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November 8, 2019

Sent via email/eFile

CREATIVE ENERGY BEATTY/EXPO PLANTS CPCN AND REORGANIZATION EXHIBIT A2-3

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 Requests for Relief**

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
Requests for Relief
Letter dated November 7, 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
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FARRIS

File No: 19078-19

November 7, 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 in reply to the following submissions, which were provided in response to our letters of October 15 and 24, 2019 (together, the "**October PCL Letters**", at Exhibits A2-1 and A2-2) in the above-noted matter:

- the submissions of CEV dated October 30, 2019 (Exhibit B-31 and referred to herein as the "**CEV Response**"), which serve to reinforce the importance of granting the relief sought by our client, Pacific Centre Limited ("**PCL**"); and

- the submissions of the Commercial Energy Consumers Association of British Columbia ("**CEC**") dated October 31, 2019 (Exhibit C3-17 and referred to herein as the "**CEC Comments**").

For ease of reference, quotations from the CEV Response are italicized below and our reply points are grouped under the following headings:

A. CEV's Misuse of the CEV BCUC Application

There can be no doubt from the October PCL Letters that at their core was concern that CEV deliberately set about to use the CEV BCUC Application as an instrument against PCL in relation to its right of first purchase (the "**ROFP**"). The CEV Response is telling in its failure to deny this foundational concern. Among other things, CEV says nothing about (much less to seek to explain) the recently produced November 9, 2017 memorandum from its counsel that features in the October PCL Letters as laying out CEV's ROFP-related strategy. CEV does not offer to withdraw the ROFP-oriented characterization that in the court proceeding (the "**Court Proceeding**") its defendant group (the "**CEV Defendants**") has used[1] to describe what the British Columbia Utilities Commission (the "**BCUC**") has determined and the extent of the BCUC's jurisdiction.

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[1] What were paragraphs 32 and 33 in the proposed Further Amended Response to Civil Claim provided to counsel for PCL on October 13, 2019 are now numbered paragraphs 31 and 32 in the final version of the Further Amended Response to Civil Claim. The wording is the same except that what became paragraph 32 (formerly 33) now commences with the words "On that basis alone" rather than the previous "Accordingly". For ease of reference, the current version of the wording at issue is as follows:

> 31. …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.
>
> 32. On this basis alone, the assets proposed to be transferred to the developer pursuant to the proposed Reorganization, including the Trust and Development Agreement and the Transfer Agreement, are not in fact required to generate and distribute steam to the Pacific Centre Complex.

On page 18 of the CEV Response, CEV does concede that the BCUC "*made its determinations…without regard to the ROFP*". It does not explain why in that case the CEV Defendants lead, through their pleadings, the B.C. Supreme Court to believe:

- that the BCUC made determinations tracking or about the "required to generate and distribute steam to [the majority of the Pacific Centre Complex]" wording of the ROFP ("the BCUC has determined in fact that the property proposed to be transferred to the developer pursuant to the proposed Reorganization…are not **required to generate and distribute steam**"[2]); and

- that the BCUC's jurisdiction is couched in the terms of the ROFP ("the BCUC has exclusive jurisdiction to determine…the question of fact whether … property is **required to generate and distribute steam** to utility customers, including the Plaintiff [i.e. PCL]"[3]).

Perhaps in order to sidestep the need to address the crux of the October PCL Letters, CEV recharacterizes PCL's concerns simply as being with "*Creative Energy (and other defendants in the Court Proceeding) **advising the Court** that pursuant to section 79 of the UCA the determinations of the BCUC on questions of fact in its jurisdiction are binding and conclusive on the Court*" (pages 6 and 18 of the CEV Response; emphasis added).[4] Of course, the issue is not an abstract one with the CEV Defendants "*advising*" the Supreme Court of the existence of provisions of the *Utilities Commission Act* ("***UCA***"). Rather, the issue is with **what** the CEV Defendants say the BCUC has determined and with **whether** it constitutes a binding determination of fact dispositive of anything related to the ROFP though stemming from a preliminary decision on different issues.

More generally, CEV asserts at page 2 of the CEV Response that "*[i]n many instances the October 15th and October 24th Filings allege facts that are disputed by Creative Energy, inaccurately characterise statements made by Creative Energy staff, inaccurately characterise Creative Energy's position in the Court Proceeding, and put forward unjustified conclusions*". The fact that nowhere in the CEV Response does CEV actually provide any example of disputed facts, inaccurate characterizations or unjustified conclusions confirms that CEV itself was unable to find any such instance. Notably, the October PCL Letters quoted directly from CEV statements where possible, including from specific exhibits in the BCUC record and from the CEV Defendants' pleadings in the Court Proceeding.

