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Pacific Northern Gas (N.E.) Ltd.

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

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Decision
and Order G-307-20

December 1, 2020

Before:
R. I. Mason, Panel Chair
W. M. Everett, QC, Commissioner
B. A. Magnan, Commissioner

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Executive summary

On December 10, 2019, Pacific Northern Gas (N.E.) Ltd. (PNG (N.E.)) filed with the British Columbia Utilities Commission (BCUC) an application for approval of a franchise agreement between the City of Fort St. John (the City) and PNG (N.E.) (Proposed 2019 Franchise Agreement), pursuant to section 45(7) of the *Utilities Commission Act* (UCA) (Application).[1]

The BCUC established a written public hearing process for review of PNG (N.E.)'s Application, consisting of notice and intervener registration, two rounds of BCUC information requests (IRs), one round of intervener IRs, and final argument. British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO) registered as an intervener.

Background

In 1997, PNG (N.E.) and the City entered into a franchise agreement (1997 Franchise Agreement) dated December 8, 1997, which expired on December 7, 2018.[2] On December 3, 2018, PNG (N.E.) and the City entered into an interim operating agreement to provide for the continued service to PNG (N.E.) customers in the City franchise area while the negotiation and approval of new franchise terms were conducted (Interim Operating Agreement).[3]

The Proposed 2019 Franchise Agreement would grant PNG (N.E.) the exclusive right, franchise and privilege to supply and distribute gas within the boundary limits of the City and the right to construct and operate its system.[4] The Proposed 2019 Franchise Agreement also sets out certain operating terms under which PNG (N.E.) may exercise its right to operate in the City,[5] and provides for a franchise fee paid by PNG (N.E.) to the City (Franchise Fee), equal to 3 percent of PNG (N.E.)'s gross revenues for provision and distribution of all gas consumed within the boundary limits of the City.[6]

Jurisdiction

The Panel finds that it has the jurisdiction under sections 23, 45 and 46 of the UCA to approve the Proposed 2019 Franchise Agreement between PNG (N.E.) and the City, and to make orders regarding the Interim Operating Agreement. [7] Sections 46(4) and (5) of the UCA provide the Panel with authority to issue an order declaring, in advance of the franchise being granted by the City, that the BCUC will issue a Certificate of Public Convenience and Necessity (CPCN) for the Proposed 2019 Franchise Agreement once the franchise has been granted by the City, subject to any terms designated in the order.

Interim Operating Agreement

The Panel interprets the Interim Operating Agreement as continuing all the terms of the 1997 Franchise Agreement after the latter expired, including PNG (N.E.)'s obligation to pay the Franchise Fee to the City. For this reason, the Panel finds that PNG (N.E.) was authorized to collect the Franchise Fee from ratepayers in the City after the expiry of the 1997 Franchise Agreement.

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[1] Exhibit B-1, cover letter p. 1.
[2] Exhibit B-1, p. 1.
[3] Exhibit B-1, Appendix C.
[4] Exhibit B-1, Appendix A, Article V.
[5] Exhibit B-1, Appendix A, Article V, VI, VII, VIII.
[6] Exhibit B-1, Appendix A, Article IX, p. 14.
[7] UCA section 45(8).

PNG (N.E.) did not seek BCUC approval of the Interim Operating Agreement prior to its execution or once the 1997 Franchise Agreement expired. While in the Panel's view there was no obligation on PNG (N.E.)'s part to do so, the Panel recommends PNG (N.E.) apply for BCUC approval of future operating agreements to seek a degree of assurance as to the recoverability of related costs and the Franchise Fees from its ratepayers.

Exclusivity of the Proposed 2019 Franchise Agreement

Under the terms of the Proposed 2019 Franchise Agreement, the City agrees not to supply or distribute gas within its boundaries, nor will it grant such rights to another party. The City has the right to operate as a utility in this manner and is free to forgo this right. However, it is the BCUC and not the City that has jurisdiction over other persons who may wish to supply and distribute gas within the boundaries of the City. The value to PNG (N.E.) of the exclusivity in the Proposed 2019 Franchise Agreement is limited to ensuring that the City itself does not compete with it. While PNG (N.E.) does not require the proposed franchise for the right to operate in the City as a result of the deemed CPCN in section 45(2) of the UCA (Deemed CPCN), the Panel accepts that there is some value to PNG (N.E.) in accepting the City's offer not to compete with PNG (N.E.). On the basis there is no evidence of potential harm to ratepayers, the Panel does not object to the granting of this franchise.

Start date of the Proposed 2019 Franchise Agreement

The Panel determines that the start date of the franchise and the Proposed 2019 Franchise Agreement shall be the date of BCUC approval of the franchise, and declines to provide retroactive approval for the Proposed 2019 Franchise Agreement. The Panel is concerned that there may be distinctions between the terms of the Interim Operating Agreement under which the parties have been operating since the expiry of the 1997 Franchise Agreement and the Proposed 2019 Franchise Agreement which would not come to light until a future BCUC proceeding.

Franchise Fee

The Panel is willing to accept the Franchise Fee, but not for the reasons submitted by PNG (N.E.). The right to operate in the City contained in the franchise has no value to PNG (N.E.)'s ratepayers because of the Deemed CPCN and is no justification for the ratepayers to pay the Franchise Fee. Further, there is no evidence that the exclusivity offered by the City is of value to PNG (N.E.)'s ratepayers. The Franchise Fee does compensate the City for PNG (N.E.)'s use of the public lands within the boundaries of the City, and the Panel agrees it is reasonable for PNG (N.E.) to compensate the City for this use, and that PNG (N.E.) should recover this compensation from ratepayers in the City.

There is no evidence that the level of the Franchise Fee, 3 percent of non-bypass revenues, is entirely justified by PNG (N.E.)'s use of public lands. There is, however, a long-established practice in BC of smaller municipalities charging utilities a franchise fee or operating fee of 3 percent. Given that the Franchise has some value to PNG (N.E.)'s ratepayers, albeit unquantified, in the interests of regulatory efficiency, and to avoid unduly burdening PNG (N.E.)'s ratepayers with further process, the Panel accepts the figure of 3 percent for the Franchise Fee in this instance.

That said, the Panel finds that it is not in the public interest for the Proposed 2019 Franchise Agreement to contain obligations requiring PNG (N.E.) to pay for:

- Fees and charges prescribed under the City's Fees and Charges for Various Municipal Services Bylaw;
- A share of relocation costs in certain circumstances when the relocations are requested by the City; and

- Costs for the removal of abandoned works requested by the City.

In each of the three matters listed above, the Proposed 2019 Franchise Agreement would enable the City to receive from PNG (N.E.), and hence from PNG (N.E.)'s ratepayers, amounts in addition to the 3 percent Franchise Fee the City already receives, at least in part for the use of its public lands. The Panel's view is that these three matters are encompassed in the meaning of "use of public lands", and that the Franchise Fee has been sufficient to compensate the City in each of these three circumstances in the past, and continues to be adequate compensation for the City in the present circumstances.

Panel Determination

For these reasons, the Panel is not willing to approve the Proposed 2019 Franchise Agreement in its current form. Given the benefits to PNG (N.E.), the City and PNG (N.E.)'s ratepayers of having an agreement setting out the operating terms between the parties, the Panel wishes to give PNG (N.E.) and the City an opportunity to renegotiate the Proposed 2019 Franchise Agreement to address the Panel's concerns. The Panel therefore adjourns the proceeding for 90 days to allow time for the parties to consider changes to the Proposed 2019 Franchise Agreement. The Panel is prepared to reconvene the proceeding if a revised franchise agreement is submitted or will reconvene the proceeding in any case after 90 days.

The Panel recommends that PNG (N.E.) amend clause 4.3 to include the text "or termination" as specified in section 4.6 of this Decision.

Were this Panel's approval to be forthcoming, the City could then seek proper approval of the franchise in compliance with section 22 of the *Community Charter*, after which PNG (N.E.) would be able to submit the final version of the Proposed 2019 Franchise Agreement to the BCUC for final approval.

Precedents

The Panel acknowledges that the BCUC has approved terms in some recent PNG (N.E.) franchise agreements similar or identical to the terms to which this Panel objects. However, this Panel is not aware of any operating agreement between FEI and a municipality that has been approved by the BCUC, that contains an operating fee, and that permits the municipality to charge FEI any fees, charges or other costs beyond the operating fee.

The BCUC is not bound by precedent, pursuant to section 75 of the UCA, although the BCUC seeks to make decisions that are consistent with prior practice, or to explain why the present circumstances support a different decision. In this instance, the Panel has considered a variety of conflicting prior practice, both from PNG (N.E.) and FEI, and considers that no decision could be consistent with all recent or historical decisions. For these reasons, the Panel reaches this decision on its own merits, considering the evidence from this proceeding, and considers that it is consistent with regulatory principles and the vast majority of past practice.

1.0 Introduction

1.1 Application and Approvals Sought

On December 10, 2019, Pacific Northern Gas (N.E.) (PNG (N.E.)) filed with the British Columbia Utilities Commission (BCUC) an application for approval of a franchise agreement between the City of Fort St. John (the City) and PNG (N.E.) (Proposed 2019 Franchise Agreement), pursuant to section 45(7) of the *Utilities Commission Act* (UCA) (Application).[8]

1.2 Background

By an agreement dated August 14, 1952, between ICG Utilities (British Columbia) Ltd. (PNG (N.E.)'s predecessor) (ICG) and the City, ICG was granted a franchise to furnish, distribute and sell natural gas within the City for an initial term of 20 years, which commenced August 15, 1954, which term was extended by agreement of the parties for a further period of 10 years and again for a further period of 11 years ending on August 15, 1995[9].

In 1997, PNG (N.E.) (through its predecessor company Centra Gas Fort St. John Inc.) and the City entered into a franchise agreement (1997 Franchise Agreement) dated December 8, 1997, which was approved by BCUC Order C-4-98, dated May 26, 1998. The 1997 Franchise Agreement expired on December 7, 2018.[10]

On December 3, 2018, PNG (N.E.) and the City entered into an interim operating agreement to provide for the continued service to PNG (N.E.) customers in the City franchise area while the negotiation and approval of new franchise terms were conducted (Interim Operating Agreement).[11]

1.3 Proposed 2019 Franchise Agreement

The Proposed 2019 Franchise Agreement would grant PNG (N.E.) the exclusive right, franchise and privilege to supply and distribute gas within the boundary limits of the City and the right to construct and operate its system.[12] The Proposed 2019 Franchise Agreement also sets out certain operating terms under which PNG (N.E.) may exercise its right to operate in the City, including those related to entry upon public lands, responsibility for damages, supply of gas and abandonment of PNG (N.E.)'s facilities.[13] The Proposed 2019 Franchise Agreement has an initial term of 21-years and allows for future renewal.[14]

The Proposed 2019 Franchise Agreement provides for a franchise fee paid by PNG (N.E.) to the City "for the use by the Company of the Public Lands and for the exclusive right, franchise, and privilege to supply gas within the boundary limits of the Municipality, in addition to the payment of any rates, taxes or assessments lawfully imposed by the Municipality" (Franchise Fee). The Franchise Fee is equal to 3 percent of the gross revenues (excluding taxes and levies) received by PNG (N.E.) in the immediately preceding calendar year for provision and distribution of all gas consumed within the boundary limits of the City.[15]

[8] Exhibit B-1, cover letter, p. 1.
[9] BCUC Order C-1-85.
[10] Exhibit B-1, p. 1.
[11] Exhibit B-1, Appendix C.
[12] Exhibit B-1, Appendix A, Article V.
[13] Exhibit B-1, Appendix A, Article V, VI, VII, VIII.
[14] Exhibit B-1, Appendix A, Article IV.
[15] Exhibit B-1, Appendix A, Article IX, p. 14.

