SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, BC V6Z 2N3 CANADA
website: http://www.bcuc.com

BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-133-15

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

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

and

Superior Propane
Status as Public Utility in British Columbia for the Operation
of a Propane Distribution System at Seascapes Development Ltd.

BEFORE: L. A. O'Hara, Panel Chair/Commissioner August 7, 2015

O R D E R

WHEREAS:

A. On February 26, 2014 and March 25, 2014, the British Columbia Utilities Commission (Commission) received complaints from the Property Manager of a 100-unit strata development property called Seascapes, located at West Vancouver, British Columbia, and a resident of Seascapes, regarding propane services supplied by a division of Superior Plus LP doing business under the name Superior Propane (Superior);

B. By Order G-60-15 dated April 22, 2015, the Commission established a written process for the review of the Application and admitted items 2 through 9 of Appendix A to that Order as evidence in the proceeding;

C. The regulatory timetable was later amended in Commission letter dated April 29, 2015 and Order G-72-15, which included the submission of additional evidence by Superior and information requests on that evidence;

D. Final arguments were received from Superior and from interveners on July 17 and July 24, 2015, respectively. Superior also filed its Reply Argument on July 31, 2015;

E. The Commission has reviewed the evidence filed in this proceeding and considered the final and reply arguments from all parties and finds that a determination is necessary.

NOW THEREFORE, pursuant to the *Utilities Commission Act* and for the reasons attached to this order, the British Columbia Utilities Commission orders as follows:

1. Superior Propane (Superior) is a public utility as defined in section 1 of the *Utilities Commission Act* (Act) and is therefore providing a regulated service of delivering and selling gaseous propane to the strata development property at Seascapes.

..../2

2. The current rates that Superior charges to its customers at Seascapes are made interim as of the date of this order, pursuant to section 90 of the Act. The difference between the interim rate and permanent rate will be subject to adjustment with short-term interest.

3. If Superior intends to apply for a limited or full exemption from regulation under section 88(3) of the Act, it must inform the Commission within 15 days of this order.

4. If Superior does not intend to apply for a limited or full exemption from regulation under section 88(3) of the Act, it must:

   (i) apply to the Commission within 30 days of this order for the approval of rates or a rate methodology for the utility service being provided at Seascapes, pursuant to sections 59–61 of the Act, and

   (ii) apply to the Commission within 45 days of this order for the approval of a tariff binder including terms and conditions of service and a schedule of fees to be charged to customers at Seascapes, pursuant to sections 59–61 of the Act.

DATED at the City of Vancouver, in the Province of British Columbia, this 7th day of August, 2015.

BY ORDER

Original signed by:

L. A. O'Hara
Panel Chair / Commissioner

Attachment

Superior Propane
Status as Public Utility in British Columbia for the Operation
of a Propane Distribution System at Seascapes Development Ltd.

REASONS FOR DECISION

By letter dated January 30, 2015, the Commission appointed a panel[1] to conduct the review of this proceeding to determine whether Superior Propane (Superior) is operating as a "public utility" as that term is defined in section 1 of the *Utilities Commission Act* (Act).

This proceeding arises from complaints previously received in early 2014 from a resident and the property manager at Seascapes, a strata development, regarding the supply of propane to the residents at the strata development. Those complaints initiated a proceeding which culminated in Order G-91-14, finding that Superior was operating as a public utility. Superior sought reconsideration of that order and by Order G-11-15, the reconsideration request was allowed and Order G-91-14 was set aside as a result of the inadvertent failure of the Commission to disclose to the parties a document that was considered by the Panel in its deliberations. This proceeding started anew the process for a determination as to whether Superior is operating as a "public utility."

The Ministry of Energy and Mines (Ministry) and Seascapes registered as interveners. By Order G-60-15, items 2 through 9 of Appendix A to Exhibit A-2 were admitted by consent as evidence in this proceeding.[2] Superior also filed additional evidence[3] and the parties and Commission staff were provided the opportunity to ask information requests (IRs) on the evidence. Superior responded to IRs from the Ministry and from Commission staff.[4]

Submissions have been received from all the parties. Superior Propane filed its final argument under cover of letter dated July 17, 2015. Final arguments from the Ministry and Seascapes were filed under cover of letters dated July 24, 2015. Superior filed its reply argument under cover of letter dated July 31, 2015.

