

3 September 2020

VIA E-FILING

Marija Tresoglavic
Acting Commission Secretary
BC Utilities Commission
6th Floor 900 Howe Street
Vancouver, BC V6Z 2N3



Reply to: Leigha Worth
ED@bcpiac.org
Ph: 604-687-3034
Our File: 7400.911

Dear Ms. Tresoglavic,

Re: Pacific Northern Gas (NE) Ltd. Application for Approval of the 2019 Franchise Agreement between Pacific Northern Gas (NE) Ltd. and the City of Fort St. John BCOAPO Final Argument

We represent the BC Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, and Tenant Resource and Advisory Centre, known collectively in regulatory processes as "BCOAPO et al." ("BCOAPO"). The constituent groups of BCOAPO et al. represent the interests of residential energy consumers in British Columbia.

Enclosed please find the BCOAPO's Final Argument with respect to the above-noted matter.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

BC PUBLIC INTEREST ADVOCACY CENTRE

Original on file signed by:

Leigha Worth
Executive Director | General Counsel

Encl.

**BC OLD AGE PENSIONERS' ORGANIZATION, ACTIVE SUPPORT AGAINST
POVERTY, COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BC,
DISABILITY ALLIANCE BC, AND TENANT RESOURCE AND ADVISORY CENTRE
("BCOAPO")**

**Pacific Northern Gas (NE) Ltd. Application for Approval of the 2019 Franchise
Agreement between Pacific Northern Gas (NE) Ltd. and the City of Fort St. John**

BCOAPO Final Argument

September 3, 2020

Please be advised that we provide the following final argument regarding the above noted application on behalf of our client groups known in this and other PNG(N.E.) regulatory processes as BCOAPO or BCOAPO et al. The constituent groups of BCOAPO et al. represent the interests of residential energy consumers in British Columbia generally but in this process specifically the interests of Pacific Northern Gas (NE)'s (PNG(NE)'s) residential ratepayers.

INTRODUCTION

On December 10, 2019, PNG (NE) filed an Application with the British Columbia Utilities Commission (BCUC) seeking approval of a new franchise agreement (2019 Franchise Agreement) between the City of Fort St. John (the City) and PNG (NE)¹.

PNG (NE) and the City initially entered into a franchise relationship in August 1952. The most recent Franchise Agreement, dated December 8, 1997 (1997 Franchise Agreement), approved by the BCUC by Order C-4-98, expired on December 7, 2018.²

On December 3, 2018, PNG (NE) and the City entered into an Interim Operating Agreement that was intended to operate as a full extension of the 1997 Franchise Agreement and maintain the status quo on an interim basis until the parties could agree upon the terms of a new franchise agreement.³

By Orders G-36-20, G-84-20, G-118-20, G-208-20 and a letter issued March 26, 2020, the BCUC Panel established and later amended a Regulatory Timetable for the review of the Application

¹ Exhibit B-1

² PNG (NE) Final Argument paras 2 and 3

³ PNG (NE) Final Argument para 65

which provided for, among other things, two rounds of interrogatories for the BCUC, one round of interrogatories for interveners, submissions on further process, and written final and reply arguments.

In our submissions on further process dated June 22, 2020, we submitted that BCOAPO has no objection to PNG (NE)'s request for approval of the 2019 Franchise Agreement including the amendments to Clause 4.3 and to Clause 4.7 the Utility and the City have agreed to implement⁴.

In the most recent procedural order⁵, the Panel invited the parties to address in final argument the following issues:

1. The appropriate jurisdiction for the BCUC to approve a franchise, and the appropriate jurisdiction for the BCUC to approve the terms of a franchise agreement;
2. Why PNG (N.E.) should agree to pay any fees and charges, including pavement degradation fees and charges, to the City of Fort St. John in addition to paying the franchise fee, whether such fees and charges should be recoverable from ratepayers, and how this may be considered to be in the public interest;
3. The appropriate start date of the new franchise and the appropriate commencement date of the initial term of the 2019 Franchise Agreement, with consideration given to the earliest date of approval that may be sought from the BCUC;
4. Once the 1997 franchise agreement expired, on what basis does PNG (N.E.) believe it is able to recover the franchise fee from ratepayers;
5. Why PNG (N.E.) should agree to pay any portion of the costs for any line relocations requested by the City of Fort St. John, whether these costs should be recoverable from ratepayers, and why this may be considered to be in the public interest; and
6. Whether PNG (N.E.) should agree at its sole cost to remove abandoned works at the request of the City of Fort St. John, whether this cost should be recoverable from ratepayers, and why this may be considered to be in the public interest.

BCOAPO limits its submission to the questions specifically asked by the BCUC and addresses these issues below.

