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ORDER NUMBER
G-332-19

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

and

Creative Energy Vancouver Platforms Inc.
Application for a Certificate of Public Convenience and Necessity for Beatty-Expo Plants and Approval of Corporate Reorganization

BEFORE:
D. A. Cote, Panel Chair
D. J. Enns, Commissioner
M. Kresivo, QC, Commissioner

on December 18, 2019

ORDER

WHEREAS:

A. On June 29, 2018, Creative Energy Vancouver Platforms Inc. (Creative Energy) filed an application with the British Columbia Utilities Commission (BCUC) for a Certificate of Public Convenience and Necessity (CPCN) pursuant to sections 45 and 46 of the *Utilities Commission Act* (UCA), to construct and operate new and renovated steam plant works and related facilities at Creative Energy's existing site at 720 Beatty Street in Vancouver and at an adjacent site within BC Place Stadium (Proposed Project), along with additional approvals required in connection to the Proposed Project (Application);

B. In the Application, Creative Energy sought the following approvals:

- Pursuant to sections 45 and 46 of the UCA, a CPCN for the construction and operation of the following components of the Proposed Project at an estimated total capital cost estimated at $53.1 million:
  - The Expo Plant, including facilities to interconnect steam, condensate and fuel oil services between the Expo and Beatty Plants; and
  - The Beatty Plant renovation;
- Pursuant to section 44.2 of the UCA, acceptance of additional capital expenditures of up to $5.25 million that would only be payable by Creative Energy if it expanded generating capacity at the Beatty Plant within the first 20 years after completion of the Proposed Project;
- Pursuant to sections 56 and 60 of the UCA, approval to establish a regulatory deferral account to record the undepreciated net book value of the Creative Energy assets that were retired as part of the Proposed Project; and

- Pursuant to sections 60 and 61 of the UCA, approval of a new long-term customer service agreement between B.C. Pavilion Corporation (PavCo) and Creative Energy for heating service to the BC Place Stadium;

C. Further, pursuant to sections 50, 52, 53 and 54 of the UCA, Creative Energy sought approval of the steps related to a corporate reorganization involving Creative Energy;

D. On February 19, 2019, the BCUC issued its decision with accompanying Order G-38-19 (February 2019 Decision), with the following determinations:

- Creative Energy's Application is not approved at that time; and
- Creative Energy is invited to file a revised application addressing the Panel's concerns, within one year from the date of the February 2019 Decision, failing which, the Application would be dismissed;

E. On April 26, 2019, Creative Energy filed revisions to the Application for a CPCN for Beatty-Expo Plants and Approval of Corporate Reorganization (Revisions to the Application), in response to the February 2019 Decision;

F. On October 15, 2019, Pacific Centre Limited (PCL) ,submitted a letter with respect to Creative Energy's Application and PCL's B.C. Supreme Court proceeding (S-197775, Vancouver Registry) against Creative Energy, Westbank Projects Corp. (Westbank), Emanate Energy Solutions Inc. and John Doe Partnership (Partnership) (the Court Proceeding), requesting, that the BCUC grant permission to PCL to apply for reconsideration of the February 2019 Decision;

G. By letter dated October 17, 2019, the BCUC requested that PCL particularize the grounds for the reconsideration. The BCUC also requested Creative Energy and registered interveners provide written submissions in response to PCL's filing, and for PCL to provide its reply submission;

H. By letter dated October 24, 2019, PCL filed its submission, requesting:

- PCL be given permission to pursue a reconsideration of the February 2019 Decision; and
- A stay or suspension of further steps in the Application;

I. On October 30, 2019 and October 31, 2019, respectively, Creative Energy and the Commercial Energy Consumers Association of British Columbia (CEC) filed their submissions in response to PCL's filing and PCL filed its reply response on November 7, 2019; and

J. The Panel has reviewed the filed submissions and considers that permission to pursue a reconsideration of the February 2019 Decision and suspension of the Application review process is not warranted.