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2 Further Amended Response to Civil Claim, Part 1 at what is now paragraph 31 (formerly 32) (emphasis added); see also paragraph 32 (formerly 33).

3 Further Amended Response to Civil Claim, Part 3 at paragraph 7 (emphasis added).

4 Again on page 11 of the CEV Response, CEV states: "*The revisions in the proposed Further Amended Response to Civil Claim*", which it notes that PCL points to, "*simply identify certain findings of fact the BCUC made in the Order G-38-19 Decision and also identify for the Court the operation of section 79 of the UCA*". CEV does not address how in its Further Amended Response to Civil Claim it characterizes those "*certain findings of fact*" that it "*identif[ies]*". On page 19 of the CEV Response, CEV states that "*the findings are what they are*", but of course the point is that the CEV Defendants have chosen to characterize them to the B.C. Supreme Court in a certain way and for a certain purpose.

The CEV Response also on page 2 "*rejects any suggestion that it has been anything less than forthcoming in the BCUC proceedings regarding the Application*". However, the CEC – to whom CEV now points as an active participant – submitted in Exhibit C3-17 that "the existence of the ROFP is a matter which the Commission and the participants should have been made aware of in a more forthright manner by Creative Energy in the Proceeding", confirming our impression from review of the BCUC record.

B. PCL Is Not the Party Seeking BCUC Findings on the ROFP

Apparently adopting the maxim that attack is the best form of defence, CEV suggests in the CEV Response that it is PCL who seeks ROFP-related findings from the BCUC, and criticizes PCL for doing so. On pages 4-5 of the CEV Response, CEV says that "*[t]he BCUC does not have the mandate…to frame its determinations* ***so as to support PCL's argument that the ROFP has been triggered****…*" (emphasis added). On page 6 of the CEV Response, CEV says that "*[t]he BCUC clearly does not have the mandate to tailor its determinations and/or proceedings* ***to support PCL's civil claim****…*" (emphasis added). On page 18 of the CEV Response, CEV says that "*[t]he BCUC did not and should not have considered whether* ***PCL (or any other customer of Creative Energy)*** *might prefer the BCUC to frame its findings of fact differently so as to support PCL's preferred interpretation of the ROFP*" and that the "*BCUC does not have the mandate…to frame its determinations so as to* ***support a person's attempt to trigger*** *a ROFP…*" (emphasis added).

However, nowhere in the October PCL Letters did PCL ask the BCUC to step in to find that the ROFP has been triggered. This is the determination that PCL has, appropriately, asked the B.C. Supreme Court (which has jurisdiction over this issue) to make, after CEV rejected two invitations to meet regarding the ROFP in May and June 2019. Inconsistently with its positions in the above paragraph, (1) CEV itself states on page 11 of the CEV Response that "*PCL chose to pursue its issues in Court rather than before the BCUC…*" and (2) criticizes PCL for doing so.

PCL came to the BCUC only because the CEV Defendants are now suggesting to the B.C. Supreme Court in the Court Proceeding that the BCUC could and did reach conclusions regarding the ROFP. For the purpose of the Court Proceeding the CEV Defendants do not take to its logical conclusion their position in the CEV Response that the BCUC would not have been making determinations "*to support*" PCL's civil claim on the ROFP. The corollary is that the BCUC likely would not have wished to make determinations to support CEV's attempt to shield itself from a PCL claim (anticipated by CEV) that the ROFP had been triggered.

CEV is, in reality, doing what it inaccurately accuses PCL of doing: seeking to use the BCUC's processes for the purpose of, and to frame the BCUC's determinations in support of CEV's own arguments in, the parties' dispute regarding the ROFP.

