British Columbia Utilities Commission

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ORDER NUMBER
G-151-16

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

and

Creative Energy Vancouver Platforms Inc.
Application for Reconsideration and Variance of Order G-88-16

BEFORE:
D. M. Morton, Commissioner/Panel Chair
H. G. Harowitz, Commissioner
R. I. Mason, Commissioner

on September 26, 2016

ORDER

WHEREAS:

A. On July 6, 2016, Creative Energy Vancouver Platforms Inc. (Creative Energy) filed with the British Columbia Utilities Commission (Commission) an application for a reconsideration and variance of Order G-88-16 pursuant to section 99 of the *Utilities Commission Act* (UCA) (Reconsideration Application);

B. On June 16, 2016, after a written hearing process, the Commission issued Order G-88-16 denying Creative Energy's Restated and Amended Northeast False Creek (NEFC) and Chinatown Neighbourhood Agreement Application;

C. The Commission has Reconsideration Criteria that describe a two phase process for a reconsideration request to the Commission. In the first phase, the applicant must establish a *prima facie* case that the Commission should proceed with a reconsideration. This phase may allow comments from interveners in the proceeding for which the reconsideration is being sought. If the Commission finds that a sufficient *prima facie* case has been made, the reconsideration proceeds to the second phase where the Commission hears arguments on the merits of the application;

D. On July 15, 2015, the Commission issued Order G-114-16 establishing a Phase 2 written argument process and regulatory timetable involving interveners and Creative Energy;

E. On July 28, 2016, the following interveners submitted written arguments:

   a. Commercial Energy Consumers Association of British Columbia
   b. FortisBC Energy Inc.
   c. City of Vancouver
   d. FortisBC Alternative Energy Services Inc.
   e. BC Sustainable Energy Association and the Sierra Club of BC;

F. On August 10, 2016, Creative Energy submitted its reply argument; and

G. The Panel has considered the arguments and finds that Creative Energy's application to vary Order G-88-16 should be denied.

NOW THEREFORE pursuant to section 99 of the *Utilities Commission Act*, with reasons attached as Appendix A to this order, the British Columbia Utilities Commission denies Creative Energy's application to vary Order G-88-16.

DATED at the City of Vancouver, in the Province of British Columbia, this *26th* day of September 2016.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

Attachment

British Columbia Utilities Commission

IN THE MATTER OF

Creative Energy Vancouver Platforms Inc.
Reconsideration and Variance of Order G-88-16
dated June 16, 2016

REASONS FOR DECISION

September 26, 2016

Before:
D. M. Morton, Commissioner/Panel Chair
H. G. Harowitz, Commissioner
R. I. Mason, Commissioner

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1.0 INTRODUCTION

On April 17, 2015, Creative Energy Vancouver Platforms Inc. (Creative Energy) applied to the British Columbia Utilities Commission (Commission) for an order approving a Neighbourhood Energy Agreement between Creative Energy and the City of Vancouver (Original NEA) and granting a Certificate of Public Convenience and Necessity (CPCN) to construct and operate a new Neighbourhood Energy System to serve new developments in the Northeast False Creek (NEFC) and Chinatown neighbourhoods of Vancouver (CPCN and Original NEA Proceeding).

By Order C-12-15, the Commission granted a CPCN for the NEFC area (excluding the Chinatown area), and did not approve the Original NEA (CPCN and Original NEA Decision, First Decision).

On February 5, 2016, in response to Order C-12-15, Creative Energy filed an application with the Commission seeking approval under section 45 of the *Utilities Commission Ac*t (UCA) of the Restated and Amended NEFC and Chinatown Neighbourhood Energy Agreement (Amended NEA), and filed for information only a Bylaw Enactment Agreement (BEA) (together, the Amended NEA Application).

By Order G-88-16 and the decision issued concurrently, the Commission denied approval of the Amended NEA Application (Amended NEA Decision, Second Decision).

On July 6, 2016, Creative Energy filed a request for reconsideration and variance of Order G-88-16 (Reconsideration Application). On July 15, 2016, the Commission issued Order G-114-16, ordering, amongst other things, that the Reconsideration Application proceed directly to Phase 2 as a written argument process.

The following interveners registered for the Reconsideration Application proceeding: The City of Vancouver (CoV), FortisBC Energy Inc. (FEI), FortisBC Alternative Energy Services Inc. (FAES), Commercial Energy Consumers Association of British Columbia (CEC), and the BC Sustainable Energy Association and the Sierra Club of BC (BCSEA-SCBC). All registered interveners submitted arguments on or before July 28, 2016, and Creative Energy submitted a reply argument on August 10, 2016.

2.0 CONTEXT

2.1 Framework for reconsideration

Reconsideration applications are guided by the Commission's guidelines titled Reconsideration Criteria. The following excerpts summarize the basic framework.

> An application for reconsideration by the Commission proceeds in two phases. In the interests of both efficiency and fairness, and before the Commission proceeds with a determination on the merits of an application for reconsideration, the application undergoes an initial screening phase. In this phase the applicant must establish a prima facie case sufficient to warrant full

consideration by the Commission. The first phase, therefore, is a preliminary examination in which the application is assessed in light of some or all of the following questions:

- Should there be a reconsideration by the Commission?
- If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?
- If there is to be a reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?

[…]

After the first phase evidence has been received, the Commission generally applies the following criteria to determine whether or not a reasonable basis exists for allowing reconsideration:

- the Commission has made an error in fact or law;
- there has been a fundamental change in circumstances or facts since the Decision;
- a basic principle had not been raised in the original proceedings; or
- a new principle has arisen as a result of the Decision.

In addition, the Commission will exercise its discretion to reconsider, in other situations, wherever it deems there to be just cause.[1]

2.2 Prior applications and decisions

2.2.1 CPCN and Original NEA Proceeding

In denying approval of the Original NEA in the CPCN and Original NEA Proceeding, the Commission stated that it "does not approve the Carbon Reduction Rider, the Benchmark Rate and the Cost Premium Cap. In addition, while there is no specific clause in the [Original] NEA that provides for mandatory connection, the wording of the agreement suggests that the Commission is approving the [North East] Bylaw" (NE Bylaw).[2] With regard to the Chinatown area, the Commission granted a CPCN that excluded the Chinatown area from the Extension Policy, for reasons that included: there is not sufficient certainty about the load in Chinatown area; Chinatown is not contiguous to the NEFC area and is not part of the same district energy system (DES); and Creative Energy proposes to develop the Chinatown DES from a local heat source with no plan regarding connection to the NEFC.[3]

2.2.2 Amended NEA Proceeding

In the Amended NEA Proceeding, the Commission determined that Creative Energy put forward acceptable remedies with regard to the Commission's concerns in the CPCN and Original NEA Proceeding with the Carbon

[1] British Columbia Utilities Commission, Reconsideration Criteria, pp. 1–2. www.bcuc.com/Documents/Guidelines/2009/DOC_22551_Reconsideration-Criteria.pdf
[2] CPCN and Original NE Decision dated December 8, 2015, p. 40.
[3] Ibid., pp. 58–59.

