public interest.

### **4. Types of Affiliation**

The Commission through this process has asked that intervenors comment on affiliation between local governments and utilities of various types including, corporate structure, ownership of the utility’s assets, and setting of the utilities rates by a local government. Following is SSL’s position on the various affiliations.

#### **(a) Corporate Structure**

SSL does not claim to be an expert in corporate structure of utilities, and therefore will leave comment on this to those with more expertise in the area.



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### **(b) Ownership of Assets**

Throughout the SSL Proceeding, BCUC seemed to focus a great deal on ownership of assets. With due respect, we say now as we did in that proceeding that we do not see how this would be a determining factor in whether the public interest is being looked after. If a local government owned a utility distribution system and leased it to an unrelated utility for a term of say 20 years, no strings attached, then barring BCUC oversight, that utility would then be able to charge whatever rates it wished and would be answerable to no regulatory authority. If on the other hand the local government leased the system to the utility on terms and conditions that included limits on rates, service expectations, etc. then it is not the ownership of the assets that is important, but rather the regulation by the local government.

### **(c) Franchise Agreement, License or Enabling Bylaws**

SSL feels strongly that where a local government has entered an agreement, issued a license, or enacted enabling bylaws (the “Enabling Documents”) to permit the operation of the utility, then as long as those Enabling Documents encompass regulatory aspects (such as rate setting, service expectations, etc.) then the utilities in those situations do not also require regulation by BCUC. Similar to SSL’s position on asset ownership, if the Enabling Documents only authorize the utility to operate without imposing any regulation, then the public interest is likely not being protected, and BCUC regulation would be appropriate.

### **(d) Rate Setting**

Where rates are set by a local government, SSL submits that it is unnecessary that those rates also be reviewed or approved by BCUC. As has been stated by the Commission itself, should the voters be unhappy with how their local government handles rate approval (or other aspects of regulation), they can voice that unhappiness at election time.

## **5. SSL as an Affiliated Utility**

SSL feels that it is an excellent example of a utility that should be exempted as part of a given class, or even more appropriately, excluded from the definition of public utility.

SSL provides district energy service to residents of the City of Langford that live in the Westhills development. This provision of district energy to these residents was set up as a municipal service by the City of Langford (the “City”) under the City’s Multi-utility Bylaw, a bylaw enacted in 2010 (the “Bylaw”). In addition to establishing the municipal service, the Bylaw set out rates, fees and charges in relation to the municipal service, and provides that the amounts of delinquent accounts in relation to the municipal service may be added to a person’s property taxes at the end of a calendar year.



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The Bylaw was explicitly enacted pursuant to section 8(2) of the Community Charter, which provides that “a municipality may provide any service that the council considers necessary or desirable, and may do this directly or through another public authority or another person or organization.” Section 7 of the Bylaw repeats this language from the Community Charter, setting out that the City may provide this service directly or through another person or organization.

Once SSL was selected by the City as the vehicle through which the City would provide the municipal service, the City and SSL entered an agreement dated April 14, 2010 (the “Agreement”) that imposed restrictions and obligations on SSL in addition to those set out in the Bylaw. Specifically, the Agreement sets specific performance standards including response times to customer enquiries; requirements for an office location and a 24 hour emergency number, and for SSL employees to carry and provide identification; providing that notwithstanding anything in the Bylaw, the residential energy rate shall not exceed that rate set by BC Hydro for its customers, and that increases above this level must be approved by City Council. The Agreement also provides that in the event of termination of the Agreement, the City will continue to regulate SSL until it has applied for and obtained authorization to operate from the appropriate regulatory authority, and provides that SSL may not assign its interest in the Agreement to any party without the consent of the City. Finally, it is worth noting that the City has responded to and resolved the few customer complaints that SSL has not been able to resolve on its own over the 9 years of its operation. The “complaint” that BCUC received and which led to the SSL Proceeding was not from an SSL district energy customer, and in fact prior to BCUC commencing the SSL Proceeding, it had never received a complaint from an SSL district energy customer.

## 6. Conclusion

While it is early in this proceeding to try to pin down exactly where the line should be drawn regarding an exemption for a class of cases or a further exclusion from the “public utility” definition in the Act with respect to utilities affiliated with local governments, SSL’s submission is that it is clear that there is a need for such an exemption or exclusion. The current system often results in either unnecessary double regulation of utilities by local government and BCUC, or expensive and repetitive exemption applications by utilities affiliated with local governments. SSL looks forward to being part of this process and is happy to answer any question or provide any further information required.

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