C. Roles of the B.C. Supreme Court and the BCUC

1. PCL's requests do not infringe on the BCUC's mandate

On pages 13 and 15 of the CEV Response, CEV asserts that "*[t]he objective of both of these PCL requests [regarding reconsideration and a suspension/stay] is to make the Court the exclusive finder of*

fact for determining questions related to whether the 'Trust Property' is surplus to the needs of the utility".[5] For its purposes CEV seeks to blur together quite distinct tasks – the interpretation/application of the ROFP, and the consideration of factors under s. 52 of the *UCA* – into a single exercise of identifying "*surplus*" (which so far only CEV has purported to do, via recitals to a contract; as is set out on page 6 of our October 24, 2019 letter, a decision under s. 52 has not yet been made by the BCUC).[6]

Only the CEV Defendants, not PCL, are seeking to blur these tasks together. Just as we are ***not*** suggesting the B.C. Supreme Court can or should make a ruling under s. 52 of the *UCA*, we ***are*** suggesting that (1) the BCUC should not be taken to have made a ruling that interprets or applies the ROFP and that (2), if the BCUC did so, that ruling should not stand.

Pages 5-7 of our letter of October 24, 2019 set out the differences between *(a)* on the one hand, the surplus-related exercise that the BCUC may undertake on an application under s. 52 of the *UCA* to dispose of assets and *(b)* on the other hand, the exercise that the B.C. Supreme Court would undertake in relation to interpreting and applying the wording of the ROFP regarding whether, within the meaning and timeframe and for the purpose of the ROFP, any part to be sold of CEV's "property, assets, business and undertaking including the plant, lands, system, Licence Agreement and customer contracts" is "required to generate and distribute steam to serve the [majority of the Pacific Centre Complex]".

On pages 4-5 and again on page 18 of the CEV Response, CEV states that "*[t]he BCUC does not have the mandate to place PCL's ROFP interest above the public interest*". Respectfully, we suggest that this creates the inaccurate impression that the relief PCL requests is contrary to the public interest, which is not the case. In this regard:

- it is in the public interest for persons who may be affected by a process to have meaningful notice, know the case to be met and have the opportunity to respond;
- it is not in the public interest to allow parties to enlist a regulator to impair property or contractual rights that are not drawn even to the regulator's attention and the adjudication of which is not part of the regulator's purview;
- it is not in the public interest for BCUC proceedings to be portrayed to the courts as dispositive of matters that have not, and would not, have been decided;

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[5] The above-quoted wording is from page 13 of the CEV Response. Similarly, CEV says on page 15: "*PCL's objective is to have the BCUC stay and vacate its findings in a misguided attempt to make the Court the exclusive finder of fact for determining questions related to whether the 'Trust Property' is surplus to the needs of the utility*".

[6] This is contrary to CEV's suggestion at page 4 (and 18) of the CEV Response that "…*in the Order G-38-19 Decision the BCUC did make determinations on questions of fact in its jurisdiction. In making those findings, the BCUC had appropriate regard to the matters relevant to the BCUC's consideration of Creative Energy's request pursuant to section 52 of the Utilities Commission Act (UCA) for approval to dispose of the 'Trust Property' as defined in the Trust and Development Agreement*".

- if the B.C. Supreme Court were to determine that the ROFP had been triggered and PCL should be permitted to have the opportunity to purchase, the project that CEV argues to be in the public interest could still proceed either with a non-affiliated purchaser (if PCL decided to proceed) or with Westbank (if PCL did not). The BCUC's public interest jurisdiction would not be excluded even in the first of these scenarios, as it would be involved in determining whether or not to grant any approvals that at that point PCL might seek. In this regard, CEV says at page 19 of the CEV Response that "*the BCUC's approval in 1970 for Creative Energy to enter into the ROFP Agreement [the '**1970 Order**'] shall not be construed as pre-approval for a party to the ROFP Agreement to do anything pursuant to the agreement*." Correspondingly, as noted in our July 12, 2019 letter, if PCL were successful in court and determined to accept a court-ordered offer pursuant to the ROFP, we anticipate there would be a new application to the BCUC;

- if the B.C. Supreme Court were to determine that the ROFP had been breached but that some remedy other than specific performance should be awarded, potentially including significant damages against CEV, one of the criteria that the BCUC has traditionally considered in exercising its public interest mandate under s. 52 of the *UCA* would not be met: "[t]here is no violation of existing covenants that will be detrimental to the customers"[7]; and

- at this stage there is no basis (and certainly none articulated in the CEV Response) to consider the public interest would be prejudiced at all or on balance by awaiting the outcome of the hearing of the summary trial applications, which are now scheduled in the Court Proceeding for the week of January 13, 2020.