1.4 Regulatory Process

On February 28, 2020, the BCUC established a written public hearing process and a regulatory timetable for review of PNG (N.E.)'s Application.[16] The regulatory timetable consisted of notice and intervener registration, BCUC information requests (IRs), PNG (N.E.)'s responses to BCUC IRs, and further process to be determined. The BCUC subsequently amended the regulatory timetable to allow PNG (N.E.) additional time to respond to IRs.[17]

On April 2, 2020, British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO) registered as an intervener.

On April 9, 2020, the BCUC further amended the regulatory timetable to include additional BCUC IRs, intervener IRs, PNG (N.E.) responses to IRs and submissions on further process.[18]

Pursuant to Order G-208-20, PNG (N.E.) filed its written final argument on August 20, 2020, with intervener final argument on September 3, 2020. PNG (N.E.) filed its reply argument on September 10, 2020.

1.5 Legislative Framework

Section 23(1) of the UCA provides:

> The commission has general supervision of all public utilities and may make orders about
>
> …
>
> (g)other matters it considers necessary or advisable for
>
> (i)the safety, convenience or service of the public, or
>
> (ii)the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights. (emphasis added)

Section 45 of the UCA provides:

> (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
> (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.
>
> (3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
> (4) The commission may, by regulation, exclude a utility plant or categories of utility plants from the operation of subsection (1).
> (5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.

[16] Order G-36-20.
[17] Exhibit A-4.
[18] Order G-84-20.

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.
(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.

Section 46 of the UCA provides:

(1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.
(2) The commission has a discretion whether or not to hold any hearing on the application.
(3) Subject to subsections (3.1) to (3.3), the commission may, by order, issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.
(3.1) In deciding whether to issue a certificate under subsection (3) applied for by a public utility other than the authority, the commission must consider

(a) the applicable of British Columbia's energy objectives,
(b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
(c) the extent to which the application for the certificate is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*.

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
(3.3) In deciding whether to issue a certificate under subsection (3) to the authority, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider

(a) British Columbia's energy objectives,
(b) the most recent of the following documents:

(i) an integrated resource plan approved under section 4 of the *Clean Energy Act* before the repeal of that section;
(ii) a long-term resource plan filed by the authority under section 44.1 of this Act, and

(c) the extent to which the application for the certificate is consistent with the requirements under section 19 of the *Clean Energy Act*.

(4) If a public utility desires to exercise a right or privilege under a consent, franchise, licence, permit, vote or other authority that it proposes to obtain but that has not, at the date of the application, been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate.

(5) On application under subsection (4), the commission may make an order declaring that it will, on application, under rules it specifies, issue the desired certificate, on the terms it designates in the order, after the public utility has obtained the proposed consent, franchise, licence, permit, vote or other authority.
(6) On evidence satisfactory to the commission that the consent, franchise, licence, permit, vote or other authority has been secured, the commission must issue a certificate under section 45.
(7) The commission may, by order, amend a certificate previously issued, or issue a new certificate, for the purpose of renewing, extending or consolidating a certificate previously issued.
(8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption.

Franchises are granted by Municipalities pursuant to section 22 of the *Community Charter*, which provides:

22 (1) A council may, by bylaw adopted with the approval of the electors, enter into an agreement that grants an exclusive or limited franchise for the provision of one or more of the following in accordance with the agreement:

(a) a public transportation system;

(b) water through a water supply system;

(c) sewage disposal through a sewage system;

(d) gas, electrical or other energy supply system.

(2) The maximum term of an initial agreement or a renewal agreement under this section is 21 years.[19]

2.0 Jurisdiction

PNG (N.E.) submits that the BCUC's jurisdiction with respect to the Application derives from sections 45(7) through (9) of the UCA. PNG (N.E.) adds that these sections of the UCA "provide that a franchise granted by a municipality to a public utility will not be valid unless approved by the BCUC," and that the BCUC must grant a CPCN, with respect to a proposed franchise, where it is satisfied that the franchise is "necessary for the public convenience and properly conserves the public interest." PNG (N.E.) submits that the 1997 Franchise Agreement was approved under section 45(7) of the UCA, as were franchise agreements between PNG (N.E.) and the City of Dawson Creek, the City of Prince Rupert, the Village of Fraser Lake, the District of Fort St. James and the Village of Pouce Coupe. [20]

PNG (N.E.)'s view is that it has a deemed CPCN to operate in the City under section 45(2) of the UCA, but that this deemed CPCN is not sufficient to approve the validity of a franchise granted to PNG (N.E.) by a municipality, and hence PNG (N.E.)'s Application to the BCUC under section 45(7) of the UCA. PNG (N.E.) adds that this interpretation of the UCA is consistent with previous BCUC approvals of franchise agreements, including the 1997 Franchise Agreement.[21]

PNG (N.E.) notes that section 23(1)(g) of the UCA provides that the BCUC "has general supervision of all public utilities and may make orders about … other matters it considers necessary or advisable for … the proper

[19] *Community Charter*, SBC 2003, c. 26.
[20] PNG (N.E.) final argument, pp. 3–4.
[21] PNG (N.E.) final argument, pp. 4–5.

carrying out of [the UCA] or of a contract charter or franchise involving use of public property or rights" (emphasis added by PNG (N.E.)). Since the Proposed 2019 Franchise Agreement is the grant of a new franchise and not a renewal of the previous franchise, PNG (N.E.) submits that the "approval" contemplated by section 45(7) of the UCA is appropriate, as opposed to the "carrying out" of a franchise contemplated by section 23(1)(g) of the UCA. [22]

Position of the interveners

BCOAPO agrees with PNG (N.E.) that sections 45(7) and (8) of the UCA grant the BCUC the jurisdiction "to approve a franchise and the terms of a franchise agreement." BCOAPO also agrees that section 23(1)(g)(ii) of the UCA is not applicable as PNG (N.E.) is not "carrying out" an existing franchise but rather is applying for a new franchise. [23]

Panel Determination

The Panel finds that it has the jurisdiction under sections 23, 45 and 46 of the UCA to approve the Proposed 2019 Franchise Agreement between PNG (N.E.) and the City.

Section 22 of the *Community Charter* authorizes a municipality, by bylaw adopted with the approval of the electors, to grant an exclusive or limited franchise for the provision of a gas supply system. While the City has not yet sought the approval of its electors, such approval is contemplated in recital D and section 2.1(a) of the Proposed 2019 Franchise Agreement submitted in Appendix A of the Application.

The Panel agrees with PNG (N.E.) that sections 45(7) through (9) of the UCA provide the BCUC with jurisdiction to grant a CPCN approving a franchise granted to PNG (N.E.) by the City. Further, the CPCN may only be granted, and thus the franchise approved, if the BCUC finds that the franchise is "necessary for the public convenience and properly conserves the public interest." [24]

Taken together, sections 46(4) and (5) of the UCA provide the Panel with authority to issue an order declaring, in advance of the franchise being granted by the City, that the BCUC will issue a CPCN for the Proposed 2019 Franchise Agreement once the franchise has been granted by the City, subject to any terms designated in the order. For these reasons, **the Panel finds that it has jurisdiction under sections 45 and 46 of the UCA to approve a franchise granted by the City to PNG (N.E.), and further finds that this approval may be given in advance of the grant of the franchise and subject to the terms the Panel designates.**

The Panel agrees that section 23(1)(g) of the UCA is not applicable to the approval of a new franchise. Section 23(1)(g) of the UCA deals, in part, with "the proper carrying out of …[a] franchise involving use of public property or rights." The phrase "carrying out" refers to the operations of the utility holding the franchise rather than to the franchise itself, and the section contains no powers for approval of a new franchise.

However, section 23(1)(g) of the UCA does give the BCUC authority to make orders about the operating terms of a franchise agreement. PNG (N.E.) is a public utility, and the franchise anticipated in the Proposed 2019 Franchise Agreement between PNG (N.E.) and the City meets the definition of a "franchise involving use of public property or rights." In addition, if the BCUC determines that a franchise is necessary for the public convenience and properly conserves the public interest, then section 45(9)(b) confers on the BCUC the authority to impose conditions on the "duration and termination" of the franchise. For these reasons, **the Panel finds that sections 23 and 45 provide the jurisdiction to approve the operating terms of the Proposed 2019 Franchise Agreement including its duration and term**.

[22] PNG (N.E.) final argument, p. 5.
[23] BCOAPO final argument, p. 4.
[24] UCA section 45(8).

Section 23(1)(g) of the UCA also gives the BCUC the authority to make orders regarding the Interim Operating Agreement. PNG (N.E.) is a public utility, and the Interim Operating Agreement between PNG (N.E.) and the City meets the definition of "a contract…involving use of public property or rights." Therefore, **the Panel finds that it has the jurisdiction to make orders about the Interim Operating Agreement**.

3.0 Interim Operating Agreement

Clause 59 of the 1997 Franchise Agreement states:

> Use of Distribution System after Termination. If the term of this Agreement expires without renewal or a purchase and sale as provided for in Part 11, or upon the termination of this Agreement pursuant to a notice of termination from the Municipality under Section 57, the Distribution System shall remain in the Company. The Distribution System may be used by the Company in its business or removed in whole or in part as it shall see fit and the Distribution System may remain in, on or under all the Highways within the Municipality and the Company may enter in, upon or under to use, break up, dig, trench, open up and excavate for the purpose of maintenance, renewal, repair, removal or operation of the Distribution System, or any part thereof, but not for extension thereof, provided that the Company shall in so doing comply with and be bound by the provisions of Sections 11 through 30, 32 through 48, 57 through 59 and 61 through 63 of this Agreement, notwithstanding the termination of this Agreement.

PNG (N.E.) states that it has continued to serve its customers in the City of Fort St. John franchise area under the Interim Operating Agreement since the expiry of the 1997 Franchise Agreement.[25] The terms set out in the Interim Operating Agreement are: [26]

> (a) The Company's works within the boundary limits of the Municipality, both before and after the date of this letter agreement, shall remain the Company's property and shall remain in the Public Lands;
>
> (b) The Company's works may continue to be used by the Company for the purposes of its business, or removed from Public Lands in whole or in part at the Company's sole discretion; and
>
> (c) The Company may continue to use Public Lands within the Municipality for the purposes of its business. The Company's employees, may enter upon all the Public Lands within the boundary limits of the Municipality to maintain, operate, install, construct, renew, alter, or place the Company's works, provided that the Company continues to operate in a manner consistent with the terms and conditions of the Existing Agreement as if the term had been extended."

PNG (N.E.) considers the terms of the Interim Operating Agreement to supersede those of clause 59 of the expired 1997 Franchise Agreement, and that "the spirit of the Interim Operating Agreement is to have PNG (N.E.) operate in a manner consistent with the terms and conditions of the Existing Agreement as if the term had been extended," as noted in provision (c).[27]

[25] Exhibit B-1, p. 1.
[26] Exhibit B-1, Appendix C, pp. 1–2.
[27] Exhibit B-3, BCUC 2.1.

PNG (N.E.) makes the following submission with regards to the basis on which it has been collecting franchise fees from customers within the City and remitting the fees to the City:[28]

> As noted in response to [BCUC] Question 2.1, the spirit of the Interim Operating Agreement is to have PNG operate in a manner consistent with the terms and conditions of the Existing Agreement as if the term had been extended. In this regard, PNG(NE) has been collecting franchise fees from customers within the City of Fort St. John, and remitting the fees in accordance with Clause 7 of the Existing Agreement.