NOW THEREFORE for the reasons attached as Appendix A to this order, the BCUC orders as follows:

1. PCL's application to apply for a reconsideration process for the February 2019 Decision is denied.

2. PCL's request to suspend proceedings related to Creative Energy's Application is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 18th day of December 2019.

BY ORDER

Original signed by:

D. A. Cote
Commissioner

Attachment

Creative Energy Platforms Inc.
Application for Certificate of Public Convenience and Necessity For Beatty Expo Plants and Approval of Corporate Reorganization

Pacific Centre Limited Application for Reconsideration

Reasons for Decision

December 18, 2019

Before:
D. A. Cote, Panel Chair
D. J. Enns, Commissioner
M. Kresivo, QC, Commissioner

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1.0 Introduction

1.1 Application

Pacific Centre Limited (PCL) and Creative Energy Vancouver Platforms Inc. (Creative Energy) are parties to litigation concerning a right of first purchase (ROFP) Creative Energy granted to PCL in or about 1969-70, with respect to real property at 720 Beatty Street, Vancouver (Court Proceedings). The property at 720 Beatty Street is also of concern in the Creative Energy's application to the British Columbia Utilities Commission (BCUC) for a Certificate of Public Convenience and Necessity (CPCN) and Approval of Corporate Reorganization (Application). The BCUC issued a decision with accompanying Order G-38-19 dated February 19, 2019 (February 2019 Decision) where it did not approve Creative Energy's Application in its present form. Both parties rely on this decision in the Court Proceeding, but interpret the determinations within it differently. Further proceedings are underway with respect to the Application, but no final decision has been issued.

By letter dated October 15, 2019, PCL requested that the BCUC:

- Grant permission to PCL to apply for reconsideration of the February 2019 Decision, if it is a final decision, from which factual findings may be extracted to prejudice the rights of PCL as a charge holder in the Court Proceeding; and
- Suspend the Application, pending the later of:
    - The determination of the Court Proceeding; and
    - The outcome of PCL's request for reconsideration.

1.2 Background Relating to the ROFP

PCL provided a summary of the background to its claims to enforce the ROFP and Creative Energy's counter claims along with a chronological review of events following its filing of the claim on July 12, 2019. PCL is of the view that it is the jurisdiction of the courts to determine whether and how PCL can enforce the ROFP and it is not an issue before the BCUC, nor would the BCUC have jurisdiction.

An issue between the parties in the Court Proceedings is what was decided in the February 2019 Decision, what findings of fact were made and what impact they potentially have on the Court Proceeding. PCL takes issue with what it describes as Creative Energy's new positions, especially as they relate to determinations Creative Energy states were made by the panel in the February 2019 Decision. It disagrees with Creative Energy's interpretation of the determinations made in the February 2019 Decision and how they are being applied in the Court Proceeding. It also claims that "carrying on any further with the BCUC Proceedings would risk prejudicing PCL given the positions that the Creative Energy Defendants have now adopted." In its view, Creative Energy has "an interest in giving decisions in the BCUC Proceedings an effect that at the time of making they were not intended to have and further opportunities to this end should not be provided." PCL points out that if it is successful in its Court Proceeding, the present BCUC proceedings may be moot.

1.3 Reconsideration Application

Section 26.02 of the BCUC's Rules of Practice and Procedure, which are attached to Order G-15-19 (Reconsideration Rules), provides that an application for reconsideration must be filed with the BCUC within 60 days of the issuance of the order or the reasons for decision, whichever is later.

Section 26.01 of the Reconsideration Rules provides an opportunity for a person who was not otherwise directly involved in a particular proceeding to apply to the BCUC for permission to file an application for reconsideration.

Section 26.01 of the Reconsideration Rules deals with the filing requirements an applicant must submit in order to obtain BCUC permission to file an application for reconsideration and stipulates the following:

> A person, other than the applicant or an intervener in the original proceeding that gave rise to the decision, may not file an application for reconsideration without obtaining prior permission of the BCUC. In applying to the BCUC for permission to file an application for reconsideration, the person seeking permission must explain:
>
> a) why the person did not participate in the original proceeding; and
>
> b) how the person is directly or sufficiently affected by the decision or how the person has experience, information, or expertise relevant to a matter arising from the decision.