⁴ Exhibit C-1-3

⁵ Exhibit A-9

SUBMISSIONS

1. The appropriate jurisdiction for the BCUC to approve a franchise, and the appropriate jurisdiction for the BCUC to approve the terms of a franchise agreement.

PNG (NE) filed the 2019 Franchise Agreement for approval by the BCUC pursuant to section 45(7) of the *Utilities Commission Act* (UCA).⁶ In its Final Argument, PNG (NE) submitted that that the jurisdiction of the BCUC with respect to the Application comes from subsections 45(7) through (9) of the UCA.⁷ Subsections 45(7) - 45(9) of the UCA state the following:

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise,
or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

[Emphases added]

Additionally, with respect to a certificate of public convenience and necessity (CPCN), subsection 45(2) of the UCA states the following:

(2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it

(a) to operate the plant or system, and

(b) subject to subsection (5), to construct and operate extensions to the plant or system.

⁶ Exhibit B-1, page 1

⁷ Para 10

BCOAPO agrees that subsections 45(7) and 45(8) clearly grants the BCUC the jurisdiction to approve a franchise and the terms of a franchise agreement. However, we note that while, based on subsection 45(2) of the UCA and the fact that it has been operating in the city well before September 11, 1980, PNG (NE) has a deemed CPCN that authorizes the Utility to operate its plant or system and to construct and operate extensions, but not to enter into new franchise agreements.

Interpretation of subsection 45(7) suggests that each new franchise granted after September 11, 1980 should be approved by the BCUC. Although PNG(NE) and the City have a history of being involved in an over 70-year long franchise relationship, the most recent 1997 Franchise Agreement expired on December 7, 2018. The proposed 2019 Franchise Agreement is a new franchise agreement, as opposed to a renewal of the 1997 Franchise Agreement⁸. In fact, according to the recital C of the 2019 Franchise Agreement, the City “has now agreed to grant [PNG(NE)] a new franchise for the distribution and sale of natural gas ...”.⁹

For these reasons, BCOAPO agrees with PNG (NE) that subsection 23(1)(g)(ii) of the *UCA* which states that the BCUC may make orders for “the proper carrying out” of franchises involving use of public property or rights is not applicable because PNG (NE) is not “carrying out” an existing franchise but rather applies for a new one.

Beyond subsections 45(7) and (8) of the UCA, section 31 of the UCA empowers the commission to “make rules governing conditions to be contained in agreements entered into by public utilities for their regulated services or for a class of regulated service” which, in our submission, provides the BCUC with the additional jurisdiction as this franchise agreement does indeed have an effect on setting customer rates.

2. Why PNG (N.E.) should agree to pay any fees and charges, including pavement degradation fees and charges, to the City of Fort St. John in addition to paying the franchise fee, whether such fees and charges should be recoverable from ratepayers, and how this may be considered to be in the public interest.

We will address this question while responding to questions 5 and 6 below.

⁸ PNG (NE) Final Argument para 17.

⁹ Exhibit B-1, Appendix A

3. The appropriate start date of the new franchise and the appropriate commencement date of the initial term of the 2019 Franchise Agreement, with consideration given to the earliest date of approval that may be sought from the BCUC.

Initially, PNG(NE) included December 1, 2018 as a commencement date of the proposed 2019 Franchise Agreement.¹⁰ However, after the BCUC pointed out that this would pre-date the December 7, 2018 expiry of the 1997 Franchise Agreement, PNG (NE) stated the following¹¹:

In the proposed 2019 Franchise Agreement, PNG(NE) had included the date of December 1, 2018 as a placeholder for the commencement date when negotiation of the renewal began in mid-2017. This date had not been updated in the draft since that time. Ideally, the term commencement date would be the date BCUC approval of the 2019 Franchise Agreement is granted, with the expiration date being 21 years from that date.

[Emphasis added]

In its Final Argument, PNG (NE) requests that the start date for the new franchise and the commencement date for the 2019 Franchise Agreement be set at December 8, 2018, the day after the 1997 Franchise Agreement expired.¹² In the alternative, PNG(NE) requests that, if approved, the commencement date be set as of the date of BCUC approval.¹³

BCOAPO submits that the commencement date for the 2019 Franchise Agreement should be set as of the date of BCUC approval for a number of reasons. To date, the 2019 Franchise Agreement has not been executed. There is also no evidence on the record that the parties have operated under the terms of the 2019 Franchise Agreement since December 8, 2018. In fact, while PNG (NE) and the City did eventually agree upon the terms of a new franchise, since December 3, 2018, they has continued to serve its customers in the City under the terms of the Interim Operating Agreement¹⁴, not the applied for one.