Reduction Rider, the Benchmark Rate and the Cost Premium Cap.[4] That said, in the Amended NEA Decision, the Commission denied approval of the NEA on two grounds:

- "[T]he applied-for franchise is constituted by the rights, privileges and concessions set out in the combined set of documents: namely the Amended NEA, the BEA and the NE Bylaw. Therefore, consistent with the [First] Decision, the Panel does not find the applied-for franchise to be acceptable in its current form, in that it implies Commission approval of the provisions contained in the NE Bylaw as well as those provisions contained in the Amended NEA."5
- "The Panel does not approve the inclusion of the Chinatown area in the franchise agreement."[6]

In filing a request for reconsideration and variation of the Amended NEA Decision, Creative Energy submits that the Commission erred in law and in fact by denying approval of the Amended NEA based on these two grounds.[7]

2.3 Evidentiary record for the Reconsideration Proceeding

In addition to the Reconsideration Application and the arguments filed as part of the Reconsideration Proceeding, the body of evidence and argument before the Reconsideration Panel is also comprised of all evidence and submissions on the record of both the CPCN and Original NEA Proceeding and Amended NEA Proceeding. This is because in the Amended NEA Proceeding, the Commission ordered that the entire evidentiary record of the CPCN and Original NEA Proceeding is included in the evidentiary record of the Amended NEA Proceeding.[8] Subsequently, the Reconsideration Panel ordered that the evidence and submissions filed in the Amended NEA Proceeding shall be included as part of the record for purposes of the reconsideration.[9]

2.4 Organization of the remainder of this document

The remainder of this document is set out in five sections.

- Section 3 addresses questions raised regarding the Commission's delineation of scope for the Amended NEA Proceeding.
- Section 4 addresses questions raised regarding the Commission's decision in the Amended NEA Proceeding to deny the application on grounds relating to the BEA and NE Bylaw.
- Section 5 addresses questions raised regarding the Commission's decision in the Amended NEA Proceeding to deny the application on grounds relating to inclusion of the Chinatown area.
- Section 6 provides the Panel's comments on the public interest issues raised in the two previous proceedings.

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[4] Amended NEA Decision dated June 16, 2016, pp. 5–6.
[5] Ibid., p. 11.
[6] Ibid., p. 15.
[7] Reconsideration Application, p. 1.
[8] Order G-29-16A, Directive 1.
[9] Order G-114-16, Directive 4.

- Section 7 provides a final determination regarding the request for reconsideration.

3.0 SCOPE OF THE AMENDED NEA PROCEEDING

While Creative Energy's Reconsideration Application does not explicitly request a reconsideration on the basis of the scope of the Amended NEA Proceeding, this Panel considers the matter to be sufficiently important to merit discussion.

Creative Energy makes the following statement regarding scope in its Reconsideration Application:

> There was no basis, in law or good regulatory practice, for the [Amended NEA] Panel to expand the scope of the review of the Application beyond the specific issues identified by the [CPCN and Original NEA] Panel, and beyond issues considered to be within the scope of the First Decision. This jump and shift in the scope of the second review exceeds the bounds of administrative fairness and proper regulatory principles since the change in scope results in inconsistent decisions by the same regulator on the same application and evidentiary record. The Amended NEA Panel had no reason on the record to support this change in the review of the Amended NEA.[10]

Creative Energy takes the argument one step further on at least two occasions, by stating that the Amended NEA Panel not only went beyond the scope of the issues identified in the First Decision, but beyond the scope of the initial proceeding itself: "Having determined that this proceeding entails a comprehensive review of the Application, the Second Panel then goes on to expand the scope of its review beyond that of the [CPCN and Original NEA] Proceeding…"[11] and "as noted in the Reconsideration Application, the Second Panel decided that the scope of the Second proceeding was to be broader in scope than the [CPCN and Original NEA] Proceeding."[12]

Panel discussion

As Creative Energy correctly points out, the Commission determined that the Amended NEA Proceeding entailed a comprehensive review of the Amended NEA Application under section 45(8) of the UCA. In its decision, the Commission provided a discussion of its reasons for making that determination.[13]

This Panel has reviewed the Amended NEA Decision and takes the view that the Amended NEA Panel provided a clear and well-supported rationale for its determination. No error in fact or law was committed in deciding to review the Amended NEA Application in its entirety (i.e. as opposed within the confines of the specific issues raised in the First Decision, as requested by Creative Energy).

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[10] Ibid.
[11] Ibid.
[12] Creative Energy Reply, p. 4.
[13] Amended NEA Decision, p. 4.

Further, the Panel does not agree with the assertions made by Creative Energy that in the Amended NEA Proceeding, the Commission expanded the scope beyond the scope of the CPCN and Original NEA Proceeding. First, the Commission is in no way legally required to set the scope of its proceeding as equal to or otherwise aligned with any prior proceeding, so a change in scope does not in and of itself constitute an error. Second, the Panel sees no persuasive evidence or argument in any of the reconsideration submissions that the Commission did indeed expand the scope of the Amended NEA Proceeding beyond the scope of the CPCN and Original NEA Proceeding. And finally, even if the Commission had done so (which we do not find to be the case), there is no compelling evidence or argument before this Panel that the Commission's decision to deny the applied-for franchise should be modified in any way for that reason.

4.0 RECONSIDERATION RELATING TO THE NE BYLAW

The Panel has divided our treatment of the bylaw issue into two distinct, albeit related, determinations.

- Was the Amended NEA Panel justified in determining that the applied-for franchise is constituted by the combined set of documents: namely the Amended NEA, the Bylaw Enactment Agreement (BEA) and the NE Bylaw?
- If so, is the Commission in error in denying approval of the applied-for franchise on the basis of the rights, privileges and concessions set out in the constituting documents?

The Panel considered these questions in sequence, as the first question is foundational to answering the second. Deciding what is included in the franchise is separate and distinct from deciding whether that franchise, however constituted, should be approved as being in the public interest. More particularly, once a determination has been made with regard to the first question, arguments about 'what is in or out' need not be revisited when addressing the second question.

4.1 Determination on the combined set of documents

In the Amended NEA Decision, is the Commission justified in determining that the applied-for franchise is constituted by the rights, privileges and concessions set out in the combined set of documents?

Creative Energy puts forward a number of arguments in support of its contention that the Amended NEA Panel erred in law and/or in fact in determining that the BEA and/or NE Bylaw form part of the applied-for franchise.