If permission is granted to an applicant to file for reconsideration of a BCUC decision, Section 26.05 of the Reconsideration Rules sets out the grounds for consideration and requires that an application for reconsideration of a decision must contain a concise statement of the grounds for reconsideration, which must include one or more of the following:

> a) the BCUC has made an error of fact, law or jurisdiction which as a material bearing on the decision;
>
> b) facts material to the decision that existed prior to the issuance of the decision were not placed in evidence in the original proceeding and could not have been discovered by reasonable diligence at the time of the original proceeding:
>
> c) new fact(s) have arisen since the issuance of the decision which have material bearing on the decision;
>
> d) a change in circumstances material to the decision has occurred since the issuance of the decision; or
>
> e) where there is otherwise just cause.

PCL has provided its position on both the application for permission to file and application for reconsideration and the grounds it would argue for reconsideration of the BCUC February 2019 Decision.

1.4 Regulatory Process

By letter dated October 17, 2019, the BCUC directed that PCL particularize the grounds for the reconsideration being requested by October 24, 2019. The BCUC provided Creative Energy and interveners an opportunity to provide written submissions in response to PCL's submission by October 31, 2019. PCL was to provide its reply response by November 7, 2019.[1]

PCL and Creative Energy filed their submissions in accordance with the timelines and Commercial Energy Consumers (CEC) filed brief submissions on the issues and PCL's request for relief.

[1] Exhibit A-36.

2.0 Application for Permission to File for Reconsideration

Position of the Parties

As indicated above, a party seeking permission to file an application for reconsideration must address two issues; i) why did the person not participate in the original proceeding ; and ii) how is the person directly or sufficiently affected by the decision or how the person has experience, information, or expertise relevant to a matter arising from the decision.

PCL's Position

i. Why PCL did not participate in the original proceeding

PCL provides the following explanations:

- It did not receive notice of the proceedings as it appears the notice had been sent to an agent it had authorized (Energy Advantage) for billing purposes. This agent did not forward it.
- No one at PCL or Cadillac Fairview (including the individual to whom Creative Energy had been advised to direct communications related to the ROFP to) was alerted by Creative Energy as to the Application. PCL states it only learned of the proceedings after the February 2019 Decision was rendered.

PCL states, "Creative Energy expressly took the position that the Court Proceeding was irrelevant to the BCUC proceedings." Further, PCL states that Creative Energy made no claims with respect to the February 2019 Decision being determinative in their response to Civil Claim and amended response to Civil Claim later in 2019.

ii. How PCL is directly or sufficiently affected by the decision

With respect to subparagraph b), Section 26.01 of the Reconsideration Rules, PCL points to the approach, which has been taken by Creative Energy in their proposed Further Response to Civil Claim and Counterclaim. PCL contends it is directly affected because Creative Energy seeks to rely on what it terms certain "factual determinations" made in the February 2019 Decision having binding force in the Court Proceeding.[2]

Creative Energy's position

Creative Energy is of the view that the PCL's filings to date meet neither of the requirements outlined in Section 26.01 of the Reconsideration Rules. Creative Energy's position is that PCL specifically chose not to participate in the proceeding and suggests that it could be concluded this was because participation in the proceedings "could in some way undermine PCL's claims in the Court Proceeding." [3]

With respect to statements regarding the lack of direct notification to PCL, Creative Energy notes that even if PCL was not aware of the Application prior to the February 2019 Decision, the proceedings continued for another 5 months from May to September 2019.[4] In explanation for not notifying PCL directly, Creative Energy states:

[2] Exhibit A2-1, pp. 9-10.
[3] Exhibit B-31, pp. 17.
[4] Exhibit B-31, p.16.

