GOWLING WLG

January 27, 2017

Via Email: commission.secretary@bcuc.com

James H. Smellie
Direct +1 403 298 1816
Direct Fax +1 403 695 3427
james.smellie@gowlingwlg.com
File no. A135776

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street, Box 250
Vancouver, BC V6Z 2N3

Attention: Laurel Ross
Commission Secretary

Dear Ms. Ross:

Re: Seascapes Strata Corporation BCS776(Seascapes)
Application for Reconsideration of Order G-172-16

We are counsel to Superior Propane Ltd. ("Superior") in respect of this matter.

In accordance with your letter of January 17, 2017 to Mr. VandeLeur of Superior (Exhibit A-2), please find enclosed Superior's Phase 1 Submissions concerning the Seascapes application for reconsideration of Order G-172-16.

Yours truly,

Gowling WLG (Canada) LLP

James H. Smellie

JS:mc
Enclosure

cc: Ioana Oros
Stratawest Management Ltd.
Via Email: ioros@stratawest.com

BRITISH COLUMBIA UTILITIES COMMISSION

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

AND IN THE MATTER OF the Superior Propane Ltd. Rate Application for Seascapes Grid System;

AND IN THE MATTER OF Order No. G-172-16 dated November 28, 2016 and the Reasons for Decision attached as Appendix A to same (**Decision**);

AND IN THE MATTER OF an application by Seascapes Strata Corporation BCS 776 dated December 22, 2016 for reconsideration and variance of Order No. G-172-16.

PHASE 1 SUBMISSIONS OF SUPERIOR PROPANE LTD.

A. Overview and Position

1. Pursuant to the process letter of the British Columbia Utilities Commission (**BCUC or Commission**) dated January 17, 2017, set out below are the Phase 1 submissions of Superior Propane Ltd. (**Superior**) concerning the captioned application for reconsideration (**Application**) by Seascapes Strata Corporation BCS 776 (**Seascapes**).

2. It is the position of Superior that the Commission should dismiss the Application. Seascapes, for the reasons which follow, has failed to put forward a *prima facie* case sufficient to warrant full reconsideration by the Commission under Phase Two.

B. Context for Phase 1

3. It is important to the proper disposition of the Seascapes Application that it be considered in light of the governing legislation, rules, guidelines and law as it relates to the Commission's regulation of utility rates and reconsideration of its orders and decisions.

(i) Ratemaking

4. The *Utilities Commission Act* (**Act**) provides that: only the rates of a utility filed with the Commission may be charged (section 61); a utility's rates may not be unjust or unreasonable (section 59); it is a question of fact solely for the Commission to judge whether a rate is unjust or unreasonable (section 59); and the determination of the Commission on a question of fact within its jurisdiction is binding and conclusive (section 79).

5. Importantly, the Act also provides that in setting rates, the Commission "...may use any mechanism, formula or other method of setting the rate that it considers advisable..." (sub-paragraph 60(1) (b.1)).

6. Consistent with this statutory discretion, the law is well-settled that, subject to meeting any specific statutory requirements, utility regulators such as the Commission have a wide discretion in selecting the method to be used and the factors to be considered in setting just and reasonable rates:

   (a) Most recently, the Supreme Court of Canada has said that where the methodology for determining just and reasonable rates is not prescribed by legislation, regulators have a broad discretion to determine the methods they use to examine costs[1] and to consider a variety of analytical tools and evidence to determine whether costs are reasonable[2];

   (b) The National Energy Board, under legislation similar to the Act, has a wide discretion in choosing the method it uses and the factors it considers in assessing just and reasonable rates[3];

   (c) The British Columbia Court of Appeal has acknowledged that the setting of just and reasonable tolls (in that case, under similar legislation[4]) is a matter of fact and opinion for the

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[1] *Ontario v. Ontario Power Generation* [2015] 3 S.C.R. 147.

[2] *ATCO Gas and Pipelines v. Alberta* [2015] 3 S.C.R. 219.

[3] National Energy Board, Reasons for Decision RH-1-2007, page 21 and the decisions of the Federal Court of Appeal cited there.

[4] *Pipeline Act*, RSBC 1996, c. 364.

