



ORDER NUMBER
F-49-20

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

and

Creative Energy Developments Limited Partnership
Application for the Disposition of the Pendrell Street Thermal Energy System Assets
Participant Assistance/Cost Award Application

BEFORE:

T. A. Loski, Panel Chair
E. B. Lockhart, Commissioner
B. A. Magnan, Commissioner

on December 16, 2020

ORDER

WHEREAS:

- A. On March 17, 2020, Creative Energy Developments Limited Partnership (Creative Energy Developments) applied to the British Columbia Utilities Commission (BCUC) pursuant to section 52 of the *Utilities Commission Act* (UCA), for approval for the disposition of 100 percent of its interests in the thermal energy system located at 1770 Pendrell Street (Pendrell Street TES) to its wholly owned subsidiary Creative Energy Pendrell LP (Creative Energy Pendrell) (Application);
- B. By Order G-112-20, dated May 12, 2020, the BCUC established a public hearing process and regulatory timetable for the review of the Application, which consisted of public notice, BCUC information requests (IRs), Creative Energy Developments response to IRs, letters of comment and submissions on further process;
- C. Creative Energy Developments filed its responses to BCUC IRs on June 11, 2020, and filed its submission on further process on June 18, 2020;
- D. Commercial Energy Consumers (the CEC) and British Columbia Old Age Pensioners' Organization et al. (BCOAPO) filed letters of comment on June 11, 2020 and June 18, 2020, respectively;
- E. By Order G-170-20, dated June 24, 2020, the BCUC established a further regulatory timetable, which consisted of intervener registration, intervener IR No. 1 and BCUC IR No. 2, Creative Energy Developments responses to IRs and the filing of written and reply arguments;
- F. The CEC and BCOAPO registered as interveners in the proceeding;

- G. On October 28, 2020, by Order G-273-20 and for the reasons attached as Appendix A to the Order, Creative Energy Developments' application to dispose 100 percent of its interest in the Pendrell Street TES to its wholly owned subsidiary, Creative Energy Pendrell was approved;
- H. The following participants filed Participant Assistance/Cost Award (PACA) applications with the BCUC with respect to their participation in the proceeding:

Date	Participant	Application
October 1, 2020	CEC	\$6,290.06
October 7, 2020	BCOAPO	\$4,063.13

- I. By letter dated November 10, 2020, Creative Energy Developments provided its comments on the PACA applications, stating that the CEC and BCOAPO should not be awarded PACA funding;
- J. The CEC and BCOAPO provided responses to Creative Energy Development's comments by letters dated November 16, 2020 and November 18, 2020, respectively; and
- K. The BCUC has reviewed the PACA applications and the comments made by Creative Energy Developments, the CEC and BCOAPO in accordance with the criteria and rates set out in the PACA Guidelines, attached to BCUC Order G-97-17, and makes the following determinations.

NOW THEREFORE pursuant to section 118(1) of the UCA, the BCUC orders as follows:

1. Funding is awarded to the following interveners in the listed amounts for their respective participation in the proceeding:

Participant	Award
CEC	\$3,119.84
BCOAPO	\$2,034.44

2. For the reasons outlined in Appendix A to this order, funding to the CEC for the "Open File Charge" is denied.
3. Creative Energy Developments is directed to reimburse the above-noted participants for the awarded amount in a timely manner.

DATED at the City of Vancouver, in the Province of British Columbia, this 16th day of December 2020.

BY ORDER

Original signed by:

T. A. Loski
Commissioner
Attachment

Creative Energy Developments Limited Partnership
Application for the Disposition of the Pendrell Street Thermal Energy System Assets

REASONS FOR DECISION

1.0 BACKGROUND

By Order G-273-20 with accompanying reasons for decision dated October 28, 2020, the British Columbia Utilities Commission (BCUC or Commission) approved an application by Creative Energy Developments Limited Partnership (Creative Energy Developments) on behalf of itself and Creative Energy Pendrell Limited Partnership (Creative Energy Pendrell), for approval for the disposition of 100 percent of Creative Energy Developments' interests in the Pendrell Street TES to Creative Energy Pendrell, a wholly owned subsidiary of Creative Energy Developments (Application).

