



ORDER NUMBER
G-203-18

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 Reorganization

BEFORE:

D. A. Cote, Commissioner/Panel Chair
D. J. Enns, Commissioner
M. Kresivo, Commissioner

on October 23, 2018

ORDER

WHEREAS:

- A. On June 29, 2018, Creative Energy Vancouver Platforms Inc. (Creative Energy) filed an application with the British Columbia Utilities Commission (the 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 (the Project), and additional approvals required in connection to the Project (the Application);
- B. Creative Energy seeks, among other things, approval of the following steps related to a corporate reorganization involving Creative Energy:
 - Amalgamation involving a public utility requiring the BCUC endorsement and Lieutenant Governor in Council (LGIC) consent pursuant to section 53 of the UCA;
 - Corporate structure changes requiring the BCUC approval, including:
 - Repurchase and issuance of shares in a public utility, pursuant to section 50 of the UCA;
 - Disposition of shares or other property of a public utility, other than in the normal course of business, pursuant to section 52 of the UCA;
 - Transfer of shares in a public utility that results in a person acquiring a reviewable interest in the public utility, pursuant to section 54 of the UCA; and
 - Disposition of Creative Energy's interest in "Trust Property" (as defined in the Application, the Trust Property is the interest in the lands, spaces and improvements on 720 Beatty Street and 701 Expo

Boulevard, Vancouver, including all development rights that are surplus to the requirements of the utility), pursuant to section 52 of the UCA;

- C. On July 13, 2018, the BCUC issued Order G-128-18, establishing a regulatory timetable which included a workshop, BCUC and Intervener Information Requests (IR) No. 1 and Creative Energy responses to BCUC and Intervener IRs No. 1 with further process to be determined;
- D. By Order G-194-18 dated October 12, 2018, the BCUC established a further regulatory timetable for the review of the Application;
- E. In the Application, Creative Energy requested that the BCUC issue a report to the LGIC on the utility amalgamation component of the proposed corporate reorganization of Creative Energy prior to completion of the review of the remainder of the Application;
- F. By letter dated September 28, 2018, the BCUC requested Creative Energy provide its submission on whether the proposed amalgamation would be beneficial in the public interest pursuant to sections 50 to 54 of the UCA. The BCUC invited parties to provide written submissions regarding the proposed amalgamation with reply submission from Creative Energy;
- G. On October 3, 2018, Creative Energy filed its written submission regarding the amalgamation step;
- H. By October 10, 2018, the Commercial Energy Consumers Association of British Columbia and FortisBC Energy Inc. filed their submissions. On October 15, 2018, Creative Energy provided its reply submission; and
- I. The BCUC has considered all submissions received on whether the amalgamation step of the proposed reorganization is beneficial in the public interest.

NOW THEREFORE for the reasons set out in Appendix A to this order, the BCUC rejects Creative Energy's proposal to prepare a report to the LGIC on the utility management component of the proposed re-organization prior to completing a full review of the Application.

DATED at the City of Vancouver, in the Province of British Columbia, this 23rd day of October 2018.

BY ORDER

Original signed by:

D. A. Cote
Commissioner

Attachment

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

Whether Creative Energy Platform Inc.'s proposal for Amalgamation is in the Public Interest

Reasons for Decision

1.0 Background

On June 29, 2018, Creative Energy Vancouver Platforms Inc. (Creative Energy) filed an application for a Certificate of Public Convenience and Necessity (CPCN) for the Expo and Beatty Plant Project and Approvals Related to Reorganization Application (Application). The Application, among other things, includes a request for approval of a series of corporate reorganization steps. Included among these is the amalgamation of a public utility requiring the consent of Lieutenant Governor in Council (LGIC) pursuant to sections 50 to 54 of the *Utilities Commission Act* (UCA).

Creative Energy has requested the British Columbia Utilities Commission (BCUC) issue a report to the LGIC on the utility amalgamation component of the proposed corporate reorganization of Creative Energy prior to the completion of the review of the remainder of the Application. It is their expectation that completion of this step prior to completion of the Application review process would allow time for the LGIC review process and result in an order consenting to the amalgamation being issued that allows the proposed project to begin early in the new year. Creative Energy has suggested that the BCUC report could request LGIC consent to be conditional, in that the amalgamation only be allowed to occur if the BCUC approves the Application and grants the CPCN for the Project.

In addition to the Application there has been one round of information requests (IRs) allowing the parties the opportunity to explore the proposed amalgamation and other topics relevant to this proceeding. In addition, by letter dated September 26, 2018, the BCUC requested Creative Energy to respond to a number of panel questions regarding the amalgamation. Responses were provided on October 1, 2018 (Exhibit B-9).

