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October 29, 2019

Sent via email/eFile

CREATIVE ENERGY BEATTY/EXPO PLANTS CPCN AND REORGANIZATION **EXHIBIT A2-2**

Re: **Creative Energy Vancouver Platforms Inc. – Application for Certificate of Public Convenience and Necessity for Beatty-Expo Plants and Reorganization – Project No. 1598962 – Farris LLP Reconsideration Permission Request**

British Columbia Utilities Commission (BCUC) staff submit the following letter for the record in this proceeding:

Farris LLP, counsel for Cadillac Fairview Corporation
Limited and Pacific Centre Limited
Reconsideration Permission Request
Letter dated October 24, 2019

Sincerely,

Original signed by:

Patrick Wruck
Commission Secretary

/aci
Enclosure

Reply Attention of: Ludmila B. Herbst, Q.C.
Direct Dial Number: (604) 661 1722
Email Address: lherbst@farris.com

FARRIS

File No: 19078-19

October 24, 2019

BY EMAIL – commission.secretary@bcuc.com

British Columbia Utilities Commission
410 – 900 Howe Street
Vancouver, BC
V6Z 2N3

Attention: Patrick Wruck
Commission Secretary and Manager, Regulatory Support

Dear Sirs/Mesdames:

Re: Creative Energy Vancouver Platforms Inc. ("CEV")
Application for Certificate of Public Convenience and Necessity for Beatty-Expo Plants and Approval of Corporate Reorganization – Project No. 1598962 ("CEV BCUC Application") –
Farris LLP Requests for Relief

We write further to Exhibit A-36 in the above-noted matter, in which the Panel requested that we particularize the grounds for the reconsideration that, in our letter of October 15, 2019 (Exhibit A2-1), we requested permission to make (the "**Reconsideration Permission Request**") on behalf of our client, Pacific Centre Limited ("**PCL**").

The Reconsideration Permission Request relates to the February 19, 2019 decision (the "**February BCUC Decision**") of the British Columbia Utilities Commission ("**BCUC**"). The request was prompted by certain paragraphs of the proposed Further Amended Response to Civil Claim that CEV and related defendants (the "**CEV Defendants**") provided to us on October 13, 2019 in the B.C. Supreme Court proceeding that PCL commenced on July 12, 2019 (the "**Court Proceeding**") to enforce its right of first purchase (the "**ROFP**").

This submission is organized into three main parts. In **Part 1**, we set out some background in relation to the Court Proceeding in order to provide context for the remainder of the discussion. In **Part 3**, we set out what we say are, if the characterization that the CEV Defendants advance in the Court Proceeding of the February BCUC Decision is accepted, material errors of law, fact or jurisdiction in the February BCUC Decision; changed circumstances or new facts since the February BCUC Decision; facts that could not previously have been brought forward; and other just causes for the reconsideration to occur. We do so with reference to Rule 26.05 of the BCUC's Rules of Practice and Procedure. In **Part 2**, we address the issue of whether the CEV Defendants' characterization of the February BCUC Decision should be accepted or not, given that the particulars that follow in Part 3 flow from the answer to this question.

PART 1 – THE COURT PROCEEDING

We deal briefly with the Court Proceeding for context, given that events in it have prompted the Reconsideration Permission Request.

A. Claims and Cross-Claims Regarding the ROFP

The Court Proceeding originated with a claim by PCL to enforce its ROFP.

A right of first purchase – also known as a right of first refusal – is both a contractual right (in the case of the ROFP, it was part of a package of contracts negotiated and made in 1969-1970 between CEV and PCL and amended in or about 1982) and, in British Columbia, an equitable interest in land pursuant to the *Property Law Act*, R.S.B.C. 1996, c. 377 ("***PLA***"). Section 9 of the *PLA* provides:

> A right of first refusal to land, also known as a right of refusal or right of pre-emption, created before or after this section comes into force is an equitable interest in land.

The ROFP in this case relates to land as well as other assets, and is registered in the Land Title Office against title to 720 Beatty Street (the "**Beatty Property**").

Claims in relation to a right of first purchase are in the jurisdiction of the courts, which is why PCL filed its claim in the B.C. Supreme Court. Also subject to that court's jurisdiction is PCL's claim that the division between beneficial and legal ownership of unsubdivided land that is planned by CEV pending the creation of airspace parcels at the Beatty plant violates s. 73 of the *Land Title Act*, R.S.B.C. 1996, c. 250 ("***LTA***"), and that CEV has not performed the ROFP in accordance with its contractual duty of good faith (as delineated by the Supreme Court of Canada in *Bhasin v. Hrynew*, [2014] 3 SCR 494, 2014 SCC 71 and other authorities).

Properly the CEV Defendants have not suggested that the B.C. Supreme Court lacks jurisdiction to adjudicate PCL's claims in relation to the ROFP, the *PLA* or the *LTA*.

The CEV Defendants are now proposing to file a cross-claim themselves in the Court Proceeding, seeking the assistance of the B.C. Supreme Court in relation to the ROFP. In the proposed Counterclaim provided to us on October 13, 2019, the CEV Defendants seek to apply to that court, under s. 35 of the *PLA*, to modify the ROFP. Section 35 provides that "[a] person interested in land may apply to the Supreme Court for an order to modify or cancel" certain charges.

B. The CEV Defendants' Characterization of the February BCUC Decision In Relation to the ROFP

As noted above, the Reconsideration Permission Request was prompted by the fact that the CEV Defendants now assert in the Court Proceeding a certain characterization of the February BCUC Decision. The CEV Defendants say that, for the purpose of the ROFP, the thus-characterized February BCUC Decision is binding on PCL and the B.C. Supreme Court under ss. 79 and 105 of the *UCA*.

In their proposed Further Amended Response to Civil Claim (the allegations in which are, in turn, incorporated into their proposed Counterclaim), the CEV Defendants describe the February BCUC Decision as doing the following:

> 32 … the BCUC has determined in fact that the property proposed to be transferred to the developer pursuant to the proposed Reorganization, including the Trust and Development Agreement and Transfer Agreement, are not required to generate and distribute steam to serve CEV's customers, which determination is binding and conclusive on PCL and this Honourable Court.
>
> 33 Accordingly, the assets proposed to be transferred to the developer pursuant to the proposed Reorganization, including the Trust and Development Agreement and Transfer Agreement, are not in fact required to generate and distribute steam to the Pacific Centre Complex.