The regulatory process for review of the Application was established by orders of the BCUC and comprised two rounds of BCUC information requests (IRs) and one round of intervener IRs, as well as written final and reply arguments.

Section 118 of the *Utilities Commission Act* (UCA) provides that "The Commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding."

The availability of Participant Assistance/Cost Award (PACA) funding emerged as an issue early in this proceeding. We find it helpful to set out the following information to illustrate how the issue developed. The Panel issued Order G-170-20, dated June 24, 2020, which established a regulatory timetable that included intervener registration. The following parties registered as interveners:

- British Columbia Old Age Pensioners' Organization et al. (BCOAPO); and
- Commercial Energy Consumers Association of British Columbia (the CEC).

In a letter dated June 26, 2020,¹ Creative Energy Developments wrote to request "the Commission to confirm that PACA funding will not be available in this proceeding." Creative Energy Developments explained that the:

Pendrell Street TES is an exempt on-site Stream A TES. It is exempt from the rate setting provisions of the Utilities Commission Act pursuant to the Commission's TES Regulatory Framework Guidelines and Order G-109-18. The rates charged to the single customer of the Pendrell Street TES are pursuant to a long-term contract, and there is no ability to increase those rates to recover unanticipated costs such as PACA funding costs. Furthermore, the customer has indicated it has no concerns with the transfer to a wholly-owned subsidiary. Any PACA funding costs would have to be absorbed by the shareholders of the Pendrell Street TES, which would not be fair.²

In a letter dated July 7, 2020,³ the CEC also sought certainty on the issue of PACA funding, stating that the "CEC presumes when the Commission establishes a regulatory process that includes intervener participation and a

¹ Exhibit B-4.

² Exhibit B-4, p. 1.

³ Exhibit C1-2.

round of information requests from the BCUC and interveners that PACA funding will be available in accordance with Commission [Participant Assistance/Cost Award] Guidelines”⁴ (PACA Guidelines).⁵

In letters dated July 7⁶ and 9⁷ 2020, the BCUC responded to Creative Energy Developments and the CEC, respectively, that the “Panel makes no determinations with respect to participant funding at this time”⁸ and that “as with all BCUC proceedings, participant funding is not guaranteed upon acceptance as an intervener, as the merits of each request for participant funding are assessed at the conclusion of the proceeding in accordance with the PACA Guidelines.”⁹

The CEC and BCOAPO filed the PACA applications with the BCUC with respect to their participation in the proceeding, as follows:

Date	Participant	Application
October 1, 2020	CEC	\$6,290.06
October 7, 2020	BCOAPO	\$4,063.13

Subsequent to the PACA application filings, Creative Energy Developments was afforded the opportunity to comment on the PACA applications. It responded on November 10, 2020, stating that the awards should be denied.

In the following sections we review the PACA Guidelines and the parties’ submissions on the applicability of the PACA Guidelines in this proceeding.

2.0 CRITERIA FOR COST AWARDS

Section 118(1) of the UCA provides that “[t]he commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.”¹⁰

In its review of the PACA applications, the Panel is guided by the PACA Guidelines as set out in Appendix A attached to BCUC Order G-97-17, which set out the eligibility requirements and criteria used in assessing cost awards, including the process for applying for a cost award, eligible costs and rates.

Section 3.1 of the PACA Guidelines outlines the considerations to determine participant eligibility for a cost award. The BCUC will consider whether the participant:

- (a) is directly or sufficiently affected by the BCUC’s decision; or
- (b) has experience, information, or expertise relevant to a matter before the BCUC that would contribute to the BCUC’s decision-making.

⁴ Exhibit C1-2, p. 1.

⁵ Order G-97-17, dated June 15, 2017, Appendix A, Participant Assistance/Cost Award Guidelines (PACA Guidelines).

⁶ Exhibit A-5.

