



ORDER NUMBER
G-231-19

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 to Acquire
and Operate a Thermal Energy System for Cooling at the Vancouver House Development

BEFORE:

T. A. Loski, Panel Chair
E. B. Lockhart, Commissioner
R. I. Mason, Commissioner

on September 24, 2019

ORDER

WHEREAS:

- A. On September 12, 2019, the British Columbia Utilities Commission (BCUC) issued Order G-222-19 and the accompanying Reasons establishing a public hearing process and the regulatory timetable for the review of the Creative Energy Platforms Inc. (Creative Energy) Application for a Certificate of Public Convenience and Necessity to Acquire and Operate a Thermal Energy System for Cooling at the Vancouver House Development (Cooling CPCN Application);
- B. On September 13, 2019, the Creative Energy filed an application for reconsideration and variance of Order G-222-19 on the grounds that the BCUC erred when establishing the regulatory timetable for the review of the Cooling CPCN Application (Creative Energy Reconsideration Application);
- C. Section 28.01, Part V of the BCUC's Rules of Practice and Procedure, which are attached to Order G-15-19, states that upon the filing of an application for reconsideration of a decision, 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; and
- D. The BCUC has reviewed the Creative Energy Reconsideration Application and considers that a summary dismissal is warranted.

NOW THEREFORE pursuant to section 99 of the *Utilities Commission Act*, for the reasons attached as Appendix A to this order, the BCUC dismisses the Creative Energy Reconsideration Application.

DATED at the City of Vancouver, in the Province of British Columbia, this 24th day of September 2019.

BY ORDER

Original signed by:

T. A. Loski
Commissioner

Attachment

Creative Energy Vancouver Platforms Inc.
Application for a Certificate of Public Convenience and Necessity to Acquire
and Operate a Thermal Energy System for Cooling at the Vancouver House Development

REASONS FOR DECISION

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1.0 Introduction

On August 16, 2019, 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 acquire and operate a district thermal energy system (TES) to provide cooling (Cooling TES) to the Vancouver House Development in the South Downtown area of Vancouver (Cooling CPCN Application).

On September 12, 2019, the BCUC issued Order G-222-19¹ and the accompanying Reasons establishing a public hearing process and an associated regulatory timetable for the review of the Cooling CPCN Application.

On September 13, 2019, Creative Energy filed an application seeking reconsideration and variance of the process and timing for the review of the Cooling CPCN Application, as set out in the regulatory timetable included in Order G-222-19 (Reconsideration Application²), and on September 18, 2019, Creative Energy provided greater clarity of its Reconsideration Application.³ Creative Energy submits that the BCUC erred in establishing the process and regulatory timetable set out in Order G-222-19 by not having due regard to the facts and prior BCUC determinations material to the decision.⁴

2.0 Background on the Creative Energy Cooling CPCN Application and Order G-222-19

Creative Energy filed its Cooling CPCN Application on August 16, 2019, consistent with the requirements of a Stream B TES.⁵ Westbank Projects Corp. (the Developer), a party affiliated with Creative Energy, is constructing the Vancouver House Development, which consists of four buildings on three parcels of land, with a total floor area of 64,598 meters squared (m²):

- Buildings 1 and 2 at 1480 Howe Street;
- Building 3 at 1461 Granville; and
- Building 4 at 1462 Granville Street.

The three buildings are for commercial use (Buildings 1, 3 and 4), while the fourth is a residential tower (Building 2). The thermal generation and distribution equipment and facilities of the Cooling TES are located within the central plant room of Vancouver House Building 2. The Cooling TES will distribute cooling energy via short runs of underground pipes to the other Vancouver House Development buildings. Initially, the Developer will be the only customer of the Cooling TES. The Developer will transfer Vancouver House Building 2 to a Strata Corporation, at which time the Developer and the Strata Corporation will be the only two customers of the Cooling TES.⁶

The Developer has been responsible for the design and construction of the works associated with the Cooling TES as part of the construction of the Vancouver House Development. Creative Energy and the Developer entered into a construction and purchase agreement on February 12, 2016 (the Purchase Agreement), whereby Creative Energy has agreed to purchase the completed Cooling TES and operate the Cooling TES as a utility to provide thermal energy (cooling) services to the Vancouver House Development.⁷ Creative Energy's obligation to

¹ Exhibit A-2.

² Exhibit B-3, p. 1.

³ Exhibit B-4.

⁴ Exhibit B-4, p. 2.

⁵ Exhibit B-1, p. 2.