Whether or not assets are "required to generate and distribute steam to the Pacific Centre Complex", as the CEV Defendants state in paragraph 33, is wording taken from the ROFP, which provides that the ROFP is triggered where CEV:

> …shall decide to sell the whole of its property, assets, business and undertaking including the plant, lands, system, Licence Agreement and customer contracts (hereinafter referred to collectively as "the undertaking"), or any part thereof required to generate and distribute steam to serve the [majority of the Pacific Centre Complex] …
>
> [or]
>
> …shall intend to offer for sale the undertaking or any such part thereof or to accept any offer for the purchase thereof…

PCL argues in the Court Proceeding that the Trust and Development Agreement (the "**Trust Agreement**") and the proposed reorganization in various respects trigger the ROFP, or alternatively that CEV had an obligation of good faith not to seek to take steps to circumvent the ROFP. These matters will be addressed in the Court Proceeding given the B.C. Supreme Court's jurisdiction over them.

Where the ROFP is triggered, its terms provide:

> [PCL] shall have the first right to purchase the undertaking or any such part thereof to be offered for sale by [CEV] at a price not exceeding and on terms not less favourable than the best bona fide offer of any other prospective purchaser…

To implement the ROFP where triggered, CEV is obliged to present "an offer in writing to [PCL] at the same price and on the same terms of sale as [CEV] shall intend to offer or to accept". If PCL accepts the offer before the expiration of the 30 days, CEV must proceed with PCL and not the other person, firm or corporation. In the Court Proceeding, PCL asks that the B.C. Supreme Court order CEV to present an offer to PCL.

The ROFP further provides that CEV "shall not be at liberty to sell the undertaking or any such part or parts thereof to any other person, firm or corporation, until the said period [the 30 days after presenting the offer to PCL] has expired and [PCL] has not accepted such offer, unless in the meantime [PCL] shall in writing unconditionally decline the offer". According to the ROFP, only if PCL declines the offer or fails, within 30 days of the offer being provided to it, to accept it, is CEV at liberty to proceed with the sale to "any other person, firm or corporation", but even then "shall not so sell the same at any lesser price or on terms more favourable than as so offered to [PCL]." In the Court Proceeding, PCL therefore asks that the B.C. Supreme Court restrain CEV from proceeding with matters that PCL says trigger the ROFP other than if the steps for which the ROFP provides have been followed.

The CEV Defendants seek to draw the BCUC into the Court Proceeding by suggesting that the February BCUC Decision addresses certain issues related to the ROFP.

As stated in our letter of July 12, 2019, if the Court determines that PCL should have the opportunity to purchase all or part of the Beatty Property and associated undertaking, and if PCL determines to do so, a new BCUC process may come to be required as the potentially resulting ownership structure would be different than the CEV BCUC Application contemplated.

PART 2 – DIFFERING VIEWS OF THE FEBRUARY BCUC DECISION

In their Further Amended Response to Civil Claim, the CEV Defendants attribute significance to the February BCUC Decision, in content and effect, in relation to the triggering of the ROFP. PCL does not share this view of the February BCUC Decision but makes the Reconsideration Permission Request in the event that the CEV Defendants' characterization of the February BCUC Decision's meaning and effect is accurate. Further particulars of the proposed reconsideration are, against that backdrop, provided in Part 3.

Before turning to that, the following five points are of note in relation to why, in our view, the CEV Defendants' characterization of the February BCUC Decision is incorrect.

A. February BCUC Decision Did Not and Could Not Have Dealt With the ROFP

First, the February BCUC Decision did not deal with the ROFP and could not have done so. The ROFP was not before the BCUC in any respect. Not even a copy of the ROFP was filed before the February BCUC Decision. Before that decision the ROFP was mentioned once, in passing, in a list of charges in the appraiser's report (Ex. A-15 at p. 8 of the report). Jurisdiction to interpret and apply the ROFP, including to adjudicate claims in relation to what is an asset "required to generate and distribute steam to serve the [majority of the Pacific Centre Complex]" for the purpose of the ROFP, is in the B.C. Supreme Court, and as returned to in Part 3(A)(1), is not in the BCUC. To suggest, as the CEV Defendants do when tracking the ROFP's language in paragraphs 32-33 of the Further Amended Response to Civil Claim (as set out above), that the BCUC made a determination in this regard, is inaccurate.

Indeed, not deciding on contractual rights in the course of the CEV BCUC Application would have been consistent with the hands off approach that CEV advocated in providing an unrelated set of contracts, containing disputed rights or obligations, to the appraiser that the BCUC had engaged. In Exhibit B-7,

when discussing "a copy of an April 22, 1988 agreement ('1988 Agreement') between CHDL, British Columbia Enterprise Corporation and Concord Pacific Developments Ltd. regarding the purchase of what is now 701 Expo Boulevard, and a copy of a January 31, 1993 agreement to amend the 1988 Agreement" that were being provided to the appraiser, CEV asked specifically that the appraiser "not provide any specific opinions regarding the meaning of the 1988 Agreement, as amended", as "the parties to the 1988 Agreement, as amended, do not necessarily agree on the interpretation of provisions of this agreement…"[1] It would be remarkable if, by contrast, the BCUC was supposed to have adjudicated on facts pertaining to a different contractual right (the ROFP), the text of which was not even part of the evidentiary record.

B. Contrasting ROFP and Section 52 of the *UCA*

Second, while the BCUC has occasion to consider whether a utility requires assets when there is an application before it to dispose of those assets under s. 52 of the *UCA*, this is not the same exercise as a court would undertake in relation to interpreting and applying the wording of the ROFP.