> Cadillac Fairview provided notice to Creative Energy in October 13, consistent with Energy Advantage's purpose, directing Creative Energy to "release any and all consumption data to Energy Advantage…upon request" and "interface with [Energy Advantage] directly regarding matters of supply and billing etc." and that the billing address and account information for the PCL accounts should be updated to Energy Advantage's contact information.

Creative Energy also states that its staff are unaware of any subsequent direction from Cadillac Fairview, PCL or Energy Advantage that certain types of Creative Energy notices should be sent to PCL rather than Energy Advantage.[5]

Creative Energy outlined the various customer engagement processes it utilized to ensure customers were notified of these proceedings, including the following:

- Flyer notifications sent to Creative Energy customers.
- An open house notice (on November 9, 2017) posted in the Vancouver Sun inviting the public to attend.
- A survey in September 2018, sent to customers that included information about the BCUC application process then underway.

In addition, Creative Energy notes that since December 2018, information about the proposed redevelopment project has been available through the Vancouver rezoning process and there have been several media articles in 2018 regarding the redevelopment project. Also, an affidavit of Mr. Knoepfel, an officer of PCL, indicates that in December 2018, he learned a rezoning application had been filed with the City of Vancouver in respect of the development planned for 720 Beatty Street. Further, Ms. Tummonds, Cadillac Fairview's General Manager for Pacific Centre and the HSBC building, has provided an affidavit confirming that in early April 2019, she located the BCUC proceedings webpage and the Application and order G-38-19 posted there.

Creative Energy argues that, regardless of whether Mr. Knoepfel or other PCL employees received the notices and information provided to them through PCL's agent, Energy Advantage, the information has been available through other public information channels. Further, PCL by letter dated May 16, 2019, confirmed its knowledge of the February 2019 Decision and indicated it was considering whether to seek intervener status. Creative Energy notes that PCL and Cadillac Fairview decided not to seek intervener status or late intervener status in the BCUC proceeding at that time.[6]

As to the effect of the February 2019 Decision on PCL, it is in Creative Energy's view that PCL is unaffected by BCUC findings within the meaning of the term "affected" as used in Section 26.01 (b) of the Reconsideration Rules. Its position is that the factual determinations in the February 2019 Decision "have no effect on the nature and quality of the steam service Creative Energy provides to PCL nor on the rates to be charged for the service." Further, Creative Energy asserts that the BCUC does not have the mandate to tailor its proceedings or its determinations in support of a civil claim such as this.[7]

[5] Exhibit B-31, p.8.
[6] Exhibit B-31, pp. 6-10.
[7] Ibid, pp. 5-6.

3.0 Application for Reconsideration

PCL's position

PCL's grounds for reconsideration are material errors of fact, law and jurisdiction, facts not placed in evidence that were material to that decision and existed prior to the issuance of the decision and new facts or changed circumstances.

i. Material errors of fact, law or jurisdiction

Assuming that Creative Energy's characterization of the meaning and binding nature of the February 2019 Decision is accurate, PCL outlines the following material errors of fact, law and jurisdiction, which may have been made:

- If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex for the purpose of the ROFP, the BCUC acted outside its jurisdiction or erred in law by proceeding to make that determination;
- If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex for the purpose of the ROFP, it erred in finding there had been sufficient consultation;
- If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex, it made a material error of fact, even assuming the jurisdictional and legal barriers above did not exist; and
- If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex for the purpose of the ROFP, it made a material error in not considering the ROFP in other respects.[8]

PCL itself takes the position that the BCUC made none of those determinations; and is therefore asking for reconsideration of determinations PCL states were not in fact made.

ii. Facts Material to the February 2019 Decision only available to PCL subsequentially