Commission[5], and that the Act confers unlimited discretion on the Commission as to the matters which it may consider in doing so.[6]

7. Seascapes asserts that it is a fundamental underlying principle of the cost of service model that a utility has the right to recover its prudently incurred and actual costs.[7] This is incorrect. The key principle of ratemaking that allows a utility to recover its reasonable operating and capital costs is not dependent upon the use of any particular methodology, such as cost of service, but is one of general application.[8] Neither is there any principle – nor does Seascapes cite any authority to that effect – which precludes a regulator such as the Commission, for ratemaking purposes, from using estimates, forecasts or proxies to determine just and reasonable rates.

(ii) Reconsideration

8. The Act gives the Commission the discretionary authority, under section 99, to reconsider its decisions and orders. If it determines to do so, it may confirm, vary or rescind the relevant decision or order. Reconsideration is an exceptional remedy, and this is apparent from the Commission's regulatory guideline for *Reconsideration Criteria* (**Guideline**), which provides the following directions:

- The fact that an intervenor such as Seascapes is "unhappy" with a Commission decision does not warrant reconsideration;
- Full reconsideration by the Commission is warranted in the case of an alleged error of fact or law only if the claim of error is substantiated on a *prima facie* basis; and
- Where the basis for reconsideration is an error in fact[9] (as in this case), it is necessary to show that it is a significant, specific error having significant material implications.

[5] *Plateau Pipeline Ltd. v British Columbia Utilities Commission* (2002) BCCA 246.

[6] *Hemlock Valley Electrical Services Ltd v. British Columbia (Utilities Commission)* (1992) 66 BCLR (2d) 1.

[7] Application, at page 3.

[8] *ATCO*, supra at FN 2.

[9] As opposed to an error of law: fundamental change in circumstances or facts; a basic principle not having being raised; or a new principle having arisen, none of which is alleged by Seascapes in the Application.

9. The British Columbia Court of Appeal has said that where an error of fact is alleged in respect of a decision of the Commission, including on a reconsideration application, the standard of review is one of reasonableness and the Commission is entitled to deference.[10]

C. Superior Rate Application and Order G-172-16

10. The Superior Propane Application for Seascapes Grid System (**Rate Application**) was filed on the direction of the Commission, it having determined that Superior's propane grid system at Seascapes was a public utility within the meaning of the Act.[11] That system was installed by Superior in 2004 pursuant to commercial agreement, including an undertaking to supply propane to the Seascapes Development for 15 years. As noted in the Decision, prior to being regulated, the 'rules of the game' for Superior at Seascapes were very different.[12] Superior's service rates were market-facing, and reflected solely the company's decisions as to what costs would or would not be recovered by those rates.

11. The Commission correctly concluded that those 'rules of the game' changed significantly once Superior's operation at Seascapes was found to be a public utility. Most notably, in accordance with the key principle noted above, Superior became entitled to an opportunity to recover its reasonable operating and capital costs through its rates.[13] Equally, that opportunity, as the Commission found in the decision, was to be afforded to Superior[14] by treating the propane grid system at Seascapes on a stand-alone basis. Seascapes takes no exception to these conclusions.

12. The Commission carefully explained its conclusions this way:

> **"2.0 RATE SETTING MECHANISM**
>
> In its Application, Superior proposes a rate setting mechanism based on its estimated cost of providing service. When asked about the considerations of any other rate setting mechanisms, Superior responded that it considered cost of service was the most appropriate method to calculate its allowed return.

[10] *Zelstoff Celgar Limited Partnership v. British Columbia Hydro and Power Authority* (2015) BCCA 497.

[11] Order G-133-2015

[12] Decision, page 11 of 30.

[13] *ATCO*, supra, at p.220

[14] Decision, pages 11, 12, 24 and 25 of 30.

...

Commission determination

The Panel accepts Superior's request to establish rates on the basis of its estimated cost of providing service.

....

More to the point, the Panel considers the method of setting rates based upon best estimates of the cost of providing service to be an established and robust framework.

...