The timing and trigger for what is or is not "required" within the meaning of the ROFP are set by the contract, informed by its full content and purpose, and other evidence that parties to it bring forward. Further, the timing and trigger are by contract in relation to service to a specific customer location. The evidentiary record in the Court Proceeding addresses the financial and technical issues associated with service directly to the Pacific Centre Complex, including if sought to be undertaken in a way isolated from service to other customers. By contrast, the timing and trigger for what property is or is not required under the *UCA* are set by the legislation and case law[2] under it, informed by the content and purpose of that legislation, and are not specific to a particular customer and location.

Further, the interests and participants in play are different in a s. 52 proceeding than in relation to the ROFP. In the case of a right of first purchase of land, there is a grantee (here, PCL) with an equitable proprietary interest in the land under s. 9 of the *PLA*. However, ratepayers involved as such in a proceeding under s. 52 of the *UCA* do not have a property interest in the assets of the utility: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140, 2006 SCC 4 at paras. 68-69.

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1 In Exhibit B-8, CEV continued: "the parties to these agreements do not necessarily agree on the interpretation of provisions of the 1988 Agreement as amended, including the provisions related to the FSR matter. For that reason, Creative Energy has asked Grover Elliot not to provide any specific opinions regarding the meaning of the 1988 Agreement, as amended. If Grover Elliot is of the view that the 1988 Agreement as amended limits or causes uncertainty about the value of the development rights of 701 Expo Boulevard, they can identify this in their report without making specific opinions about the meaning of specific provisions. We expect that Grover Elliot will not have any difficulty with observing this request." It continued: "Grover Elliot should not have any difficulty doing their work and providing a report without opining on the meaning of or disclosing specific provisions of the 1988 Agreement, as amended. It should not be necessary for the BCUC or interveners to review the specific provisions of the 1988 Agreement, as amended, to understand and consider Grover Elliot's expert report; however, if the BCUC is of the view that it needs to review the 1988 Agreement, as amended, Creative Energy will file it with the BCUC on a confidential basis."

2 See, for example, Reasons for Decision in Corix Multi-Utility Services Inc. Application for Disposition of Assets from the Burnaby Mountain District Energy Utility (September 11, 2019).

C. Section 52 Application Was Not Decided In February BCUC Decision In Any Event

Third and in any event, to the extent there might be seen to be any cross-over, a disposition under s. 52 of the *UCA* was not included in the subject matter of the February BCUC Decision. In this regard, the CEV BCUC Application had several components. In its "Summary of Approvals Sought" in that application (Ex. B-1 at p. 7), CEV noted:

> This Application seeks the following approvals as explained in greater detail in the body of the Application:
>
> 1. Pursuant to sections 45 and 46 of the Utilities Commission Act (UCA), a certificate of public convenience and necessity (CPCN) for the construction and operation of the following components of the Proposed Project at an estimated total capital cost of $53.1 million:
>
> - the Expo Plant, including facilities to interconnect steam, condensate and fuel oil services between the Expo and Beatty Plants
> - the Beatty Plant renovation
>
> ….
>
> 5. Pursuant to sections 50 to 54 of the *UCA*, approval of corporate reorganization steps to facilitate both the Developer's project and the acquisition by Emanate Energy of an indirect 50% equity interest in Creative Energy:
>
> …
>
> - disposition of surplus utility property and rights

The February BCUC Decision considered CEV's request under paragraph 1 above, but did not consider its request under paragraph 5. Page 57 of the February BCUC Decision provides that "the Panel will not consider the proposed Corporate Reorganization at this time". On page 2 of the February BCUC Decision, the corporate reorganization was described – in accordance with Exhibit B-1 – as the aspect of the matter that was to include disposition of property under s. 52 of the *UCA*. The Order that is associated with the February BCUC Decision (Order G-38-19) is thus described on its face as being pursuant only to ss. 44.2, 45 and 46 of the *UCA*, not s. 52.

Correspondingly, while the BCUC referred on occasion in the February BCUC Decision to CEV's position or statements as to surplus assets, it did not make a finding in this regard. The decision simply refers to the fact that pursuant to the Trust Agreement CEV is to "transfer to the Developer the land and airspace that Creative Energy owns and which Creative Energy *states* are surplus to its needs in its operation as a utility" (pages 12, 45; italics added; the BCUC also used quotation marks in referring to "surplus" at page 5) and did not decide the point.

Obtaining an order under ss. 45 and 46 of the *UCA* requires the BCUC to consider not the test under s. 52, but to consider the public convenience and the public interest as conceptualized in ss. 45 and 46, including through the lens of the applicable of B.C.'s energy objectives and applicable requirements of the *Clean Energy Act*.

D. CEV Defendants' Position Is Future-Looking In Any Event

Fourth, CEV's position as to surplus assets leading up to the February BCUC Decision would itself in any event not be reflective of what the CEV Defendants would like the February BCUC Decision to have determined.

Even on the face of the Trust Agreement, CEV and its fellow contracting parties do not describe the real property in question as presently surplus; rather it is said in the first recital that the real property "*will*, as a result of the new and refurbished facilities, *become* surplus" (italics added). Certainly apart from the parking lot that was addressed already by the BCUC in the 1980s, this must be so given the present dependence of CEV on the plant (the "**Beatty Plant**") and office space, and the land (including airspace) on which they sit, at the Beatty Property.

It may be that the CEV Defendants wish to use construction and operation under the CPCN, if granted, to render certain property surplus for the purposes of s. 52 of the *UCA*, including by lessening the footprint of the Beatty Plant through the decommissioning and/or repositioning of certain boilers at the Beatty Plant, and through the shifting of baseload generation to the Expo Plant. However, until that construction and operation occurs, neither the equipment nor the land, including airspace, where it is located could be surplus; without them steam would not be generated or distributed. (Notably, for the purpose of the ROFP, the relevant date is CEV's decision or intention to sell, not its implementation; otherwise the mechanics of the right of first purchase simply could not work.)

E. Not a Final Decision

Finally, the February BCUC Decision was not a final decision on the CEV BCUC Application or, indeed, even on the CPCN. Rather, the BCUC determined not to approve the CPCN. The Panel stated that "the CPCN and related approvals have not been granted" (p. 57). Further, various matters on the CEV BCUC Application were not to any extent addressed.