2. Pausing for Court Proceeding is consistent with the statutory framework

CEV suggests not only that the BCUC should continue without revisiting the February BCUC Decision and without suspension of what otherwise would be next steps, but also effectively that to do otherwise would be contrary to the statutory framework. At page 5 of the CEV Response (with similar wording at pp. 13-15), CEV asserts:

> *PCL's requests are wholly inconsistent with the statutory scheme as set out in Part 6 of the UCA. The BCUC has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by the UCA, and the BCUC does not defer to court proceedings even if the court proceeding involves similar or the same questions of fact as are before the BCUC.*

However, it is not contrary to the *UCA* for a court to make a decision before the BCUC does or for the BCUC to consider what a court does. On some issues, such as the adjudication of the contractual and property claims between PCL and the CEV Defendants, including CEV's counterclaim under s. 35 of the *Property Law Act* (the "***PLA***"), the court would have the sole jurisdiction. On other issues, its decision may still be informative. CEV does not refer as part of its framework to s. 120 of the *UCA*, which provides:

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[7] Reasons for Decision in Corix Multi-Utility Services Inc. Application for Disposition of Assets from the Burnaby Mountain District Energy Utility (September 11, 2019) on pp. 4 and 6.

> No waiver of rights
>
> (1) Nothing in this Act releases or waives a right of action by…a person for a right, penalty or forfeiture that arises under a law of British Columbia.

Though CEV refers to ss. 80 and 81 of the *UCA* on page 14 of the CEV Response, it does not appear to acknowledge their impact on its argument. Section 80 of the *UCA* provides:

> In determining a question of fact, the commission is **not bound by** the finding or order of a court in a proceeding involving the determination of that fact, and the finding or order is, **before the commission, evidence only**. [emphasis added]

Section 80 in no way suggests that the BCUC *cannot* take into account determinations made in the B.C. Supreme Court, including determinations of fact. Rather, as the above sections make clear, decisions of the B.C. Supreme Court may be "before" the BCUC, may constitute "evidence" before the BCUC, and though not "binding" may (by implication) at least be persuasive.

Section 81 of the *UCA* in turn provides:

> The fact that a suit, prosecution or other proceeding in a court involving questions of fact is pending **does not deprive the commission of jurisdiction** to hear and determine the same questions of fact. [emphasis added]

The fact that the BCUC retains "jurisdiction" to do something does not mean that it must do so. Rather, it has discretion in whether, when and how it exercises its powers.

Sections 80-81 are directed to questions of fact just as is s. 79, which is the section on which CEV most relies. Even if these provisions required disregarding the courts (which they do not), on their face they apply only to findings "of fact". Matters relating to the interpretation and application of the ROFP, a contract, raise questions of mixed law and fact, or alternatively in some circumstances questions of law: *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, 2014 SCC 53 at paras. 43-55. Statutory language about a tribunal's "findings of fact" does not include findings of mixed fact and law: *British Columbia v. Bolster*, 2007 BCCA 65 at paras. 118-119. It certainly would not encompass legal questions; there is no doubt that determinations of law made by the B.C. Supreme Court are binding on the BCUC.

With respect to s. 105(2) of the *UCA*, which CEV also cites (on page 14), that section provides: "Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court." However, PCL's request is to the BCUC, not to a court, in respect of the suspension, stay and reconsideration that are sought.

On several occasions in the CEV Response, CEV alludes to the 1970 Order approving the ROFP and states that it was on the condition that "*the ROFP Agreement shall not restrict the power of the BCUC to act from time to time in accordance with statutory requirements*" (pages 3, 6, 14, 18-19). However, as the above discussion underlines, there is no statutory requirement on the BCUC that prohibits it from

granting the relief that PCL seeks. Further, and to the contrary, the *UCA* provides it with the flexibility to do so.

D. Serious Issues In Play From PCL's Perspective

1. Whether CEV's Counterclaim simply out of an abundance of caution

CEV seeks to downplay the issues in the Court Proceeding, seemingly to suggest that waiting for its resolution is not worthwhile. An example of CEV's downplaying of the issues is on page 4 of the CEV Response, where CEV says the following:

> *…**to provide greater clarity and recognition of the BCUC's exclusive jurisdiction** to determine (i) what is reasonable, safe, adequate or fair service for Creative Energy to provide, and (ii) whether a proposed sale or encumbrance of the whole or a part of Creative Energy's property is in the public interest, Creative Energy has advised PCL that it will be asking the Court to **cancel the ROFP or** amend its wording **to make clear** that the ROFP shall not apply to a transaction or a series of transactions which is expressly subject to approval of the BCUC.* [emphasis added]