PCL states that it was not until well after the February 2019 Decision that it understood Creative Energy would take a position that a BCUC determination could prejudice PCL in relation to the ROFP. PCL explains that material indicating what it believes to be Creative Energy's longstanding objective (to have the BCUC determine the real property assets to be surplus), were filed on October 9, 2019, in the Court Proceeding. PCL asserts that this objective is material to the February 2019 Decision and had BCUC been alerted it could "have required specific, meaningful notice referencing the ROFP to be provided to individuals at PCL or Cadillac Fairview with whom CEV [Creative Energy] had previously discussed the ROFP." On this basis, the BCUC could have required evidence and argument as to its jurisdiction in the adjudication of the ROFP. It is also PCL's position that the BCUC has no jurisdiction with respect to the adjudication of the ROFP.

iii. Changed circumstance or new facts

With respect to changed circumstance, PCL states that Creative Energy "is now seeking to have the BC Supreme Court proceed as though CEV had asked the BCUC to make a decision on its contractual and proprietary obligations vis- à-vis PCL and the BCUC had made such a determination."

[8] Exhibit A2-2, pp. 7-15.

PCL also states that Creative Energy's evolving position on the definitiveness of the underlying Trust and Development Agreement (TDA) represents another changed circumstance or new fact. PCL states that Creative Energy have consistently described the TDA as a key component and central governing document, with which it does not disagree. However, PCL contends that the position of Creative Energy has changed in the Court Proceeding. Specifically, PCL points to testimony where Creative Energy states that the lands it intends to transfer have not been fully delineated and cannot constitute a "decision to sell" under the ROFP. PCL notes that sworn testimony in the Court Proceeding indicate that plans and specifications from Schedule C of the TDA were conceptual and not an accurate representation of the final size, layout or organization of the proposed Beatty Plant.[9]

iv. Other

PCL is of the view that Creative Energy intended to use its Application to fend off a potential claim that the ROFP had been triggered. It states that leading up to the February 2019 Decision, there was no indication to the BCUC or other parties that Creative Energy sought to rely on the BCUC process or steps within that process to deny PCL the ability to rely on its ROFP.[10]

v. Request for Suspension or Stay of BCUC Proceedings

In addition to its request for approval to apply for reconsideration, PCL requests a suspension or stay of BCUC proceedings until the later of either a determination on the Court Proceeding or the outcome on its request for reconsideration. PCL states that its concern is that Creative Energy is seeking to use the February 2019 Decision and presumably any further decision made, as a tool in the Court Proceeding. It reports that Creative Energy has asked the BC Supreme Court to modify PCL's rights in a manner that may shape PCL's interest in participating in any resumed BCUC proceedings. In its view, Creative Energy is giving BCUC decisions an effect that were not intended at the time they were made and further opportunities like this should not be provided. PCL's position is that its contractual entitlements are a matter for court determination and Creative Energy should not be permitted to proceed "where seeking to use the BCUC process as an instrument to prejudice PCL's rights." PCL states that carrying on with the BCUC proceedings further would risk prejudicing PCL, given Creative Energy's adopted positions.[11]

Creative Energy's Submission

Creative Energy acknowledges that in its February 2019 Decision, the BCUC did not make a final decision on the Application but notes that it did make determinations on questions of fact within its jurisdiction. Creative Energy states that in doing so, the BCUC had "appropriate regard to the matters relevant to the BCUC's consideration of Creative Energy's request pursuant to section 52 of the *Utilities Commission Act* (UCA) for approval to dispose of the 'Trust Property' as defined in the Trust and Development Agreement." That said, the "BCUC considered whether the proposed disposition is in the public interest, and the findings it made are what they are."

Creative Energy states that PCL's requests for relief are highly unusual. It describes PCL's objective as having the BCUC rescind its findings and "stand down" to make the Court the exclusive finder of fact with regard to questions related to whether the Trust property is surplus to the utility. Creative Energy describes the PCL requests as follows:

[9] Ibid, pp. 16-17.
[10] Ibid, p.18.
[11] Exhibit A2-1, pp.7-8.

> one request is for the BCUC not to make any more findings of fact in relation to the Application until after the Court Proceeding is complete, and the other request is for the BCUC to reconsider and rescind findings of fact made in the Order G-38-19 Decision.