PART 3 – PARTICULARS OF REQUESTED RECONSIDERATION

Rule 26.05 of the BCUC's Rules of Practice and Procedure provides:

> An application for reconsideration of a decision must contain a concise statement of the grounds for reconsideration, which must include one or more of the following:
>
> a) the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision;
>
> b) facts material to the decision that existed prior to the issuance of the decision were not placed in evidence in the original proceeding and could not have been discovered by reasonable diligence at the time of the original proceeding;
>
> c) new fact(s) have arisen since the issuance of the decision which have material bearing on the decision;

d) a change in circumstances material to the decision has occurred since the issuance of the decision; or

e) where there is otherwise just cause.

We address each of these factors in the remainder of this submission.

A. Material Errors of Fact, Law or Jurisdiction

As noted above, Rule 26.05 of the Rules of Practice and Procedure provides that grounds for reconsideration may include that the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the February BCUC Decision. Several such errors, again assuming that the CEV Defendants' characterization of the meaning and binding nature of the February BCUC Decision is accurate, are outlined below.

(1) If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex for the purpose of the ROFP, the BCUC acted outside its jurisdiction or erred in law by proceeding to make that determination

If in the February BCUC Decision the BCUC made a determination on what was required to generate or distribute steam to serve the Pacific Centre Complex for the purpose of the ROFP, as paragraphs 32-33 of the CEV Defendants' Further Amended Response to Civil Claim – which go as far as tracking the ROFP wording – seek to suggest, this would have been:

- outside the BCUC's subject matter jurisdiction under the *UCA*. As the B.C. Court of Appeal noted in *Princeton Light & Power Co. Ltd. v. MacDonald*, 2005 BCCA 296 at 14-15, the *UCA* "does not contemplate or make any provision for the adjudication or enforcement of contractual claims by a customer against a utility." See also *Crestbrook Pulp and Paper Co. v. Columbia Natural Gas Ltd.* (1978), 87 D.L.R. (3d) 248 (B.C.C.A.).

- in excess of the BCUC's jurisdiction on procedural grounds, given that it would have been without notice to PCL that the ROFP was to be the subject of BCUC adjudication, and without the opportunity for PCL to determine whether or not to file evidence or make submissions about this issue. (As returned to below, there is a dispute about whether an email to PCL's billing agent about the existence of the CEV BCUC Application that was not forwarded to PCL should be treated as notice of the CEV BCUC Application, but certainly there is no doubt that the content of the notice made no mention of the ROFP.)

- an error of law as made without any evidence, given that no copy of the ROFP was part of the record leading up to the February BCUC Decision and no other evidence was filed about the ROFP or its meaning. There is an occasional reference to "encumbrances" or "legal encumbrances" in the record of the CEV BCUC Application process, but apart from a passing mention of the existence of the ROFP in the appraisal report obtained by the BCUC, we see no specific reference to the ROFP. This is so despite the opportunities that CEV had, if seeking to bring it into the process, to raise its existence and potential implications. Notably, despite CEV

occasionally providing examples of other encumbrances that existed in relation to the Beatty Property, we do not see any reference by CEV to the ROFP as an example.

It does not seem to us likely that the CEV Defendants' characterization of the February BCUC Decision as deciding whether the ROFP was triggered or not is correct, including in light of the very fact that the ROFP was not before the BCUC. The fact the ROFP was not before the BCUC was reflected in the process that the BCUC followed.

However, if the CEV Defendants are correct in their characterization of the February BCUC Decision, the errors were material. Had the errors not been made, no decision would have been made on the interpretation or application of the ROFP.

(2) If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex for the purpose of the ROFP, it erred in finding there had been sufficient consultation

The Panel stated at page 35 of the February BCUC Decision that it is "satisfied that Creative Energy did take sufficient steps to try to involve its customers and other stakeholders." CEV paraphrases and relies on this statement at paragraph 28 of its proposed Further Amended Response to Civil Claim and paragraph 31 of its proposed Counterclaim.

If the February BCUC Decision is about what is required to generate and distribute steam for the purpose of the ROFP, however, as paragraphs 32-33 of the CEV Defendants' Further Amended Response to Civil Claim contend is the case, the BCUC erred in reaching the above conclusion. In that case, the consultation would plainly have been insufficient.

The CPCN Application Guidelines should not govern consultation in relation to matters that are not about the CPCN, but they are at least illustrative of the need to interact with stakeholders involved in a decision before the BCUC. There is an expectation of consultation with those "who may be directly impacted by the project and its feasible alternatives" or "that may experience impacts on their rates and service".

Even outside those guidelines, procedural fairness requires notifying and consulting those with a substantial contractual and proprietary interest before a decision by which they would be affected, with the obligations of notification and consultation heightened where the affected person's interest is greater and their expectation of a specific form of communication more established. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, where *inter alia* it was noted at para. 25 that a significant factor in determining the nature and extent of the duty of fairness is the importance of the decision to the person affected; the more important the decision is, the more stringent the procedural protections that will be mandated.

The consultation (and notification) that the BCUC should have expected, if the CEV Defendants are right that ROFP-related matters were addressed in the February BCUC Decision, would have taken into account the following points not drawn to the BCUC's attention by CEV. These points were obviously not raised by PCL given that it did not receive notice or, if it did, the notice CEV purported to provide did not disclose that the ROFP was in any way in issue in this BCUC proceeding.

In 2017, CEV approached PCL seeking a potential discharge of the ROFP. When it did so, CEV approached the General Manager of the Pacific Centre Complex and met with her. When PCL declined to discharge the ROFP, PCL's then counsel on this matter advised CEV, by letter of October 26, 2017, that it should direct any further communications regarding the ROFP to Cadillac Fairview's Executive Vice President, Operations.

CEV did not consult with either of the individuals above on the CEV BCUC Application or any purported effect of such process on the ROFP, and did not bring it to the attention of any other individual at PCL or Cadillac Fairview. This is so despite the fact that it now appears CEV, from well before the commencement of this BCUC proceeding, had developed a strategy of relying on a BCUC determination that CEV's real estate assets were surplus, as creating "difficulty [for PCL] in arguing that its ROFR applies to those assets". This was set out in the memorandum from CEV's solicitors, dated November 9, 2017 and provided to us only on October 9, 2019, that was attached as Schedule "B" to our correspondence to the BCUC dated October 15, 2019. This memorandum is further referred to below.