PNG (N.E.) is of the view that clause 59 of the 1997 Franchise Agreement was not "sufficient" for the parties, as clause 59 was intended to apply to the situation in which the parties are not in the process of negotiating a new franchise agreement, and it instead sets out the "way forward" once the franchise relationship has come to an end. By contrast, in the present situation, PNG (N.E.) and the City of Fort St. John were in the process of negotiating a new franchise agreement when the 1997 Franchise Agreement expired, and the parties wished to continue the franchise relationship. PNG (N.E.) adds: [29]

> As such, the Interim Operating Agreement was intended to be an extension of the 1997 Franchise Agreement as a whole, though they confirm that they are consistent with the "spirit" of section 59 of the 1997 Franchise Agreement, in terms of what would happen with the works, etc. That is, [PNG] wanted its rights of exclusivity to continue, and the City of Fort St. John wanted to continue to receive franchise fees, through the interim period.
>
> As such, the Interim Operating Agreement was necessary to extend the current arrangement, until such time as a new agreement could be negotiated and approved by the BCUC.

Accordingly, PNG (N.E.) continues to rely on the authority granted to it by the approval of the 1997 Franchise Agreement, for the payment of franchise fees, and the ability to recover these fees from ratepayers.[30] PNG (N.E.) submits that "if the [Proposed] 2019 Franchise Agreement is approved with a commencement date of December 8, 2018, this will confirm PNG's authority to remit franchise fees to the City, and recover this franchise fee from ratepayers."[31]

If PNG (N.E.) is incorrect in its ability to collect franchise fees after the expiry of the 1997 Franchise Agreement on December 8, 2018, or otherwise in its authority to enter into the Interim Operating Agreement to extend the terms of the 1997 Franchise Agreement, PNG (N.E.) requests that the BCUC approve the Interim Operating Agreement and the payment of franchise fees thereunder, as part of this proceeding.[32]

PNG (N.E.) notes that the BCUC has previously approved an interim operating agreement between PNG (N.E.) (then Centra Gas Fort St. John Inc.) and the City (1995 Interim Operating Agreement), including a 3 percent franchise fee. On June 5, 1997 (after the prior franchise agreement expired in August 1995), PNG (N.E.) applied for approval of the 1995 Interim Operating Agreement, which was approved by the BCUC by Order C-4-97. The 1995 Interim Operating Agreement applied until the utility and the City could finalize the 1997 Franchise Agreement. PNG (N.E.) also notes Order C-11-05 – Approval of Extension to the Terasen Gas Inc. Franchise Agreement with the Town of Oliver, as an example of an application for extension that was brought after the expiration of the initial franchise agreement.[33]

[28] Exhibit B-3, BCUC 2.2.
[29] Exhibit B-6, BCUC 9.1.
[30] PNG (N.E.) Final Argument, p. 19; Exhibit B-6, PNG (N.E.) Response to BCUC IR 9.3. See also Exhibit B-3, PNG (N.E.) Response to BCUC IR 2.2.
[31] PNG (N.E.) Final Argument, p. 20.
[32] PNG (N.E.) Final Argument, p. 20.
[33] PNG (N.E.) Final Argument, pp. 20–21.

PNG (N.E.) also acknowledges that in Order C-11-04 – Approval of the Extension of the Terasen Gas Inc. Gas Franchise Agreement with the District of 100 Mile House, the BCUC stated the following with respect to an extension sought after expiry of a franchise agreement: "The Commission continues to note that Terasen Gas' extension requests are filed subsequent to the expiry terms of the gas Franchise Agreements. Future extension requests must be filed prior to the expiry terms with extensions that encompass a reasonable negotiating time frame." However, this requirement may have been, in part, due to the fact that Terasen Gas Inc. had previously sought approval of three extensions from the BCUC with respect to the same franchise agreement.[34]

Positions of the intervener

BCOAPO accepts PNG (N.E.)'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 (N.E.) 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 (N.E.). Additionally, BCOAPO acknowledges that these fees were prudently incurred, and hence their recovery is reasonable.[35]

While PNG (N.E.) argues that franchise fees are not in the cost of service but rather a flow-through of costs,[36] 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. [37]

PNG (N.E.) notes in reply that BCOAPO does not take issue with PNG (N.E.)'s ability to pay the City franchise fees during the period of the Interim Operating Agreement or to recover these amounts from ratepayers, and does not take issue with the ability of the BCUC to now approve the Interim Operating Agreement, should the BCUC find it necessary in the circumstances.[38]

For clarity, PNG (N.E.) submits that it had referred to franchise fees as a "flow-through item" in the context of responding to a question on whether franchise fees were included in its recent revenue requirements applications, and to explain that franchise fees are not a component of the cost of service that is subject to review and approval as part of the revenue requirements application proceedings.[39]

Panel determination

The issue of whether the Interim Operating Agreement extended the terms of the 1997 Franchise Agreement after the latter expired is a significant one. If the Interim Operating Agreement did not extend the terms of the 1997 Franchise Agreement, then PNG (N.E.) may not have been authorized to collect the Franchise Fee from ratepayers in the City once the 1997 Franchise Agreement expired.

PNG (N.E.)'s tariff provides for the collection of the Franchise Fee from ratepayers. For example, in Residential Service – Rate Schedule 1, PNG (N.E.)'s tariff states:

> A Franchise Fee Charge of 3.00% of the aggregate of the above charges is payable (in addition to the above charges) if the Premises to which Gas is delivered under this Rate Schedule is located

[34] PNG (N.E.) Final Argument, footnote 66, p. 21.
[35] BCOAPO Final Argument, p. 6.
[36] Exhibit B-3, BCUC IR 2.3.
[37] BCOAPO Final Argument, p. 7.
[38] PNG (N.E.) Reply Argument, p. 2.
[39] PNG (N.E.) Reply Argument, p. 3.

within the boundaries of a municipality to which Pacific Northern Gas pays Franchise Fees. (emphasis added)

In the Panel's view, PNG (N.E.) is authorized to collect the Franchise Fee from ratepayers in the City only if it is obligated to pay the Franchise Fee to the City.

If the 1997 Franchise Agreement had expired without the Interim Operating Agreement in place, clause 59 of the 1997 Franchise Agreement would have taken effect, continuing selected terms of that agreement. Since clause 59 makes no reference to the terms pertaining to the Franchise Fee, PNG (N.E.) would not have been obliged to pay the Franchise Fee and would not have been authorized to collect it from ratepayers in the City.

The Interim Operating Agreement includes the following term:

> (c) The Company may continue to use Public Lands within the Municipality for the purposes of its business. The Company's employees, may enter upon all the Public Lands within the boundary limits of the Municipality to maintain, operate, install, construct, renew, alter, or place the Company's works, provided that the Company [PNG] continues to operate in a manner consistent with the terms and conditions of the Existing Agreement [1997 Franchise Agreement] as if the term had been extended. (emphasis added)

The Panel interprets this term of the Interim Operating Agreement as continuing all the terms of the 1997 Franchise Agreement after the latter expired, including PNG (N.E.)'s obligation to pay the Franchise Fee to the City. For this reason, **the Panel finds that PNG (N.E.) was authorized to collect the Franchise Fee from ratepayers in the City after the expiry of the 1997 Franchise Agreement**.

PNG (N.E.) did not seek BCUC approval of the Interim Operating Agreement prior to its execution or once the 1997 Franchise Agreement expired. While in the Panel's view there was no obligation on PNG (N.E.)'s part to do so, PNG (N.E.) had the opportunity to seek its approval under section 23(1)(g)(ii) of the UCA. The Panel recommends PNG (N.E.) apply for BCUC approval of future operating agreements to seek a degree of assurance as to the recoverability of related costs and the Franchise Fees from its ratepayers.

4.0 Franchise Agreement

In reviewing the Proposed 2019 Franchise Agreement, the Panel addresses the following issues:

- Necessity of a franchise agreement;
- Start date of the Proposed 2019 Franchise Agreement;
- Payment of pavement degradation fees and charges;
- Costs with respect to line relocations;
- Cost with respect to abandoned works; and
- Renewal and termination clauses.

4.1 Necessity of a franchise agreement

Clauses 3.1 and 3.2 of the Proposed 2019 Franchise Agreement provide:[40]

[40] Exhibit B-1, Appendix A, p. 3.

> The Municipality hereby grants to the Company, to the extent that the Municipality is empowered, the exclusive right, franchise and privilege:
>
> (a) to enter in, upon and under all Public Lands to place, construct, lay, operate, use, maintain, renew, alter, repair, extend and/or remove the Company's works; and
>
> (b) to supply and distribute gas within the boundary limits of the Municipality.
>
> During the term of this Agreement, the Municipality will not itself supply or distribute gas within the boundary limits of the Municipality nor grant any right, licence, privilege, concession or franchise to any other person, firm, corporation or utility, to supply or distribute gas within the boundary limits of the Municipality, or to enter in, upon and under Public Lands to place, construct, lay, operate or use mains, plants, pipes, conduits and/or other equipment for the purpose of distributing gas within the boundary limits of the Municipality.

PNG (N.E.) notes that FortisBC Energy Inc. (FEI) has moved from franchise agreements to operating agreements, taking the position that it has the right to operate in municipalities by virtue of deemed CPCNs and its agreements with municipalities do not require a franchise.[41] However, PNG (N.E.) submits that it is seeking approval of a franchise agreement as opposed to an operating agreement as it desires an "exclusive right, franchise and privilege" to operate within the City.[42]

PNG (N.E.) submits that it has a deemed CPCN to operate in the City under section 45(2) of the UCA because it has been operating there under the terms of a franchise agreement since 1952.[43]

PNG (N.E.) submits that franchise exclusivity is "a key component of the regulatory compact which underlies the rights and obligations of public utilities."[44] PNG (N.E.) cites the ATCO decision:[45]

> 63 These goals [of sustainability, equity and efficiency] have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price – nothing more… Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated [citations omitted].

Panel discussion

The Panel acknowledges that the City has the authority under section 22 of the *Community Charter* to enter into an exclusive franchise agreement for the provision of a gas supply system, subject to the approval of the BCUC under sections 45 and 46 of the UCA. We take no issue with the City's right to grant a franchise or to offer exclusivity in its franchise arrangements with PNG (N.E.). However, the Panel is not convinced that PNG (N.E.) requires a franchise to operate in the City or that the granting of an exclusive franchise is in the interests of PNG (N.E.)'s ratepayers.

[41] Exhibit B-6, BCUC IR 10.3.
[42] PNG (N.E.) Final Argument, p. 6.
[43] PNG (N.E.) Final Argument, p. 4.
[44] Exhibit B-3, BCUC IR 4.1.
[45] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 SCR 140, 2006 SCC 4.

It is important to distinguish between a franchise and a franchise agreement. A franchise is the right of a utility to operate, which could be an exclusive right. A franchise agreement contains the terms of the franchise and may also contain the terms under which the utility operates. If a utility did not have a franchise, it could still have the right to operate and, like FEI, have an operating agreement setting out the terms under which it operates. The matter at issue in this section (4.1) is the necessity of a franchise, not the terms under which PNG (N.E.) operates in the City, which the Panel considers in the remainder of section 4.

PNG (N.E.) views it has a deemed CPCN under section 45(2) of the UCA to operate in the City, and the Panel agrees. Therefore, the franchise offered by the City is not required for PNG (N.E.) to operate within its boundaries. The only feature of the proposed franchise that PNG (N.E.) submits it desires is exclusivity.