3.0 DELIVERY RATES

Having established that a method based upon the estimated cost of providing service is the framework for establishing rates, attention can be turned to two aspects of rate setting: determining what costs are included, and what rate mechanism will be used to recover these costs."[15]

13. In determining an initial revenue requirement for Superior, the Commission made numerous adjustments to the estimated costs proposed for inclusion by Superior. For detailed reasons set out in the Decision, certain of those adjustments aligned with the position of Seascapes, and reduced or eliminated certain estimated costs; in a few instances, those adjustments increased the Superior estimates. In the result, the Commission approved a total revenue requirement for Superior, inclusive of return on investment, of $75, 293.[16]

14. The evidence considered by the Commission in the exercise of its rate-making authority for Superior included the Rate Application and Superior's responses to two (2) rounds of information request responses to the BCUC and Seascapes. Seascapes offered no evidence in the rate proceeding; in fact, on the completion of the second round of information requests, Seascapes specifically asked the Commission to close the evidentiary record.[17] In the result, the Commission had only submissions from Seascapes to consider in determining just and reasonable rates for Superior.

D. Seascapes Reconsideration Application - Submissions

[15] Decision, pages 5-7 of 30.

[16] Decision, Tables 1 and 3, pages 6 and 21 of 30.

[17] Rate Application, Exhibit A-14, Order No. G-115-16.

15. As summarized by the Commission[18], Seascapes' request for reconsideration is limited to two (2) issues:

> " • Insurance costs – Seascapes claims that the Commission, based on a quote, approved the amount of $22,500 annually for insurance costs that Superior is not required to actually make and accepted this amount as the imputed value of insurance coverage.
>
> • Oversight of the Cost of Gas – Seascapes claims that the Commission established a protocol for the purchase of the propane gas from its sister company, which includes no oversight by the Commission of the cost of gas."

Superior's submissions on each of these claims follows.

(i) Insurance Costs

16. Seascapes argues that reconsideration is warranted in respect of the issue of insurance because the Commission erred in fact, erred in interpreting the facts, did not follow the cost of service model, and erred in accepting the Zurich quote as a reasonable proxy for insurance cost.

17. In its submission on the Rate Application, and not having offered any evidence of its own, Seascapes simply claimed that Superior's proposed inclusion of $22,500 for insurance costs in rates was a departure from the practice of self-insuring that did not benefit Seascapes ratepayers, and asked the Commission to entirely exclude this cost.[19] In other words, Seascapes argued that its ratepayers should not have to pay anything for insurance protection, and that Superior should bear 100% of the risk of liability. This was a patently unreasonable position. As to the Zurich quote itself, Seascapes said nothing in its submission.

18. Unsurprisingly, the Commission rejected the Seascapes claim, which it carefully explained as follows[20]:

> "Superior submits that it has otherwise self-insured, but now that Seascapes is a regulated entity and must be treated as if it exists on a stand-alone basis, a cost of insurance is appropriately included in its cost estimate. Superior further submits that it has obtained a quote from a third party (Zurich) for $22,500.

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[18] Seascapes Reconsideration & Variance, Order G-172-16, Exhibit A-2.

[19] Rate Application, Seascapes Final Submission, August 12, 2016 at page 21

[20] Decision, page 11 of 30.

Seascapes Strata's position is that this cost should be excluded, arguing that "for reasons of its own, Superior has decided that it will try to move away from this efficient practice [of self-insurance] in the case of Seascapes and attempt to require Seascapes to pay for this coverage... If Superior has deemed it appropriate to self-insure for an amount for its customers this should also apply to Seascapes residents."

The Panel accepts Superior's position. As an unregulated entity, it was solely up to Superior to assume whatever risks it so chose, and to determine if/how it would try to recover insured premiums and/or uninsured losses from customers. However, as a regulated utility, the 'rules of the game' change significantly: Superior is entitled to put in place insurance that protects ratepayers against major losses, and recover those insurance premiums from ratepayers. The Panel understands Superior's position to be that it intends to continue to self-insure up to $250,000 per incident, and presented the Zurich quote as a proxy for the value of that self-insurance. The Panel is satisfied that the quote from Zurich is a reasonable basis upon which to establish the imputed value of the insurance coverage, and therefore approves the $22,500 amount for this line item.