After the BCUC set notice requirements in relation to the CEV BCUC Application, without being advised by CEV of the ROFP or the above communications, CEV appears simply to have sent a copy of the Public Notice of this BCUC proceeding to a company called Energy Advantage, which is PCL's agent for billing purposes. The Public Notice provided to Energy Advantage simply advised of the CEV BCUC Application rather than of the interpretation or application of the ROFP being at issue in the proceeding. Indeed, the Public Notice only stated that CEV was applying to the BCUC for approval "to construct and operate new and renovated steam plant works and related facilities at Creative Energy's existing site at 720 Beatty Street in Vancouver and at an adjacent site within BC Place Stadium (the Project), and additional approvals required in connection with the project". None of this gives any indication or notice of, among other things, the substantial disposition of the Beatty Property and the sale of a reviewable interest in the utility to Emanate Energy Solutions Inc., for which approval from the BCUC was to be sought as part of the proceeding.

The one intervener that participated consistently in the CEV BCUC Application, the Commercial Energy Consumers Association of British Columbia ("**CEC**"), is one that CEV suggested represented no specific customer, noting in its reply argument that "[t]o our knowledge, no current or potential future customer of Creative Energy has engaged the CEC to represent it in this proceeding. Rather, the CEC says that it represents the interests of commercial energy consumers in a general way" (para. 2). Further, there is no way in which CEC would have had any knowledge or insight in relation to the ROFP.

Consultation is a material issue, as reflected by the fact that the February BCUC Decision addresses it in some detail. Consultation in relation to a decision that – on the CEV Defendants' characterization – would relate to the interpretation and application of the ROFP, and bind PCL in this regard, was not adequate and we expect that the BCUC would not have found it to be so had the situation been outlined to it.

(3) If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex, it made a material error in fact even assuming the jurisdictional and legal barriers above did not exist

The issue of assets required to generate or distribute steam to serve the Pacific Centre Complex within the meaning of the ROFP is live in the Court Proceeding. There, correspondingly, substantial evidence specific to that issue has been filed. That evidence includes expert reports filed on behalf of PCL, to support its position that the ROFP has been triggered. The Court Proceeding will also include substantial written and oral argument in relation to the issue at the hearing of the summary trial and judgment applications therein.

Without the benefit of that evidence and argument, the BCUC erred in several respects if it determined that only assets not required to generate or distribute steam to serve the Pacific Centre Complex were being sold.

In the February BCUC Decision, the Panel noted that on the one hand, utility equipment at the new Expo Plant would be on land owned by B.C. Pavilion Corporation ("**PavCo**") and accessed via a statutory right of way ("**SRW**"). However, on the other hand, the Panel seems clearly to have believed that the plan was for all the utility equipment at the renovated Beatty Plant to be on land, including airspace, which would be owned in fee simple by CEV (subject to a situation where an airspace parcel could not be created and an alternative such as a 999-year lease would need to be implemented).

Thus the Panel noted at page 10 of the February BCUC Decision that there would be "an air space parcel or long term lease for the Beatty Plant…and a 40-year SRW for the Expo Plant being proposed". It understood the CEV proposal to be ultimately to have two facilities, "one housed in a property at the Beatty site which will be either the subject of an air parcel or a long term lease, and the other housed at the BC Place subject to a SRW for 40 years" (page 45).

As reflected in the February BCUC Decision, CEV took the position in the BCUC proceedings that "it retains fee simple ownership at Beatty" and "states that the airspace parcel [which is stated to be the parcel "containing the Beatty Plant" and "housing the utility"] provides fee simple title to the airspace for Creative Energy" (pages 12, 47). In Exhibit B-6, in responding to IR 40.3 from CEC, CEV said the following: "The value of the air space parcels is that Creative Energy retains fee simple title (ownership) to its plant and office space…"

However, the present plans of CEV even for the renovated Beatty Plant involve neither fee simple ownership nor a long-term lease of the land/airspace in which certain utility equipment would be located, although CEV would have fee simple ownership or a long-term lease over areas in which certain *other* utility equipment would be located.

For the pieces of utility equipment at the renovated Beatty Plant that would not be on land/airspace owned in fee simple by CEV, or held on a long-term lease, access would be through a SRW. Unlike the much-examined SRW agreement in relation to the Expo Plant, as far as we are aware the SRW agreement in the case of the renovated Beatty Plant was not before the BCUC. Further, it would not be with PavCo, which was a registered intervener in the CEV BCUC Application. Rather, it would be with the "Developer".

The utility equipment at the renovated Beatty Plant that is planned not to be on land, including airspace, owned by CEV or subject to a long-term lease would include boiler flues, an emergency generator and two diesel tanks. Evidence filed by PCL in the Court Proceeding indicates that such utility equipment is necessary to the operation of a steam plant.

There does not seem to be any dispute in the Court Proceeding that the present plan of CEV in relation to the renovated Beatty Plant is, with respect to boiler flues, the emergency generator and the two diesel tanks, to access them only via an SRW. Kieran McConnell, who is CEV's Vice President Projects & Engineering, attested on October 9, 2019 in the Court Proceeding: "…it is currently proposed that two items of equipment related to the Proposed Reconfigured Beatty Plant, namely the new Generator No. 1 and two diesel tanks, *would be located on land not retained by CEV*" (para. 115; italics added). CEV's notice of application dated October 9, 2019 for summary trial or judgment in the Court Proceeding refers to having "flues or distribution piping…protrude *beyond the area currently contemplated for the proposed Air Space Parcel*" that CEV would own (para. 66; italics added).

In the Court Proceeding, the CEV Defendants seek to counter the weight of the above in part by suggesting that their plans are in flux such that utility equipment could move or the bounds of the airspace parcel could be re-drawn. This is addressed in Part 3(C)(2) below.

