



**ORDER NUMBER
G-211-24**

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

and

BC Sustainable Energy Association
Reconsideration of Order F-26-24

BEFORE:

E. A. Brown, Panel Chair
D. A. Cote, Commissioner

on August 8, 2024

ORDER

WHEREAS:

- A. On June 25, 2024, the BC Sustainable Energy Association (BCSEA) applied to the British Columbia Utilities Commission (BCUC) for reconsideration of BCUC Order F-26-24 (Reconsideration Application);
- B. By Order F-26-24 dated May 15, 2024, among other matters, the BCUC awarded a Participant Assistance/Cost Award (PACA) of \$152,553.48 to BCSEA for its participation in the FortisBC Energy Inc. Stage 2 Comprehensive Review and Application for Approval of a Revised Renewable Gas Program proceeding. BCSEA requested \$177,610.12 in its final PACA application dated January 9, 2024;
- C. The BCUC has reviewed the Reconsideration Application in accordance with sections 118 and 99 of the *Utilities Commission Act* (UCA) and the criteria set out in the BCUC's Rules of Practice and Procedure attached to Order G-72-23, and determines the following order is warranted.

NOW THEREFORE pursuant to section 99 of the UCA, the BCUC orders that the Reconsideration Application is summarily dismissed in its entirety without further process, for the reasons outlined in the decision accompanying this order.

DATED at the City of Vancouver, in the Province of British Columbia, this 8th day of August 2024.

BY ORDER

Original signed by:

E. A. Brown
Commissioner

DECISION

1.0 Introduction

The British Columbia Utilities Commission (BCUC) issued Decision and Order G-77-24 on March 20, 2024, regarding the FortisBC Energy Inc. (FEI) Stage 2 Comprehensive Review and Application for Approval of a Revised Renewable Gas Program proceeding (Proceeding). By Order F-26-24 dated May 15, 2024, the BCUC awarded Participant Assistance/Cost Award (PACA) costs to participants for their participation in the Proceeding. On June 25, 2024, the BC Sustainable Energy Association (BCSEA) applied to the BCUC for reconsideration of BCUC Order F-26-24 (Reconsideration Application).

1.1 BCUC Rules of Practice and Procedure

The BCUC's Rules of Practice and Procedure attached to Order G-72-23 dated April 3, 2023 (Rules) set out the rules regarding a reconsideration application in Part V – Reconsideration. Within Part V, Rule 26.05 provides 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:

- (b) the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision;
- (c) 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;
- (d) new fact(s) have arisen since the issuance of the decision which have material bearing on the decision;
- (e) a change in circumstances material to the decision has occurred since the issuance of the decision;
or
- (f) where there is otherwise just cause.

Rule 28.01 states that the BCUC may, without further process, summarily dismiss the application, in whole or in part, on the basis that it fails to establish, on its face, any reasonable grounds for reconsideration of the decision.

1.2 PACA Guidelines

Pursuant to section 118(1) of the *Utilities Commission Act* (UCA), “[t]he [BCUC] may order a participant in a proceeding before the [BCUC] to pay all or part of the costs of another participant in the proceeding.” The BCUC approved the BCUC's Participant Assistance/Cost Award Guidelines attached to Order G-97-17 (PACA Guidelines) pursuant to section 118 of the UCA. The PACA Guidelines apply to proceedings commenced prior to June 20, 2022,¹ and set out the BCUC's procedure for considering PACA applications.

¹ BCUC Order G-178-22.

Section 2.1 of the PACA Guidelines provides that the BCUC “may award costs for participation in a proceeding under section 118 of the [UCA].”

Pursuant to section 4.3 of the PACA Guidelines, in determining the amount of a participant’s cost award, the BCUC will consider the following:

- (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.

Section 14.0 of the PACA Guidelines sets out the process for making a PACA application. In particular:

- Section 14.2.1 states that, to make a final application for a PACA award, a participant must file a completed PACA application form;
- Section 14.2.4 stipulates that the party being asked to pay will be provided the opportunity to comment on the PACA application;
- Section 14.2.5 provides that the PACA applicant will then be given the opportunity to reply to those comments; and
- Section 14.2.8 provides that the BCUC aims to issue final cost awards by order no later than 60 calendar days after the proceeding’s final order, decision or report has been issued.