- The Commission concluded that the BEA was part of the franchise, but did not provide any reasons other than to identify the Entire Agreement clause as an important factor in its determination.[14]
- By concluding that the NE Bylaw was one of the constituting documents, the Commission assumed jurisdiction to approve the bylaw.[15]
- The Commission accepts that it has no jurisdiction over the CoV or enactment of its bylaws. Yet by virtue of concluding that the NE Bylaw is one of the constituting documents, Commission concludes that it

[14] Reconsideration Application, p. 8.
[15] Ibid., p. 4.

must approve the NE Bylaw. The bylaw cannot be both beyond the Commission's jurisdiction and at the same time be a constituting document.[16]

- The Commission made an error of law, or mixed fact and law when it concluded that all agreements between the CoV and Creative Energy pertaining to the franchise agreement grant a privilege, concession or franchise that must be approved pursuant to section 45(7) of the Act.[17]

4.1.1 Intervener arguments

CoV argues that the NE Bylaw is beyond Commission jurisdiction and was not part of the approval requested by Creative Energy, either directly or indirectly.[18] It further argues that the Commission derives all powers from statute, and cannot assume jurisdiction by virtue of an agreement between two parties (viz. Creative Energy and CoV). While the NE Bylaw would apply to the franchise area, the NE Bylaw stands on its own as proper exercise of CoV jurisdiction.[19]

BCSEA-SCBC argues that the Commission incorrectly interpreted the "Entire Agreement" inasmuch as "under no reasonable interpretation of the Entire Agreement clause can it be concluded that the franchise between the City and Creative Energy includes the City of Vancouver's contemplated mandatory connection bylaw."[20] More specifically, BCSEA-SCBC notes that the NE Bylaw is not a "document required to be delivered" pursuant to the BEA or the Amended NEA: the BEA requires the CoV to enact the bylaw if and when the City Council approves the bylaw.

CEC submits that the Commission's interpretation of the "Entire Agreement" clause was reasonable, and hence the modifications made in the amended filing were more a matter of form over substance.[21]

FEI argues that:

- Creative Energy has attributed a determination to the Commission that the Commission did not make: viz. that the Second Panel, in determining that the BEA and NE Bylaw formed part of the franchise, "assumed jurisdiction to approve the NE Bylaw."[22]
- The Commission's exercise of its own jurisdiction under section 45(8) is fundamentally different from the courts' jurisdiction to strike or uphold a municipal bylaw.[23]
- The "Entire Agreement" clause of the BEA links the NE Bylaw to the Amended NEA.[24]

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[16] Reconsideration Application, p. 4.
[17] Ibid., p.8.
[18] CoV Argument, p. 7.
[19] Ibid., p. 8.
[20] BCSEA-SCBC Argument, p. 5.
[21] CEC Argument, p. 3.
[22] FEI Argument, p. 5.
[23] Ibid., p. 6.
[24] Ibid., p. 7.

- The BEA has a number of attributes in addition to the "Entire Agreement" clause that continue to create a linkage between the NE Bylaw and the Amended NEA, including: a preamble that indicates that the CoV will not enact the NE Bylaw until the Commission approves the franchise; "the BEA obligates the CoV to enact the NE Bylaw on approval of the amended NEA" and "operates to terminate the amended NEA should the NE Bylaw not be enacted by a defined date."[25]

FAES adopts the submission of FEI in its entirety,[26] and hence this document will not provide further citation or reference to FAES' position (i.e. distinct from that of FEI).

4.1.2 Creative Energy reply

In reply, Creative Energy makes the following points:

> In the Amended NEA and in law, the NE Bylaw is independent of the Amended NEA. As noted in the Reconsideration Application, it cannot form part of the applied-for franchise. The Commission fell into error in its analysis on this fundamental point.
> The Arguments of FEI in this proceeding only add to this confusion. FEI claims that it is self-evident that the BEA included express obligations on the CoV to pass the NE Bylaw with mandatory connection provisions. That is not true. The BEA cannot bind CoV council. The NE Bylaw will be presented to Council for enactment, if the franchise is approved. The Council may enact the NE Bylaw, but that event is independent of the Commission jurisdiction. The fact that the CoV will only take that step if the Amended NEA is approved does not make the NE Bylaw part of the applied-for franchise. The CoV is simply proceeding in a logical sequence. There is no need to bring the NE Bylaw forward for council to consider if the franchise is not approved.[27]

Commission determination

The Commission determines that the Amended NEA Decision contains no error in fact or law relating to the inclusion of the BEA and NE Bylaw in the applied-for franchise.

In light of all the material before us, the Panel is not persuaded by Creative Energy's arguments in favour of overturning this aspect of the Amended NEA Decision.

The Panel does not agree with the position that the Commission is not able, as a matter of law or jurisdiction, to consider the BEA and NE Bylaw as part of the applied-for franchise for review under section 45 of the UCA. Section 45 requires the Panel to consider the public interest issues related to the franchise.

Incorporating these documents into the franchise does not put the Commission in a position where it must approve the bylaw. The Amended NEA Panel was very clear in setting a distinction between the Commission's rights/obligation to approve the bylaw itself (which the Commission is not attempting to assert) and the Commission's rights/obligations to consider any and all relevant rights, privileges and concessions granted under

[25] Ibid., p. 8.
[26] FAES Argument, p. 1.
[27] Creative Energy Reply, p. 5.

a franchise in the context of section 45 of the UCA. This Panel concludes that, in considering the BEA and NE Bylaw as part of the applied-for franchise, the Amended NEA Panel appropriately limited its review to consideration of the elements therein singularly in the context of the UCA.

As to Creative Energy's argument that the Commission's decision in the Amended NEA Proceeding provided no justification other than citing the "Entire Agreement" clause, this Panel does not find that argument to be a compelling reason to modify or set aside the Amended NEA Decision.

- First, we note that the Amended NEA Decision states in its discussion of the finding that "Particularly in light of this clause…"[28] This Panel takes that phrasing to mean that this was not the singular and only basis upon which the Amended NEA Panel made this determination. In setting out the other aspects of the evidence and arguments put forward by FEI and CEC in the evidentiary summary leading up to its determination discussion, it is clear that the Amended NEA Panel also considered this material in its deliberations.[29] The fact that the determination discussion did not restate all the evidence does not mean that the Amended NEA Panel was not aware of it and/or did not consider it.
- Further to this point, even if one takes Creative Energy's position (which this Panel does not) that the "Entire Agreement" clause is the singular basis upon which the Amended NEA Panel based its decision, this Panel finds that the Amended NEA Panel made no error in law or fact in interpreting that clause the way they did, and hence that interpretation alone provides sufficient justification for the decision taken.
- Finally, as pointed out by FEI in its argument, there are a number of other elements contained in the BEA that tie the NE Bylaw to the Amended NEA. So even if this Panel were to find the Second Decision deficient in its explanation for including the BEA and NE Bylaw as part of the applied-for franchise (which we do not), on the strength of the entire body of evidence and argument before us, this Panel finds that the applied-for franchise in the Amended NEA Application is constituted by the rights, privileges and concessions set out in the combined set of documents: namely the Amended NEA, the BEA and the NE Bylaw.

With regard to CoV's position that Creative Energy did not seek approval of the BEA or NE Bylaw in their Amended NEA Application, this argument has no bearing on our decision. The Commission has the power to consider all aspects of an application that it considers relevant, whether or not the applicant expressly raised them.

Regarding Creative Energy's assertion that the Amended NEA Panel erred in concluding that all agreements between CoV and Creative Energy must be approved by the Commission pursuant to section 45 of the UCA, the Panel finds this contention to be too broad to be probative. The Amended NEA Panel did not make a blanket determination regarding any and all agreements but rather a precise and specific determination that the BEA and NE Bylaw were included in the applied-for franchise.

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[28] Amended NEA Decision, p. 11.