(4) If the BCUC made a determination on assets required to generate or distribute steam to serve the Pacific Centre Complex for the purpose of the ROFP, it made a material error in not considering the ROFP in other respects

If the BCUC considered the ROFP for some purposes, it should in fairness have considered its implications otherwise as well. Material implications of the ROFP would have been with respect to (a) alternatives to what CEV presented to the BCUC in the CEV BCUC Application; (b) project drivers; and (c) project risks.

(a) Alternatives to what is proposed in the CEV BCUC Application

On page 47 of the February BCUC Decision, the Panel states that "the only viable alternative to moving forward with this CPCN is to move forward with the In-situ Alternative (or some form of it) at a cost estimated to be $34 million". The CEV Defendants quote this statement at paragraph 28 of their proposed Further Amended Response to Civil Claim and paragraph 31 of their proposed Counterclaim.

In its submissions of November 20, 2018 in the CEV BCUC Application, CEV made statements such as the following:

- At paragraph 106: "Creative Energy is not aware of any other developer that would have the same understanding and acceptance of the needs of the utility or willingness to undertake development around and over an operating steam plant with public utility obligations. It is inconceivable that a third party developer would agree to the requirements the Trust and Development Agreement imposes on the Developer…"

- At paragraph 107: "Creative Energy submits that spending time and resources to pursue the option of working with an arm's length third party developer would only result in additional costs

> (that would have to be paid for by ratepayers) and delays to the Proposed Project with no benefit to ratepayers. Creative Energy considers that there is no other cost-effective scenario to piggy back refurbishment of the steam plant on the development of the surplus property while protecting customers from the risks."

However, if the ROFP were live for the determinations that the CEV Defendants suggest at paragraphs 32-33 of their proposed Further Amended Response to Civil Claim were made by the BCUC in the February BCUC Decision, the ROFP was glaringly missing from the analysis of alternatives.

Implementing the ROFP would simply have required CEV to present an offer to PCL – which, well known to all concerned, is part of the Cadillac Fairview family, which its development and financial pedigree – with a 30-day window for acceptance. As noted in our October 15, 2019 letter to the BCUC, PCL has adduced considerable evidence in the Court Proceeding that if CEV were required to comply with the ROFP and offer all or part of its undertaking to PCL, PCL would be in a position to evaluate the offer expeditiously and that it has within its corporate structure the financial resources and utility- and development-related expertise to take on a substantial project of this nature: Knoepfel Affidavit at paras. 19-28, 86-90 (Schedule "C" to Exhibit A2-1).

By its nature, the very premise of the ROFP is that PCL may be inclined to take on all or part of the Beatty Property and the associated utility if an offer is presented to it.

The offer in this case would be – as the Panel noted when discussing the situation of Westbank – one with attractions to a developer. The Panel noted in the February BCUC Decision that "the Developer in our view has much to gain by the approval of the CPCN" (page 47) and "it is true that the Developer stands to gain in the event the Proposed Project is approved" (page 54).

Though the triggering of the ROFP might, if PCL were to accept an offer that it asks the Court to order CEV to make, prevent Westbank from pursuing the proposed project, that does not mean that another entity would not be willing and able to do so. Presumably taking into account the prospect that the CEV Defendants may not succeed in convincing the Court that the ROFP has not been triggered (and that PCL should not have the opportunity to purchase), as of the CEV Defendants' Amended Response to Civil Claim of October 9 CEV alternatively seeks relief from forfeiture under s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

(b) Project drivers

If the BCUC reached a conclusion on the ROFP in the February BCUC Decision, it would have been a material defect in its reasoning not to have considered as well the extent to which thinking about the ROFP seems – according to evidence in the Court Proceeding that the CEV Defendants provided on October 9, 2019 – to have shaped the legal structure that CEV presented to the BCUC for approval in the CEV BCUC Application.

On pages 30-34 of the February BCUC Decision, the Panel sets out a number of "drivers for the Proposed Project" as identified by CEV. The February BCUC Decision refers at page 33 to the fact that "Creative Energy has outlined the following drivers for the Proposed Project; to maintain reliable service and improve safety, efficiency and emissions as well as workspaces and accessibility." The Panel

analyzes those drivers, which are utility oriented, and no others. They are reflective of what CEV put forward and also of the innocuous basis that CEV suggested for the proposed reorganization. CEV noted in the CEV BCUC Application that its requested form of reorganization "is required to facilitate the Proposed Project and Developer's project, the development and transfer of assets surplus to utility needs on a tax efficient basis, and the acquisition of an indirect 50 percent interest in the utility by Emanate Energy" (Ex. 1, p. 97).

However, as is now apparent in evidence recently provided in the Court Proceeding, it is the CEV Defendants' contention that a key driver in how CEV structured the project and reorganization that it presented to the BCUC was to avoid triggering the ROFP. This is reflected in the November 9, 2017 memorandum that we received on October 9, 2019 – again, well after the February BCUC Decision – as part of a then-unsworn affidavit in the Court Proceeding. In that memorandum, CEV's solicitors suggested that a structure apparently akin to that now put forward to the BCUC would "minimize" risk "of the potential for breach of the Cadillac Fairview ROFR" though the structure "would achieve the same commercial effect" as the form of transaction that was seen as posing a greater risk. CEV's Vice President, Projects & Engineering, has attested in an affidavit also provided to us on October 9: "In fact, it was always, and remains, CEV's *intention to plan* the Proposed Reorganization and the Proposed Project in such a manner as not to trigger the ROFP" (italics added) (para. 112 of his affidavit sworn on October 8, 2019).

Leading up to the February BCUC Decision, the BCUC and interveners repeatedly asked CEV questions about what had motivated the proposed structure and about its perceived benefits. However, nothing in the record would have suggested to the BCUC that CEV was concerned about triggering the ROFP if the project or reorganization were structured differently, or that the structure adopted was significantly driven by seeking to avoid this result. This information is not helpful to the CEV Defendants in the Court Proceeding – grantors of a right of first purchase have an obligation of good faith not to circumvent it, and in any event even concerted efforts not to trigger it may do so – but it is telling for the purpose of the CEV BCUC Application.