The Panel notes that the issue before it is restricted to whether Superior is a public utility under the Act. This requires a determination as to whether Superior meets the definition of a "public utility" under section 1 of the Act. The parties have made additional submissions on whether there is a need for regulation given the service provided by Superior to customers at Seascapes. The Panel does not intend to address those submissions at this time. If Superior is found to be a public utility then its operations at Seascapes are a regulated service unless an existing exemption applies to it (no existing exemptions are applicable) or it applies to and obtains approval from the Commission to be exempted in whole or part from regulation pursuant to section 88(3) of the Act.

Superior Propane's Submission

The essential characteristics of the service provided at Seascapes by Superior as outlined in its final argument are as follows:

[1] Exhibit A-1.
[2] Exhibit A-6.
[3] Exhibit B-8.
[4] Exhibits B-10 and B-11.

(a) Superior Propane delivers liquid propane gas to a 12,000 USWG main storage tank located at Seascapes;

(b) At a cost of $266,195,[5] Superior Propane constructed a grid distribution system to facilitate the efficient delivery of propane to Seascapes' homeowners. In essence, homeowners draw propane from the main storage tank to their individual units, as required, for their various needs;

(c) The facilities at Seascapes include a vaporizer, which enables and assures the delivery of propane to Seascapes' homeowners as and when required;

(d) Meters are in place for each individual unit, and each homeowner is invoiced according to their propane consumption;

(e) The price of propane delivered to Seascapes reflects the efficiencies of the Superior Propane operation using a single main storage tank as opposed to delivering to 100 bulk tanks. Such pricing would not be possible if delivery were required to each individual unit holder at Seascapes;

(f) The relationship between Superior Propane and Seascapes is governed by the Propane Supply and Installation of Grid Distribution Agreement between Superior Propane and Seascapes dated September 9, 2004 (Agreement), a schedule to which is a general retail agreement to be entered into by each individual unit holder at Seascapes with Superior Propane.[6]

Superior acknowledges that its operation at Seascapes involves its ownership and operation of equipment for the sale and delivery of an agent for the production of heat for the public for compensation, and thus *prima facie*, falls within the first part of the definition of a "public utility" under the Act (section 1). However, it notes that this definition is prefaced by the word "means." Superior submits that does not mean all such operations are public utilities, and in particular, the Act specifically does not include within the scope of the Commission's jurisdiction all persons not otherwise a public utility that are ".... engaged in the petroleum industry" (section 1).

The term "petroleum industry" is defined to include the carrying on within British Columbia of the business of the storage and the wholesale or retail distribution or sale of petroleum products (section 1).

Superior submits that all of the foregoing leads to the key definition in section 1 of the Act for the purpose of this proceeding, set out in full, below:

> "petroleum products" includes gasoline, naphtha, benzene, kerosene, lubricating oils, stove oil, fuel oil, furnace oil, paraffin, aviation fuels, liquid butane, liquid propane and other liquefied petroleum gas and all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things.[7]

[5] Exhibit B-10, BCUC IR 1.2.6.
[6] Superior Final Argument, pp. 1–2.
[7] Superior Final Argument, p. 5.

Superior notes that this last definition is not preceded by the term "means" or any other term that would imply or signal that what follows is an exhaustive definition. Superior submits that in its Order No. G-91-14 of July 10, 2014, the Commission stated that the Act defines petroleum products "as ... liquid propane and other liquefied petroleum gas and all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things." In fact, the Act does not use the term "as" in its definition of petroleum products, but rather the definition is introduced by the word "includes" and this makes a substantial difference in its interpretation.

The terms "means" and "includes" have distinct legal meanings and cannot properly be replaced by the term "as." Specifically, the legislative use of the term "means," as is used in the definition of public utility under the Act, connotes an exhaustive definition. The legislative use of the term "includes," as is used in the definitions of petroleum industry and petroleum products under the Act, connotes an expansive definition, and signifies that the lists following those definitions was intended by legislators to be non-exhaustive. In other words "all products obtained from petroleum, whether or not blended with or added to other things" fall within the definition of "petroleum products," and their storage, sale or distribution by a person not otherwise a public utility is not included in the definition of a public utility under the Act.