CEV is suggesting above that its request to the B.C. Supreme Court is simply made out of an abundance of caution. However, in its Counterclaim CEV goes well beyond asking the court for a declaration that the ROFP in its existing form should be interpreted as CEV would like. Rather, the Counterclaim sets out the CEV Defendants' request that the court "modify" the ROFP and cause the parties to make a "further" covenant. In the Counterclaim, the CEV Defendants seek:

> 1. An Order **modifying** the ROFP Agreements pursuant to section 35(2) (a), (b) and/or (d) of the *Property Law Act* R.S.B.C. 1996, c. 377, to **add** the following paragraph following paragraph 2 thereof:
>
> > The parties hereto **further** covenant and agree that this right of first purchase shall not apply to a transaction or a series of transactions which is expressly subject to approval of the British Columbia Utilities Commission. [emphasis added]

(We note that the "Relief Sought" portion of the CEV Defendants' Counterclaim does not expressly seek that the B.C. Supreme Court "*cancel*" the ROFP, which is one of the terms used in the CEV Response. This said, the term "cancel" is mentioned elsewhere in the Counterclaim and the dramatic change the CEV Defendants seek via the "modification" may, in any event, in effect amount to that.)

The CEV Defendants do not suggest in the Counterclaim that in the absence of the modification sought there would simply be less clarity. Rather, they suggest that "[i]f the ROFP Agreements are not cancelled or modified as set out herein", CEV's use of the Beatty Property "**will** be impeded" ("Legal Basis" portion of the CEV Defendants' Counterclaim, at para. 18; emphasis added).

2. CEV's comments about the strength of PCL's court claim

CEV seeks to suggest, indirectly, that PCL's court claim should not be given much weight. CEV asserts on page 5 of the CEV Response that "*PCL's argument*" is "*that the ROFP has been triggered on a technicality*" and on page 18 that this is a case of "*a person's attempt to trigger a ROFP on a technicality*". CEV also alludes to the age of the ROFP, stating on page 2 that it was "*granted…50 years ago*" and on page 6 that PCL is "*seeking to enforce a 50-year old ROFP*".

Clearly PCL has not devoted the extent of effort it has to this matter on the basis of a "technicality". Rather, it has pursued its rights under the ROFP, which at no time during the past 50 years (until the fall of 2019) had CEV brought an application to modify. The matters will now be addressed, with extensive evidence and argument, in a five-day summary trial in the week of January 13, 2020, in the B.C. Supreme Court.

E. Whether ROFP Provides Any Rights to PCL Beyond Those of a Regular Customer

CEV says on page 6 of the CEV Response that "*PCL has chosen not to consider the benefits, costs and risks of the Proposed Project for serving the long-term steam requirements of PCL's Pacific Centre Complex*…" On page 17, CEV continues: "*PCL continues to focus on litigating the ROFP, which PCL believes gives it rights to acquire Creative Energy's property, rather than considering the benefits of the Proposed Project for serving the long-term requirements of the Pacific Centre Complex*…"

In effect, CEV appears to be suggesting that PCL has no rights beyond those of the general customer base to which any determinations of the BCUC regarding the benefits, costs and risks of the Proposed Project relate.

This suggestion would plainly be wrong, as the CEV Defendants implicitly acknowledge by bringing the Counterclaim in which they seek to carve transactions that are subject to BCUC approval out from the ROFP. By doing so the CEV Defendants seek to put PCL in the same position as other customers who neither have an ROFP nor made the trade-offs for it that PCL did. The Counterclaim implicitly recognizes that presently, unless the relief the CEV Defendants seek in the Counterclaim is granted, PCL is not in the same position as those other customers. It need not balance the same matters as the BCUC does in the course of its own deliberations, nor is the ROFP triggered by a particular determination even by PCL itself on those factors.

CEV suggests PCL should have gone to the BCUC to argue about risks to service if it considered them to exist (see also pages 10, 16-17 of the CEV Response). The ROFP means that, where the ROFP is triggered, PCL does not need to live with any risk; in that case, PCL has the opportunity to decide whether or not to take on the undertaking and assets whose intended sale triggers the ROFP, subject to any necessary approvals. Of course, if the ROFP is not triggered and if PCL does not obtain a remedy flowing from lack of good faith dealing with the ROFP, then it needs to live with the same balancing as do other customers.