The BCUC asked questions prior to the February BCUC Decision to which it would have been natural for CEV to respond with reference to the ROFP given the above intentions, but CEV chose not to do so. For example, in IR 59.7, the BCUC asked: "Please discuss if Creative Energy has considered alternatives to the Proposed Reorganization, including but not limited to, wind up of Creative Energy into Newco instead of an amalgamation." In Exhibit B-5, CEV gave a response that included: "An approach that involves winding-up Creative Energy and distributing the assets to the parent would be more complex than amalgamation." Distributing CEV's assets as a whole through a wind-up was presumably thought to more obviously trigger the ROFP. However, CEV did not suggest to the BCUC or interveners that this complexity was associated in its view with the potential for triggering the ROFP, which as noted on page 5 of our letter of October 15 it tried to find a way to "work around".

It may well have been material to the BCUC that concerns about the ROFP played what now appears to be so prominent a role, perhaps even to the extent of causing CEV to sacrifice better plans. In the Court Proceeding, the CEV Defendants seem to suggest that to sidestep the ROFP, a tax-efficient structure had to be relinquished, stating that "CEV's initial reorganizational plan" (until PCL refused to discharge the ROFP in the fall of 2017) "involved the transfer of the entirety of the Beatty Property to a limited partnership, a tax-efficient structure in which partnership units would be issued enabling funds to

be raised for the Major System Upgrade...” (para. 36 as numbered in the Further Amended Response to Civil Claim, though found in earlier versions as well) The CEV Defendants do not state outright that the new structure was less efficient than the earlier one, but that is surely the implication that they seek the Court to draw.

(c) Project risks

At pages 26-30 of the February BCUC Decision, the Panel identified several “risk-related issues with the CPCN for the Proposed Project”. While the Panel did not purport to set out an exhaustive list, the risks that it considered related to “roles and responsibility for various project risks”, “financial over expenditures”, “indemnities” and “contingency planning”.

Certainly the triggering of the ROFP was not among the risks expressly considered and, given that not part of the CEV BCUC Application, we are confident that this was also not implicit in the Panel’s consideration. However, if the CEV Defendants are correct that the BCUC considered the ROFP for some purposes, it should have been considered for this purpose as well.

The CEV Defendants make clear in the materials provided to us on October 9, 2019 in the Court Proceeding that in their view, if PCL were to succeed in the relief sought in the Court Proceeding, the matters that the CEV Defendants have put before the BCUC for approval may not be able to proceed. The CEV Defendants’ notice of application in the Court Proceeding states that “[t]he Proposed Reorganization would be undermined by a triggering of the ROFP” (para. 48). CEV’s Vice President, Projects & Engineering, states: “Since the outset of this project I have recognized that if the Proposed Reorganization or any element of it were to trigger the ROFP, the entire restructuring would be jeopardized” (para. 112 of his affidavit sworn on October 8, 2019; also para. 63 of CEV’s notice of application).

Of course, the CEV Defendants deny in the Court Proceeding that the ROFP has been triggered; it is not surprising that they do so given the efforts they seem to have taken to avoid CEV offering the Beatty Property or undertaking, or any part thereof, for sale to PCL.

PCL does not agree that those efforts were successful or that, if they were, CEV would have complied with the duty of a grantor of a right of first purchase to deal with the grantee in good faith. Further, as noted in Part 3(A)(4)(a) above, PCL does not agree that it can simply be concluded as the CEV Defendants do in the Court Proceeding that the project would be at risk, given there is a contender other than Westbank (PCL) potentially able to step in, on its evaluation of a court-ordered offer pursuant to the ROFP. However, the CEV Defendants’ own view of risks to the project presumably would have been of interest to the BCUC if already considering the ROFP for other purposes, or indeed in any event.

B. FACTS MATERIAL TO THE FEBRUARY BCUC DECISION ONLY SUBSEQUENTLY AVAILABLE TO PCL

Rule 26.05 provides that a further basis for reconsideration would be where facts material to the February BCUC Decision that existed prior to the issuance of the decision were not placed in evidence leading up to the February BCUC Decision and could not have been discovered by reasonable diligence before the February BCUC Decision. This situation also arises in this case.

Not until well after the February BCUC Decision has it become apparent that the CEV Defendants would take the position that a BCUC determination prejudices PCL in relation to the ROFP.

Facts suggesting that the CEV Defendants planned to take this position did exist prior to the February BCUC Decision but were not known until the CEV Defendants articulated this position publicly. Material indicating what appears to have been a longstanding plan of the CEV Defendants became available on October 9, 2019 in the course of the Court Proceeding, when as noted above PCL received by way of an exhibit to a then-unsworn affidavit a November 9, 2017 memorandum from CEV's solicitors stating to fellow participants in the proposed transaction: "Upon being declared, by the BCUC, as assets which are surplus to the operation of the utility, the beneficial interest in the real property will be transferred to the Development Entity. ***(Once the BCUC considers the real property assets to be surplus, then Cadillac should have difficulty in arguing that its ROFR applies to those assets.)***" (emphasis added).

CEV's above-highlighted objective is material in various respects to the February BCUC Decision and the process that led to it. We expect that had CEV alerted the BCUC to the emphasized objective above, the BCUC could, for example, have required specific, meaningful notice referencing the ROFP to be provided to individuals at PCL or Cadillac Fairview with whom CEV had previously discussed the ROFP; it could have required the filing of a copy of the ROFP; and it could have required evidence and argument on whether adjudication related to the ROFP was in its jurisdiction and, if to any extent the BCUC found that it was, on the substance of the points that CEV sought to have it decide in this regard.

C. CHANGED CIRCUMSTANCES OR NEW FACTS

Rule 26.05 of the BCUC's Rules of Practice and Procedure indicates that reconsideration may be undertaken where a change in circumstances material to the February BCUC Decision has occurred since the issuance of that decision, or new fact(s) have arisen since the issuance of the February BCUC Decision which have material bearing on the decision.

(1) How CEV is seeking to proceed

One changed circumstance is that CEV is now seeking to have the B.C. Supreme Court proceed as though CEV had asked the BCUC to make a decision on its contractual and proprietary obligations vis-à-vis PCL and the BCUC had made such a determination. This is addressed in more detail in other parts of this submission.