Under the terms of the Proposed 2019 Franchise Agreement, the City agrees not to supply or distribute gas within its boundaries, nor will it grant such rights to another party. Municipalities are not regulated by the BCUC to the extent that they may provide gas utility services within their boundaries. As a result, the City has the right to operate as a utility in this manner and is free to forgo this right. However, it is the BCUC and not the City that has jurisdiction over other persons who may wish to supply and distribute gas within the boundaries of the City. Notwithstanding the City's offer not to "grant any right, licence, privilege, concession or franchise" to another person to supply and distribute gas within the boundaries of City, the BCUC may grant another person the right to operate in the City. The value to PNG (N.E.) of the exclusivity in the Proposed 2019 Franchise Agreement is limited to ensuring that the City itself does not compete with it, and PNG (N.E.) submits no reasons why this limited exclusivity from the City is in the interests of ratepayers.

PNG (N.E.) cites the description of the "regulatory compact" described in the ATCO decision, including the notion that utilities are provided an exclusive territory in which to operate in return for taking on the obligation to reliably serve customers in that territory. However, the UCA contains no specific provision with respect to exclusivity, and a CPCN granted by the BCUC to a utility to operate is not inherently or necessarily exclusive. Rather, the BCUC grants a CPCN on the basis of the public convenience and necessity, which will depend on the circumstances prevailing at the time of the application, and on the terms the BCUC considers are appropriate. As the BCUC has noted previously, with the exception of thermal energy systems serving a master planned development, the BCUC is not aware that it has ever granted an exclusive franchise.[46]

While PNG (N.E.) does not require the proposed franchise for the right to operate in the City, the Panel accepts that there is some value to PNG (N.E.) in accepting the City's offer not to compete with PNG (N.E.). On the basis there is no evidence of potential harm to ratepayers, the Panel does not object to the granting of this franchise. In the remainder of this section the Panel considers issues with respect to the operating terms of the 2019 Proposed Franchise Agreement.

The Panel will consider the degree to which the value of the franchise to PNG (N.E.) justifies the franchise fee in the overall determination in section 5.

4.2 Start date of the Proposed 2019 Franchise Agreement

In the Application, PNG (N.E.) proposes a start date of December 1, 2018 for the Proposed 2019 Franchise Agreement.[47] In response to BCUC IRs, PNG (N.E.) states that this date was a placeholder, and that ideally the start date of the agreement would be the date BCUC approval of the Proposed 2019 Franchise Agreement is granted.[48]

[46] BCUC Order G-151-16, pp. 20–21.
[47] Exhibit B-1, Appendix A, p. 4, Clause 4.1.
[48] BCUC IR 5.1.

PNG (N.E.) requests that the BCUC set the start date for the new franchise and the Proposed 2019 Franchise Agreement to be December 8, 2018, the day after the 1997 Franchise Agreement expired. PNG (N.E.) submits that the BCUC has the ability to do this retroactively, and that doing so "would ensure continuity in the franchise relationship (which was also the intent of the parties entering into the Interim Operating Agreement)."[49] PNG (N.E.) cites the example of the operating agreement between Terasen and the District of Chetwynd, where the BCUC provided retroactive approval.

PNG (N.E.) submits that retroactive approval of the Proposed 2019 Franchise Agreement would address the question of PNG (N.E.)'s authority to collect franchise fees after the expiry of the 1997 Franchise Agreement. If the BCUC declines to set the start date of the Proposed 2019 Franchise Agreement to be December 8, 2018, PNG (N.E.) requests that, if approved, the start date be set as of the date of BCUC approval. [50]

Position of the interveners

BCOAPO submits that the start date of the Proposed 2019 Franchise Agreement should be the date of BCUC approval, for a number of reasons.[51] To date, the Proposed 2019 Franchise Agreement has not been executed. Further, BCOAPO notes there is no evidence on the record that PNG (N.E.) and the City have operated under the terms of the Proposed 2019 Franchise Agreement since December 8, 2018, but rather they have operated under the terms of the Interim Operating Agreement.

PNG (N.E.) acknowledges in reply that it has been operating under the terms of the Interim Operating Agreement and not the terms of the Proposed 2019 Franchise Agreement. However, PNG (N.E.) submits that "there is no practical impact arising from this distinction that would prevent the BCUC from approving the [Proposed] 2019 Franchise Agreement with a retroactive commencement date." PNG (N.E.) adds that the distinctions between the two sets of terms "have not been relevant in the intervening period since the expiry of the 1997 Franchise Agreement."[52]

PNG (N.E.) submits that, in any event, it is agreeable to the start date being set to the date of BCUC approval of the Proposed 2019 Franchise Agreement. [53]

Panel Determination

The Panel determines that the start date of the franchise and the Proposed 2019 Franchise Agreement shall be the date of BCUC approval of the franchise. The process for BCUC approval of the franchise and how the date will be determined is explained in section 5 below.

The Panel has concerns about providing retroactive approval for the Proposed 2019 Franchise Agreement. PNG (N.E.) submits that no distinctions between the terms of the Interim Operating Agreement and the Proposed 2019 Franchise Agreement have been relevant since the expiry of the 1997 Franchise Agreement. However, any such distinctions may not become apparent until a future BCUC proceeding, for example a revenue requirements proceeding, and retroactive approval of the Proposed 2019 Franchise Agreement might lead to conflicting interpretations as to whether costs incurred after the expiry of the 1997 Franchise Agreement are recoverable from ratepayers.

In the absence of a compelling reason to risk the unintended consequences of retroactive approval, and noting PNG (N.E.)'s submission that it is agreeable to the start date being the date of BCUC approval, the Panel

[49] PNG (N.E.) Final Argument, p. 18.
[50] PNG (N.E.) Final Argument, p. 18.
[51] BCOAPO Final Argument, p. 5.
[52] PNG (N.E.) Reply, p. 2.
[53] PNG (N.E.) Reply, p. 2.

considers the date of BCUC approval to be the most reasonable start date for the new franchise and the Proposed 2019 Franchise Agreement.

4.3 Payment of pavement degradation fees and charges

Clause 5.1 of the Proposed 2019 Franchise Agreement includes the following: [54]

> Subject to the provisions of Sections 5.11, 5.12 and 5.13, the Company shall carry out all works at its own expense, including all costs prescribed under the Municipality's Fees and Charges for Various Municipal Services Bylaw, as amended from time to time, and shall take all reasonable precautions to minimize damage and obstructions, and shall restore any Public Lands and any improvements thereto that may be affected by its works substantially to their former condition in accordance with the Municipality's Subdivision and Development Servicing Bylaw, as amended from time to time, and shall maintain any such Public Lands at its own expense to that standard for a period of one (1) year. (emphasis added)

In response to BCUC IRs, PNG (N.E.) proposes the following modification to the provision with regards to its obligation to pay fees and charges imposed by the City:[55]

> Subject to the provisions of Clauses 5.11, 5.12 and 5.13, [PNG] shall carry out all works at its own expense, including all costs prescribed under the [City's] Fees and Charges for Various Municipal Services Bylaw – Schedule E – Pavement Degradation Fees and Charges. (emphasis added by PNG (N.E.))

The underlined reference represents an addition to the provision that was proposed in the Application. PNG (N.E.) describes the addition as preferable and more specific, and that both PNG (N.E.) and the City propose this amended version.

Schedule E of the City's Fees and Charges for Various Municipal Services Bylaw consists of the following:[56]

> These fees will apply to a company who has entered into a Municipal Access Agreement with the City of Fort St. John.
>
> These fees reflect the fact that once pavement has been cut, the strength and longevity of the pavement cannot be restored. The cut edges lead to cracks and ultimately potholes and other defects that require ongoing maintenance and premature replacement. The fee reflects that ongoing maintenance and loss of pavement life.
>
> Where the a Company excavates, breaks up or otherwise breaches the surface of any ROW, the Company will, in addition to its obligation to restore the ROWs, contribute to the cost of the pavement degradation based on the total area of pavement excavated, and such amount will be payable within thirty (30) days of completing the restoration of the applicable ROW, on a onetime project basis, in accordance with the following table:

[54] Exhibit B-1, Appendix A, Clause 5.1, p. 6.
[55] Exhibit B-6, IR 14.1.
[56] City of Fort St. John bylaw 2456, adopted March 11, 2019, Schedule E.

Age of Street in Years Since Last Paved as determined by the City of Fort St. John	Fee Per Square Metre of Excavation (Calculations will be made using a Minimum width of 1 metre)
0 – 5 Years	$70.00
6 – 10 Years	$50.00
11- 15 Years	$40.00
16 – 20 Years	$30.00
21 Years or greater	$20.00

The Proposed 2019 Franchise Agreement contains the following:[57]

> Should the Company no longer be authorized or required to pay the franchise fee under any agreement between it and the Municipality or by any order of the Commission, the Municipality shall be free to apply such approval, permit and licence fees, charges and levies it is legally entitled to collect. (emphasis added)

FEI's operating agreement with the City of Trail, approved by BCUC Order G-4-20, contains the following:[58]

> Except for taxes payable by FortisBC, including the taxes payable pursuant to section 644 of the Local Government Act, R.S.B.C. 2015, c. 1, as amended, the payment of the costs of all services and utilities consumed in respect of FortisBC's operations, or as specifically provided in this Agreement, the Municipality will not require FortisBC to seek or obtain approvals, permits or licenses. The Municipality will not charge or levy against FortisBC any approval, license, inspection or permit fee, or charge of any other type, that in any manner is related to or associated with FortisBC constructing, installing, renewing, altering, repairing, maintaining or operating Company Facilities on any Public Places or in any manner related to or associated with FortisBC exercising the powers and rights granted to it by this Agreement (other than for repair of damage to the Municipal Facilities or Public Places in accordance with Section 14).
>
> If the Municipality does charge or levy fees or costs against FortisBC (other than for repair of damage to the Municipal Facilities or Public Places in accordance with Section 14) then FortisBC may reduce the annual operating fee payable to the Municipality under Section 11 by an amount equal to such charges, fees or costs or in the event no annual operating fee is payable, FortisBC will not be required to pay such charges or fees or costs. (emphasis added)

PNG (N.E.) submits that the 3 percent franchise fee payable to the City "is intended to represent 'compensation for the use by the Company of the Public Lands and for the exclusive right, franchise and privilege to supply gas within the boundary limits of the Municipality', in addition to any 'rates, taxes or assessments' lawfully imposed by the City." PNG (N.E.) submits that as the franchise fee is intended "as compensation for these specific rights

[57] Exhibit B-1, Appendix A, Clause 4.7(e), p. 6.
[58] FEI Application for Approval of Operating Agreement with the City of Trail, Exhibit B-1, Appendix A, pp. 12–13.

only," it is "appropriate and in the public interest for it to pay certain additional fees or charges to the City, and for these amounts to be recoverable from ratepayers." [59]

In any event, PNG (N.E.) submits, while it is paying the franchise fee, it is not responsible for the payment of certain charges to the City. PNG (N.E.) is not generally responsible for costs prescribed under the City's Fees and Charges for Various Municipal Services Bylaw, with the exception of pavement degradation fees and charges. PNG (N.E.) submits that it is reasonable to pay limited fees and charges, including pavement degradation fees and charges, in addition to a franchise fee, and that these charges "are in the public interest and should be recoverable from ratepayers."[60]

Position of the Intervener

BCOAPO submits 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." However, BCOAPO adds that while PNG (N.E.)'s responses to BCUC IR's appear reasonable in isolation, the Panel should rely on the BCUC's "extensive experience and institutional memory" in determining whether the costs are reasonable. [61]

PNG (N.E.) submits in reply that BCOAPO has not pointed to any decision of the BCUC that suggests the clause with regards to fees and charges is anything other than reasonable, and that PNG (N.E.) has identified in its final argument past instances in which similar clauses have been accepted by the BCUC.[62]

BCOAPO notes that PNG (N.E.) relies on the fact that the Proposed 2019 Franchise Agreement is the result of a negotiation between PNG (N.E.) and the City. BCOAPO submits that while this consideration has some merit, it must be acknowledged 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." If the Panel finds that a proposal is of some benefit to the shareholder, BCOAPO submits the Panel could determine the shareholder to be responsible for some part of the costs PNG (N.E.) proposes to recover from ratepayers.[63]

PNG (N.E.) disagrees with BCOAPO's view that it "is largely (but not completely) indifferent to the impact on ratepayers." PNG (N.E.) submits that it "specifically considered the interests of ratepayers and customers in the City" when negotiating the terms of the Proposed 2019 Franchise Agreement, which included considerations such as rate impact.[64]

Panel Determination

The Panel finds that the term of the Proposed 2019 Franchise Agreement whereby PNG (N.E.) commits to pay fees and charges prescribed under the City's Fees and Charges for Various Municipal Services Bylaw is not in the public interest.