By letter of September 28, 2018, Creative Energy was requested to provide its written submission on whether the proposed amalgamation would be beneficial in the public interest pursuant to sections 50 to 54 of the UCA by October 3, 2018. Other parties were invited to make their submissions on this topic by October 10, 2018 with Creative Energy's reply submissions to be made by October 15, 2018.

2.0 UCA requirements for amalgamation

The requirements of a public utility with regard to LGIC consent are set out in section 53(1) of the UCA as follows:

- 53 (1) A public utility must not consolidate, amalgamate or merge with another person
- (a) unless the Lieutenant Governor in Council
 - (i) has first received from the commission a report under this section including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, and
 - (ii) has, by order, consented to the consolidation, amalgamation or merger, and
 - (b) except in accordance with an order made under paragraph (a).

(2) The Lieutenant Governor in Council may, in an order under subsection (1) (a), include conditions and requirements that the Lieutenant Governor in Council considers necessary or advisable.

(3) An application for consent of the Lieutenant Governor in Council under subsection (1) must be made to the commission by the public utility.

(4) The commission must inquire into the application and may for that purpose hold a hearing.

(5) On conclusion of its inquiry, the commission must,

(a) if it is of the opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, submit its report and findings to the Lieutenant Governor in Council, or

(b) dismiss the application.

(6) If a public utility gives notice to its shareholders of a meeting of shareholders in connection with a consolidation, amalgamation or merger, it must

(a) set out in the notice the provisions of this section, and

(b) file a copy of the notice with the commission at the time of mailing to the shareholders.

3.0 Positions of the parties

Creative Energy submissions

Creative Energy states that the proposed reorganization as a whole is required in order to facilitate the following:

- Creative Energy's proposed project as well as that of the Developer;
- The development and transfer of the utility's surplus assets thereby isolating the utility from risks associated from the Developer's project and on a tax efficient basis; and
- Emanate's acquisition of an indirect 50 percent interest in the utility.¹

Creative Energy states that the ratepayer and public interest benefits of the Project along with the Developer's Project, which are enabled by the proposed Creative Energy Reorganization are summarised as follows:

- 1) Creative Energy will have two interconnected steam plants that conform to modern seismic and fire resistance standards, have significantly increased efficiency, and enhance long-term service reliability with improved redundancy for customers, and new administrative office space, all for less than one third of the cost of these improvements.
- 2) Public areas will be significantly enhanced and beautified with an enhanced facade on the new Expo Plant, and a large public plaza between Beatty Street and BC Place, which will be especially important once the viaducts on Georgia Street are lowered and this site becomes a gateway into downtown Vancouver.
- 3) Local air quality will be improved as a result of new high efficiency and low NOx emissions equipment, and through the increased height of the stacks at both steam plants.
- 4) Natural gas consumption will be reduced by 20,600 MWh (74,200 GJ) per year and GHG emissions will be reduced by 3,700 tonnes per year.

¹ Exhibit B-10, p. 3.

- 5) NOx emissions will be reduced to meet the current Metro Vancouver standard of 30ppm.²

Creative Energy also states that the proposed reorganization will enable these benefits and neither the proposed reorganization nor the amalgamation step within it will have a detrimental effect on the public utility or the users of its service. Newco, in its view, will be a newly formed company with no material liabilities that will merge into Creative Energy (2018) following amalgamation.³

Creative Energy references the BCUC's handling of the Cal-Gas Inc. proposed amalgamation, with specific reference to the Panel in that proceeding's assertion that "Given that all steps in the Cal-Gas Reorganization will occur in immediate succession, the Panel considers it appropriate to assess the benefits of the Cal-Gas Reorganization as a whole when making its findings on Amalgamation." Creative Energy states that if applied to their proposed reorganization where steps also occur in immediate succession, it would be appropriate to assess the benefits as a whole when making findings on the amalgamation step. However, Creative Energy proposes that BCUC's recommendation to the LGIC to make its consent conditional on BCUC approving the Application given the following:

- (i) The public interest benefits of the proposed reorganisation and the amalgamation step enables the two projects to proceed on a basis that isolates the utility from risks associated with development of the Trust property on a tax efficient basis; and
- (ii) The BCUC has yet to determine whether the proposed project is in public convenience and necessity.

