

**To:** [BCUC](#)  
**Subject:** Request to Intervene - CBP CPCN Application - Okanagan Indian Band  
**Date:** Thursday, February 18, 2021 5:23:12 PM

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**Date Submitted:** February 18, 2021 17:23 PST

**Proceeding name:** CBP CPCN Application

## **Participant contact information**

**Organization or individual name:** Okanagan Indian Band

**City:** Vernon

**Province:** British Columbia

**Email:** [ctruesdale@jfkllaw.ca](mailto:ctruesdale@jfkllaw.ca)

**Phone number:** 250-405-3467

## **For organizations only - representative contact information**

**Name:** Claire Truesdale

**Organization (if different from above):** JFK Law Corporation

**City:** Victoria

**Province:** British Columbia

**Email:** [ctruesdale@jfkllaw.ca](mailto:ctruesdale@jfkllaw.ca)

**Phone number:** 250-405-3467

**Also representing (if applicable):** N/A

## **Additional information**

**Please state your reasons for intervening in this proceeding:**

Please refer to the letter submitted on February 17, 2021 on behalf of Okanagan Indian Band.

**Please state how you are directly or sufficiently affected by the Commission's decision in**

**this matter; or describe your experience, information, or expertise relevant to this matter that would contribute to the Commission's decision making:**

Please refer to the letter submitted on February 17, 2021 on behalf of Okanagan Indian Band.

**Please list the key issues you intend to address in the proceeding:**

Please refer to the letter submitted on February 17, 2021 on behalf of Okanagan Indian Band.

## **For administrative purposes only**

**Do you intend to participate fully, including attendance at hearings and submission of evidence or information requests, if applicable?:** Yes

**Do you intend to request PACA funding? This does not impact your ability to participate:** Yes

**Have you or your organization web-registered as an intervener or interested party in the past 12 months?:** No



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February 17, 2021

By email: [Commission.Secretary@bcuc.com](mailto:Commission.Secretary@bcuc.com)

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British Columbia Utilities Commission  
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File No. 1040-064

Attn: Marija Tresoglavic, Acting Commission Secretary

Dear Marija Tresoglavic:

**Re: CB Powerline Ltd. ("CBP")  
Cosens Bay Community Electrification Project ("Project")  
Application for a Certificate of Public Convenience and Necessity  
("Application")  
Okanagan Indian Band Request for Late Intervener Registration**

We are counsel for the Okanagan Indian Band ("**OKIB**") in respect of the above noted British Columbia Utilities Commission ("**BCUC**") proceeding. OKIB respectfully requests leave from the BCUC for late registration to participate in the proceeding as an intervener. OKIB acknowledges that the date for intervener registration provided within the Regulatory Timetable established in Order Number G-18-21 has passed.<sup>1</sup>

However, OKIB submits that granting this request for late intervener registration is reasonable and should be granted because:

- i. the late request is justifiable in the circumstances;
- ii. OKIB will be directly or sufficiently affected by the BCUC decision;
- iii. OKIB possesses information and expertise that is relevant to the proceeding;

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<sup>1</sup> BCUC, Letter dated January 19, 2021 – BCUC Order G-18-21 establishing a further regulatory timetable – Exhibit A-6 at Appendix A.

- iv. OKIB's interests and concerns cannot be represented by other parties in the proceeding and OKIB's participation will not result in duplication;
- v. OKIB commits to participating actively, responsibly and respectfully for the duration of the proceeding; and,
- vi. OKIB's participation as an intervener will not result in prejudice or procedural unfairness to CBP or any other party in the proceeding, but denying OKIB's participation may prejudice OKIB's interests.

Therefore, OKIB asks that the BCUC grant OKIB's request for intervener registration and amend the regulatory timetable to allow for the filing of one round of OKIB information requests, OKIB evidence, and final argument. OKIB acknowledges that the BCUC has established a written proceeding for the Application. OKIB does not seek to add any oral components to the proceeding established. OKIB has advised legal counsel for CBP of its intention to seek leave to participate as an intervener in the proceeding and OKIB looks forward to discussing its Project-related concerns. OKIB welcomes the opportunity to discuss OKIB's participation in this proceeding with CBP and the BCUC at the soonest possible date.