Further, as was set out above, CEV's suggestion that litigating in relation to the ROFP means that PCL is necessarily against the Proposed Project is not correct. Rather, the ROFP would provide to PCL, if the right were triggered, the opportunity to evaluate whether to participate in the same project (in place

of other entities like Westbank). If PCL determined not to do so, the project would proceed with the same parties as CEV has put forward.

F. Whether PCL Can Trigger Reconsideration

1. Whether PCL is "affected"

CEV asserts at pages 6 and 17 of the CEV Response that "*PCL is not affected at all by the BCUC's findings, within the meaning of the term 'affected' as used on BCUC Rule 26.01(b)*".

Respectfully, CEV's position is quite difficult to understand. On the one hand, CEV suggests that PCL could or even should have participated in the CEV BCUC Application and would like to suggest that it gave notice to PCL in order to permit it to do so. Further, CEV seems to criticize PCL for not seeking to intervene even after the February BCUC Decision. However, the wording of Rule 9.04 in relation to the requirements for intervener standing (which CEV appears to suggest PCL met) track the wording that CEV suggests that PCL does not meet in Rule 26.01. Rule 9.04 provides: "Persons requesting intervener status must demonstrate to the satisfaction of the BCUC that they are directly or sufficiently affected by the BCUC's decision, or that they have experience, information or expertise relevant to a matter before the BCUC that would contribute to the BCUC's decision-making."

CEV suggests that PCL can only be "affected" within the meaning of Rule 26.01(b) if there is an "*effect on the nature and quality of the steam service Creative Energy provides to PCL*" or "*on the rates to be charged for the service*" (pages 6, 17 of the CEV Response). CEV then further suggests that PCL is not affected because there is no such effect.

CEV's view of the meaning of "affected" in Rule 26.01(b) is arbitrarily narrow and unsupported by any authority or analysis. CEV's narrow interpretation is also contrary to s. 8 of the *Interpretation Act,* which provides that enactments,[8] such the BCUC's Rules of Practice and Procedure, "must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

Clearly, PCL has been "affected" by the February BCUC Decision given the CEV Defendants' own attempted use of the February BCUC Decision against PCL, but even on CEV's own, arbitrarily narrow interpretation there clearly is also an effect on PCL. The BCUC did not find there was no risk associated with the CPCN were it to be granted. Rather, it said on page 54 of the February BCUC Decision:

> The Panel acknowledges that the Application has a number of positive attributes making it attractive. However, at the same time there are other attributes and issues that have raised concerns. **Balancing the positive and negative aspects of the Application the Panel has determined that moving forward with the Proposed Project as outlined in**

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[8] The *Interpretation Act* defines "enactment" as including a "regulation", which is in turn defined as including an "… order, rule … or other instrument enacted (a) in execution of a power conferred under an Act". The BCUC's power to enact its Rules of Practice and Procedure is conferred pursuant to s. 11(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, applicable to the BCUC pursuant to s. 2.1(d) of the *UCA*.

> **the Application does not represent a reasonable exchange for the utility and its customers and as filed, is not in the public interest.** [emphasis in original]

With respect to PCL specifically, as the project envisions that equipment serving the baseload would be located at the Expo Plant, which is on land not owned by CEV and against which the ROFP is not registered, plainly there would be a significant loss of PCL's ability to mitigate against those risks in the manner contemplated when the ROFP was entered into.

Further, contrary to CEV's suggestion, it does appear that there would be a rate impact on CEV's customers. Pages 39-45 of the February BCUC Decision included a discussion of potential impacts.

2. Prior course of the proceedings before the BCUC

(a) Whether PCL was given a "choice"

On page 6 of the CEV Response, CEV says that "*PCL **has chosen not**…to present its perspective on such matters* [the benefits, costs and risks of the Proposed Project] *to the BCUC*" (emphasis added; see also page 17).

Having a "*choice*" would suggest that PCL had notice of the CEV BCUC Application so as to have the opportunity to make a decision on whether or not to participate. By the time that PCL had notice of the CEV BCUC Application, the February BCUC Decision that is now at issue had already been made. By the time that the CEV Defendants provided the Further Amended Response to Civil Claim, it was nearly eight months after the February BCUC Decision had been issued. PCL sent its October 15, 2019 letter to the BCUC less than 48 hours after receiving CEV's proposed Further Amended Response to Civil Claim.