The Panel accepts PNG (N.E.)'s submission that the Franchise Fee is compensation to the City for PNG (N.E.)'s use of public lands and for PNG (N.E.)'s exclusive right to supply gas in the boundary limits of the City. The question for the Panel is whether PNG (N.E.) should pay fees and charges to the City in addition to paying the Franchise Fee for providing service within the City's boundaries. Since the costs incurred by PNG (N.E.) under an approved franchise agreement would be presumed by the BCUC to be prudently incurred in delivering service to

[59] PNG (N.E.) Final Argument, p. 16.
[60] PNG (N.E.) Final Argument, pp. 16–17.
[61] BCOAPO Final Argument, pp. 6–7.
[62] PNG (N.E.) Reply, p. 3.
[63] BCOAPO Final Argument, p. 7.
[64] PNG (N.E.) Reply, pp. 3–4.

ratepayers, the Panel must consider whether such costs would be just and reasonable for PNG (N.E.) to recover from ratepayers when deciding whether to approve such an agreement.

The Proposed 2019 Franchise Agreement states that PNG (N.E.)'s use of public lands includes its right to "place, construct, lay, operate, use, maintain, renew, alter, repair, extend and/or remove" its facilities (Works).[65] After carrying out Works on its own initiative, PNG (N.E.) must, at its own cost, restore public lands "substantially to their former condition", and maintain such public lands to that standard for one year. Restoration costs are in addition to the Franchise Fee and have been a feature of the franchise and operating agreements since at least 1997.

The proposed payment by PNG (N.E.) to the City of municipal fees and charges, limited by PNG (N.E.) during the proceeding to pavement degradation fees and charges, was not a provision in the 1997 Franchise Agreement. Since at least 1997, then, the two parties have accepted that the Franchise Fee and PNG (N.E.)'s obligation to restore public lands after completing Works are sufficient compensation to the City for this aspect of "use of public lands." There is no evidence that PNG (N.E.)'s use of public lands has changed in any way that would justify additional fees and charges, or that the Franchise Fee is insufficient to compensate the City.

Further, the Proposed 2019 Franchise Agreement contains a provision whereby the City becomes entitled to collect "approval, permit and licence fees, charges and levies" in the event that PNG (N.E.) is no longer "authorized or required to pay the franchise fee."[66] It appears to the Panel that the parties have considered that the Franchise Fee includes compensation for municipal fees and charges. Otherwise, there would have been no need to ensure through a contractual term that such fees and charges became payable to the City in the event that the Franchise Fee ceased to be payable.

In the Panel's view, the Franchise Fee and PNG (N.E.)'s obligation to restore public lands are sufficient compensation for the City when PNG (N.E.) conducts Works on public lands, and it would not be just and reasonable for PNG (N.E.) to recover from ratepayers additional fees and charges to the City.

PNG (N.E.) submits that one individual aspect of the Proposed 2019 Franchise Agreement "should not be considered in isolation, but rather as one aspect of an overall agreement."[67] The Panel does not agree. The Panel must consider any aspect of the proposed agreement in context, but this does not prevent us from reviewing individual aspects of the agreement.

Further, PNG (N.E.) submits that it negotiated the Proposed 2019 Franchise Agreement "with an aim of achieving an arrangement that was fair to both PNG (N.E.)(NE)'s ratepayers, and the municipality."[68] The Panel shares BCOAPO's concern with regard to the extent to which ratepayers' interests were considered during the negotiations. In the Panel's view, it is not reasonable to expect a utility to negotiate with another party in the interests of both its ratepayers and shareholders. Rather, it is the role of the Panel to determine whether the Proposed 2019 Franchise Agreement is in the public interest by considering among other things the interests of the City, PNG (N.E.) and PNG (N.E.)'s ratepayers. With respect to PNG (N.E.)'s ratepayers, the Panel considers, among other things, whether it is just and reasonable that the costs that flow from the agreement should be recoverable from them.

For the foregoing reasons, **the Panel finds there is no adequate justification for PNG (N.E.) to pay the City for municipal fees and charges in addition to the Franchise Fee, and further finds these costs should not be recoverable from ratepayers if PNG (N.E.) incurred them**.

[65] Exhibit B-1, Appendix A, Clause 3.1(a), p. 3.
[66] Exhibit B-1, Appendix A, Clause 4.7(e), p. 6.
[67] PNG (N.E.) Final Argument, p. 10.
[68] PNG (N.E.) Final Argument, p. 10.

The Panel's view is consistent with the BCUC's approval of FEI's operating agreements. For example, the operating agreement between FEI and the City of Trail (City of Trail Operating Agreement), the most recent FEI operating agreement approved by the BCUC, contains a clause specifically preventing the City of Trail from charging or levying against FEI "any approval, license, inspection or permit fee, or charge of any other type, that in any manner is related to or associated with FortisBC constructing, installing, renewing, altering, repairing, maintaining or operating" its facilities. [69] The City of Trail Operating Agreement also contains a provision whereby if the City of Trail does charge any such fees or charges, FEI may reduce its operating fee by an equal amount. This demonstrates to the Panel that, in the case of FEI's operating agreements, the operating fee (which is set at 3 percent, the same as PNG (N.E.)'s proposed Franchise Fee in this instance) is considered sufficient compensation for all fees and charges that a municipality might consider levying for the use of its public lands.

4.4 Costs with respect to line relocations

PNG (N.E.)'s 1997 Franchise Agreement contained the following cost allocation for work requested by the City: [70]

> The direct cost of work done by the Company under this Section, less an amount equal to two percent (2%) of the direct cost of parts of the Distribution System which the Company takes out of service as a result of the closure or alienation multiplied by the number of years during which it has been in service, shall be reimbursed by the Municipality, excluding any loss of profit or other indirect loss.

The Proposed 2019 Franchise Agreement contains the following term: [71]

> 5.11 Upon the request of the Engineer, the Company shall change the location (which, in the case of pipe, means any change of either or both of line and elevation) of any part of its works upon, along, across, over or under Public Lands to some other reasonable location upon, along, across, over or under Public Lands. If the part of the works of which the location is changed as hereinbefore provided was (i) installed as to both line and elevation in accordance with the approval or instructions in writing of the Engineer, or (ii) was installed as to line in accordance with the approval or instructions in writing of the Engineer and was laid at a depth of at least eight hundred (800) mm under a roadway paved with at least fifty (50) mm of concrete or asphalt, or (iii) was installed as to line in accordance with the approval or instructions in writing of the Engineer and is being changed because its line is no longer satisfactory to the Municipality, the Municipality shall bear and pay to the Company the entire cost of the change less an amount equal to 2% of the installed value on the Company's books of any of the said part of the said works which the Company takes out of service as a result of the change, multiplied by the number of years during which it has been in service. Provided, however, that notwithstanding that the said part of the works was installed, or installed and laid, in one of the manners specified, if at any time the Municipality requires the Company to alter the elevation of any part of the said works to facilitate the laying, construction or operation of either storm or sanitary sewer pipes by not more than one-half of the outer diameter of the storm or sanitary sewer pipe concerned, plus one-half of the outer diameter of the gas pipe concerned, the Municipality shall bear and pay to the Company fifty percent (50%) of the sum arrived at by taking from the cost of the change an amount equal to two percent (2%) of the installed value on the Company's

[69] FEI Application for Approval of Operating Agreement with the City of Trail, Exhibit B-1, Appendix A, pp. 12–13.
[70] Exhibit B-1, Appendix B, Clause 35.
[71] Exhibit B-1, Appendix A, p. 9.

> books of any of the said part of the said works which the Company takes out of service as a result of the change multiplied by the number of years during which it has been in service. (emphasis added)

PNG (N.E.) submits that the exception whereby PNG (N.E.) is responsible for 50 percent of the cost of a request for relocation made by the City (Relocation Cost Exception) is appropriate and in the public interest, and that these costs should be fully recoverable from ratepayers. PNG (N.E.) explains that these costs are incremental costs, incurred due to the presence of pipelines, and that the City remains responsible for 100 percent of its own costs associated with this type of work. [72]

PNG (N.E.) confirms that the Relocation Cost Exception was not in the 1997 Franchise Agreement and is new to the Proposed 2019 Franchise Agreement. [73]

PNG (N.E.) adds that the Relocation Cost Exception is one aspect of the overall agreement, and that the Proposed 2019 Franchise Agreement was negotiated "between PNG(NE) and the City, with an aim of achieving an arrangement that was fair to both PNG (N.E.)(NE)'s ratepayers, and the municipality". PNG (N.E.) submits that by making this compromise, it was able to negotiate compromises from the City, and without this benefit, the City may have wished to adjust other terms in the Proposed 2019 Franchise Agreement. [74]

PNG (N.E.) submits that, in any event, the Relocation Cost Exception clause is favourable to PNG (N.E.) and its ratepayers, as in the absence of an agreement otherwise: [75]

> the Pipeline Crossings Regulation, BC Reg 147/2012, would apply and provide that the City was not responsible for covering any of PNG(NE)'s costs (subject to a narrow exception where the utility's costs are to be shared 50/50 between the utility and the municipality, where the municipality wishes to construct a new highway or construct a new road for access to a subdivision).

Further, PNG (N.E.) submits that the Relocation Cost Exception is more favourable to PNG (N.E.) than the provisions of the 1997 Franchise Agreement. Finally, PNG (N.E.) notes that the Proposed 2019 Franchise Agreement is harmonized with its other recent franchise agreements, for example the agreement with the Village of Pouce Coupe. PNG (N.E.) submits that this harmonization allows for internal consistency and will "logically result in administrative efficiencies." [76]

The *Oil and Gas Activities Act* defines a pipeline to exclude "piping used to transmit natural gas at less than 700 kPa to consumers by a gas utility as defined in the *Gas Utility Act.*" [77]

Position of the intervener

BCOAPO's submission presented in section 4.3 above and PNG (N.E.)'s reply in the same section apply equally to the matter of costs with respect to line relocations.

Panel Determination

The Panel finds that the proposed Relocation Cost Exception whereby PNG (N.E.) in certain circumstances shares the cost of relocations requested by the City is not in the public interest.

[72] PNG (N.E.) Final Argument, p. 10.
[73] Exhibit B-3, BCUC IR 6.1, 6.2.
[74] PNG (N.E.) Final Argument, pp. 10–11.
[75] PNG (N.E.) Final Argument, p. 11.
[76] PNG (N.E.) Final Argument, pp. 11–12.
[77] *Oil and Gas Activities Act*, SBC 2008, c. 36, at section 1(2).

Generally speaking, the regulatory principle of cost causation requires that ratepayers should only pay for prudently incurred costs reasonably required to provide service. For this reason, if a change to PNG (N.E.)'s system is requested by the City, the Panel would expect the City to pay for the change. This appears to be the case for most changes requested by the City, but not the Relocation Cost Exception. In our view, there must be a compelling reason why PNG (N.E.)'s ratepayers should pay any portion of changes requested by the City.