(2) CEV's position on the definitiveness of the Trust Agreement

Another changed circumstance or new fact involves CEV's evolving position on the definitiveness of the underlying Trust Agreement.

If the CEV Defendants' characterization of the February BCUC Decision as binding is accurate, CEV was content to have the BCUC proceed to a final order on the strength of the Trust Agreement, which CEV consistently described as "central". In CEV's initial covering letter to the BCUC filing the CEV BCUC Application (Ex. B-1), CEV described the Trust Agreement as "A key component of the proposed project" and stated that the Trust Agreement "is a central governing document for the Proposed Project".

Throughout the CEV BCUC Application, CEV emphasized the weight of the Trust Agreement and the degree of consideration and planning that had been undertaken in setting out the framework for what was to unfold; indeed CEV complained that the appraisal that the BCUC sought did not take it into account. Though the Trust Agreement left some room for adjusting specifics as detailed design and construction approached and unfolded, and PCL acknowledges certain statements to that effect in the record, the key elements were supposedly established. CEV said at paragraphs 88-90, 103-106 and 139 of November 2018 submissions that CEV and the Developer had conducted "detailed work on the Proposed Project and negotiated definitive agreements", and spent either two or "several" years and $1.45 million putting together a development scheme. CEV noted in Exhibit B-17, in responding to CEC IR 63.1, that "[t]he Trust and Development Agreement was negotiated as a whole over many months". CEV urged on the BCUC an expedited resolution to allow for the relatively prompt commencement of building work (first at the Expo Plant, with construction initially contemplated as commencing in January 2019, but then at the Beatty Property).

Reflecting the role of the Trust Agreement and its schedules in the CEV BCUC Application, the Panel referred on page 9 of the February BCUC Decision to Schedule C-3 of the Trust Agreement, noting that a CEV statement as to office space was "confirmed in Schedule C-3 of the Trust Agreement which depicts the layout of the new offices." In response to BCUC IR 27.6, which had asked CEV to "explain what assurances are in place to ensure the new office space meets Creative Energy's needs", CEV said in Exhibit B-5: "The Developer is to develop the new office space for Creative Energy generally in accordance with the plans included in Schedule C-3 of the Trust and Development Agreement. Please refer to section 3.3(a) of the agreement. Creative Energy continues to work with Developer to ensure Creative Energy's needs for office space are met."

We would agree that the Trust Agreement charts a "definitive" course.

However, the position of the CEV Defendants in the Court Proceeding is different. In this regard, as stated in our October 15 letter, for certain purposes the CEV Defendants seek to suggest in the Court Proceeding that their planning is at a preliminary and fluid stage, for example stating at paragraph 37 that "[t]he lands that PCL alleges CEV intends to transfer have not been finally delineated and thus cannot constitute a 'decision to sell' under the ROFP as *neither the Trust Agreement nor the contemplated transfer contain the essential terms of a contract, such that the offer which if accepted would be legally enforceable*" (italics added). Mr. McConnell has sworn in the Court Proceeding that the plans and specifications in Schedule C to the Trust Agreement were simply "conceptual in nature" and "not intended to represent the final size, layout or organization of the Proposed Reconfigured Beatty Plant" (paras. 71-72). The CEV Defendants do this to suggest the placement of certain utility equipment for the renovated Beatty Plant on lands/airspace in relation to which CEV would not have fee simple ownership or a long term lease can still be changed, despite the trouble taken otherwise to date.

To the extent that the BCUC relied in coming to the February BCUC Decision on a degree of certainty in what would occur, pursuant to the contractual arrangements of which it was advised, the CEV Defendants' position would now seem to be that this reliance was misplaced.

D. OTHER JUST CAUSE TO RECONSIDER

It appears that CEV intended to use the CEV BCUC Application to fend off a potential claim by PCL that the ROFP had been triggered. Again, as noted above, solicitors for CEV circulated a memo in November 2017 to others in the proposed transaction noting: "Upon being declared, by the BCUC, as assets which are surplus to the operation of the utility, the beneficial interest in the real property will be transferred to the Development Entity. ***(Once the BCUC considers the real property assets to be surplus, then Cadillac should have difficulty in arguing that its ROFR applies to those assets.)***" (emphasis added).

Leading up to the February BCUC Decision, there was no indication to the BCUC, interveners or PCL that the CEV Defendants sought to rely on the outcome of the BCUC process, or interim steps in the BCUC process, as bases to deny PCL's ability to rely on its ROFP.

This situation should be remedied.

CONCLUSION

As set out in our letter of October 15 and above, we request that PCL be given permission to pursue a reconsideration of the February BCUC Decision pursuant to Rule 26 of the BCUC's Rules of Practice and Procedure.

Alternatively, if the BCUC determines that the characterizations of the February BCUC Decision that the CEV Defendants are advancing in the Court Proceeding are not correct, then a full reconsideration may not be necessary. A further decision by the BCUC that the February BCUC Decision did ***not*** involve any determination "in fact that the property proposed to be transferred to the developer pursuant to the proposed Reorganization, including the Trust and Development Agreement and Transfer Agreement, are not required to generate and distribute steam to serve CEV's customers" or "are not in fact required to generate and distribute steam to the Pacific Centre Complex", and then to stay or suspend further steps or decisions in the CEV BCUC Application, would be sufficient for PCL's purposes at this time. The parties could then to proceed with a merits hearing in the Court Proceeding (now sought to be in January 2020), to resolve the matters between them related to the ROFP without PCL being unfairly prejudiced by the February BCUC Decision (for the reasons described above).

Given the use the CEV Defendants have sought to make of the February BCUC Decision in the Court Proceeding, PCL considers that a stay or suspension of further steps in the CEV BCUC Application is necessary including to ensure that matters related to ROFP are adjudicated in court without unjustified reliance on BCUC determinations that could cause further requests for reconsideration or appeals and an unnecessary use of regulatory resources at the BCUC. We continue to rely on our letter of October

15, 2019 in this regard as well.

Yours truly,

FARRIS LLP

Per: 

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