### **The request for late intervener registration is justifiable in the circumstances**

The expedited regulatory timetable established for the proceeding, in conjunction with the sheer volume of technical materials requiring review that has already prompted the BCUC to seek further time and amendment to its regulatory timetable, has resulted in an unreasonable amount of time for OKIB to review and assess its interests in the Project.

On September 11, 2020, CBP submitted the Application for a Certificate of Public Convenience and Necessity ("**CPCN**").<sup>2</sup> The Application requested an expedited and written proceeding.<sup>3</sup> On October 5, 2020, the BCUC issued Order Number G-248-20 establishing a written public hearing process and regulatory timetable for the proceeding.<sup>4</sup> The regulatory timetable requested intervener registration by November 4, 2020. On November 10, 2020, the BCUC issued Information Request ("**IR**") No. 1 to CBP.<sup>5</sup> On December 4, 2020, the BCUC issued Order Number G-317-20, which amended the Regulatory Timetable and requested intervener registration by January 7,

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<sup>2</sup> CB Powerline Ltd., Application for a Certificate of Public Convenience and Necessity dated September 11, 2020 – Exhibit B-1 [Application].

<sup>3</sup> Application at p 14.

<sup>4</sup> BCUC, Letter dated October 5, 2020 – BCUC Order G-248-20 establishing the regulatory timetable – Exhibit A-2 at Appendix A.

<sup>5</sup> BCUC, Letter dated November 12, 2020 – BCUC IR No. 1 to CBP – Exhibit A-3.

2021 as a result of CBP's administrative errors in providing notice to affected parties.<sup>6</sup> On December 10, 2020, CBP submitted its responses to BCUC IR No. 1.<sup>7</sup> On January 19, 2021, the BCUC issued Order Number G-18-21, which further amended the Regulatory Timetable as a result of CBP's responses to BCUC IR No. 1.<sup>8</sup>

The operational and financial capacity of OKIB is regularly overwhelmed by the many referrals and engagements activities required as a result of the numerous existing and proposed projects within Okanagan (Syilx) Territory that create overlapping and competing deadlines.

In normal circumstances, OKIB struggles to meaningfully engage in these activities due to OKIB's operational and financial capacity restraints. In the current circumstance, that being the ongoing COVID-19 global pandemic, OKIB has faced significant challenges, including managing cases of COVID-19 within the community and OKIB staff, resulting in a materially decreased ability to meaningfully participate in engagement. In addition to dealing with active cases, OKIB has experienced internal capacity limitations as a result of mandatory public health and safety measures put in place to protect public health and safety. Consequently, OKIB continues to face difficulties when engaging with proponents, the Crown, and its own community.

The Application expressly acknowledges that the release of the Crown referral notice to Indigenous communities was delayed in part due to operational limitations caused by COVID-19.<sup>9</sup> The Application further acknowledges that there has been minimal engagement efforts on the part of the Crown<sup>10</sup> and that OKIB advised that its response to the Application would not be provided until the Crown referral had been received.<sup>11</sup> Although the Crown referral process commenced in August 2020, the Crown has been slow to provide information. OKIB recently reached out to the Crown for an update, and was informed they were significantly behind on processing applications and conducting engagement. In addition, OKIB notes that its offices were closed from December 23, 2020 to January 4, 2021 for the winter holidays.

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<sup>6</sup> BCUC, Letter dated December 4, 2020 – BCUC Order G-317-20 establishing an amended regulatory timetable – Exhibit A-5 at Appendix A.

<sup>7</sup> CB Powerline Ltd., Letter dated December 10, 2020 – CBP submitting responses to BCUC IR No. 1 – Exhibit B-6 [CBP Response to IR No. 1].

<sup>8</sup> BCUC, Letter dated January 19, 2021 – BCUC Order G-18-21 establishing a further regulatory timetable – Exhibit A-6 at Appendix A.

<sup>9</sup> Application at 28.

<sup>10</sup> Application at 28.

<sup>11</sup> Application at 30.

Finally, OKIB and its staff are unfamiliar with the BCUC process. OKIB is accustomed to dealing directly with the Crown, and to some extent with proponents, but not as experienced dealing with regulatory tribunals. OKIB has only recently come to understand the BCUC process, and the importance of its participation.