[29] Other relevant sections of the agreement include: a preamble which indicates that the CoV will not enact the NE Bylaw until the Commission approves the franchise; "the BEA obligates the CoV to enact the NE Bylaw on approval of the amended NEA" and "operates to terminate the amended NEA should the NE Bylaw not be enacted by a defined date."

Creative Energy argues that there is "no need to bring the NE Bylaw forward for council to consider if the franchise is not approved."[30] However, it also argues that the NEA and the bylaw are not inextricably connected. If Creative Energy genuinely holds the view that the bylaw is simply a matter of CoV policy/planning irrespective of who holds what franchise (i.e. it applies as a universal set of regulations for a given geography and is not tied to the franchise rights) then the Panel would not be persuaded by Creative Energy's claim that there would be no point in bringing the bylaw forward if the franchise is not approved.

4.2 Determination on the denial of the applied-for franchise

In the Amended NEA Decision, is the Commission justified in denying approval of the applied-for franchise, on the basis that all three documents constitute the applied-for franchise?

Creative Energy notes that the Commission did not view the BEA as an adequate response to the public perception concerns raised in the First Decision. Creative Energy suggests that instead of denying the application, the Commission could have approved the franchise and simply stated in its reasons that it was not approving the mandatory connections policies of the CoV.[31]

Creative Energy also argues that it is not possible to satisfy the Commission's imperative to "adequately set the NE Bylaw outside the scope of the applied-for franchise," because as a matter of law, it already is.[32]

Creative Energy also suggests that the Commission incorrectly determined that it was Creative Energy's position that the CPCN and Original NEA Panel had approved mandatory connection, citing the following sentence from the Commission's Decision in the Second Proceeding:

> Creative Energy's position appears to be that, even if the Panel finds that the matter of mandatory connection had not been approved in the Prior Decision, the issue is in any case rendered moot in the current Application by virtue of moving those provisions into the BEA.[33]

Creative Energy further argues that it follows from inclusion of the NE Bylaw in the NEA, that the Commission believed it had authority to approve the NE Bylaw and that it was necessary to approve the NE Bylaw before issuing a CPCN under section 45(9).[34]

4.2.1 Intervener arguments

BCSEA-SCBC argues that the Commission erred when it found that approval of the franchise would require providing an opinion on CoV's bylaw, arguing that neither the BEA nor the NE Bylaw provide Creative Energy with any authority to impose mandatory connection requirements, and hence the Amended NEA Application

[30] Creative Energy Reply, p. 5.
[31] Reconsideration Application, p. 5.
[32] Ibid., p. 6.
[33] Amended NEA Decision, p. 11.
[34] Reconsideration Application, p. 4.

(even including these documents) is not a case where the franchise would in turn give the Commission jurisdiction to determine whether those mandatory connection provisions are in the public interest pursuant to section 45(8) of the UCA.[35]

BCSEA-SCBC also cites the following paragraph from the Second Decision:

> This brings us back to the fundamental problem articulated in the Prior Decision. Creative Energy argues that the Commission has no jurisdiction or purview over the decisions made by CoV; and yet, by enveloping the bylaw into the scope of the applied-for franchise, Creative Energy is asking the Commission to give its approval to the provisions set out in the (to be enacted) CoV bylaw. They cannot have it both ways. [36]

Commenting on this quote, BCSEA-SCBC argues that the Commission's characterization of "the fundamental problem articulated in the [First] Decision" is incorrect for a number of reasons. In the CPCN and Original NEA Proceeding: the Commission did not find that the bylaw was enveloped in the Original NEA; the Commission found that it was not required to make a determination on the bylaw in order to approve the franchise; and the Commission's concern was to avoid public perception that CoV bylaws are approved by the Commission.[37]

In a similar vein, BCSEA-SCBC argues that in the Amended NEA Proceeding, the Commission erred when it adopted as a reason for denying the applied-for franchise, a point expressed only as preference by the Commission in the CPCN and Original NEA Proceeding, "that the Commission would prefer that the City of Vancouver not make its enactment of the mandatory connection bylaw conditional upon Commission approval of the franchise."[38] In the accompanying footnote to this argument, BCSEA-SCBC elaborates as follows: "What the First Panel commented was the Commission's preference, the Second Panel applied as the rationale for denial of approval of the franchise."[39]

FEI points out that the Commission decision in the Amended NEA Proceeding is both appropriate in its own right, and also consistent with the Commission's decision in the CPCN and Original NEA Proceeding, in pointing out that while CoV may have jurisdiction to invoke mandatory connection, the Commission has jurisdiction to consider whether the franchise satisfies section 45(8) of the UCA. FEI goes further, and argues that section 45(8) gives rise to an obligation and not just a right to review the franchise in that context, and that this jurisdiction is fundamentally different from the courts' jurisdiction to strike or uphold a municipal bylaw.[40]

4.2.2 Creative Energy reply

Creative Energy's reply did not provide additional arguments or comments relevant to this section.

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[35] BCSEA-SCBC Argument, p. 6.
[36] Amended NEA Decision, p. 11.
[37] BCSEA-SCBC Argument, p. 7.
[38] Ibid., p. 8.
[39] Ibid., p. 8, footnote 12.
[40] FEI Argument, p. 6.

Commission determination

The Commission determines that the Amended NEA Decision contains no error in fact or law relating to denying the applied-for franchise on the basis of the rights, privileges and concessions set out therein.

As noted in the introductory remarks to section 4.0 of this document, in deliberating this issue, the Panel did not revisit the question of what is 'in' the applied-for franchise; that matter was laid to rest in the prior section (4.1) of this decision. What remains, then, is to consider whether the Commission was justified in denying the applied-for franchise as constituted by the prior determination.

In reviewing the material before this Panel, we see no basis for concluding that the Commission erred in its decision to deny approval of the franchise, or the reasons stated therefore.

The Commission is clear that, having found the BEA and NE Bylaw to be part of the constituting documents, approval of the applied-for franchise would involve providing an opinion on the merits of mandatory connection and mandatory end use provisions contained therein.

Regarding the argument put forward by Creative Energy and BCSEA-SCBC that the Commission could have handled any apparent perception problems by approving the franchise and adding appropriate caveats, the Panel considers this line of reasoning to be not relevant to this proceeding. At issue is not whether the Commission could have made different determinations than those contained in the Amended NEA Decision, but rather whether the determinations it did make are in error.

We now turn to Creative Energy's argument, that it cannot satisfy the Amended NEA Panel's requirement to place the bylaw sufficiently outside the scope of the franchise "because it already is." This argument relates to the question of constituting documents (which was previously addressed) and not whether the franchise as constituted is acceptable to the Commission.

Creative Energy submits that "the Panel incorrectly suggests that it was Creative Energy's position that the First Panel had approved mandatory connection."[41] Creative references "Second Decision, p. 11; second full paragraph after Commission Determination," which is reproduced below:

> Creative Energy's position appears to be that, even if the Panel finds that the matter of mandatory connection had not been approved in the Prior Decision, the issue is in any case rendered moot in the current Application by virtue of moving those provisions into the BEA, which Creative Energy contends is outside the scope of the franchise agreement. The Panel does not accept that argument.[42]

[41] Reconsideration Application, p. 7. Emphasis added.