For added clarity, the Panel's determination that insurance premiums are recoverable from ratepayers is predicated upon the Panel's view that in the event there are any future losses that would be covered by this insurance (regardless of whether Superior uses a third-party insurer or relies on self-insurance) those losses would be borne entirely by Superior shareholders and not recoverable from Seascapes ratepayers."[21]

19. Seascapes now takes a somewhat different approach. Contrary to its position on the Rate Application, Seascapes does not take issue with the Commission's conclusion that as a regulated utility, Superior is entitled to put insurance in place to protect ratepayers, and recover the costs of such insurance in rates. Rather, Seascapes now claims that:

(a) The Zurich quote was unclear as to the coverages provided, but such coverage is in any event excessive, and the quote is unreasonable;

(b) There was no evidence on which the Commission could conclude that Superior would continue to self-insure;

(c) The Commission did not "follow the costs of service model" because the cost it approved for inclusion in Superior's revenue requirement is not an "actual cost"; and

[21] *Ibid.*

(d) The Commission should have developed an insurance cost "amount to be charged to Seascapes" on the basis of Superior's actual claims history, or by developing an "... estimate...using an average of several insurance quotations."

20. As a first point, Superior notes that all of these claims are new arguments made by Seascapes for the first time. None of these claims and arguments was raised by Seascapes in the Rate Application. There is no evidence in the record of that proceeding which can support the Seascapes' claims, and Superior is prejudiced by reason of the fact that Seascapes elected not to make these arguments in the Rate Application.

21. Superior observes that in its responses to Commission IR 9.1.1 and Seascapes IR 7.1 in the Rate Application, Superior recommended that Seascapes explore other options to determine if the Zurich quote was reasonable. Superior is unaware of whether Seascapes acted on this recommendation, but as noted earlier, Seascapes offered no evidence in that proceeding.

22. The suggestion that the Zurich quote was not apparent as to what is being insured is without merit, particularly since Seascapes clearly understood the quote sufficiently to now criticize the coverage limits provided.[22]

23. As the Commission noted in the Decision with respect to Seascapes' "actual + adjusted" alternative to cost of service[23], there is an internal inconsistency in the new Seascapes claim that the Commission erred in using the Zurich quote. On the one hand, it criticizes the BCUC for using an actual quote from an actual insurance company to determine a reasonable proxy cost for rate-making purposes, but then suggests that the Commission should have obtained several actual quotes to make that determination.

24. It was reasonable to conclude from the evidence in the Rate Application, including Superior's IR responses, that to the extent of $250,000, Superior intends to self-insure. But whether Superior does or does not continue to do so is not the important point on this aspect of the Decision. For ratemaking purposes, the corollary to the Commission's determination to allow for a cost of

[22] Application, at page 4.

[23] Decision, page 7 of 30.

insurance to be recovered in rates, as noted in the last paragraph of the Decision excerpted above, is that apart from the allowed cost of $22,500, any insurance losses will not be for the account of Seascape ratepayers.

25. The Seascapes' reference to the Ontario Energy Board's Electricity Distribution Rate Handbook (**Handbook**) is not helpful. The Handbook simply states that insurance expenses recoverable in rates can include premiums in the case of 3rd party insurance (such as from an actual insurance company like Zurich), or self-funded claims and "any changes in reserves recorded as an expense."[24] This is not uncommon[25], but the point is that whether through 3rd party insurance or reserves for self-insurance, reasonable liability protection for utilities comes at a cost to ratepayers, and is not, as Seascapes argued in the Rate Application, free.

26. The fact that the Commission accepted the Zurich quote as a reasonable proxy for insurance costs, especially in the absence of any other evidence on the point, was well within the broad discretionary authority it enjoys under the Act as to the methodology and factors to be considered in determining just and reasonable rates for Superior. There is no error in populating a utility cost of service using estimated or forecast costs, particularly in this instance where prior history was not of assistance in determining a framework for initial stand-alone utility rates.

27. Seascapes' arguments fall well short of making any sort of reasonable case for reconsideration of the merits of the Commission's decision to include a cost of insurance in Superior's revenue requirement and just and reasonable rates for Seascapes. In effect, Seascapes is saying that the Decision should be reconsidered because it lost the argument about including any insurance cost, and would like the Commission to consider including some different, unspecified cost.