⁷ Exhibit A-6.

⁸ Exhibit A-5, p.1.

⁹ Ibid.

¹⁰ *Utilities Commission Act* [RSBC 1996] Chapter 473.

Section 3.2 of the PACA Guidelines describes the general characteristics of a participant in a proceeding that would meet the eligibility criterion. Included among examples of these is a participant representing the direct interests of ratepayer groups or affected groups in relation to matters that are regulated by the BCUC. If the participant is eligible for a cost award, the Panel then considers the following in determining the amount of a participant's cost award in accordance with section 4.3 of the PACA Guidelines:

- a. Has the participant contributed to a better understanding by the BCUC of the issues in the proceeding?
- b. To what degree will the participant be affected by the outcome of the proceeding?
- c. Are the costs incurred by the participant fair and reasonable?
- d. Has the participant joined with other groups with similar interests to reduce costs?
- e. Has the participant made reasonable efforts to avoid conduct that would unnecessarily lengthen the duration of the proceeding, such as ensuring participation was not unduly repetitive?
- f. The funding day calculation for funding in accordance with sections 4.1 and 4.2, if one is provided.
- g. Any other matters which the BCUC determines appropriate in the circumstances.

Sections 7.0 through 13.0 of the PACA Guidelines outline the types of eligible costs that can be awarded to participants including, among other things, professional fees, foregone earnings, childcare expenses, disbursements, tax costs and other costs.

With respect to disbursements and other costs, section 10.1 states: "[d]isbursements directly related to the participant's participation in the proceeding may be allowed."

3.0 PACA APPLICATIONS

The Panel, in its review of BCOAPO's and the CEC's PACA applications, is guided by the PACA Guidelines.

Creative Energy Developments submits that the applications should be rejected. In general, it explains, it supports the opportunity for potentially affected parties, including associations that represent the interests of potentially affected ratepayer groups, to participate in the regulatory review of utility proposals, supported by the opportunity for PACA funding where eligible and appropriate. In its view, however, there was no need for participant intervention in this Application and further, the Interveners' participation did not contribute to a better understanding.¹¹

Creative Energy Developments refers to its submission on June 26, 2020, made as soon as a public hearing was ordered. It states that it put this position on the record out of fairness to parties like the CEC and BCOAPO that might assume that participation itself justifies an award of PACA funding, even where there are no legitimate issues arising from the application and/or where the party does not represent an interest that could be impacted by the application.¹²

Thus, in Creative Energy Developments' view, PACA funding should be denied for the following reasons:

1. The Application did not raise issues that affect the ratepayer interests represented by the CEC and BCOAPO;

¹¹ Creative Energy Developments Letter, dated November 10, 2020, p. 2.

¹² Ibid.

2. Neither the CEC or the BCOAPO identified an in-scope issue for consideration or contributed to a better understanding by the Commission of such an issue.
3. The Pendrell Street Stream A TES is exempt from the rate-setting provisions of the *Utilities Commission Act*, and has a long-term contractual agreement with the single customer (the building owner) specifying the service to be provided and the rates to be charged. The long-term customer contract and the established public interest of a Stream A exemption granted by the Commission obviates the need for participant intervention into the Commission's oversight of Stream A utilities generally.¹³

Finally, Creative Energy Developments states:

“the Panel's response to the CEC's specific request in the context of the CEC's stated presumption necessarily means both of the following:

- 1) Acceptance as an intervener and active participation in a Commission proceeding is not itself sufficient for an award of PACA funding, and
- 2) PACA funding will only be awarded to an intervener that identifies an issue or issues within the scope of the proceeding for the Commission's consideration and contributes to a better understanding by the Commission of such issue(s).”¹⁴

CEC Response

The CEC responded on November 16, 2020, stating that Creative Energy Developments failed to seek advance approval from the BCUC for the transaction to which the Application pertained and as required under the UCA. The CEC submits it was not possible for any intervener, or the BCUC, to know what issues may arise when the party coming to the BCUC is already in noncompliance with the legislation when it makes the application.¹⁵