The BCUC *Rules of Practice and Procedure* ("**Rules**")<sup>12</sup> require that the rules governing requests for late intervener registration be interpreted by the BCUC in a liberal manner in the public interest to ensure the fairest, most expeditious and efficient determination of every matter before the BCUC, consistent with the requirements of procedural fairness.<sup>13</sup> The BCUC is authorized to allow late requests for intervener registration.<sup>14</sup>

In light of the current circumstance, OKIB submits that its request for late intervener registration is reasonable and should be granted by the BCUC.

### **OKIB will be directly or sufficiently affected by the BCUC decision**

The Project will occur within the Okanagan (Syilx) Territory over which the Syilx, of which OKIB is a part, has unextinguished Aboriginal Title and Rights to lands and resources. The Syilx Nation Declaration, dated July 31, 2014, asserts the unextinguished Aboriginal Title and Rights to lands and resources within the Okanagan (Syilx) Territory. The Application states that, based on its environmental and social studies for the Project, and once protective and mitigative measures are employed, the Project will result in low impacts.<sup>15</sup> This acknowledges that there are indeed potential impacts. Among other things, OKIB should have input into protective and mitigative measures for the Project to ensure that not only environmental impacts, but impacts to rights are considered.<sup>16</sup>

The Project is planned in a highly environmentally sensitive area, with importance to OKIB traditional practices. OKIB is concerned about disturbance or loss to Syilx way of life and for current and future generations of OKIB members. There is a deep connection between OKIB people and their land. OKIB people were given a responsibility to take care of the land and the plants and animals. It is this relationship, including their way of life and use and occupancy that is threatened by the potential impacts of the Project. OKIB also remains concerned about the destruction of lands, country foods, and medicinal plants as a result of construction activities, as well as the introduction of non-native species. Further, OKIB remains concerned about the Project's

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<sup>12</sup> BCUC, *Rules of Practice and Procedure* – Order G-15-19 (December 17, 2018) [Rules].

<sup>13</sup> Rules, s 2.

<sup>14</sup> Rules, s 9.03.

<sup>15</sup> Application at 27 and 49.

<sup>16</sup> *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*] at para 45

potential addition to existing significant cumulative effects in Okanagan (Syilx) Territory, including impacts to physical, emotional, mental, cultural and spiritual well-being.

The archaeological overview assessment contained within the Application confirms that no archaeological resources were identified during the preliminary field reconnaissance of the Project. However, one area of high archaeological potential, AOP 1, was identified on the western bank of Kalamalka Lake. Based on the results of the PFR, an archaeological impact assessment ("**AIA**") was recommended.<sup>17</sup> A member of OKIB was engaged to assist the fieldwork and study for the Archaeological Overview Assessment.<sup>18</sup> CBP's Response to BCUC IR No. 1 confirms that CBP will be undertaking an AIA for the Project.<sup>19</sup> OKIB submits that its participation in the AIA is necessary and that the area of high archaeological potential, AOP 1, on the western bank of Kalamalka Lake requires further information and assessment prior to the BCUC rendering a decision for the Project.

OKIB also remains concerned about potential impacts on water, watersheds and water crossings, including wetlands, drainages, groundwater, drinking water and all those other environmental components that are interconnected on these environmental features. The Application states that CBP has filed two water applications under the *Water Sustainability Act*,<sup>20</sup> which seek approval for works near streams, sensitive wetlands and the lake, as well as a stream crossing.<sup>21</sup> Response to BCUC IR No. 1 indicates that these applications are either pending or have concluded with the Ministry of Forests, Lands, and Natural Resource Operations ("**FLNRO**") finding that a change approval is not required for the contemplated works.<sup>22</sup> While OKIB received one initial referral from this Ministry for the change approval, it has not been able to get an update on the status of these approvals, nor was it provided with sufficient information to engage with FLNRO.

OKIB submits that the Project's construction, operation, and maintenance activities, and the BCUC decision related thereto, will directly or sufficiently affect OKIB.

### **OKIB possesses information and expertise that is relevant to the proceeding**

OKIB possess both western and Indigenous knowledge and expertise that is relevant to the proceeding and will assist the BCUC in its review and decision-making. OKIB's

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<sup>17</sup> Application at 1 of Exhibit 2.6.3.