Superior cites Sullivan on the Construction of Statutes:

- an exhaustive definition declares the complete meaning of the defined term and is generally introduced by the verb "means;"
- a non-exhaustive definition does not displace the meaning of the defined term in ordinary usage, but rather exemplifies it, or illustrates its application by providing examples, and is generally introduced by "includes."

To the same effect is the Uniform Acts Drafting Conventions guide of the Uniform Law Conference of Canada:

> "Means" and "includes" have different uses.
>
> "Means" is appropriate for exhaustive definition (where French uses s'entend de, or no linking word at all). "Includes" is appropriate for two kinds of definitions; those that extend the defined term's usual meaning (here French uses techniques such as assimiler a), and those that merely give examples of the defined term's meaning without being exhaustive (here, French generally uses s'entend notamment de).[8]

While Superior acknowledges that there may be specific cases where the context in which "includes" can suggest an exhaustive definition, Superior Propane submits that is not this case. This is clearly demonstrated by the fact that the legislature was clear and specific that: "petroleum products ... includes ... all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things."[9]

Superior submits that in order to conclude that for the purposes of the Act only liquid petroleum is a "petroleum product," it would be necessary to entirely ignore this language, which can hardly be said to reflect an intention to exclude any derivative of petroleum in whatever form. Indeed, it would be absurd to say that "all derivatives

[8] Superior Final Argument, pp. 6–7.
[9] Superior Final Argument, p. 5.

of petroleum" includes propane in its compressed liquid form but not propane when it is released from a pressurized storage container.

The Ministry's Submission

The Ministry submits that this matter is straightforward. In respect of its propane grid system at Seascapes, Superior is clearly a "public utility" as that term is defined in the Act. In 2012 the BC Legislature removed any doubt that the provision of propane in a gaseous form constitutes the operation of a public utility.

The Ministry challenges Superior's assertion that there is no need for its operation at Seascapes to be regulated as a public utility. Whether or not that is the case does not change the fact that the Legislature clearly intends the provision of gaseous propane to be regulated as a public utility under the Act. If Superior believes that its operations at Seascapes should not be so regulated, then it should seek an exemption under section 88(3) of the Act.

The Ministry relies upon *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. Iacobucci J., at paragraph 21, adopted the "modern principle" for the interpretation of statutes:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Ministry notes that Superior concedes in its argument that it *prima facie* falls within the definition of "public utility" in the Act. However, it argues that it falls within the exception in paragraph (e) of the definition, as it is engaged in the petroleum industry. The "petroleum industry" is defined to include the wholesale or retail distribution or sale of petroleum products. The definition of "petroleum products" provides as follows:

> "petroleum products" includes gasoline, naphtha, benzene, kerosene, lubricating oils, stove oil, fuel oil, furnace oil, paraffin, aviation fuels, liquid butane, liquid propane and other liquefied petroleum gas and all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things;

The Ministry notes that the word "liquid" was added before the words "butane" and "propane" pursuant to the Energy and Mines Statutes Amendment Act, 2012, SBC 2012, c. 27, s. 25. By adding the word "liquid" before the word "propane," the Legislature could only have meant one thing. That is, that those providing liquid propane were not to be regulated as public utilities. Those providing other forms of propane, in this case gasified propane, would be regulated as a public utility under the Act. If the Legislature had intended that those providing propane in other forms would fall within the definition of "petroleum products," and therefore fall within the "petroleum industry" exception, it would not have used the qualifying word "liquid." Any other conclusion would defy logic.

The Ministry submits this is consistent with one of the key maxims of statutory interpretation: *expressio unius est exclusio alterius*, or "to express one thing is to exclude another". See Ruth. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham: Butterworths, 2002) at pages 186–187.