1.3 BCSEA PACA Application and Order F-26-24

On January 9, 2024, BCSEA filed its final PACA application for the Proceeding and sought PACA costs of \$177,610.12 for its participation. On April 25, 2024, FEI provided its comments on the PACA application and indicated that PACA applicants were copied. The BCUC did not receive any reply comments from PACA applicants. By Order F-26-24, among other matters, the BCUC awarded PACA costs of \$152,553.48 to BCSEA,² and stated the following:³

The Panel takes no issue with the daily rate claimed by BCSEA in respect of its legal fees, nor with BCSEA’s other costs (consultants and specialist/expert witnesses). However, the Panel finds the number of days claimed for BCSEA’s legal counsel to be excessive. Compared to the PACA applications filed by the other interveners, BCSEA has claimed a substantially higher number of legal counsel days that is 8 days more than the next highest claim and approximately 24 days more than the average for legal counsel.

In the Panel’s view, the disparity between BCSEA’s claimed legal costs and those of other interveners is not commensurate with BCSEA’s contribution to the proceeding. Rather, the Panel

² Since the Proceeding commenced prior to June 30, 2022, the BCUC applied the PACA Guidelines in Order F-26-24 to the PACA applications filed for the Proceeding.

³ BCUC Order F-26-24, Decision, p. 4.

finds BCSEA's level of contribution in the proceeding to be comparable to other interveners, and therefore an adjustment to BCSEA's legal counsel funding days is warranted. Based on the Panel's judgement, a reasonable level of legal counsel funding days for BCSEA would be equivalent to the next highest claim at 25.3 days for the regulatory effort necessary to participate fully in the proceeding...

2.0 BCSEA Reconsideration Application

In its Reconsideration Application, BCSEA seeks a direction that FEI reimburse BCSEA \$25,056.64, which is the amount by which the BCUC reduced BCSEA's applied-for PACA costs in Order F-26-24.

In support of this request, BCSEA states:⁴

The [BCUC] breached procedural fairness by failing to give BCSEA notice of, and an opportunity to comment on, the [BCUC's] intention to cut back the cost award to BCSEA based on a comparison of BCSEA's lawyer days with the undisclosed number of lawyer days claimed by other, undisclosed interveners.

BCSEA also submits that the BCUC unreasonably failed to consider a variety of factors listed in paragraph 6 of the Reconsideration Application, including that the Proceeding was lengthy, that BCSEA's legal counsel spent time to manage BCSEA's expert evidence, that BCSEA was the only intervener representing both sustainable energy policy objectives and its members' interests as FEI ratepayers, and that BCSEA argued successfully on key substantive issues.⁵

Panel Determinations

For the reasons that follow, **pursuant to section 99 of the UCA and Rule 28.01, the Panel summarily dismisses the Reconsideration Application in its entirety.**

As noted in section 1.1 above, Rule 26.05 stipulates that a reconsideration application must contain a concise statement of the grounds for reconsideration, which must include one or more of the five grounds listed in that Rule. Rule 28.01, in turn, states that the BCUC may summarily dismiss a reconsideration application on the basis that it fails to establish, on its face, any reasonable grounds for reconsideration of the decision.

BCSEA does not state which of these five enumerated grounds from Rule 26.05 it relies on in its Reconsideration Application. However, in the Panel's view, BCSEA has failed to establish a reasonable basis for any of the enumerated grounds on the face of its Reconsideration Application.

In particular, the Panel has considered whether BCSEA has established a reasonable basis to conclude that the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on its decision in Order F-26-24,⁶ or that there is otherwise just cause to reconsider the decision,⁷ through the following issues raised in the Reconsideration Application:

1. Whether the BCUC **breached procedural fairness** by failing to provide BCSEA notice of, and an opportunity to comment on, its intention to reduce BCSEA's PACA costs due to a comparison with other interveners' PACA applications.

⁴ Exhibit B-1, p. 1.

⁵ Exhibit B-1, pp. 1–2.

⁶ Rule 26.05(b).

⁷ Rule 26.05(f).