The CEC further submits that it is not possible to gauge the appropriateness of intervening without due consideration of the application, which may or may not require information requests. The CEC states the BCUC found sufficient potential issues to justify its own review and information requests, reasonably leading the CEC to conclude that the application itself was not sufficient to determine that there were no issues to be examined and considered. In its review of the Application, the CEC states it found certain areas for further examination, including the clarifying of certain items and the lack of a Transfer Pricing Policy (TPP) and associated Code of Conduct (COC).¹⁶

The CEC states that a finding of no significant concern by the BCUC and/or a ratepayer group does not in any way diminish the value of review. Rather it is important to ensuring confidence in a positive decision that ratepayer groups have had the opportunity to review the application for expected or unexpected implications. A finding that there are no significant concerns can provide important support for the BCUC's decision-making. Further, the absence of issues that lead to denial or requested changes do not diminish the value of the BCUC and/or the public review process.¹⁷

With respect to Creative Energy Developments' comments regarding the recovery of costs, the CEC submits the fact that Creative Energy Developments signed an agreement with its customer that does not enable the

¹³ Creative Energy Developments Letter, dated November 10, 2020, pp. 1-2.

¹⁴ Ibid., p. 4.

¹⁵ CEC Letter, dated November 16, 2020, p. 1.

¹⁶ Ibid., p. 4.

¹⁷ Ibid., pp. 2, 4.

recovery of its regulatory costs is Creative Energy Developments' responsibility. The recovery of regulatory costs and PACA funding costs is not and should not be determinative with respect to PACA awards.¹⁸

BCOAPO Response

BCOAPO responded on November 18, 2020, stating that after reviewing the evidence on the record, BCOAPO found that the information was not sufficient to conclude whether the transaction at the heart of the Application was indeed in the public interest, and would not detrimentally affect the utility and its remaining residential customers. It was only after reviewing the evidence in Creative Energy Developments' responses to intervenor IRs No. 1 and BCUC IRs No. 2 that BCOAPO was able to satisfy itself that there was no risk to residential ratepayers resulting from the transaction. BCOAPO further notes that pursuant to section 52 of the UCA, under which approval was being sought, the public interest was a live issue to be tried and examined.¹⁹

BCOAPO states that the obligation to identify a specific issue presented by the application is not a consideration for eligibility for a cost award under part 3 of the PACA Guidelines. Instead, section 4.3 of the PACA Guidelines states that in determining the amount of a participant's cost award the BCUC will consider, among others, whether the participant contributed to a better understanding by the BCUC of the issues in the proceeding. Based on the language of this section, BCOAPO submits, the participant is not required to raise a new or separate issue but only to contribute to a better understanding of the existing issues, including work done on behalf of their client groups that demonstrates, in the absence of clear evidence already on the record, that such an issue is present.²⁰

BCOAPO further states that at the time of the transaction to transfer the Pendrell Street TES to Creative Energy Pendrell, Creative Energy Developments knew that it would involve costs associated with the regulatory process and that those costs would reduce the return to the partners. BCOAPO submits that it is not unfair that the regulatory costs on this process would have to be absorbed by shareholders, as the payee of the transaction costs expects to enjoy risk management benefits provided by the transfer. Creative Energy Developments' objection in this regard is not a valid basis upon which to oppose BCOAPO's costs award provided that its intervention on behalf of its clients would be found, by the BCUC, effective and properly done in purpose and execution.²¹

In summary, BCOAPO submits it took all reasonable steps to ensure it added value to the process and the BCUC's understanding of the concerns of residential ratepayers while endeavoring to be as efficient as possible.²²

4.0 BCUC Determination

The CEC represents the interests of commercial ratepayers who are or may be potentially affected in the future by the results of a proceeding. BCOAPO's interest in this proceeding stem from its members, a group of community organizations that work for and represent the interests of residential tenants as well as low and fixed income residents of BC. In addition, the CEC and BCOAPO have experience and expertise relevant to matters before the BCUC. Therefore, the Panel is satisfied that both the CEC and BCOAPO meet the criteria of being eligible for a cost award.