⁶ Ibid., p. 1.

⁷ Ibid.

purchase the Cooling TES from the Developer is contingent upon BCUC approval of the Cooling CPCN Application.⁸ After Creative Energy acquires the Cooling TES it will operate as a public utility.⁹

Creative Energy is not seeking approval of rates for the provision of cooling service using the Cooling TES as part of the Cooling CPCN Application. Rather, Creative Energy intends to file a separate rates application in September 2019 for interim approval of rates in advance of November 1, 2019 if possible, and subject to approval of the Cooling CPCN Application.¹⁰

3.0 Applicable Law and the BCUC Rules of Practice and Procedure Regarding Reconsideration Applications

Section 99 of the *Utilities Commission Act* provides:

The commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation.

The BCUC Rules of Practice and Procedure provide the following:

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 has a material bearing on the decision;
- b) facts material to the decision that existed prior to the issuance of the decision were not placed into 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 a 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.¹¹

The BCUC Rules of Practice and Procedure also provide the following:

Upon the filing of an application for reconsideration of a decision, 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.¹²

⁸ Ibid., p. 2.

⁹ Ibid.

¹⁰ Ibid., p. 3.

¹¹ Attachment to Order G-15-19 dated December 17, 2018, Part V, Section 26.05.

¹² Ibid., Section 28.01.

4.0 Creative Energy Reconsideration Application

Creative Energy requests the BCUC to reconsider the process and the timing for the review of the Cooling CPCN Application, as set out in the regulatory timetable included in Order G-222-19.¹³ Creative Energy submits that the BCUC erred in establishing the process under Order G-222-19 by not having due regard to facts and prior BCUC determinations material to the decision.¹⁴

Creative Energy submits that the regulatory timetable established by Order G-222-19 would make it extremely challenging to obtain a CPCN and to have interim rates approved for the Cooling TES by November 1, 2019. Creative Energy further submits that the inability to operate the TES to provide cooling to the customers at building occupancy and/or to charge rates in respect of cost incurred to provide service, ultimately, are the material impacts of Order G-222-19.¹⁵

Creative Energy claims that the reasons accompanying Order G-222-19, show the BCUC considered a public hearing process, with notice to such parties and opportunity for them to fully participate, as necessary because commercial tenants of the developer, strata corporation, and strata unit owners must be given an opportunity to make submissions to the BCUC on whether they support the operation of the Cooling TES. As referenced in its reconsideration request, Creative Energy submits that this requirement of the BCUC does not have due regard to the disclosure the developer provided to such parties nor to the determinations of the BCUC in its March 2, 2015 Decision, issued under Order G-27-15, putting into effect the Thermal Energy Systems Regulatory Framework Guidelines at Appendix A to that Order (TES Guidelines Decision).¹⁶

Creative Energy also submits that with due regard to the precedent established under the facts and determinations of the TES Guidelines Decision, the BCUC in this proceeding ought to have reasonably concluded similarly that the strata unit owners and commercial tenants at the Vancouver House Development do not need the opportunity of a public BCUC hearing process to express their support for the operation of the Cooling TES by Creative Energy.¹⁷

5.0 Panel Determination

For the reasons set out below, the Panel finds that the Creative Energy Reconsideration Application has failed to establish, on its face, any reasonable grounds for the BCUC's determinations in Order G-222-19 and the accompanying Reasons to be reconsidered, and therefore dismisses the Creative Energy Reconsideration Application.

Creative Energy's submission has not persuaded the Panel that an error of fact, law or jurisdiction has been made. Nor has Creative Energy's submission provided new facts that have a material bearing on the BCUC's decision or suggested that circumstances have changed since the issuance of Order G-222-19. The Panel understands that Creative Energy disagrees with the regulatory timetable established by Order G-222-19, but disagreement alone is not adequate grounds for reconsideration.

¹³ Exhibit B-3, p. 1.

¹⁴ Exhibit B-4, p. 2.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid., p. 3.