Creative Energy submits that this approach is reasonable in this instance as the amalgamation is "of a utility and a shell company with no material assets, facilities or operations, and is directly in aid of a project that is subject to BCUC approval."⁴

Intervenors' submissions

FortisBC Energy Inc. (FEI) states that the bifurcated process proposed by Creative Energy is incompatible with the statutory framework because approving amalgamation first assumes the remainder of the Application is valid. Moreover, in FEI's view, Creative Energy has provided no basis on which the BCUC could conclude that amalgamation taken separate from the remainder of the Application is "beneficial in the public interest." FEI states that in response to BCUC IR 59.2 requesting that Creative Energy discuss and quantify the benefits from amalgamation Creative Energy explained that the only benefits were those public interest benefits associated with the proposed project. FEI continues by stating that Creative Energy's only specific justification for amalgamation is there will be no harm to the utility or its ratepayers.⁵

FEI is not convinced by the record that an amalgamation with the shell company would be as benign as suggested by Creative Energy. In its view the effect of amalgamation, regardless of the assets or liabilities of the company with which Creative Energy wishes to amalgamate, will be to create a new public utility and Creative Energy has not demonstrated it to be as inconsequential as has been suggested.

FEI's position is that the record to date is insufficient to support the BCUC having an opinion that, separate from the rest of the Application, amalgamation is beneficial in the public interest. Noting that Creative Energy has tried to justify this by suggesting amalgamation consent could be contingent on BCUC's eventual approval of the

² Exhibit B-11, p. 5.

³ Ibid., p. 6.

⁴ Ibid., p. 7.

⁵ Exhibit C4-2, pp. 2-3.

Application, FEI notes there is nothing in section 53 of the UCA that permits this, nor does the legislation contemplate the BCUC altering its position to the opposite conclusion once the proceeding has been completed. FEI also points out that the procedural status of the proceeding casts doubt on Creative Energy's request. Although the hearing is underway it has not been concluded and section 53(5) requires BCUC to submit its report only "(o)n conclusion of its inquiry."⁶

FEI also takes issue with the use of the Cal-Gas amalgamation as precedent, noting that in the Cal-Gas amalgamation it was not presented as a necessary component of a larger project, nor was the Cal-Gas amalgamation report issued in the context of a larger application or recommendation that the LGIC attach a condition to its consent. Moreover, Cal-Gas presented numerous positive justifications for the amalgamation to proceed, while Creative Energy has provided no justifications that do not depend on approval of the rest of the Application. Based on this, FEI submits that the Cal-Gas amalgamation does not support Creative Energy's recommended relief.

FEI concludes by stating that the correct approach for the BCUC would be to consider whether the proposed amalgamation is "beneficial in the public interest" following the close of the record in this proceeding.⁷

Commercial Energy Consumers Association of British Columbia (CEC) hold similar views to those of FEI and raised similar concerns with respect to interpretation of section 53 of the UCA. In CEC's view it is too early to tell whether the amalgamation is "beneficial in the public interest" and submits that the BCUC is not in a position to make a determination until the Application review is complete.

CEC raises concern with respect to Creative Energy's assertions as to the isolation of the utility from risks associated with the development of the Trust Property by the Developer. CEC submits that Creative Energy's responses to IRs, inclusive of those issued by the Panel, are sufficiently vague and, as a result, ratepayers face risks. CEC requests Creative Energy clearly and definitively identify the risks the utility is isolated from and describe what would constitute a delay caused by the utility. In CEC's view, Creative Energy must clearly and unequivocally identify the risks assumed by the utility for the BCUC and others to determine whether the benefits, as proposed, exist. These are currently lacking and, as pointed out by CEC, highlighted by the response to Panel IR 1.1 that states that restrictions are designed to mitigate exposures rather than the utility being fully indemnified. CEC continues by noting the degree of flexibility in the language used by Creative Energy in its responses and the lack of certainty that risks associated with the proposed project have been eliminated for ratepayers. CEC concludes by encouraging Creative Energy to be more specific as to how risks to the utility and ratepayers are eliminated.

Creative Energy reply submission

Creative Energy asserts that the submissions from FEI and CEC distract from what it considers to be the key facts; the requirement of LGIC consent for only the amalgamation step of the reorganization and the newly formed company Newco will be a shell company with no material assets, liabilities or operations that is directly affiliated with Creative Energy and not a utility company amalgamating with an operating company.

In Creative Energy's view there is no need for the BCUC to first determine whether the overall Application is in the public interest before reporting to the LGIC in regards to the amalgamation step. The BCUC report is to provide its opinion with regard to the proposed amalgamation step and it can be framed in a manner the BCUC considers appropriate. In addition, LGIC consent and conditions will have no impact on BCUC's responsibility to

⁶ Exhibit C4-2, pp. 4–5.