[42] Amended NEA Decision, p. 11. Deletion not in original, but added to demonstrate the point above.

The relevant phrase of the Amended NEA Decision is "even if the Panel finds that the matter of mandatory connection had not been approved in the Prior Decision" (emphasis added). In the context of reading this section of the Amended NEA Decision in its entirety, the Panel interprets "had not been approved" to mean "had been disallowed." In any event, a holistic reading of the paragraph suggests that this entire phrase is of secondary importance to the meaning conveyed in the paragraph, and could be deleted altogether without compromise to the essential point being made by the Commission.

With regard to Creative Energy's argument that references section 45(9) of the UCA, section 45(9) was never raised by the Amended NEA Panel, who referenced section 45(8) as relevant to its deliberations. Assuming that the intended reference was 45(8), the Panel finds the argument to be another aspect of jurisdiction that has been fully addressed in section 4.1 of this decision.

Turning to BCSEA-SCBC's arguments, the Panel does not consider them to be valid reasons to overturn the Second Decision. First, the Panel does not agree with BCSEA-SCB's assertion that the Amended NEA Panel misunderstood or mischaracterized "the fundamental problem" outlined in the First Decision. The First Decision's treatment of the "fundamental problem" is cited in the Second Decision (reproduced immediately below), and has been commented on extensively by all parties in submission during both the Second Proceeding and this Reconsideration Proceeding.

> While there is no specific clause in the NEA that provides for mandatory connection, there is language in the NEA that may leave the impression that the Commission is, indirectly, approving the Neighbourhood Energy Bylaw, which will mandate connection. The Panel prefers to see an NEA that is clear and unequivocal, in terms of what is to be approved by the Commission, and does not imply that CoV enactments are supported by the Commission.
>
> The Panel is concerned that enactment of the NE Bylaw is conditional upon Commission approval of the NEA. In our view, this could raise a public perception that the Commission has reviewed and approved the NE Bylaw. The existing rezoning policy that requires mandatory connection contains no such link to BCUC approval. We note the submission of the CoV that the NE Bylaw "supplements the existing rezoning policy that requires mandatory connection to the NES. If enacted, the NES Bylaw would add regulatory support to the existing connection policy." The Panel would prefer that the CoV enact bylaws and policies that are not linked to approvals by the BCUC; otherwise, confusion arises, and the public may perceive that the BCUC approves the CoV's mandatory connection. [43]

This Panel is satisfied that the Amended NEA Panel considered and understood these passages. And in any event, as pointed out in in the Amended NEA Decision, the Amended NEA Proceeding is not legally bound by the CPCN and Original NEA Decision. So, even if the Amended NEA Panel misunderstood the CPCN and Original NEA Decision (which this Panel does not consider to be the case) that alleged misunderstanding does not constitute an error of fact or law.

[43] Amended NEA Decision, p. 7.

As to BCSEA-SCBC's arguments that neither the BEA nor the NE Bylaw provide Creative Energy with any authority to impose mandatory connection requirements, this matter was fully dealt with in the CPCN and Original NEA Decision quote above, and particularly "While there is no specific clause in the NEA that provides for mandatory connection, there is language in the NEA that may leave the impression that the Commission is, indirectly, approving the Neighbourhood Energy Bylaw, which will mandate connection." The Commission, in the Amended NEA Proceeding took a similar position regarding the BEA and NE Bylaw; that "it implies Commission approval of the provisions contained in the NE Bylaw as well as those provisions contained in the Amended NEA."[44]

This Panel does not agree with BCSEA-SCBC's argument that the Amended NEA Panel erred by relying on the CPCN and Original NEA Panel's stated preference as a reason to deny the Second Application. An examination of the complete determination made by the Amended NEA Panel is necessary to place the matter in an appropriate context:

> The [Second] Panel determines that the applied-for franchise is constituted by the rights, privileges and concessions set out in the combined set of documents: namely the Amended NEA, the BEA and the NE Bylaw. Therefore, consistent with the [First] Decision, the [Second] Panel does not find the applied-for franchise to be acceptable in its current form, in that it implies Commission approval of the provisions contained in the NE Bylaw as well as those provisions contained in the Amended NEA.[45]

The Amended NEA Panel is very clear that its reason for denying the franchise is that "it implies Commission approval of the provisions…" Contrary to BCSEA-SCBC's interpretation, this Panel finds the phrase "consistent with the [First] Decision" is simply a comparative observation made by the Amended NEA Panel and could be deleted altogether without compromise to the essential point being made in the determination.

Turning finally to CEC and FEI's arguments that the applied-for franchise goes not only to matters of perception but also substantive issues regarding mandatory connection, these will be addressed by this Panel in section 6.0.

5.0 RECONSIDERATION RELATING TO THE INCLUSION OF THE CHINATOWN AREA

Creative Energy puts forward four principal arguments in support of overturning the decision to deny approval of the franchise on the basis of the Chinatown area being included.

The first argument is summarized by the following two excerpts from Creative Energy's submission: Creative Energy first cites the Amended NEA Decision (the first paragraph below), and then provides comments on that quotation (in second paragraph).

> The [Amended NEA] Panel states: "The Panel places considerable weight on the comments and findings in the [First] Decision. Notably that there is insufficient certainty about the load in

[44] Ibid., p. 11.
[45] Ibid., p. 11.

> Chinatown, that the Chinatown area is not contiguous to the NEFC area, and most importantly, that the CPCN was granted for the NEFC only, excluding Chinatown."
>
> The [CPCN and Original NEA] Panel did not conclude that there was insufficient certainty about the load in Chinatown to approve the NEA. In fact, the [CPCN and Original NEA] Panel, contrary to the views of the [Amended NEA] Panel, did not link in any way the load in Chinatown to its decision regarding the NEA. The same is true with respect to the fact that the Chinatown is not contiguous to the NEFC area.[46]

The second argument is that the Amended NEA Panel was incorrect in stating that the CPCN and Original NEA Panel excluded Chinatown when it granted the CPCN, because Creative Energy did not apply for a CPCN that included Chinatown.[47]

The third argument put forward by Creative Energy centres on the following quotation from the Second Decision, that "there is no evidence before [the Amended NEA Panel] that supports a finding that granting a franchise in the Chinatown area is necessary for the public convenience or properly conserves the public interest."[48] Creative Energy points out that there is considerable evidence on the record, and hence the Amended NEA Panel erred in fact when it wrote "there is no evidence…"

The fourth argument centres on what Creative Energy characterizes as mixed and ambiguous signals the Commission has sent, when comparing the Amended NEA Decision with prior Commission decisions regarding UBC/Corix.[49]

CoV echoes two of Creative Energy's arguments: first, regarding the fact that Creative Energy did not apply for a CPCN that included Chinatown in the CPCN and Original NEA Application; and second, that the Commission erred in stating in the Amended NEA Decision, that "there is no evidence" that supports a finding that including Chinatown is in the public interest.[50]

BCSEA-SCBC agrees with Creative Energy that the Amended NEA Panel was wrong to consider the CPCN and Original NEA Panel's findings regarding load and geography as being pertinent to the franchise question, and also provides a summary of evidence already on record that supports inclusion of Chinatown as being in the public interest.[51]

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[46] Reconsideration Application, p. 9.
[47] Ibid., p. 9.
[48] Amended NEA Decision, p. 15.
[49] Reconsideration Application, p. 11.
[50] CoV Argument, p. 9.
[51] BCSEA-SCBC Argument, pp. 9–11.