¹⁸ CEC Letter, dated November 16, 2020, p. 5.

¹⁹ BCOAPO Letter, dated November 18, 2020, p. 2.

²⁰ Ibid., p. 4.

²¹ Ibid., p. 7.

²² Ibid.

Having concluded that the CEC and BCOAPO are eligible for PACA funding, the next step is to determine the amount of the award to which each is entitled. **For the reasons set out below, the Panel determines that partial cost awards should be approved for BCOAPO and the CEC.**

The Panel notes that each intervener actively participated in the proceeding. Although we do not disagree with the statement that Creative Energy Developments makes several times that “acceptance as an intervener and active participation in a Commission proceeding is not itself sufficient for an award of PACA funding,”²³ we also note that neither participant is asserting active participation as the only basis of its claim.

The considerations listed in section 4 of the PACA Guidelines, and referenced above, are useful guidance in this part of our analysis, to determine the amount of the award that the participants are entitled to. Rather than addressing each consideration separately (because not all are relevant), we address the following considerations, which are the most relevant in this proceeding:

- a. Has the participant contributed to a better understanding by the BCUC of the issues in the proceeding?
- b. To what degree will the participant be affected by the outcome of the proceeding?
- c. Are the costs incurred by the participant fair and reasonable?

The Panel finds that the CEC and BCOAPO contributed to a better understanding of the issues raised in this proceeding. The CEC’s IRs focussed on the need for a TPP and COC. BCOAPOs IRs focussed on the corporate organization and structure of Creative Energy Developments. In its final argument, BCOAPO states that it accepts that there are no apparent disadvantages to the transaction other than transaction costs which will not affect rates. Further, BCOAPO concludes that “there is nothing on the record indicating that this transaction will be detrimental to Creative Energy’s residential ratepayers or indeed, any of its ratepayers so BCOAPO supports the Application.”²⁴

We disagree with Creative Energy Developments’ characterization of the Panel’s response to the CEC dated July 9, 2020 that PACA funding will only be awarded to an intervener that identifies an in-scope issue in the proceeding and contributes to a better understanding by the Commission of such issue. Insisting that an intervener ‘bring’ an issue to a proceeding creates an unnecessarily high bar for participation and could discourage otherwise helpful participation. Certainly, an intervener that pursues out-of-scope issues in a proceeding may find that the Panel does not award costs commensurate with the time spent, however, that is not the case here.

The second consideration is the degree to which the participant will be affected by the outcome of the proceeding. Creative Energy Developments stated in the Application that the “transfer of the Pendrell Street TES to Creative Energy Pendrell LP does not in any way change ... the rates charged to the single customer pursuant to the existing customer service agreement.”²⁵ Therefore, with regards to one of the considerations in section 4 of the PACA Guidelines, the ‘degree to which the participant will be affected by the outcome of the proceeding’, both the CEC and BCOAPO knew from reading the Application that their interests, or those of their members, were unlikely to be affected by the transfer of the Pendrell Street TES. The CEC and BCOAPO would also have been reminded of this before they decided to intervene, because Creative Energy Developments repeated this information in its submission on June 26, 2020.

²³23 Creative Energy Developments Letter, dated 10 November 2020 p. 4.

²⁴ BCOAPO Final Argument, p. 5.

²⁵ Exhibit B-1, pp. 3 -4.

On the other hand, because they represent ratepayers' interests, it would have been presumptuous to deny the Interveners the opportunity to explore issues, albeit on a 'short leash', or to expect them to do so at their own cost. For example, the CEC was entitled to pursue questions regarding the TPP and COC. Creative Energy Developments indicates in response to the CEC's IRs that "a TPP and COC will govern and assist Creative Energy Developments continuing to ensure that utility rates are reasonable and do not result in disproportionate recovery or cross-subsidy between projects."²⁶ Similarly, BCOAPO was entitled to ask questions to satisfy itself that residential tenants of 1770 Pendrell would not be negatively impacted by the proposed transfer.