⁷ Ibid., pp. 6–8.

determine whether the request approvals should be granted. Creative Energy asserts that proposed approach enables the BCUC to make its decision on the Application and the LGIC to issue its consent by the end of the year allowing the Expo component of the project to proceed and the Proposed Reorganization to proceed as desired in January, 2019.⁸

BCUC determination

Based on the submissions of the parties it is clear there is not a common view as to how to proceed with the handling of LGIC consent to move forward with amalgamation of Creative Energy and Newco.

Creative Energy has taken what might best be described as a bifurcated approach to securing LGIC consent for amalgamation. Put simply, it has asked the Panel to file a report expressing an opinion that is favourable to moving forward with amalgamation and finding it is beneficial in the public interest ahead of completion of the review of the broader Application. This report would request the LGIC make its consent conditional on the BCUC approving the broader Application. This approach is based upon Creative Energy's desire to initiate work on the early steps of the proposed project in January 2019 and if consented to, the fact that Newco will be a shell company with no material assets, liabilities or operations that is directly affiliated with Creative Energy.

FEI and CEC both oppose moving forward at this time with a report requesting LGIC approval. The basis for this opposition is primarily related to the lack of a complete evidentiary record at this point in time. In their view the evidentiary record to date is insufficient to support the Panel having an opinion (separate from the rest of the Application) that amalgamation is "beneficial in the public interest" as required by section 53(5) of the UCA. In addition, CEC has raised concerns about the lack of clarity with respect to risk elimination, as opposed to mitigation.

The BCUC derives its jurisdiction from the UCA and therefore any determination made by a Panel must be in accordance with the direction provided by it. In the view of the Panel section 53 of the UCA provides clear and specific direction with respect to securing consent for a consolidation, amalgamation or merger from the LGIC. Most relevant to this proceeding is the requirement under section 53(5) that the BCUC file a report "including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest."⁹ The key question arising from this section of the UCA is whether the evidence to date is sufficient to allow the Panel to provide an opinion that the proposed amalgamation is "beneficial in the public interest."

In the view of the Panel the evidence on the record to date is insufficient to form the basis of an opinion that the proposed amalgamation is "beneficial in the public interest." The evidence seems clear that the proposed project will be facilitated by the proposed amalgamation but there is scant evidence to suggest there are benefits associated with the amalgamation itself. When asked specifically about the benefits related to of the proposed reorganization Creative Energy's response indicated only that there would be no detrimental effect on the utility and its customers.¹⁰ When further asked to discuss and quantify the public interest benefits of amalgamation itself Creative Energy again provided no benefits. Instead it referred to the BCUC report concerning the Cal-Gas Reorganization where the BCUC considered it appropriate to assess the benefits of the proposed Reorganization as a whole when making findings on the amalgamation in that instance. Creative Energy proposes that a similar approach should be applied in this proceeding:

Applying that finding to the Proposed Reorganization involving Creative Energy, the benefits of the Proposed Reorganization as a whole should be considered when making findings on the

⁸ Creative Energy Reply Argument.

⁹ section 53(1)(a) of the UCA.

¹⁰ Exhibit B-5, BCUC IR 59.4.

amalgamation step. The Proposed Reorganization as whole enables Creative Energy and the Developer to proceed with the Proposed Project, the public interest benefits of which are described in the Application.¹¹

The Panel agrees with the approach taken in the case of the Cal-Gas amalgamation decision and that any findings related to the amalgamation must consider the public interest benefits. However, we do not agree with Creative Energy's interpretation of how this may be applied. As noted by both FEI and CEC, the process to review the Application for the proposed project is far from complete and whether the amalgamation and the proposed project are beneficial in the public interest remains very much at issue. CEC's concerns related to the lack of clarity provided by Creative Energy with respect to mitigation versus elimination of risk serves to amplify why this is the case.

Given the lack of evidence indicating that amalgamation is "beneficial in the public interest" on its own merits and the fact that the proposed project and related benefits are at issue within this proceeding, the Panel finds it is premature to prepare a report to the LGIC on the utility amalgamation component of the proposed corporate reorganization prior to completing a full review of the Application. The Panel therefore rejects Creative Energy's proposal. The preparation of a report to the LGIC will be considered concurrently with the entirety of the Application.

¹¹ Exhibit B-5, BCUC IR 59.5.