CEC makes the following points:

- Creative Energy's application for an extension policy was tantamount to an application for a CPCN that includes Chinatown, and Creative Energy's argument to the contrary is a matter of semantics.
- The Second Decision's wording "no evidence" would have been better written if it stated as "no convincing evidence" but the omission in not a material error. While there is much evidence on the record that supports inclusion of the Chinatown area as in the public interest, there is also much evidence on the record that supports a finding that including Chinatown is not in the public interest, and it is clear from a holistic reading of the Second Decision that the Commission considered all the evidence before it.[52]

FEI echoes CEC's argument that Creative Energy's arguments regarding the CPCN are essentially semantic with regard to CPCN versus extension test, and also goes on to say that in any event the First Decision did indeed exclude Chinatown from the CPCN, quoting from page 14 of the First Decision: "the [First] Panel finds that a CPCN for the NEFC DES Project limited in scope to exclude Chinatown."[53] FEI also characterizes Creative Energy's argument regarding no evidence as an "uncharitable gloss on the Commission's individual word choices" for reasons similar to those put forward by the CEC.[54]

Commission determination

The Panel determines that the Amended NEA Decision contains no error in fact or law relating to denying the applied-for franchise on the basis of the inclusion of the Chinatown area.

The Panel agrees with FEI and CEC that Creative Energy's focus on the phrase "no evidence" is an exercise in semantics. Our reading of the Second Decision in its entirety makes it abundantly clear that the Amended NEA Panel was not oblivious to, nor did it ignore the full evidence before it. As CEC suggests, inserting an extra word would have been helpful, but this is at worst a matter of poor composition, and certainly not an error in fact or law.

Regarding the issue of whether or not the Commission excluded Chinatown from the CPCN in the CPCN and Original NEA Decision, this Panel finds sufficient evidence to support the conclusion that in the CPCN and Original NEA Proceeding, Creative Energy applied for inclusion of Chinatown in the CPCN through its proposed extension test and the Commission did indeed exclude Chinatown from the CPCN.

As to whether or not the First Decision's findings around load and geography were or were not intended by the Commission to have bearing on the issue of the franchise, this Panel considers that to be beside the point. The Amended NEA Panel makes it abundantly clear that it considers the findings of load uncertainty and geography to be relevant to its decision. This Panel finds that this choice is entirely within the Amended NEA Panel's rights as an independent panel, regardless of whether or not the CPCN and Original NEA Panel intended its comments to be construed as probative in that regard.

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[52] CEC Argument, p. 4.
[53] FEI Argument, pp. 12–13.
[54] Ibid., pp. 15–16.

Finally, having reviewed the entirety of evidence and argument on the record, this Panel agrees with the Amended NEA Panel's conclusion that, on balance, Creative Energy has failed to establish a persuasive case that inclusion of the Chinatown area is in the public interest.

6.0 FURTHER COMMENT ON PUBLIC INTEREST

In the determination laid out in the previous sections, we have considered whether the Commission erred in its review of the amended NEA in the Second Decision. However, in this proceeding two parties, BCSEA-SCBC and the CoV suggest that the First Decision should be reconsidered. Neither FEI, FAES nor CEC suggest there was any error made in the original decision and are generally supportive of that decision. We will now address the comments of CoV and BCSEA-SCBC regarding the CPCN and Original NEA Decision.

CoV submits that:

> the concern that approval of the NEA or Amended NEA may be perceived as "indirect" approval of the NE Bylaw was not a proper basis to deny approval of the NEA or Amended NEA. The BCUC erred in law and proper administrative practice when it denied the NEA and Amended NEA to avoid a potential perception that the BCUC is somehow indirectly approving the NE Bylaw. It is a disturbing precedent for the BCUC to hold back from approving the NEA simply because it is concerned about a possible public perception, even when it knows that perception would be misguided. The BCUC can easily avoid any misguided perceptions by explaining its mandate in its decision on the NEA.[55]

In expanding on this point, CoV states:

> It is a disturbing precedent for the BCUC to hold back from approving the NEA simply because it is concerned about a possible public perception, even when it knows that perception would be misguided. The BCUC can easily avoid any misguided perceptions by explaining its mandate in its decision on the NEA.[56]

BCSEA-SCBC "respectfully ask the Reconsideration Panel to vary the original decision by approving the franchise as requested by Creative Energy."[57]

Creative Energy draws attention to the First Decision, which states:

> The Panel also notes a further distinguishing feature, the applicant's authority for mandatory connection stems not from the NEA but rather from a CoV bylaw – a crucial distinction in this case. Creative Energy does not derive any authority from the franchise agreement to demand its

[55] CPCN and Original NEA Proceeding, CoV Argument, p. 8. Emphasis added.
[56] Ibid. Emphasis added.
[57] Ibid. Emphasis added.

> developers to connect: that authority originates from the mandatory connection bylaw and zoning requirements.[58]

Following on immediately from this quoted excerpt, Creative Energy argues that "[i]t is a crucial distinction, and one missed by the Second Panel because the Second Panel concluded that the applied-for franchise included a CoV bylaw."[59]

However, CEC argues that the applied-for franchise does not simply raise a public perception concern, but rather goes to the substantive issue of whether the franchise meets the test of section 45(8). CEC argues that Creative Energy failed to satisfy that test.[60]

FEI submits that its:

> Final Submissions in both proceedings explained why section 45(8) of the UCA gives the Commission jurisdiction to consider – and, indeed, gives rise to an obligation to consider - mandatory connection in a circumstance where a proposed franchise contains terms referencing mandatory connection or includes terms that require the enactment of a mandatory connection bylaw. The Commission's exercise of its own jurisdiction under section 45(8) is fundamentally different from the courts' jurisdiction to strike or uphold a municipal bylaw.[61]

Regarding the public interest test, CoV argued that the NES policies and NES Bylaw were the culmination of many years of research and public consultation by CoV. These policies serve the public interest since they help achieve CoV and provincial objectives related to the reduction of greenhouse GHG emissions expressed in CoV policy, the 2007 Energy Plan and the *Clean Energy Act*. As the CoV witness explained, an NES is a cost-effective way to reduce building-related GHG emissions and an important element of CoV's GHG emission reduction plan.[62]

Creative Energy argued that "[i]n considering this Application, in our submission, the Commission ought to afford significant deference to the public interest as recognized by the elected officials of the CoV and reflected through the City's policies and bylaws. The commercial interest of a few corporations must be subordinated to that public interest."[63] Creative Energy further argued that the Commission must undertake its public interest analysis "within the parameters mandated by the City through its various policy tools for the NEFC."[64]

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[58] CPCN and Original NEA Decision, p. 48.
[59] Reconsideration Application, p. 8.
[60] CEC Argument, p. 4.
[61] FEI Argument, p. 6.
[62] CPCN and Original NEA Proceeding, CoV Final Argument, p. 10, para. 4.
[63] CPCN and Original NEA Proceeding, Creative Energy Final Argument, p. 3, para. 1.
[64] Ibid., p. 66, para. 251.