<sup>18</sup> Application at 30.

<sup>19</sup> CBP Response to IR No. 1 at 75.

<sup>20</sup> *Water Sustainability Act*, SBC 2014, c 15.

<sup>21</sup> Application at 26.

<sup>22</sup> CBP Response to IR No. 1 at 39.

knowledge cannot be discounted. The courts have been clear that projects must be considered in an historical and cumulative context to account for the impacts that have already affected OKIB member's ability to exercise their Aboriginal Title and Rights, and the extent to which the exercise of those rights has already been lost. This context needs to be considered prior to considering the Project's effects on rights.

OKIB's involvement is also critical because there are fundamental differences between the evaluation of environmental effects and the consideration of effects on section 35 rights. It is well-recognized that a biophysical approach to impact assessment is unduly restrictive and inappropriate for assessing impacts to section 35 rights.<sup>23</sup> A proper assessment must recognize that impacts to a community, effects on cultural way of life and continuity and changes to a cultural landscape can occur regardless of the level of anticipated physical change to the environment.

Further, the responsibility of the BCUC to consider Project effects on Aboriginal Title and Rights imports a duty to consider reconciliation when making decisions and formulating recommendations because the fundamental purpose of section 35 of the *Constitution Act, 1982*<sup>24</sup> is the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."<sup>25</sup> Tribunals such as the BCUC are mandated to consider whether the duty to consult has been fulfilled before they can determine whether a project is in the public interest.<sup>26</sup>

OKIB continues to review the Application and responses to BCUC IR No. 1. However, OKIB have prepared a list of matters on which they anticipate seeking further information through IRs and for which they may seek to lead evidence in this proceeding, which may include:

- Impacts to fish and fish habitat;
- Impacts to water, watersheds, waterways, drainages, groundwater, drinking water, and related impacts to human health and well-being and to wildlife;
- Access to water resources for OKIB to exercise its cultural, health, spiritual, ceremonial, and other traditional uses;
- Access to lands including traditional use sites for harvesting traditional plants and medicines required for OKIB to exercise its cultural, health, spiritual, ceremonial, and other traditional uses;

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<sup>23</sup> *Clyde River* at para 45.

<sup>24</sup> *Constitution Act, 1982*, s 35 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>25</sup> *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10; *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 29

<sup>26</sup> *Clyde River* at para 40; see also *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 59 and 70.

- The ability to meaningfully practice traditional cultural practices such as ceremony, spiritual belief system and the intergenerational transfer of Syilx language and culture; and,
- Impacts to heritage sites and heritage objects that are of particular spiritual, ceremonial or other cultural value.

OKIB note that this list of evidence to be lead remains preliminary at this time as OKIB continues its review of the Application and related supporting documents. Further, OKIB hereby advises that the exercise of its Aboriginal Title and Rights continue in the area, as a result of OKIB's historic access and use associated with former Long Lake Indian Reserve No. 5 located near the head of Kalamalka Lake, which may be potentially impacted by the Project, will require further assessment. Therefore, while OKIB has provided the above list of anticipated interests and concerns to facilitate an efficient proceeding, OKIB expressly reserves the right to raise other matters as its review and further information is provided by CBP for review as the proceeding progresses.

In light of current public health and safety restrictions on in-person gatherings currently in place and potentially to come, OKIB does not seek an oral component to this proceeding for the delivery of its traditional knowledge. At this time, OKIB remains of the view that its traditional knowledge cannot be appropriately or adequately conveyed or considered through videoconference or telephone. In light of this limitation, OKIB will endeavour to provide CBP and the BCUC with all relevant information regarding its knowledge, interests, and concerns, to the extent possible through written means.

OKIB submits that the current circumstance and the potential impacts to OKIB's Aboriginal Title and Rights weighs heavily in favour of the BCUC exercising its discretion to grant OKIB intervener status. OKIB further submits that its participation in the proceeding will assist the BCUC in discharging its statutory duty to determine whether the Project is in the public interest.