28. The evidence in the Zurich quote was reasonable, it was clear as to the coverages afforded, it was uncontested by Seascapes, and the Commission was entitled to rely on it. To have accepted the Seascapes position that there should have been no cost included for insurance in rates

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[24] At: **http://www.ontarioenergyboard.ca/documents/edr_final_ratehandbook_110505.pdf**

[25] See BCUC Decision Re: BC Gas Utility Ltd 2003 RRA (February 4, 2003). There, the Commission allowed a 33% increase in insurance premiums and accepted a BC Gas proposal to self-insure for risks of war and terrorism and to establish a deferral account to recover the costs of such incidents in rate.

See as well the *Gas Pipeline Uniform Accounting Regulations* under the *National Energy Board Act*, which prescribe the treatment of costs incurred or appropriated for insurance premiums **or** amounts accrued to maintain reserves for self-insurance: **http://laws-lois.justice.gc.ca/eng/regulations/SOR-83-190/index.html.**

would have been entirely inconsistent with key ratemaking principles. The simple fact that Seascapes is unhappy with the Commission's decision does not justify reconsideration, particularly since Seascapes has abandoned its initial position and is asserting a new claim in the Application.

(ii) Oversight of the Cost of Gas

29. Here, Seascapes also argues that the Commission "erred in its interpretation of the facts."[26]

30. In the Rate Application:

(a) Consistent with the fact that it sources propane through the SGL[27] Langley facility in Port Kells, Superior's evidence was that it proposed to use the posted spot price at that facility on the 15th of each month as a component of the Seascapes energy rate, because it provides a consistent pricing mechanism, which it expects over time will have a neutral impact on Seascapes and Superior.

(b) Seascapes' offered no evidence on this point. Its submission was that there is a need to review the cost of propane periodically, but Seascapes, recognizing the Commission's discretion, chose to leave it to the Commission's expertise to determine a fair and practical way to manage and review that cost, but – importantly - provided that the cost of that review is less than the benefit of conducting it: "less process and less frequency is recommended."

(c) The Commission agreed with Superior[28], as follows:

"Commission determination

The Panel approves the request to use the SGL commodity price on the 15th of the month is an acceptable basis upon which to set the basic cost of gas. The Panel agrees with Superior that this method is a practical and simple approach for reflecting the actual costs incurred by Superior in acquiring propane on behalf of Seascapes customers."[29]

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[26] Application, at page 2.

[27] Superior Gas Liquids; acknowledged by Superior in its response to Seascapes IRs to be a sister company:

[28] The Commission also accepted the Superior/SGL propane supply agreement: Decision, page 29 of 30.

[29] Decision, page 23 of 30.

(d) Superior, Seascapes and the Commission also concurred on a light handed approach to determine rates beyond 2016, and the Commission prescribed a mechanism to annually adjust rates for inflation, directed the parties to endeavour to agree on material adjustments to updated estimates, subject always to a revenue requirement application for required rate adjustments, or complaint, as necessary.[30]

31. Seascapes now claims that in not providing for any oversight of the cost of gas, the rates approved by the Commission for Superior are unjust and unreasonable.[31]

32. Having offered no evidence and made no suggestion in the Rate Application as to the nature of such oversight, Seascapes newly discovered expertise now leads it to suggest a "remedy" in the form of a quarterly review of the gas cost to Seascapes, in comparison to other regulated propane utilities.

33. Seascapes claims that every other gas provider – presumably at least those under active regulation by the BCUC – must go through a review process when the price of gas goes up or down.[32] Seascapes, as is its habit, offers no evidence to substantiate this claim. But in any case, this argument fails to establish a *prima facie* case for reconsideration, because it completely ignores the Superior evidence that was before the Commission on the Rate Application that (as summarized by the BCUC):

> "...there are situations where this [SGL spot] pricing method will benefit the Seascapes customers, and there are situations where this pricing method will favour Superior. Over the calendar year this impact is expected to be neutral. Superior further states that the administrative burden of tracking the exact propane cost to Seascapes would offset any benefit to the Seascapes customers."[33]

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[30] Decision, page 27-28 of 30.