The standard practice for franchise and operating agreements between BC utilities and municipalities has been that the franchise or operating fee, which is compensation for the utility's use of public lands, includes the provision that a municipality pays for all costs of changes it requests of utilities. This is demonstrated in the City of Trail Operating Agreement, FEI's most recent operating agreement approved by the BCUC, which states "The Municipality agrees to pay for all of the costs for changes to the affected Company Facilities."[78] This cost-sharing arrangement was also present in the 1997 Franchise Agreement with the City. PNG (N.E.) has not presented a compelling reason why the City deserves to be compensated over and above the amount of the Franchise Fee for any amount of relocations the City requests when the standard arrangement is that other municipalities paying a franchise or operating fee pay for all of their relocation costs.

PNG (N.E.) argues that the Relocation Cost Exception clause is favourable to PNG (N.E.) and its ratepayers, as in the absence of an agreement the *Pipeline Crossings Regulation* (PCR) would apply, and the City would not be responsible for any of PNG (N.E.)'s costs, subject to a narrow exception. The Panel disagrees. The term pipeline used in the PCR is defined in the *Oil and Gas Activities Act* to exclude "piping used to transmit natural gas at less than 700 kPa to consumers by a gas utility." [79] Distribution piping normally operates at a pressure less than 700 kPa, in which case the PCR would not apply. PNG (N.E.) has not submitted evidence to demonstrate that the additional cost to PNG (N.E.) of line relocations in cases where the PCR applies exceeds the savings to PNG (N.E.) of line relocations where the PCR does not apply.

In the Panel's view, the Franchise Fee is sufficient compensation for the City when requesting relocations by PNG (N.E.), and it would not be just and reasonable for PNG (N.E.) to recover from ratepayers any additional amounts for such relocations. The City and PNG (N.E.) were in agreement for at least the twenty years of the 1997 Franchise Agreement that the Franchise Fee was sufficient compensation for all relocations requested by the City, and the Panel is not convinced that anything has changed in this regard.

For the same reasons as provided with respect to the matter of municipal fees and charges, the Panel considers it appropriate to look at this individual aspect of the agreement and not make a "take it or leave it" decision on the Proposed 2019 Franchise Agreement in its entirety.

For the same reasons as provided with respect to the matter of municipal fees and charges, it is the Panel's role to consider the interests of the City, PNG (N.E.) and PNG (N.E.)'s ratepayers. With respect to PNG (N.E.)'s ratepayers, the Panel considers, among other things, whether it is just and reasonable that the costs that flow from the agreement should be recoverable from them.

For the foregoing reasons, **the Panel finds there is no adequate justification for PNG (N.E.) to pay the City for any relocation costs requested by the City in addition to the Franchise Fee, and further finds these costs should not be recoverable from ratepayers if PNG (N.E.) incurred them**.

4.5 Cost with respect to abandoned works

Clause 8.1 of the Proposed 2019 Franchise Agreement provides:[80]

[78] FEI Application for Approval of Operating Agreement with the City of Trail, Exhibit B-1, Appendix A, pp. 9–10.
[79] *Oil and Gas Activities Act*, SBC 2008, c. 36, at section 1(2).
[80] Exhibit B-1, Appendix A, clause 8.1, pp. 13–14.

In the event the Company ceases to operate, on a permanent basis, any part of its works on the Public Lands and has received all required regulatory approvals in respect thereto, the Company shall, at its sole cost,

a. restore the surface of the Public Lands affected to the same conditions, as far as may be practicable so to do, as the same were in prior to the entry thereon and use thereof by the Company; and

b. at the request of the Municipality, and subject to the Company's ability to refer the matter to arbitration pursuant to Article X, remove any works that the Engineer may reasonably require the Company to remove.

(emphasis added)

PNG (N.E.) submits that "in the circumstances in which clause 8.1(b) is applicable, and given the safeguards built into this clause, it is appropriate for PNG(NE) to solely bear the costs of removing abandoned works, and that this cost is in the public interest and should be recoverable from ratepayers." PNG (N.E.) adds that ceasing to operate its works on a permanent basis is a business decision within PNG (N.E.)'s control, and as such it is appropriate for it to bear the cost of such a business decision as opposed to the City. [81]

PNG (N.E.) submits that it is protected from the City making "unreasonable or frivolous" requests because the City's engineer may only make reasonable requests, and that PNG (N.E.) has the ability to refer requests to arbitration.[82]

PNG (N.E.) notes that the 1997 Franchise Agreement does not contain a similar provision, but that the "issues around environmental concerns, including asset abandonment and site remediation, have gained greater attention," and increased their importance for municipalities. [83]

PNG (N.E.) submits that, as with the Relocation Cost Exception, the cost of removing abandoned works requested by the City should not be considered in isolation, as it is one aspect of the overall agreement negotiated between the parties. Further, and also as with the Relocation Cost Exception, PNG (N.E.) submits that the clause dealing with the cost of removing abandoned works requested by the City is consistent with other recent franchise agreements it has entered into.[84]

PNG (N.E.) submits clause 8.1 is in the public interest, and that its costs with respect to removing abandoned works should be fully recoverable from ratepayers. [85]

Position of the Intervener

BCOAPO's submission presented in section 4.3 above and PNG (N.E.)'s reply in the same section apply equally to the matter of costs with respect to line relocations.

Panel determination

The Panel finds that the term of the Proposed 2019 Franchise Agreement whereby PNG (N.E.) is responsible for the cost of removing abandoned works requested by the City is not in the public interest.

[81] PNG (N.E.) Final Argument, p. 13.
[82] PNG (N.E.) Final Argument, p. 13.
[83] PNG (N.E.) Final Argument, p. 13.
[84] PNG (N.E.) Final Argument, p. 14.
[85] PNG (N.E.) Final Argument, p. 14.

Generally speaking, the regulatory principle of cost causation requires that ratepayers should only pay for prudently incurred costs reasonably required to provide service. For this reason, if the City requests PNG (N.E.) to remove abandoned works, the Panel would expect the City to pay for the removal.

As PNG (N.E.) has acknowledged, the 1997 Franchise Agreement does not contain a provision making PNG (N.E.) responsible for the cost of removing abandoned works at the request of the City. The 1997 Franchise Agreement contained a Franchise Fee for PNG (N.E.)'s use of public lands. As a result, PNG (N.E.) was not responsible for any costs associated with requests from the City with regards to PNG (N.E.)'s facilities, which could include requests to remove abandoned works as well as requests to relocate or modify works that were not being abandoned.

In the Panel's view, the Franchise Fee is sufficient compensation for the City when requesting PNG (N.E.) to remove abandoned works, and it would not be just and reasonable for PNG (N.E.) to recover from ratepayers any additional amounts for such relocations. The City and PNG (N.E.) were in agreement for at least the twenty years of the 1997 Franchise Agreement that the Franchise Fee was sufficient compensation for such requests by the City, and the Panel is not convinced that anything has changed in this regard.

The City of Trail Operating Agreement, FEI's most recently approved operating agreement, does not contain a clause addressing the cost of removing abandoned works.

The only FEI operating agreement of which the Panel is aware that addresses the cost of removing abandoned works is the 2019 City of Surrey Operating Agreement, which took effect in 2019, under which FEI is responsible for the cost of removing abandoned facilities at the request of the City of Surrey, but not for the cost of excavation, backfilling and surface restoration. [86] However, the circumstances in the City of Surrey are different to those in the City.

Under the terms of the 2019 City of Surrey Operating Agreement, FEI started to pay the City of Surrey an operating fee for the first time; prior to 2019, FEI had not paid any operating or franchise fee to the City of Surrey. However, unlike the agreement between PNG (N.E.) and the City, the operating fee now paid by FEI to the City of Surrey is not 3 percent of revenues, but is a significantly smaller figure justified by specific costs FEI is able to avoid as a result of the 2019 City of Surrey Operating Agreement, such as certain fees and charges forgone by the City of Surrey (in that proceeding, the evidence demonstrated that in 2016 a 3 percent fee would have been $3.4 million, whereas the operating fee ultimately approved by the BCUC would have been $600,000[87]).

In the Panel's view, it is appropriate for FEI to take responsibility for a portion of the cost of removing abandoned facilities in the City of Surrey in addition to paying an operating fee, as the basis for the operating fee was the avoidance of certain specific costs by FEI which did not include the cost of removing abandoned facilities. By contrast, PNG (N.E.) pays the City a franchise fee which is not based on avoidance of specific costs by PNG (N.E.), but rather PNG (N.E.) submits it is compensation for the use of public lands as well as the exclusive right to supply gas within the boundaries of the City.

Because the operating fees paid to the City of Surrey are calculated on a different basis to the Franchise Fee paid to the City, the responsibility of FEI for a portion of the cost of removing abandoned facilities in the City of Surrey is distinguishable from the City's Proposed 2019 Franchise Agreement.

The Panel does not dispute that the matter of abandoned works may have gained greater attention recently and acknowledges the matter's importance for municipalities. However, the Panel sees no evidence that the situation in the City is materially different to that of other municipalities served by PNG (N.E.) and FEI who are

[86] Decision and Order G-18-19, dated January 29, 2019.
[87] Order G-18-19, pp. 19, 24.

compensated for the removal of abandoned works through a franchise or operating fee. Alternatively, if the situation has changed for all municipalities in BC with regards to the cost of removing abandoned works, it is not appropriate to reinterpret the meaning of the franchise or operating fee for all future franchise and operating agreements based solely on the evidence and submissions in this proceeding.

For the same reasons as provided with respect to the matter of municipal fees and charges, the Panel considers it appropriate to look at this individual aspect of the agreement and not make a "take it or leave it" decision on the Proposed 2019 Franchise Agreement in its entirety.

For the same reasons as provided with respect to the matter of municipal fees and charges, it is the Panel's role to consider the interests of the City, PNG (N.E.) and PNG (N.E.)'s ratepayers. With respect to PNG (N.E.)'s ratepayers, the Panel considers, among other things, whether it is just and reasonable that the costs that flow from the agreement should be recoverable from them.

For the foregoing reasons, **the Panel finds there is no adequate justification for PNG (N.E.) to pay the City for the removal of any abandoned works removed at the City's request in addition to the Franchise Fee, and further finds these costs should not be recoverable from ratepayers if PNG (N.E.) incurred them**.

PNG (N.E.) states that if it "were to cease to operate part of its works on a permanent basis, this decision would be a business decision undertaken by PNG (N.E.)(NE), and within PNG (N.E.)(NE)'s control."[88] The Panel draws PNG (N.E.)'s attention to section 41 of the UCA, which states:

> A public utility that has been granted a certificate of public convenience and necessity or a franchise, or that has been deemed to have been granted a certificate of public convenience and necessity, and has begun any operation for which the certificate or franchise is necessary, or in respect of which the certificate is deemed to have been granted, must not cease the operation or a part of it without first obtaining the permission of the commission.

Utilities may not cease any part of an operation for which a CPCN has been granted without permission of the BCUC. The Panel reminds PNG (N.E.) to seek such permission before making such a "business decision undertaken by PNG (NE), and within PNG (NE)'s control." At that time, the BCUC may make such determinations as it considers appropriate, which may include determinations on abandonment and the recoverability of costs for removal of abandoned works.

4.6 Renewal and termination clauses

Clause 4.3 of the Proposed 2019 Franchise Agreement states:[89]

> If the [sic] neither party gives notice of renewal of this Agreement or should the parties fail to obtain the requisite approvals and permissions to any renewal of this Agreement, the parties agree to enter into an operating agreement permitting the Company to gain access to its works for a further period of one (1) year on the terms and conditions set out in Article V of this Agreement or on such other terms as the parties may agree or the Commission, on application, may require.