**OKIB's interests and concerns are not duplicative and OKIB will actively participate in the proceeding**

The interests and concerns of OKIB are unique and distinct and cannot be adequately represented by the interested parties or those filing letters of comment in the proceeding. As such, OKIB is confident that its participation as an intervener is necessary and, in accordance with the BCUC Rules, OKIB will further take all reasonable efforts to avoid duplication where possible. Further, in accordance with the BCUC Rules, OKIB commits to participating actively, responsibly and respectfully for the duration of the proceeding.

## **The participation of OKIB as an intervener will not result in prejudice or procedural unfairness**

OKIB respectfully requests that the BCUC grant this request for late intervener registration and allow OKIB to participate in all future stages of the proceeding. Further, OKIB respectfully requests that the BCUC amend the regulatory timetable to establish additional stages that would allow OKIB to submit IRs, evidence, and final argument, with CBP being granted corresponding rights of response.

OKIB acknowledges that the intervener IR submission deadline has recently passed. OKIB further acknowledges that no steps for intervener evidence or intervener final argument have been established under the current regulatory timetable. However, in light of the circumstance detailed above, OKIB submits that it is reasonable and just to allow OKIB to submit IRs, evidence, and final argument. Absent such participatory rights, the ultimate decision for the Project risks being found inadequate as a result of information gaps and incomplete considerations in the review.

The Application confirms that CBP is not currently seeking approval of the electricity rates it will charge for services and will instead apply for such rates at a later date following CPCN approval.<sup>27</sup> The Application also confirms that CBP will hold up to an additional \$200,000 in support of general operating needs to temporarily offset unforeseen rate shock on behalf of its customers.<sup>28</sup> As such, OKIB submits that any potential prejudice to CBP customers resulting from additional time required in this proceeding is speculative and cannot ground a claim of prejudice, and that such potential prejudice has nonetheless already been accounted for and mitigated by CBP.

The Application's development and construction schedule states that the Project's construction activities are anticipated to begin in the latter half of 2021.<sup>29</sup> CBP's Response to BCUC IR No. 1 confirms that maintaining the Project's schedule requires the submarine cable to be placed no later than April 2021<sup>30</sup> and that certain construction activities begin in Q2 2021.<sup>31</sup> However, CBP's Response to BCUC IR No. 1 further states that CBP will proceed with construction preparations once regulatory certainty has been obtained.<sup>32</sup> In addition, CBP's Response to BCUC IR No. 1 confirms that CBP

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<sup>27</sup> Application at 14.

<sup>28</sup> Application at 8.

<sup>29</sup> Application at Exhibit 4.3.

<sup>30</sup> CBP Response to IR No. 1 at 49.

<sup>31</sup> CBP Response to IR No. 1 at 67.

<sup>32</sup> CBP Response to IR No. 1 at 69 and 78.

now anticipates construction activities occurring a year later than previously planned, being September to December 2021.<sup>33</sup>

As such, OKIB submits that the revised construction schedule for the Project can reasonably accommodate OKIB's intervener participation in this proceeding and additional amendments to the regulatory timetable sufficient to facilitate such participation without CBP experiencing prejudice.

## **Conclusion**

OKIB respectfully requests leave from the BCUC for late registration to participate in the proceeding as an intervener. As demonstrated in the preceding paragraphs, OKIB's lateness is justified in the circumstances and the BCUC decision in respect of the Project will directly or sufficiently affect OKIB. Granting OKIB's request for late intervener registration will ensure the BCUC is provided all relevant information, particularly in respect of potential effects on OKIB's Aboriginal Title and Rights, for its consideration of the Application. The interests, concerns and information to be provided by OKIB cannot be adequately represented by any other party to the proceeding and will not result in duplication.

OKIB welcomes the opportunity to participate actively, responsibly and respectfully in all future stages of the proceeding and such participation will not result in prejudice to any party. However, denying OKIB's request may result in prejudice to OKIB's interests. OKIB welcomes the opportunity to discuss OKIB's participation in this proceeding at the soonest possible date.

Yours truly,

**JFK Law Corporation**

Per:

**Claire Truesdale**

CPT/jf

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Jim Pinter, Pinter Electrical Consulting Inc.: ([Jim@pinterco.ca](mailto:Jim@pinterco.ca))

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<sup>33</sup> CBP Response to IR No. 1 at Exhibit 15.3.