In this material regard, the 2019 Franchise Agreement is different from the 2017 Franchise Agreement executed on December 8, 1997, and subsequently approved by Order C-4-98 in 1998 with effective date of December 8, 1997.¹⁵

¹⁰ Exhibit B-1, Appendix A, term 4.1

¹¹ Exhibit B-3, BCUC IR 5.1 and 5.2

¹² Para 60

¹³ PNG (NE) Final Argument, para 62

¹⁴ PNG (NE) Final Argument, para 63

¹⁵ Exhibit B-1, Appendix B

4. Once the 1997 franchise agreement expired, on what basis does PNG (N.E.) believe it is able to recover the franchise fee from ratepayers.

BCOAPO accepts PNG (NE)'s position that since the Interim Operating Agreement was intended to operate as a full extension of the 1997 Franchise Agreement previously approved by the BCUC, it provided PNG (NE) the ability to collect franchise fees after the expiry of the 1997 Franchise Agreement and to recover these fees from ratepayers. However, if the BCUC finds that approval for interim operating agreements in these circumstances is necessary, BCOAPO does not oppose the approval of the Interim Operating Agreement and the payment of franchise fees thereunder, as suggested by PNG (NE).¹⁶

Additionally, BCOAPO acknowledges that these fees were prudently incurred and hence, their recovery is reasonable.

5. Why PNG (N.E.) should agree to pay any portion of the costs for any line relocations requested by the City of Fort St. John, whether these costs should be recoverable from ratepayers, and why this may be considered to be in the public interest, and

6. Whether PNG (N.E.) should agree at its sole cost to remove abandoned works at the request of the City of Fort St. John, whether this cost should be recoverable from ratepayers, and why this may be considered to be in the public interest.

In respect of issues raised by the BCUC in questions 2, 5, and 6 BCOAPO makes the following submissions.

BCOAPO's position on these issues in this process is based solely on the evidence on the public record. However, because the BCUC is mandated to review and decide on all franchise agreement applications under its jurisdiction, it has a great deal of institutional memory to help this Panel, if necessary - inform any determination of "what is fair" and "what is typical" in terms of franchise agreements.

It is BCOAPO's view that utilities enjoy an assumption of prudence in regulatory proceedings that requires overcoming a high evidentiary hurdle in order to successfully challenge proposed recoveries of whatever costs the utility claims. In addition, in BCOAPO's view, major financial

¹⁶ PNG (NE) Final Argument, para 70

risks such as commodity costs, are typically borne entirely by ratepayers due to the flow-through of costs that are approved by most, if not all, regulators.

Having said this, while PNG (NE) argues that franchise fees are not in the cost of service but rather a flow-through of costs,¹⁷ BCOAPO's position is that, as far as residential ratepayers are concerned, they are included in the rates they pay as a cost reasonably and prudently incurred to provide service, not a flow-through analogous to the Utility's commodity costs.

With respect to the reasonableness and recoverability of specific items addressed in points 2, 5, and 6, BCOAPO submits that the BCUC should be guided by:

- Its own assessment of the reasonableness of the responses provided by the Applicant, especially at Exhibit B-3, IRs 6.1, 7.1, 8.1, and 8.2 and Exhibit B-6, IRs 9.1, 9.3, 10.1, 10.2, 10.3, 11.4, 11.5, 12.1, 12.3, and 13.1. On reviewing these responses in isolation, they seem to be reasonable but whether they are actually so should be, we submit, determined by this Panel in the larger context of other approvals granted by the BCUC. As stated previously, BCOAPO submits that the BCUC should rely on its extensive experience and institutional memory in this regard.
- PNG (NE) makes various arguments in support of its proposal, e.g., that it has a deemed CPCN, that the revised terms are at least as favourable as those in the lapsed agreement, and the proposals are generally consistent with other approvals and harmonized with other recent agreements approved by the BCUC.
- The Utility also relies on the fact that this proposed Agreement, while being overdue, is the result of a negotiation between the parties. BCOAPO's view is that, while in general this concept has some merit, any consideration made with that in mind must be tempered by an acknowledgement that when flow-through costs are accepted or negotiated by the utility, the utility is largely (but not completely) indifferent to the impact on ratepayers. That said, if this Panel finds that the proposal is of some benefit to the shareholder, it could then determine that the shareholder be made, in part, responsible for some of the costs PNG (NE) proposes to recover from ratepayers.

¹⁷ Exhibit B-3, BCUC IR 2.3

CONCLUSION

Overall, BCOAPO recommends that the BCUC approve the 2019 Franchise Agreement with the amendments to Clause 4.3 and to Clause 4.7 the Utility and the City have agreed to implement, subject to our comments outlined above, including comments regarding the commencement date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Original on file signed by:

Leigha Worth, Executive Director

BC Public Interest Advocacy Centre

Irina Mis, Staff Lawyer

BC Public Interest Advocacy Centre