In Creative Energy's view, PCL's requests are inconsistent with the regulatory scheme as set out in the UCA (Part 6) as BCUC has jurisdiction for matters conferred upon it by the UCA and does not defer to court proceedings even where there are similar and or the same questions of fact.

CEC Submission

CEC submits that the BCUC and participants should have been made aware of the existence of the ROFP by Creative Energy in a more forthright manner. If the ROFP had been raised, the costs and efforts undertaken to structure the Application in a manner intended to avoid the ROFP would have been properly and fairly pursued. CEC's key concern would have been whether Creative Energy's approach negatively impacted ratepayers or the public interest. While reserving the right to pursue those concerns in the event PCL is granted relief, CEC takes no position on the request for relief.

PCL Reply Submission

At the core of PCL's concern is that Creative Energy "deliberately set about to use the CEV BCUC Application as an instrument against PCL in relation to its right of first purchase...", a point Creative Energy did not deny. PCL does acknowledge that Creative Energy concedes that BCUC made its determinations without regard for the existing ROFP. However, in PCL's view, it does not explain why Creative Energy, through their pleadings, led the BC Supreme Court to believe that, (1) the BCUC made determinations about the "required to generate and distribute steam to {the majority of the Pacific Centre Complex} wording of the ROFP"; or (2) "that the BCUC's jurisdiction is couched in the terms of the ROFP…the BCUC has the exclusive jurisdiction to determine…the question of fact whether... property is **required to generate and distribute steam** to utility customers, including the Plaintiff [i.e. PCL]." PCL further states, "the issue is **what** the CEV defendants say the BCUC has determined and with **whether** it constitutes a binding determination of fact dispositive of anything related to the ROFP though stemming from a preliminary decision on different issues." More simply, PCL's concern is most accurately capsulized in the following statement:

> CEV is, in reality, doing what it inaccurately accuses PCL of doing: seeking to use the BCUC's processes for the purpose of, and to frame the BCUC's determinations in support of CEV's own arguments in, the parties' dispute regarding the ROFP. [12]

Concerning Creative Energy's submissions to the effect that the requirements of Section 26.01 of the Reconsideration Rules have been not been met, PCL disagrees.

Regarding its participation in the prior proceedings, PCL states that it was not a matter of "choice" as stated by Creative Energy. PCL points out that nowhere within Creative Energy's submission does it indicate that it provided notice of Creative Energy's Application directly to PCL or Cadillac Fairview. Nor did Creative Energy explain why it did not do so despite its "evident interest in using determinations in it against PCL in relation to the ROFP." With respect to notification of its agent, PCL reports that Energy Advantage has only been able to find a single document within its records related to Creative Energy's Application. PCL provides no description of the content of that one document.[13]

[12] Exhibit A2-3, pp. 1-4.
[13] Exhibit A2-3, p. 11.

As to Creative Energy's suggestion that PCL could have participated in the second part of this process, PCL responds that by that point, the February 2019 Decision had been made, and in addition by Order G-107-19, the BCUC had specified a limited scope for the remaining input and submissions.[14]

Concerning the role of its agent, Energy Advantage, PCL provides citations from a 2013 email to Central Heat Distribution Limited (now Creative Energy) where Energy Advantage described itself as "the appointed agent **regarding all billing and payment matters…."** and listed Pacific Centre Complex as an account**.** PCL reports that Energy Advantage supported its statement by including form letters from both Cadillac Fairview and Morguard that includes the statements that Creative Energy referred to on Page 8 of its Response. PCL does not refute these statements quoted by Creative Energy with respect to the role of Energy Advantage. However, PCL does take issue with Creative Energy's statement that there has not been subsequent direction concerning communications provided to them. PCL points out that by letter dated October 26, 2017, Westbank Projects Corp. and Creative Energy were asked to address any future correspondence regarding the ROFP to a Cadillac Fairview employee.[15]

4.0 BCUC Determination

PCL's request for relief involves two separate requests:

1. Permission to apply for a reconsideration of the February 19 Decision; and
2. The later of a suspension of the proceedings with respect to Creative Energy's Application pending the outcome of a Court Proceedings between PCL and Creative Energy; or the outcome of the reconsideration if allowed to move forward.