The Ministry also submits that the British Columbia Court of Appeal's decision in R. v. Hunter, 2000 BCCA 363, illustrates the application of this maxim. In that case, the Court reached the "inescapable" conclusion that, since the Narcotic Control Act specifically excluded "nonviable" cannabis seeds from the definition of a prohibited substance, viable seeds, which the accused was charged with possessing for the purposes of trafficking, must be captured by the definition. The Court stated at paragraph 9:

> ... [T]he plain reading of the relevant provisions contained in the Act would lead one to the conclusion that these seeds are a prohibited substance. I say that because it seems to me to be an inescapable conclusion that if Parliament states that "non-viable" seeds of the plant are to be excluded from the definition, then it must be the case that viable seeds will be included in any such definition .... The exclusion of non-viable seeds appears to admit of no other inference or conclusion but that viable seeds are to be included in the definition of illegal substance.

The Ministry submits that when applying the same logic, it is clear that by specifying "liquid propane," the Legislature intended to exclude other forms of propane, in this case its gaseous form. To borrow the Court of Appeal's words, the inclusion of "liquid propane" in the definition of "petroleum products" admits of no other inference but that other forms of propane are not to be captured by that definition.

In this context, Superior's assertion that the definition of "petroleum products" is not exhaustive is immaterial. This case deals with propane. The only kind of propane that is within the definition of "petroleum products" is liquid propane. In other words, "propane" is exhaustively dealt with in this definition. The legislature has made it clear that only liquid propane is a "petroleum product."

The Ministry also submits that the same logic applies to the "basket clause" at the end of the definition. Having exhaustively dealt with "propane," the words "... all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things" have no application. In short, having dealt with propane, and specified that only liquid propane was a "petroleum product," it would be illogical for the Legislature to have intended to deal with propane, in any form, in this "basket clause."

In its reasons attached to Order G-91-14, the Commission concluded that "... the Legislature has clarified that only liquid propane is exempt from regulation under the [Act]."

Finally, the Ministry also submits the object of the Act is in no way inconsistent with this conclusion. Fundamentally, the purpose of the Act is to protect customers receiving essential services where they do not have a choice of provider, in other words, where they are "captive." As the Commission said in the Alternative Energy Solutions Inquiry "The [Commission] agrees that the purpose of the [Act] is to regulate natural monopolies and protect consumers from the exercise of economic power."[10]

Seascapes' Submission

Seascapes submits that Superior operates as a public utility with respect to its business relationship with Seascapes residents. It considers the Act to be clear and prescriptive on this matter. Notwithstanding, Seascapes is relying on the Ministry to address the legal issues related to the intent and application of the legislation.

[10] FortisBC Energy Inc. Inquiry into the Offering of Products and Services in the Alternative Energy Solutions and Other New Initiatives, Report dated December 27, 2012, p. 15.

Superior Propane's Reply Submission

Superior takes issue with the Ministry's interpretation of *Rizzo.* It says the Ministry suggests that in reading all of the relevant words of the Act in their grammatical and ordinary sense, per *Rizzo*, it would not be logical to conclude that propane in any form other than liquid should fall within the definition of "petroleum products" in the Act. The *Hunter* case is distinguishable from this case. In that matter, the language used in the statute supported the conclusion reached by the Court. There, the language was much clearer – "... but not including non-viable cannabis seed" – and could support the conclusion reached. It is notable that the legislation in that case did not include the important subsequent language which the Ministry terms a "basket clause;" it is equally notable that the legislation in this case, in establishing specific exemptions from regulation, does not use the "not including" language of Hunter; in Superior's submission, it is precisely because of those differing facts that the Court could reach the conclusion it did as set out in paragraph 9 of the Ministry's argument.

Superior submits that if all of the relevant words are to be read in their grammatical and ordinary sense, the Ministry's position is that liquid petroleum is a petroleum product, but propane in any other form – including vapour or gaseous – is not. This conclusion, the Ministry says, can be reached because not only is it appropriate, but it is in fact logical and necessary to ignore the words of that "basket clause." There is no doubt that propane, in whatever form, is a "derivative[s] of petroleum and a[ll] product[s] obtained from petroleum." The words are relevant and it is inappropriate if not illogical to ignore them.