Nowhere in the CEV Response does CEV indicate that it provided notice of the CEV BCUC Application directly to PCL or to Cadillac Fairview, or explain why it did not do so despite CEV's evident interest in using determinations in it against PCL in relation to the ROFP.

CEV addresses its provision of notice to Energy Advantage, but that entity has been able to find only a single document related to the CEV BCUC Application in its records rather than a record of the multiple instances of contact CEV suggests it had with customers. On pages 8-9 of the CEV Response, CEV states: "*The affidavit of Mr. Knoepfel indicates, at paragraphs 82-83, that for unknown reasons Energy Advantage might not have forwarded the above-referenced notices and information to PCL or at least not to the attention of Mr. Knoepfel. At this time, this evidence is disputed by Creative Energy*". Since Mr. Knoepfel swore his affidavit, PCL has confirmed to the CEV Defendants that the full results of Energy Advantage's search through its records have been provided to the CEV Defendants (and that they contain only a single document from CEV related to the CEV BCUC Application).

On page 8 of the CEV Response, CEV notes: "*The October 15th Filing, at page 9, suggests that PCL had authorized Energy Advantage to act for PCL only for 'billing' purposes; that is, only to receive and process bills. That characterisation misrepresents Energy Advantage's role*". However, in the Court Proceeding, the CEV Defendants filed an affidavit sworn on October 9, 2019 by Robert Gorter, who is described therein as CEV's Director, Regulatory Affairs & Customer Relations. Mr. Gorter's Exhibit "A"

starts with a 2013 email from Energy Advantage to Central Heat Distribution Limited (at the time) in which Energy Advantage described itself as "the appointed Agent r**egarding all billing and payment matters** for the list of accounts noted on Schedule 'A'" (emphasis added). The buildings on Schedule "A" included the Pacific Centre Complex as well as various other buildings in Vancouver. Energy Advantage's description of the scope of its agency in relation specifically to this site is of significantly greater importance than the website offering of potential services to prospective clients that CEV cites on page 8 of the CEV Response.

Energy Advantage supported its statement with form letters from both Cadillac Fairview and Morguard to "Billing Department" that included the additional statements that CEV refers to (together with Energy Advantage's website) at page 8 of the CEV Response. Cadillac Fairview's letter started with the following: "The Cadillac Fairview Corporation hereby appoints Energy Advantage Inc. of Burlington to act as its Agent regarding all billing matters associated with the service at the list of locations detailed herein".

On page 8 of the CEV Response, CEV states:

> *Current Creative Energy staff are not aware of any subsequent direction from Cadillac Fairview, PCL or Energy Advantage…that certain types of Creative Energy notices and information should be sent to PCL directly and not to Energy Advantage.*

It does not address at all the October 26, 2017 letter, which was addressed in part to Kieran McConnell (who is still with CEV), in which Westbank and CEV were asked specifically to address future correspondence regarding the ROFP to Sal Iacono at Cadillac Fairview. CEV does not, of course, suggest that Mr. Iacono, to whom CEV was specifically asked to address issues regarding the ROFP, is with Energy Advantage or that CEV reached out to him. Email correspondence of October 31, 2017 from Ian Gillespie of Westbank to John Sullivan at Cadillac Fairview referenced the October 26, 2017 letter, further evidencing that, contrary to the implication from the silence in the CEV Response, it had been sent and received.

At page 9 of the CEV Response, CEV refers to Mr. Knoepfel's knowledge in December 2018 of a rezoning application. Among other things, that does not refer to this BCUC proceeding or to the disposition of assets by CEV to the developer.

(b) After the February BCUC Decision

CEV suggests on pages 16-17 of the CEV Response that PCL could at least have intervened between PCL's learning of the February BCUC Decision and the first of the October PCL Letters. However, by that point the February BCUC Decision had been made. The BCUC was clear in Order G-107-19 that remaining input and submissions were to be regarding the "specified Scope". CEV suggests that the "*main*" focus of this process "*was on the potential risks to Creative Energy customers arising from undertaking the Proposed Project in coordination with the Developer's project, and measures proposed to mitigate those risks*" (page 10 of the CEV Response), but this was very much in the context of specific enumerated issues.

CEV's position at the time, as reflected in its letters of July 8 and August 15, 2019 to the BCUC, seemed to be that the concerns of PCL as reflected in the Court Proceeding had no place in the CEV BCUC Application. Mr. Webb's letter of August 15, 2019 noted, for example, that "BCUC Order G-159-19 dated July 15, 2019 establishing the final steps for the proceeding does not mention the Cadillac Fairview correspondence nor request the parties to comment on anything in that correspondence. The scope for the final steps of the proceeding remains limited to the eight required changes and explanations specified with the Order G-38-19 Decision (**Specified Scope**) and has not been expanded to include any matter in Cadillac Fairview's civil claim."