4.1 Permission to apply for reconsideration

As outlined in Section 1.3 of these Reasons for Decision the person seeking permission to file an application for reconsideration must explain (1) why they did not participate in the original proceeding; and (2) how the person is directly or sufficiently affected by the decision.

i. Lack of Notification

PCL has claimed that it had no notification that the Application was under review by the BCUC. Based on the evidence provided, there is a question of whether PCL had been notified as to the Application and proceeding leading to the February 2019 Decision. However, the evidence on the record is unclear. It does appear that PCL's agent, Energy Advantage, had been notified but it is unclear as to whether Energy Advantage was the appropriate recipient for such notification. Therefore, the Panel makes no determination as to whether adequate notice of the Application was received by PCL with respect to BCUC proceedings leading up to the February 2019 Decision. However, as pointed out by Creative Energy, the redevelopment project has been the subject of media articles in 2018 and was the subject of a notice in the Vancouver Sun for an Open House in November 2017.

That said, regardless of whether PCL was cognizant of the proceedings leading up to the February 2019 Decision, they were fully aware of the proceedings currently underway and could have intervened had they wished to do so. This is supported by the affidavit of Ms. Tummonds who confirmed that she was aware of the BCUC

[14] Exhibit A2-3, pp. 12-13.
[15] Exhibit A2-3, pp. 11-12

proceedings in April 2019. PCL chose not to intervene explaining that the February 2019 Decision had already been made and the BCUC had specified the scope based on outstanding issues raised in that decision. Given the professed importance of the outcome of this proceeding to PCL, it is surprising PCL did not at least attempt to intervene and raise its issues. In addition, the Panel notes that PCL had the opportunity to ask for a reconsideration of the February 2019 Decision when they first learned of it. It chose not to do so. Moreover, while we acknowledge that the Panel provided a specified scope for the second part of this proceeding, it did not mean that a request to broaden the scope to include issues raised by a direct customer of Creative Energy could not have been considered by the Panel. Given these factors, the Panel finds that PCL had the opportunity to intervene but chose not to do so.

ii. Interpretation of the February 2019 Decision

The primary concern expressed by PCL is the interpretations Creative Energy has placed on the findings of the February 2019 Decision and how they have the potential to prejudice the Court Proceeding. However, the Panel notes that one point the parties seem to agree upon is that the Panel has not made a final decision on the Application. On this point the Panel also agrees. In the February 2019 Decision, the Panel rejected Creative Energy's application for a CPCN in its applied form and deferred ruling on the corporate reorganization until such time as the requirements outlined in Section 6.0 of the February 2019 Decision have been addressed. The findings and determinations within the February 2019 Decision stand on their own and need no further explanation or clarification.

iii. Impact on the Parties

The Panel acknowledges that denying this request for reconsideration and moving forward with the BCUC proceeding has the potential to influence the Court Proceeding. However, there are also potential negative consequences resulting from approving a reconsideration process or suspending the proceeding as proposed by PCL. The Trust and Development Agreement, which has been agreed to, is not an offer in perpetuity and can be withdrawn. Allowing a reconsideration to go forward or a suspension of these proceedings could result in a lengthy delay in the event of appeals and may have an impact on the offer. This in turn could have an impact on the potential customer benefits related to the project the Panel spoke to in the February 2019 Decision (PCL being one of these customers). This would not be in the public interest. Therefore, the Panel finds that while denying PCL's request for reconsideration may have an impact on PCL's interests in the Court Proceeding, this would also be the case with approving the request as Creative Energy and its customers would face the risk of the offer being withdrawn.