[31] Application, page 2.

[32] Whether the practice is so universal is unknown, but irrelevant. Superior acknowledges that some utilities, especially those that operate on a much larger scale than Superior at Seascapes, review their rates regularly with the BCUC to ensure that customer rates recover gas purchase costs. See, for example, BCUC Order G-179-6 for FortisBC Energy Inc. (December 1, 2016) for quarterly propane costs at Revelstoke. The annual volume in that case is close to 9 million litres, and its reference price is established with reference to the Mt. Belvieu spot and forward markets. In this case, the Commission's reasonable conclusion was that the burden of analysing futures and spot pricing, establishing deadbands and rate change triggers, possible deferral accounts and so forth would not be outweighed by any tangible benefit to the Seascape ratepayers.

[33] Decision, page 22-23 of 30.

34. Having left the matter entirely in the hands of the Commission, with the admonition that the cost of such a review cannot exceed the benefit, Seascapes nevertheless now says that reconsideration is warranted because some level of oversight is necessary, provided it is done in a "cost effective" manner. But this is precisely the same submission that Seascapes made in the Rate Application, and reconsideration is not intended to provide an opportunity to an unhappy intervenor to re-argue its case.

35. Once again, Seascapes offers a one-way street: if a periodic gas cost review means a benefit to Seascapes, then it is a good thing; if it comes at a cost to Seascapes, not only is it not a good thing, don't do it. And it must be remembered that the reasonable costs to Superior of that review would be recoverable in rates from Seascapes, irrespective of whether there is a benefit to either Seascapes or Superior.

36. The suggestion that there is something sufficiently untoward about the affiliate supplier relationship to warrant frequent gas cost review is without merit. No such suggestion was made by Seascapes in the Rate Application, there was certainly no evidence to support it there, and no mention was made of it by the Commission in the Decision. It is another inappropriate new argument.

37. Moreover, the Seascapes claim implies that it was an error for the Commission to take into account the only evidence that it had about "cost effectiveness" from Superior: that the SGL spot price would prove neutral over time, and the tracking costs would exceed any benefit to Seascapes, as noted in paragraph 33, above.

38. It can hardly have been wrong for the Commission to have left the matter of gas cost oversight precisely as Seascapes suggested, according to the evidence it had, and on which it had to base its Decision. Seascapes now submits that periodic review would be the "right thing to do" but that is only if the price is right, and there is no evidence of that.

39. With respect, the question at Phase 1 of this reconsideration is whether the Commission erred in deciding that the evidence did not warrant periodic gas cost review, other than in relation to establishing rates each year. On the standard of reasonableness applicable to Commission decisions, the answer to that is clearly no.

E. Conclusion

40. At this point - Phase 1 - of the Commission's reconsideration process, the burden is on Seascapes to establish, *prima facie*, whether there is a reasonable basis for reconsideration.[34] The term *prima facie*, in this context, means more than the literal 'at first sight.' What it means is that the burden is on Seascapes to establish sufficient grounds in its alleged errors in fact to establish a doubt as to the reasonableness of the Decision and assuming it can do that, to establish that any such error have a significant material implication.

41. Against that test and the criterion of error in fact on which the Application is premised, Seascapes has not demonstrated any error on the part of the Commission in the Decision in respect of the issues in question. Taken as a whole, and understanding this was Superior's initial rates application for Seascapes, the Commission's Decision to include a reasonable cost for insurance in the Superior revenue requirement and rates, and not to prescribe a more frequent review of propane gas costs for Seascapes other than that which might be associated with future year rate adjustments, was both reasonable and correct.

42. For all of these reasons, the procedural order sought by Seascapes should be denied and its Application for reconsideration of the Decision should be dismissed.

ALL OF WHICH is respectfully submitted this 27th day of January, 2017.

SUPERIOR PROPANE LTD.

By its counsel:

GOWLING WLG (CANADA) LLP

Per: *<Original signed by>*

John R. Cusano
James H. Smellie

[34] See *Zelstoff*, supra at FN 7.