Commission determination

The Panel finds that Superior meets the definition of "public utility" as defined in section 1 of the Act and is therefore providing a regulated service at Seascapes. In making this finding, the Panel finds that it is only propane in its liquid and not gaseous form that falls within the exception applicable to those in the petroleum industry who would otherwise meet the definition of public utility under the Act.

Superior acknowledges that it *prima facie* falls within the definition of public utility under the Act. It owns and operates equipment or facilities for the sale and delivery of an agent for the production of heat for the public for compensation. However, it argues that the exemption in the definition for those engaged in the "petroleum industry" applies to it. Whether that is so or not depends on whether the propane being delivered at Seascapes falls within the definition of "petroleum products" under section 1 of the Act. It is important to note that although Superior delivers liquid propane to its main storage tank at Seascapes, the liquid propane is vaporized prior to the actual delivery to Seascape's homeowners. **The Panel finds that Superior is delivering and selling gaseous propane to the homeowners at Seascapes.**

Prior to the passage of the *2012 Energy and Mines Statutes Amendment Act,* SBC 2012, c. 27, s. 25, the definition of "petroleum products" in the Act did not include the word "liquid" before either "butane" or "propane." The passage of the *Energy and Mines Statutes Amendment Act* altered the pre-existing wording to specifically include the word "liquid" before the words "butane" and "propane" in the definition of "petroleum products" in section 1 of the Act.

The Panel is guided by the Court's comments in *Rizzo* when interpreting the disputed provisions of the Act. The words are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature.

The Panel has determined that the Legislature must have intended that the introduction of the word "liquid" in the 2012 amendment should have some substantive effect on the prior definition of "petroleum products" in

section 1 of the Act. In this regard, the Panel agrees with the Ministry. If the Legislature intended that those who provide other forms of propane than liquid propane, in this case gasified propane, would fall under the definition of "petroleum products," there would have been no reason to add the qualifying word "liquid" before the pre-existing word "propane."

The Panel disagrees with Superior that the fact that the definition of "petroleum products" starts with the word "includes" and the fact that there is a "basket clause" at the end of the definition which provides "… and other liquefied petroleum gas and all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things" allows for an expansive exemption from the definition of public utility beyond those providing liquid propane. Once again, the Panel agrees with the Ministry that the "basket clause" was not intended by the Legislature to override the specific and exhaustive exemption granted to those providing liquid propane otherwise there would have been no need to include the word "liquid" before "propane." This interpretation allows the definition of "petroleum products" to be read harmoniously and to be read in their grammatical and ordinary sense. Only those service providers who deliver liquid propane to customers are exempted from the definition of "public utility." Superior delivers and sells gasified propane to the homeowners at Seascapes and is therefore caught by the definition of "public utility" under the Act.

As mentioned above, the parties have made additional submissions on the issue of whether there is a need for Superior to be regulated as a "public utility." The Panel has not addressed these submissions as the issue before it was restricted to whether Superior met the definition of public utility under the Act. If Superior is of the opinion that regardless of whether it meets the definition of public utility under the Act, there is still no need for it to be regulated, then it should make an application to the Commission for whole or partial exemption from regulation under section 88(3) of the Act.

In accordance with section 61(3) of the Act, public utilities can only charge rates that have been approved by the Commission. Only by making its rates interim, Superior shall be able to charge rates that are lawful and collectible. **The Panel makes further determinations regarding Superior's rates and rate schedules:**

1) **In accordance with section 90 of the Act, the current rates that Superior charges to its customers at Seascapes are made interim as of the date of this order. The difference between the interim rate and permanent rate (to be determined) will be subject to adjustment with short-term interest.**
2) **If Superior intends to apply for a limited or full exemption from regulation under section 88(3) of the Act, it must inform the Commission within 15 days of this order.**
3) **If Superior does not intend to apply for a limited or full exemption from regulation under section 88(3) of the Act:**
    - **(i) Superior must apply to the Commission within 30 days of this order for the approval of rates or a rate methodology for the utility service being provided at Seascapes, and**
    - **(ii) Superior must apply to the Commission within 45 days of this order for the approval of a tariff binder including terms and conditions of service and a schedule of fees to be charged to customers at Seascape.**