iv. Grounds for the Requested Reconsideration

In its letter dated October 17, 2019, the BCUC was explicit in asking PCL to particularize the grounds for the requested reconsideration. PCL has provided in its submissions fulsome descriptions of how Creative Energy has used what it interprets as the findings from the February 2019 Decision in the Court Proceedings. PCL submissions have also described and highlighted the issues related to the ROFP, which is the basis of their dispute. What PCL has not done is persuasively describe how the findings in the BCUC February 2019 Decision are in error or incorrect. Instead it has relied on the phrase, "if the BCUC made a determination" and expressed its concerns with respect to what the findings might mean if what Creative Energy has implied in the Court Proceeding is correct. In fact, PCL has requested reconsiderations of determinations that PCL specifically states the Panel has not made in the February 2019 Decision. As stated above, that decision stands on its own and the Panel does not intend to provide further explanation or clarification.

PCL has argued that it did not know that Creative Energy was going to advance the position it has taken with regard to the February 2019 Decision and its potential impact on the ROFP. While this may be true, the Panel notes that the position taken by Creative Energy is in another hearing (the Court Proceeding) having no bearing on the current BCUC proceedings. In the view of the Panel, this does not represent adequate grounds for reconsideration of the February 2019 Decision.

PCL has also argued that in the Court Proceedings, Creative Energy has introduced changed circumstances or new facts that differ from what was portrayed by Creative Energy in its Application leading to the February 2019 Decision. The Panel notes that this again relates to an outside court proceeding having no bearing on the current BCUC proceeding. With reference to examples raised with respect to the definitiveness of the Trust Agreement, the Panel notes that the sworn statements are part of BCUC's records and can be dealt with to the extent that they impact determinations related to the Trust Agreement and do not represent reasonable grounds for a reconsideration.

PCL's position is that Creative Energy intended to use this Application as a means of fending off a potential claim that the ROFP had been triggered. As discussed below, the BCUC has no jurisdiction with respect to the ROFP as it is a matter for the courts to decide. Therefore, it does not represent reasonable grounds for reconsideration.

Taking into account that PCL had the opportunity to intervene in the current proceedings, the potential impacts on the public interest and the lack of grounds justifying the need for reconsideration of the February 2015 Decision, the Panel denies the PCL request for the BCUC to approve a reconsideration process.

4.2 Suspension of the proceedings

The Panel also denies PCL's request to suspend proceedings related to Creative Energy's Application for a CPCN for the Beatty and Expo Plants and Approval of its proposed Corporate Reorganization.

The Panel denies PCL's request for the following reasons:

1. The BCUC and the courts have different jurisdictions with respect to the different issues that have arisen. Sections 52 and 53 of the *UCA* outlines the BCUC's jurisdiction with respect to the disposition of property as well as the consolidation, amalgamation and merger of a public utility. It is not appropriate for the BCUC to deal with the ROFP because, as stated by PCL, the jurisdiction to interpret and apply the ROFP lies with the BC Supreme Court. Thus, given the separate jurisdictions, the Panel finds it inappropriate for the BCUC to suspend proceedings awaiting a final decision in the Court Proceedings.
2. As noted, PCL has argued that it did not know that Creative Energy was going to advance the position they have taken with regard to the BCUC February 2019 Decision and its potential impact on the ROFP. While this may be true, the fact that PCL did not turn its mind to the decision is not sufficient to warrant suspension of the proceedings.
3. If PCL was concerned as to the outcome of the BCUC proceedings, it should have intervened. As noted above, PCL had the opportunity to intervene in these proceedings but chose not to do so.
4. The summary trial of the Court Proceedings is scheduled for February of 2020, but there is no certainty as to the timeline when the judgements will be made and potential appeals are considered. PCL's request to suspend the current proceedings pending the outcome of the Court Proceedings dealing with the ROFP would eliminate concern that any future BCUC decision may have on prejudicing its civil action against PCL. However, the suspension of the proceedings with no date certain would have a potential prejudicial effect on Creative Energy and its customers. Thus, regardless of whether the BCUC

determines that a suspension of the current proceeding is appropriate or not, there are potential impacts to both parties.

For these reasons, the Panel finds that a suspension of proceedings is not in the public interest.