CoV argued that"[t]here is no reasonable basis to dispute that the franchise underlying the NEA is necessary for the public convenience and conserves the public interest. The NEA is part of a comprehensive NES initiative that the CoV has spent years studying and developing through its legislative tools under the *Vancouver Charter."*[65]

FEI submitted that "no such constraint exists … the Commission's public interest mandate regarding CPCNs and franchises requires consideration of a wide variety of interests, and the Commission is unfettered by the COV's objectives or preferences." [66] In support of its argument, it cited the view of the Federal Court of Appeal:

> … the term "public interest" includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. Some may be given little or no weight; others much. But surely a body charged with deciding in the public interest is "entitled" to consider the effects of what is proposed on all members of the public. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is accordingly, in my view, an error of law justifying the intervention of this Court.[67]

In reply, Creative Energy stated that it "agrees that the consideration of the public interest must be broad and inclusive, but also that those competing considerations must be weighed and balanced. The CoV's NES plans and actions should be given great weight in the Commission's consideration of the public interest."[68]

With regard to mandatory connection – and mandatory end use – provisions, in the First Proceeding evidence was presented of viable alternatives to the NES proposed by Creative Energy. For example: FAES argued that it could provide on-site geothermal that would meet CoV's greenhouse gas emissions (GHG) targets in a cost effective manner; FEI argued that it could deliver renewable natural gas (RNG) through its natural gas distribution system; and CEC contended that electricity is a viable option. Creative countered these proposals, arguing, among other things that the calculations were flawed and that none could deliver the energy within the GHG targets of CoV at a competitive price.

In addition, there was discussion around Creative Energy's decision to split the project into two separate applications. Phase one includes the initial build of the DES using the existing Creative Energy plant which utilizes natural gas as an energy source. It is only in Phase 2 that Creative Energy proposes to upgrade the central plant to utilize a fuel that will meet the CoV's GHG targets. Evidence heard in the oral hearing indicated that there is no firm requirement to make this upgrade the central plant until 2030. Many parties argued that there is considerable uncertainty around the energy supply of Phase 2 and therefore when the DES would begin to meet the CoV's GHG targets. In contrast, parties argue that alternatives can begin to deliver GHG reductions immediately.[69]

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[65] CPCN and Original NEA Proceeding, CoV Final Argument, p. 10, para. 42.
[66] CPCN and Original NEA Proceeding, FEI-FAES Joint Final Argument, p. 2, para. 42.
[67] Sumas Energy 2 Inc. v. Canada (National Energy Board), 2005 FCA 377, para. 23.
[68] CPCN and Original NEA Proceeding, Creative Energy Reply Argument, p. 6, para. 11.
[69] CPCN and Original NEA Decision, Appendix A, pp. 1–6.

Panel discussion

The Panel will now address the public interest issues raised in the two previous proceedings regarding provisions that provide for, support or suggest the provision and support of, mandatory connection and end/use. These provisions effectively grant Creative Energy a monopoly on the provision of heat and hot water in NEFC and for new buildings and significant renovations in Chinatown. At issue is whether, pursuant to section 45(8) of the UCA, these provisions are "necessary for the public convenience and properly conserves the public interest."

In its Final Argument in the CPCN and Original NEA Proceeding, FAES provided a taxonomy, reproduced here as Table 1, regarding market protection measures. This taxonomy is useful in drawing an important set of distinctions surrounding the nature of franchises in the context of monopoly powers.

Table 1 – Spectrum of Market Protection Measures [70]

Term	Explanation/Description	Examples
1. Traditional Utility (No exclusivity but economic barriers to entry)	• The nature of the product or commodity, the capital investment and the physical connection to the customer may act to make it impractical for another service provider to install and compete to provide the identical product or commodity once the investment has been made; • The provision of the product or commodity (natural gas, electricity, steam, etc.) differs from the use by which that product or commodity may be employed (the provision of light, heat, cold or power); • A customer remains free to: decline to connect to a Traditional Utility's system; to take service from it; and to satisfy its needs for a particular end use from any other source.	• Natural gas distribution service provider (*e.g.,* FEI) • Electricity distribution service provider (*e.g.,* BC Hydro) • DES provider (*e.g.,* Creative Energy core utility) • On-site TES
2. Exclusive Provider of Utility Service	• Franchise agreements could, subject to Commission approval, establish a single utility as the exclusive provider of a utility service (a particular product or commodity, ie. natural gas, electricity, steam, etc.) in a particular service territory; • The provision of the product or commodity (natural gas, electricity, steam, etc.) differs from the use by which that product or commodity may be employed (the provision of light, heat,	• This is not typical in BC. • Creative Energy's proposed NEFC NES would confer this protection, and others below.

[70] CPCN and Original NEA Proceeding, FAES Final Argument, pp. 23–25.

	cold or power); • A customer remains free to: decline to connect to an Exclusive Provider of Utility Service's system; to take service from it; and to satisfy its needs for a particular end use from any other source.	
3. Mandatory Connection	• Mandatory connection means that a customer has no choice but to connect to a utility system that provides a particular utility service; • Mandatory connection is not necessarily synonymous with "mandatory use."	• Mandatory Connection Bylaw to compel new buildings, and buildings undergoing major renovations, in NEFC and Chinatown to connect to a NES.
4. Mandatory Use	• Mandatory use obligates a customer, once connected, to also take the product or commodity from the utility.	• The proposed Mandatory Connection Bylaw provides for "compulsory use in mandatory service area" (Article 2.1) and "compulsory use in conditional service area" (Article 2.2)91
5. Exclusive Provider of an End Use	• The Exclusive Provider of End Use enjoys the exclusive right to satisfy customers' need for an end use (*i.e.,* the provision of light, heat, cold or power); • This differs from an Exclusive Provider of Utility Service, which enjoys the exclusive right to provide a particular product or commodity (*i.e.,* natural gas), while customers remain free to satisfy their need for an end use from any other source; • The concept of being the Exclusive Provider of an End Use goes beyond "mandatory connection" and "mandatory use" as it compels a customer to take service specifically from one provider in any and all circumstances to satisfy its need for an end use, to the exclusion of any alternative.	• Creative's Application to be the Exclusive Provider of Hot Water Service in NEFC and Chinatown areas, thus eliminating competition among other utilities that provide products or commodities that serve the same end use(*e.g.,* FEI, BC Hydro, Creative Energy core utility, FAES and any other TES Providers)

A key difference between the first category and all others is that a franchise agreement in the first category doesn't grant a legal monopoly. A franchise agreement in any of the remaining categories creates a legal monopoly.