Creative Energy acknowledges the BCUC's conclusion that additional information is needed for it to make its determination on the Cooling CPCN Application.¹⁸ Creative Energy also submits that the BCUC has the discretion to review and approve the Cooling CPCN Application without a public hearing¹⁹. However, Creative Energy asserts that a public hearing process is not necessary.²⁰ In support of its claim, Creative Energy submits that the BCUC's reasons in support of Order G-222-19 run counter to findings included in the TES Guidelines Decision. Specifically, Creative Energy claims that with due regard to the precedent established under the facts and determinations in section 2.0 of the TES Guidelines Decision, the BCUC in the Cooling CPCN Application proceeding ought to have reasonably concluded similarly that a public hearing process is not needed.²¹

The Panel notes that Section 2.0 of the TES Guidelines Decision, is entitled "Strata Corporations and the Micro TES Exemption."²² The Creative Energy Cooling TES is a Stream B TES, it is not a Micro TES, nor is it a TES owned by a Strata Corporation. A TES with an initial capital cost that is less than \$500,000 is considered a Micro TES and is exempt from active regulation, including the requirement for a CPCN and Commission oversight of rates.²³ A TES Owned by a Strata Corporation that exclusively serves that Strata Corporation's Strata Unit Owners is exempt from active regulation by the BCUC, and this exemption does not include a TES with a customer that is a Strata Corporation.²⁴ The Panel is of the view that previous findings specific to a Micro TES or an exempt Strata Corporation are not helpful in the review of a CPCN for a Stream B TES. The TES Guidelines state that a Stream B TES "will be regulated similar to other Public Utility systems. An application for a CPCN and a rate approval application are required."²⁵

In any event, the BCUC is not bound by precedent. Section 75 of the UCA sets out that the BCUC must make its decision on the merits and justice of the case, and is not bound to follow its own decisions. Further, the BCUC may determine its own process, pursuant to section 11 (1) of the *Administrative Tribunals Act*, which applies to the BCUC by virtue of section 2.1 (d) of the UCA. Accordingly, the Panel is not persuaded that the BCUC erred by not reaching findings in the review of the Cooling CPCN Application that are consistent with the findings in the TES Guidelines Decision specified by Creative Energy.

Creative Energy claims that the BCUC did not have due regard to the disclosure the developer provided commercial tenants of the developer, strata corporation, and strata unit owners of the Vancouver House Development.²⁶ The Panel acknowledges that potential purchasers of units in the residential tower and future members of the strata were informed about the Cooling TES. An extract of the relevant portion of the disclosure was included in the Cooling CPCN Application.²⁷ However, the Panel notes that no information regarding the cost of the Cooling TES, rates, nor service agreements were included in the disclosure statements. The Panel is of the view that this information may be of interest to the parties, and an opportunity for parties to participate in the process for the review of the CPCN Application is in the public interest.

The Panel agrees with Creative Energy, that the BCUC has the discretion to review the Cooling CPCN Application without a public hearing. The BCUC's mandate and jurisdiction to review CPCN applications is set out in sections 45 and 46 of the UCA. Section 46 (2) provides that the BCUC has a discretion whether or not to hold any hearing

¹⁸ Exhibit B-3, p. 2.

¹⁹ Exhibit B-3, p. 1.

²⁰ Ibid., p. 2.

²¹ Ibid., p. 3.

²² Decision Accompanying Order G-27-15, p. 1, section 2.0.

²³ Appendix A to Order G-27-15, TES Guidelines, p. 11.

²⁴ Ibid.

²⁵ Ibid., p. 3.

²⁶ Exhibit B-4, p. 2.

²⁷ Exhibit B-1, p. 23.

on a CPCN application. Additionally, the Panel notes that the TES Guidelines state that “upon determining that the applicant’s TES is to be considered under Stream B regulation, it is the BCUC’s sole discretion the process by which an application will be reviewed.”²⁸

The Panel notes that given the timing of the execution of the Purchase Agreement in 2016, there was ample opportunity to file the Cooling CPCN Application well in advance of timeframe that Creative Energy selected to file its application. However, Creative Energy elected to file the Cooling CPCN Application, in mid-August 2019, approximately 11 weeks in advance of the approval date it was seeking. The Panel acknowledges that the regulatory timetable established by Order G-222-19 may result in a decision on the Cooling CPCN Application after November 1, 2019, requested by Creative Energy.²⁹ However, in the case of the review of the Cooling CPCN Application, the Panel finds that the public interest benefits of having a public hearing process outweigh the benefits of a potentially more expedient BCUC decision that may result from not holding a public hearing.

Based on the foregoing analysis of the issues raised, the Panel finds that the Creative Energy Reconsideration Application has failed to establish, on its face, any reasonable grounds for the BCUC’s determinations in Order G-222-19 and the accompanying Reasons to be reconsidered, and therefore dismisses the Creative Energy Reconsideration Application.

²⁸ TES Guidelines – Appendix A to Order G-27-15, p. 18, section 2.4.1.

²⁹ Exhibit B-1, p. 3.