2. Whether the BCUC **unreasonably failed to consider the factors** listed by BCSEA in paragraph 6 of the Reconsideration Application.

With respect to the procedural fairness issue, the Panel notes that the Supreme Court of Canada has stated that the duty of procedural fairness is variable, flexible, and context-specific, and that the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) at para. 77.

In *Vavilov*, the Supreme Court of Canada also referenced the following non-exhaustive list of factors from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, that inform the content of the duty of procedural fairness in a particular case: (1) the nature of the decision and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker.

Applying the above guidance from the Supreme Court of Canada, the Panel notes that, in the case at hand, both section 118(1) of the UCA and section 2.1 of the PACA Guidelines make it clear that the decision of whether or not to award PACA costs to a participant is discretionary on the part of the BCUC. The PACA Guidelines provide a process by which a participant applying for PACA costs has the opportunity to put forward its case in a PACA application form,⁸ following which the party being asked to pay the PACA costs has an opportunity to comment,⁹ and the PACA applicant has a further opportunity to reply to these comments.¹⁰ The PACA Guidelines also make it clear that timeliness is an important consideration with respect to the determination of PACA costs, given the goal set out in section 14.2.8 of the PACA Guidelines for the BCUC to issue final PACA decisions within 60 calendar days after the proceeding's final order, decision or report has been issued.

In determining BCSEA's PACA award amount, the BCUC followed the process set out in the PACA Guidelines. First, the BCUC provided BCSEA an opportunity to present its case through its PACA application form. Upon receiving BCSEA's PACA application, the BCUC provided FEI, who is the party being asked to pay, the opportunity to comment. FEI provided its comments on the BCSEA's PACA application. BCSEA then had the opportunity to respond to FEI's comments.

The final step was the BCUC's determination of the PACA award amount for the BCSEA. The Panel notes that section 4.3 of the PACA Guidelines sets out a broad range of factors for the BCUC to consider when determining the amount of a participant's cost award, including whether "the costs incurred by the participant [are] fair and reasonable," and "[a]ny other matters which the [BCUC] determines appropriate in the circumstances." In the Panel's view, these broad factors allow the BCUC to consider the costs applied for by other participants in a proceeding, when determining PACA costs for a given participant.

The BCUC completed all steps of this process and issued Order F-26-24 within its 60-day timeline.

By following the PACA guidelines, following its own conforming process and reasonably deploying its discretionary ability to award PACA costs, we find the process followed by the BCUC was fairly and efficiently executed.

BCSEA argues that the BCUC breached procedural fairness by failing to give BCSEA notice of, and an opportunity to comment on, the Panel's intention to reduce their PACA award based on a comparison with the costs claimed by other participants. The Panel notes that the PACA Guidelines do not require that the BCUC inform a PACA

⁸ PACA Guidelines, s. 14.2.1.

⁹ PACA Guidelines, s. 14.2.4.

¹⁰ PACA Guidelines, s. 14.2.5.

applicant of an unfavourable decision with an opportunity to respond prior to issuance. Overall, the Panel does not consider that any additional process steps were necessary in this case for procedural fairness. The Panel finds that the process followed in this case was proportionate to the nature of the decision (BCSEA's entitlement to a discretionary cost award) and the objective to issue PACA determinations in a timely way. Given the foregoing the Panel finds that the process in this case was fair.

With respect to the issue of whether the BCUC unreasonably failed to consider the factors listed by BCSEA in paragraph 6 of the Reconsideration Application, the Panel notes that the BCUC's decision in Order F-26-24 included an overall assessment of BCSEA's level of contribution to the Proceeding.¹¹ BCSEA has not demonstrated that the BCUC failed to consider the factors listed in the Reconsideration Application when the BCUC undertook this assessment. Therefore, the Panel finds that BCSEA has not demonstrated, on the face of the Reconsideration Application, a reasonable basis for any of the grounds for reconsideration set out in Rule 26.05.

DATED at the City of Vancouver, in the Province of British Columbia, this 8th day of August 2024.

Original signed by:

E. A. Brown
Panel Chair/Commissioner

Original signed by:

D. A. Cote
Commissioner

¹¹ BCUC Order F-26-24, Decision, p. 4.