In response to a BCUC IR, PNG (N.E.) stated that it and the City would be amenable to modifying clause 4.3 as follows:[90]

[88] PNG (N.E.) Final Argument, p. 13.
[89] Exhibit B-1, Appendix A, p. 4.
[90] Exhibit B-6, BCUC IR 11.4.

> If neither party gives notice of renewal of this Agreement or should the parties fail to obtain the requisite approvals and permissions to any renewal of this Agreement, the parties agree to enter into an operating agreement, subject to Commission approval, permitting the Company to gain access to its works for a further period of one (1) year on the terms and conditions set out in Article V of this Agreement or on such other terms as the parties may agree or the Commission, on application, may require.
>
> (emphasis added by PNG (N.E.) to indicate inserted text)

Clause 4.7 of the Proposed 2019 Franchise Agreement states:[91]

> Upon termination of this Agreement, if a new agreement has not been ratified or if the Commission has not imposed the terms and conditions under which the Company may use the Public Lands, the following provisions will apply:

In response to a BCUC IR, PNG (N.E.) stated that it and the City would be amenable to modifying clause 4.7 as follows:[92]

> Upon expiration or termination of this Agreement, if a new agreement has not been ratified or if the Commission has not imposed the terms and conditions under which the Company may use the Public Lands, the following provisions will apply:
>
> (emphasis added by PNG (N.E.) to indicate inserted text)

PNG (N.E.) submits that each of the clauses 4.3 and 4.7 serve a useful and different purpose within the Proposed 2019 Franchise Agreement, and that PNG (N.E.) and the City are amenable to changing the wording of these clauses as set out in BCUC IRs 11.4 and 11.5 should the BCUC believe the revisions to be necessary.

Clause 4.1 of the Proposed 2019 Franchise Agreement states:[93]

> The initial term of this Agreement shall be for a period of twenty one (21) years commencing on December 1, 2018 and expiring on November 30, 2039.

Clause 4.2 of the Proposed 2019 Franchise Agreement states: [94]

> At any time within two (2) years prior to the expiration of the initial term of this Agreement, and at least one (1) year prior to the expiration of the initial term of this Agreement, either party may give notice to the other that it desires to renew this Agreement for a further term of twenty one (21) years, or such lesser number of years as may be the maximum permitted by legislation at that time and the renewal shall be upon the terms and conditions set out in this Agreement or such other terms as the parties may agree provided that such renewal will be conditional upon obtaining all such approvals and permissions as are at that time required by legislation or regulation. The parties agree to use their best efforts to obtain any such approvals and permissions. (emphasis added)

PNG (N.E.) considers the BCUC's approval necessary for a renewal of the 2019 Franchise Agreement. PNG (N.E.) states this view is based on the precedent established for renewals undertaken in recent years, and specifically

[91] Exhibit B-1, Appendix A, p. 5.
[92] Exhibit B-6, BCUC IR 11.5.
[93] Exhibit B-1, Appendix A, p. 4.
[94] Exhibit B-1, Appendix A, p. 4.

in the instance of the BCUC requiring it to seek retroactive BCUC approval for a number of franchise agreement renewals for PNG (N.E.)-West that were executed in 2010 and 2011.[95]

Position of the Intervener

BCOAPO recommends that clauses 4.3 and 4.7 of the Proposed 2019 Franchise Agreement be modified as suggested by the BCUC.[96]

Panel discussion

Clause 4.3 of the Proposed 2019 Franchise Agreement refers to entering into an interim operating agreement "on the terms and conditions set out in Article V of this Agreement or on such other terms as the parties may agree or the Commission, on application, may require" (emphasis added). Article V of the Proposed 2019 Franchise Agreement contains provisions regarding PNG (N.E.)'s use of public lands, but does not include provisions relating to, for example, payment of a franchise or other fee.

In the Panel's view, an interim operating agreement containing only the terms and conditions set out in Article V of the Proposed 2019 Franchise Agreement would expose PNG (N.E.) to risk of non-recovery of costs incurred under the agreement or non-compliance with the UCA. Article VI of the Proposed 2019 Franchise Agreement, for example, addresses the responsibilities of the parties with respect to damage to public lands and to PNG (N.E.)'s facilities. If the matters addressed in Article VI were not addressed in an interim operating agreement, there may be issues with the recoverability of PNG (N.E.)'s costs in the event of damage. The Panel has already noted that PNG (N.E.) may not be able to collect franchise fees from ratepayers in the absence of an obligation to pay them to the City. If PNG (N.E.) were to collect franchise fees from ratepayers in the absence of such an obligation, PNG (N.E.) may not be in compliance with section 63 of the UCA that requires utilities to collect rates only if they are "specified in the subsisting schedules of the utility applicable to that service and filed under this Act."

For these reasons, the Panel strongly recommends PNG (N.E.), in the event that any franchise agreement expires or is terminated, to enter into an interim operating agreement that clearly and explicitly addresses all the terms PNG (N.E.) wishes to continue, and ensure that any such agreement is executed prior to the expiry or termination of the franchise agreement.

In section 3 of this Decision, the Panel established that it does not consider approval of interim operating agreements to be a requirement of the UCA. However, we recommend PNG (N.E.) to seek approval under section 23(1)(g)(ii) of the UCA to seek a degree of assurance as to the recoverability of related costs and the Franchise Fees from its ratepayers. The Panel does not require PNG (N.E.) to modify clause 4.3 of its Proposed 2019 Franchise Agreement to make interim operating agreements subject to BCUC approval, but does not object if PNG (N.E.) wishes to add this requirement.

PNG (N.E.) states that clause 4.7 of the agreement is intended to apply in the event that the Proposed 2019 Franchise Agreement expires or is terminated,[97] and that it is amenable to including both circumstances in the Proposed 2019 Franchise Agreement. The Panel considers this would be a useful clarification for PNG (N.E.) and the City and recommends PNG (N.E.) makes the modification it has suggested.

PNG (N.E.) has stated that the renewal of a franchise agreement requires the BCUC's approval. The Panel agrees, and notes that in the event that PNG (N.E.) and the City seek to renew the Proposed 2019 Franchise Agreement, the parties acknowledge in clause 4.2 that "such renewal will be conditional upon obtaining all such approvals

[95] Exhibit B-3, BCUC IR 5.3.
[96] BCOAPO Final Argument, p. 8.
[97] Exhibit B-3, BCUC IR 5.7.

and permissions as are at that time required by legislation or regulation." The Panel requests that PNG (N.E.) add an explicit reference to BCUC approval in clause 4.2 of the Proposed 2019 Franchise Agreement.

5.0 Overall Determination

PNG (N.E.) submits the Proposed 2019 Franchise Agreement is both necessary for the public convenience and properly conserves the public interest. PNG (N.E.) adds that the Proposed 2019 Franchise Agreement has benefits for both PNG (N.E.) and the City, and that PNG (N.E.) has "considered the interests of its customers in Fort St. John and its ratepayers, as well as the interests of the public interest more generally." In the event the Proposed 2019 Franchise Agreement is not approved, PNG (N.E.) submits that its benefits will be lost, and costs may result, for example in resolving disputes between PNG (N.E.) and the City. [98]

PNG (N.E.) states it "likely has a deemed CPCN with respect to the construction and operation of this system and any extensions, pursuant to section 45(2) of the UCA."[99]

Clause 9.1 of the Proposed 2019 Franchise Agreement states:[100]

> As compensation for the use by the Company of the Public Lands and for the exclusive right, franchise, and privilege to supply gas within the boundary limits of the Municipality, in addition to the payment of any rates, taxes or assessments lawfully imposed by the Municipality, the Company shall pay to the Municipality on the first day of March of each year a sum equal to three percent (3%) of the gross revenues (excluding taxes and levies) received by the Company in the immediately preceding calendar year for provision and distribution of all gas consumed within the boundary limits of the Municipality. (emphasis added)

Position of the Intervener

BCOAPO submits that "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 (N.E.) (NE) has a deemed CPCN that authorizes the Utility to operate its plant or system and to construct and operate extensions."[101]

BCOAPO recommends that the BCUC approve the Proposed 2019 Franchise Agreement, subject to PNG (N.E.) modifying clauses 4.3 and 4.7 as suggested by the BCUC and subject to BCOAPO's comments regarding the start date of the agreement.[102]

Panel determination

The Panel does not approve the Proposed 2019 Franchise Agreement. The Panel adjourns the proceeding for 90 days to provide PNG (N.E.), should it so choose, the opportunity to renegotiate the Proposed 2019 Franchise Agreement with the City and submit a revised version to this Panel. The Interim Operating Agreement remains in place and governs the relationship of the parties "until approval of the New Agreement has been ratified."[103]

[98] PNG (N.E.) Final Argument, pp. 7–8.
[99] Exhibit B-6, BCUC IR 10.1.
[100] Exhibit B-1, Appendix A, p. 14.
[101] BCOAPO Final Argument, p. 4.
[102] BCOAPO Final Argument, p. 8.
[103] Exhibit B-1, Appendix C, p. 1.

The Panel agrees with PNG (N.E.) that there are advantages to the Proposed 2019 Franchise Agreement. Franchise and operating agreements between utilities and municipalities are common and are regularly approved by the BCUC. Such agreements provide certainty in the relationship between the parties and reduce both the likelihood of disputes and the cost of their resolution.

The Panel is willing to accept the Franchise Fee, which the Proposed 2019 Franchise Agreement states is compensation for the use of public lands and the exclusive right to supply gas within the boundaries of the City, but not for the reasons submitted by PNG (N.E.). However, the Panel questions the level of 3 percent at which the Franchise Fee is set.

PNG (N.E.) has a deemed CPCN to operate its gas system in the City and therefore does not need a franchise for the right to operate. For this reason, the right to operate in the City contained in the franchise has no value to PNG (N.E.)'s ratepayers and is no justification for the ratepayers to pay the Franchise Fee.

The Panel has already established in section 4.1 above that the City is empowered to enter into an exclusive arrangement with PNG (N.E.) and that for the City to agree not to compete with PNG (N.E.) has some value to PNG (N.E.). However, there is no evidence that the exclusivity offered by the City is of value to PNG (N.E.)'s ratepayers, and it is not clear to the Panel the degree to which this exclusivity is a justification for the Franchise Fee.

The Franchise Fee does compensate the City for PNG (N.E.)'s use of the public lands within the boundaries of the City, and the Panel agrees it is reasonable for PNG (N.E.) to compensate the City for this use, and that PNG (N.E.) should recover this compensation from ratepayers in the City. That said, there is no evidence that the level of the Franchise Fee, 3 percent of non-bypass revenues, is entirely justified by PNG (N.E.)'s use of public lands. As already noted, the BCUC determined in 2019 that the value of the use of public lands to FEI's ratepayers in the City of Surrey was considerably less than 3 percent of revenues.

The Panel does not, then, see compelling evidence to justify setting the Franchise Fee at 3 percent. For example, there is no quantified value to PNG (N.E.)'s ratepayers that would justify this level based on cost causation.

That said, there is a long-established practice in BC of smaller municipalities charging utilities a franchise fee or operating fee of 3 percent. Given that the Franchise has some value to PNG (N.E.)'s ratepayers, albeit unquantified, in the interests of regulatory efficiency, and to avoid unduly burdening PNG (N.E.)'s ratepayers with further process, the Panel accepts the figure of 3 percent for the Franchise Fee in this instance.