At most, franchises in the first category in Table 1 acknowledge that a utility might exist as a natural monopoly and provide a framework to enable a utility to operate in a given region, but provide no exclusivity to the utility. This is not a matter of accident or coincidence. The Commission is deliberate in its choices to typically not grant a franchise that has inherent rights, privileges or concessions that:

- Provide for exclusivity of supply; and/or
- Require mandatory connection; and/or
- Require mandatory end use; and/or
- Grant exclusive provision of end use.

The Panel is not aware, and there is no evidence before us, that the Commission has ever, with the exception of a particular class of projects, granted anything other than a franchise in the first category in Table 1. As the Commission pointed out in the First Decision, the exceptions are projects that involve the provision of thermal energy services to a master planned development.[71]

To further elaborate, the Panel turns to the Commission report issued on December 27, 2012, titled Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives Report (the AES Report). Two key principles were articulated by the Commission in the AES Report:

1. Only regulate where required; and
2. Regulation should not impede competitive markets.

The following excerpt from the AES Report was quoted by FAES in its Final Argument in the CPCN and Original NEA Proceeding:

> Regulation exists to protect consumers against the abuse of monopoly power but, in the Commission Panel's view, the superior protection for consumers is the competitive marketplace. The Commission Panel accepts Dr. Jaccard's statement that '[t]he underlying principle of economic regulation is that monopoly should only exist where it is not possible to replace it with competition.' […] Competitive forces are generally accepted as providing societal benefits and consumer protection more efficiently and effectively than economic regulation.
> […]
> Based on the above, the Commission Panel finds as a fundamental principle that regulation is only appropriate where required and is driven by the inability of competitive forces to operate with greater efficiency and effectiveness than a sole service provider.
> While the Commission does not regulate competition *per se*, the Panel accepts that it should not act to hinder competition, where competition is feasible.[72]

The Panel reaffirms this fundamental principle – to regulate only where required and to not impede competitive markets, unless there is an inability of competitive forces to operate with greater efficiency and effectiveness

[71] CPCN and Original NEA Proceeding, Decision, p. 48.
[72] AES Report, p. 14.

than a sole service provider. Accordingly, to grant a franchise that confers the greatest degree of monopolistic powers would require a compelling reason to demonstrate that it is in the public interest to do so.

The Panel finds that the evidence is not persuasive that alternatives cannot deliver the carbon reduction goals of the CoV at a competitive price for the following three reasons. First, notwithstanding Creative Energy's arguments to the contrary, interveners have provided evidence that viable alternatives do exist. Second, the Commission has approved in prior instances a number of cost effective on-site thermal energy systems and has approved a renewable natural gas program for FEI. Third, given the 2030 time horizon for achieving outcomes, there is no evidence before us that precludes the possibility that other effective new innovations/technologies may still arise within the franchise period.

Although Creative Energy argues that these alternative approaches cannot deliver the intended benefits, it also argues that it needs the monopolistic protection provided by the proposed franchise agreement. If Creative Energy is correct in arguing that no other technologies are capable of delivering the intended benefits, then it does not require the protection of a monopolistic franchise (i.e. beyond the first category in Table 1 above) to assure its load. Conversely, if other technologies/service offerings currently exist or arise during the term of the applied-for franchise, then granting that added protection within the franchise runs counter to the public interest because it hinders competition.

From the evidence before us the Panel finds that the franchise as applied for in either the CPCN and Original NEA Application or the Amended NEA Application would represent an intrusion into a competitive market that is contrary to the fundamental principle outlined above. Therefore, because it is not in the public interest to do so, this Panel will not approve a franchise agreement that includes any provision that imposes, or suggests the imposition of, any monopolistic restrictions beyond the first category in Table 1 above, except for master planned developments.

In the First Proceeding, the Commission pointed out that Creative Energy is not requesting that the Commission make a determination on mandatory connection. However, referencing the NE Bylaw, and embedding other related language in the agreement, results in is a franchise agreement that the Panel cannot approve, given the reaffirmation of the fundamental principle described above. In this reconsideration proceeding, FEI has highlighted a number of areas in the Amended NEA itself (i.e. in addition to the mandatory connection and mandatory end use provisions arising from linking the Amended NEA to the NE Bylaw) that confer or appear to confer a legal monopoly, in particular:

- Section 2.3(b) grants Creative Energy the exclusive franchise to provide "hot water or any other form of energy for the purposes of supplying Hot Water Service" in the NEFC and Chinatown;
- Section 2.3 (d) expressly confirms that Creative Energy was to be the "sole supplier of thermal energy for the purposes of supplying Hot Water Service;"
- Schedule A of the Amended NEA, defines a Franchise Area Bylaw as one "that requires, among other things, that all Franchise Area Buildings connect to and make use of the Franchise Area NES and that Franchise Area Building mechanical systems comply with the Key Components of Franchise Area Energy Connection Requirements (to the extent such requirements are incorporated into the Bylaw) and not incorporate any heat production equipment;"

- Section 4.3(a)(i) compels the CoV to advise all applicants for a building permit that the building must be compatible with the Franchise Area Bylaw and NES; and
- Section 12.8(c) raises the spectre of CoV liability if it fails to take commercially reasonable steps to oppose circumvention of the NE Bylaw.

So long as Creative Energy's proposed franchise contains provisions that provide, or suggest the provision of, any of the rights denoted above, the franchise fails to satisfy section 45(8) of the UCA, because it is not in the public interest.

The mandate of the Commission differs from the mandate of CoV and as a result, the public interest determinations also differ. While the Panel makes no comment on CoV's consideration of public interest issues, as part of our public interest determination, we have considered the CoV's stated objective to establish a district energy system in Northeast False Creek and Chinatown area. We agree with the submissions of FEI-FAES in the CPCN and Original NEA Proceeding. As stated by the Federal Court of Appeal, our public interest determination must consider all affected members of the public.[73] Therefore we must not only consider the CoV's NES plans, but we must also weigh and balance of competing considerations. Given the existence of alternatives to an NES we don't find the approval of the proposed NEA as being in the public interest because there are viable alternatives to creating a monopolistic energy provider.

Further, we note that in denying this franchise agreement the CoV is not necessarily prevented from achieving its objective to establish a DES in the NE False Creek and Chinatown area. Two ways that the CoV can achieve this objective are:

1. Utilize the exemption from the definition of a public utility provided in section 1 of the UCA that allows the CoV, as a municipality, to own and operate the DES. This is the route the CoV took in SE False Creek.
2. Enact the NES Bylaw entirely independently from the NEA and any related agreements.

7.0 FINAL DETERMINATION ON RECONSIDERATION

The Commission denies Creative Energy's application to vary Order G-88-16.

Having ruled in sections 4 and 5 that the Amended NEA Panel made no errors in fact or law on the matters which Creative Energy has set before this Panel for reconsideration, and in section 6 reconsidered the public interest issues raised in the two previous proceedings regarding provisions that provide for, or suggest, mandatory connection and end/use, there is no basis upon which this Panel has reason to grant Creative Energy's request to vary either the Amended NEA Decision or the CPCN and Original NEA Decision.

[73] Sumas Energy 2 Inc. v. Canada (National Energy Board), 2005 FCA 377, para. 23.