Finally, we examine whether the costs incurred by the participants are fair and reasonable. The table below summarizes the number of PACA funding days requested by each intervener in the PACA applications.

Participant	Legal	Consulting	Total
CEC	0.91	1.97	2.88
BCOAPO	1.0	0.63	1.63

Although this was not a long proceeding, participant costs come out of someone's pocket, and must not be taken for granted. In our view, although both the CEC and BCOAPO did contribute to a better understanding, the Panel considers the number of funding days requested by each of the interveners is excessive relative to their contribution.

We acknowledge Creative Energy Developments statement that the "rates charged to the single customer of the Pendrell Street TES are pursuant to a long-term contract, and there is no ability to increase those rates to recover unanticipated costs such as PACA funding costs...Any PACA funding costs would have to be absorbed by the shareholders of the Pendrell Street TES, which would not be fair."²⁷

Section 118 of the UCA authorizes the Panel to order a participant in this proceeding to pay all or part of the costs of another participant in the proceeding. Notwithstanding the rates that Creative Energy Developments charges its customer are fixed by contract, that decision was a matter negotiated by the parties, and should not now be used against the interveners.

In consideration of the PACA Guidelines, whether the participant has contributed to a better understanding of the issues raised in the proceeding and whether the costs incurred are fair and reasonable, **the Panel finds the number of funding days sought by the CEC and BCOAPO is excessive and a downwards adjustment by 50 percent to each amount is warranted.**

Participant	Legal		Consulting		Total	
	Original	Revised	Original	Revised	Original	Revised
CEC	0.91	0.46	1.97	0.98	2.88	1.44
BCOAPO	1.0	0.50	0.63	0.32	1.63	0.82

²⁶ Exhibit B-7 CEC IR 2.2

²⁷ Creative Energy Developments Letter, dated November 10, 2020, p. 3.

Disbursements

BCOAPO and the CEC both claimed for disbursements and / or other costs. BCOAPO claimed \$5.75 (inclusive of tax) for printing and photocopying and the CEC claimed \$50.40 (inclusive of tax) for an “Open File Charge.” In assessing the reasonableness and fairness of the disbursements and other costs, the Panel must consider whether those costs are necessarily or properly incurred in the conduct of the proceeding.

The Panel acknowledges that the proceeding was conducted through a written process and accepts that the printing and photocopying charges claimed by BCOAPO are reasonable and justified. However, the “Open File Charge” claimed by the CEC appears to relate to the creation by the CEC’s legal consultant of a new file to initiate the provision of legal services for this proceeding.

In determining whether a particular cost should be awarded following a proceeding, the Panel considers it important to review the context and nature of the cost in question. The Panel notes that the terms “disbursements directly related to the participant’s participation” and “other costs the Commission deems reasonable and justified” in sections 10.1 and 13.1 of the PACA Guidelines, respectively, limit the scope of recoverable costs. The question becomes whether a properly incurred cost is recoverable because it arises directly from the factual issues raised in the proceeding, as opposed to the specific circumstances and business practices of the participant.

The purpose of permitting the recovery of disbursements and other costs is to provide the participant with a means by which to be reimbursed for costs that arise directly from the issues of the proceeding or for materials or services that directly support its participation in the proceeding. The Panel does not accept that the CEC’s legal consultant’s “Open File Charge” is a necessary cost that arises directly from the issues of the proceeding or directly supports the CEC’s participation in the proceeding. Instead the cost is a result of the CEC’s legal consultant’s existing cost structure and thus, while it may represent a standard business practice for that consultant, it is not necessary for the conduct of the proceeding, and accordingly does not reflect the intent of the cost awards under the PACA Guidelines. For these reasons, the Panel finds that the “Open File Charge” claimed by the CEC not to be a reasonable or justified cost which should form part of the CEC’s PACA award.

The Panel awards participant costs of \$3,119.84 and \$2,034.44, inclusive of applicable taxes, to the CEC and BCOAPO, respectively.