The Panel must not give its approval for the Proposed 2019 Franchise Agreement unless it "is necessary for the public convenience and properly conserves the public interest."[104] In section 4 of this Decision, the Panel set out its findings that it is not in the public interest for the Proposed 2019 Franchise Agreement to contain obligations requiring PNG (N.E.) to pay for:

- Fees and charges prescribed under the City's Fees and Charges for Various Municipal Services Bylaw;
- A share of relocation costs in certain circumstances when the relocations are requested by the City; and
- Costs for the removal of abandoned works requested by the City.

In each of the three matters listed above, the Proposed 2019 Franchise Agreement would enable the City to receive from PNG (N.E.), and hence from PNG (N.E.)'s ratepayers, amounts in addition to the 3 percent Franchise Fee the City already receives, at least in part for the use of its public lands. The Panel's view is that these three matters are encompassed in the meaning of "use of public lands", and that the Franchise Fee has been sufficient

[104] UCA section 45(7).

to compensate the City in each of these three circumstances in the past, and continues to be adequate compensation for the City in the present circumstances.

For these reasons, the Panel is not willing to approve the Proposed 2019 Franchise Agreement in its current form. Given the benefits to PNG (N.E.), the City and ratepayers of PNG (N.E.) within the City's boundaries of having an agreement, the Panel wishes to give PNG (N.E.) and the City an opportunity to renegotiate the Proposed 2019 Franchise Agreement to address the Panel's concerns. The Panel therefore adjourns the proceeding for 90 days to allow time for the parties to consider changes to the Proposed 2019 Franchise Agreement. The Panel is prepared to reconvene the proceeding if a revised franchise agreement is submitted or will reconvene the proceeding in any case after 90 days.

The Panel recommends that PNG (N.E.) amend clause 4.3 to include the text "or termination" as specified in section 4.6 of this Decision.

Further, the Panel has determined that the start date of the Proposed 2019 Franchise Agreement shall be the date of BCUC approval of the franchise. The start date of the Proposed 2019 Franchise Agreement should be modified to be the date that this Panel approves the Proposed 2019 Franchise Agreement, should it do so.

Were this Panel's approval to be forthcoming, the City could then seek proper approval of the franchise in compliance with section 22 of the *Community Charter*, after which PNG (N.E.) would be able to submit the final version of the Proposed 2019 Franchise Agreement to the BCUC for final approval.

Precedents

The Panel acknowledges that the BCUC has approved terms in some recent PNG (N.E.) franchise agreements similar or identical to the terms to which this Panel objects. For example, in 2018 the BCUC approved PNG (N.E.)'s franchise agreement with the Village of Pouce Coupe,[105] which PNG (N.E.) submits contains an identical clause with respect to the cost of removing abandoned works, and an essentially identical clause with respect to the cost sharing of certain relocations requested by the municipality.[106] The BCUC's Order with respect to PNG (N.E.)'s franchise agreement with Pouce Coupe was issued without reasons, and the Panel will not speculate on the reasoning that the BCUC employed in reaching that decision.

The earliest agreement of which the Panel is aware in which PNG (N.E.) pays for the removal of abandoned works at the request of a municipality is PNG (N.E.)'s franchise agreement with the City of Dawson Creek, approved by the BCUC on January 29, 2015.[107] The Panel is aware of agreements dating back at least as far as 1988 where PNG (N.E.) included the Relocation Cost Exception, for example in the case of the Village of Burns Lake.[108]

However, this Panel is not aware of any operating agreement between FEI and a municipality that has been approved by the BCUC, that contains an operating fee, and that permits the municipality to charge FEI any fees, charges or other costs beyond the operating fee.

The BCUC is not bound by precedent, pursuant to section 75 of the UCA. That said, the BCUC seeks to make decisions that are consistent with prior practice, or to explain why the present circumstances support a different decision. In this instance, the Panel has considered a variety of conflicting prior practice, both from PNG (N.E.) and FEI and considers that no decision could be consistent with all recent or historical decisions.

[105] BCUC Order C-4-18.
[106] PNG (N.E.) Final Argument pp. 14, 11.
[107] BCUC Order C-1-15.
[108] BCUC Order C-8-90.

For these reasons, the Panel reaches this decision on its own merits, considering the evidence from this proceeding, and considers that it is consistent with regulatory principles and the vast majority of past practice.

DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of December 2020.

*Original signed by:*_____
R. I. Mason
Panel Chair / Commissioner

*Original signed by:*_____
W. M. Everett, QC
Commissioner

*Original signed by:*_____
B. A. Magnan
Commissioner

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ORDER NUMBER
G-307-20

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

and

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

BEFORE:
R. I. Mason, Panel Chair
W. M. Everett, QC, Commissioner
B. A. Magnan, Commissioner

on December 1, 2020

ORDER

WHEREAS:

A. On December 10, 2019, Pacific Northern Gas (N.E.) Ltd. (PNG (N.E.)) applied to the British Columbia Utilities Commission (BCUC) for approval of a new franchise agreement (2019 Franchise Agreement) between the City of Fort St. John and PNG (N.E.), pursuant to section 45(7) of the *Utilities Commission Act* (UCA) (Application);

B. PNG (N.E.) (through its predecessor company Centra Gas Fort St. John Inc.) and the City of Fort St. John entered into a franchise agreement (1997 Franchise Agreement) dated December 8, 1997, approved by BCUC Order C-4-98, dated May 26, 1998. The 1997 Franchise Agreement expired on December 7, 2018;

C. PNG (N.E.) submits that on December 3, 2018, PNG (N.E.) and the City of Fort St. John entered into interim operating arrangements to provide for the continued service to customers in the franchise area while the negotiation and approval of new franchise terms were conducted;

D. By Order G-36-20, dated February 28, 2020, the BCUC established a public hearing process and regulatory timetable for review of the Application, which consisted of BCUC information requests (IRs), PNG (N.E.) responses to IRs and intervener registration;

E. By Letter dated March 26, 2020, the BCUC amended the regulatory timetable in response to PNG (N.E.)'s request by Letter, dated March 25, 2020, to extend the deadline to file responses to IRs;

F. On April 2, 2020, British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO) registered as an intervener;

G. Following PNG (N.E.)'s response to BCUC IRs on April 2, 2020, by Orders G-84-20, G-118-20, and G-141-20, the BCUC amended the regulatory timetable for the review of the application, which included BCUC and intervener IRs, PNG (N.E.) responses to IRs and submissions on further process;

H. By Order G-208-20, dated July 31, 2020, the Panel invited the parties to submit final arguments, including a request to address specific issues in final argument;

I. The Panel has considered the Application, evidence, and submissions and makes the following determinations.

NOW THEREFORE pursuant to sections 23, 45 and 46 of the UCA, and for the reasons outlined in the attached decision, the BCUC orders as follows:

1. The Panel does not approve the Proposed 2019 Franchise Agreement.

2. The Panel adjourns the proceeding for 90 days to provide PNG, should it so choose, the opportunity to renegotiate the Proposed 2019 Franchise Agreement with the City and submit a revised version to this Panel.

DATED at the City of Vancouver, in the Province of British Columbia, this 1st day of December 2020.

BY ORDER

Original signed by:

R. I. Mason
Commissioner

Pacific Northern Gas (N.E.) Ltd.

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

Glossary of Terms

1997 Franchise Agreement	Franchise agreement between the City of Fort St. John and PNG (N.E.) dated December 8, 1997, which expired on December 7, 2018
2019 City of Surrey Operating Agreement	FortisBC Energy Inc.'s 2019 operating agreement with the City of Surrey
Application	An application for approval of a franchise agreement between the City of Fort St. John (the City) and PNG (N.E.) (Proposed 2019 Franchise Agreement), pursuant to section 45(7) of the *Utilities Commission Act* (UCA)
BCOAPO	British Columbia Old Age Pensioners' Organization *et al.*
BCUC	British Columbia Utilities Commission
The City	The City of Fort St. John
City of Trail Operating Agreement	The operating agreement between FEI and the City of Trail
CPCN	Certificate of Public Convenience and Necessity
Deemed CPCN	The deemed CPCN in section 45(2) of the UCA
FEI	FortisBC Energy Inc.
Franchise Fee	A franchise fee paid by PNG (N.E.) to the City, which is 3 percent of non-bypass revenues
ICG	ICG Utilities (British Columbia) Ltd. (PNG (N.E.)'s predecessor)
IR	Information Request
Interim Operating Agreement	An interim operating agreement dated December 3, 2018
PCR	*Pipeline Crossings Regulation*
PNG (N.E.)	Pacific Northern Gas (N.E.) Ltd.
Proposed 2019 Franchise Agreement	A franchise agreement between the City of Fort St. John and PNG (N.E.)
Relocation Cost Exception	The exception whereby PNG (N.E.) is responsible for 50 percent of the cost of a request for relocation made by the City
UCA	*Utilities Commission Act*

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

and

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

EXHIBIT LIST

Exhibit No.	Description
COMMISSION DOCUMENTS	
A-1	1. Letter dated February 28, 2020 – Appointing the Panel for the review of the Pacific Northern Gas (N.E.) Ltd. Application for Approval of the 2019 Franchise Agreement between Pacific Northern Gas (N.E.) Ltd. and the City of Fort St. John 2.
A-2	Letter dated February 28, 2020 – British Columbia Utilities Commission Order G-36-20 establishing a regulatory timetable and public notice
A-3	Letter dated March 12, 2020 – BCUC Information Request No. 1 to PNGNE
A-4	Letter dated March 26, 2020 – BCUC Letter approving extension to PNGNE for Response to BCUC IR No. 1
A-5	Letter dated April 9, 2020 – BCUC Order G-84-20 establishing a further regulatory timetable
A-6	Letter dated April 30, 2020 – BCUC Information Request No. 2 to PNGNE
A-7	Letter dated May 20, 2020 – BCUC Order G-118-20 amending Regulatory Timetable
A-8	Letter dated June 5, 2020 – BCUC Order G-141-20 amending Regulatory Timetable
A-9	Letter dated July 31, 2020 – BCUC Order G-208-20 establishing further regulatory timetable

APPLICANT DOCUMENTS

B-1	**PACIFIC NORTHERN GAS (NE) LTD. (PNGNE)** - Application for Approval of the 2019 Franchise Agreement between Pacific Northern Gas (NE) Ltd. and the City of Fort St. John – Letter dated December 10, 2019
B-2	Letter dated March 25, 2020 – PNGNE Submitting extension request to file Information Request Responses
B-3	Letter dated April 2, 2020 – PNGNE Submitting responses to BCUC Information Request No. 1
B-4	Letter dated May 15, 2020 - PNGNE Submitting request to amend the Regulatory Timetable
B-5	Letter dated June 4, 2020 - PNGNE Submitting request to amend the Regulatory Timetable
B-6	Letter dated June 15, 2020 – PNGNE Submitting responses to BCUC Information Request No. 2
B-7	Letter dated June 15, 2020 – PNGNE Submitting responses to BCOAPO Information Request No. 1
B-8	Letter dated June 15, 2020 – PNGNE Submitting response on Further Process

INTERVENER DOCUMENTS

C1-1	**BRITISH COLUMBIA OLD AGE PENSIONERS' ORGANIZATION, ACTIVE SUPPORT AGAINST POVERTY, DISABILITY ALLIANCE BC, COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS OF BC, AND TENANTS RESOURCE AND ADVISORY CENTRE (BCOAPO ET AL.) –** Letter dated April 2, 2020 request for intervener status by Leigha Worth and Irina Mis
C1-2	Letter dated April 23, 2020 – BCOAPO Submitting Information Request No. 1 to PNGNE
C1-3	Letter dated June 22, 2020 – BCOAPO Submitting comment on Further Process

INTERESTED PARTY DOCUMENTS

D-1

LETTERS OF COMMENT

E-1