(c) CEC's involvement in the CEV BCUC Application

On page 12 of the CEV Response, CEV states that "*the BCUC accepted that the CECBC represented the interests of commercial ratepayers who are or may be potentially affected in the future by the results of the Application, which would appear to include PCL. CECBC's participation in the proceeding included a heavy focus on issues related to change in land ownership, for example*".

However, as the CEC Comments (Exhibit C3-17) make clear, "[n]otwithstanding those pursuits, the CEC was unaware of the [ROFP] which is now the subject of the Request for Relief and related litigation."

3. Whether the February BCUC Decision is subject to challenge

In the CEV Response, CEV suggests that PCL's request to reconsider is at best atypical as it targets "*findings*" and "*does not seek any change to the terms of BCUC Order G-38-19*" (pages 5, 13, 15). However, the CEV Defendants cannot both create a situation that requires a remedy and then insulate themselves from the remedy because of the oddity of the situation they have created.

As noted in our letter of October 24, 2019, if the BCUC determines that the characterization of the February BCUC Decision that the CEV Defendants are advancing in the Court Proceeding is not correct, then a full reconsideration may not be necessary. In the absence of that BCUC determination, the reconsideration may and should proceed.

(a) Context for the challenge brought

In the circumstances, PCL is faced with a situation where some mechanism is required to address what the CEV Defendants have sought to do if the content and effect of the February BCUC Decision are as the CEV Defendants portray. As long as the CEV Defendants seek to rely on the points they do in relation to the February BCUC Decision[9] (though it did not yield any of the approvals they sought), PCL must be able to challenge those points (though it does not disagree with the fact the approvals sought were not granted).

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[9] In addition to the CEV Defendants' pleadings from the Court Proceeding reviewed above, CEV suggests, at p. 4 of the CEV Response, that while "*the Order G-38-19 Decision*" is not a "*final decision*", the BCUC did make determinations on questions of fact relevant to CEV's "*request pursuant to section 52 … for approval to dispose of the 'Trust Property' as defined in the Trust and Development Agreement*".

It would be particularly ironic if an unsuccessful party like CEV were able to use the very fact that there is not a more readily targetable order resulting from its application to insulate itself from challenge to its attempted weaponization of associated "findings".

(b) Identifying erroneous findings is typical in reconsideration

In the CEV Response, CEV suggests that PCL seeks only "*reconsideration and variance of findings of fact*" (pages 4, 5, 13, 15). PCL has identified findings of various kinds that in light of the CEV Defendants' characterization would be in error, properly so given that Rule 26.05 includes among the grounds for reconsideration errors of fact, law or jurisdiction.

(c) CEV Defendants' pleadings turn on order flowing from findings

In their Further Amended Response to Civil Claim in the Court Proceeding, the CEV Defendants seek to "rely on the principles of *res judicata* and/or issue estoppel", "[f]urther, and in the alternative" to ss. 79 and 105 of the *UCA*. By the nature of those principles the "determinations" on which they seek to rely must have been fundamental to the order made and not "collateral" to them. In other words, had the "findings" not been made, the order would have been different.

On the CEV Defendants' analysis, Order G-38-19 should not be read as an order dominated by non-acceptance or rejection, as determinations favourable to CEV would not have been necessary to an order of that nature.

Rather, for the CEV Defendants to be able to apply the principles of *res judicata* and/or issue estoppel, on their analysis the relevant decision is the permission granted to CEV to "file a revised application addressing the Panel's concern within one year". It is rather strained, at best, to depict this as a "final" decision to which the above principles would apply, but this must be what the CEV Defendants rely on.

If that is a sufficient foothold for the principles of *res judicata* and/or issue estoppel, the flip side is that this is an order that would need to be set aside or varied on correcting the findings they characterize the BCUC as having made. If the BCUC finds the CEV's characterization to be the correct one, then PCL would disagree with, and seek to set aside or vary on reconsideration, any part of Order G-38-19 based on the errors it has identified.

(d) Decisions and not simply orders subject to reconsideration

Further and in any event, while CEV focuses on the reconsideration not targeting the terms of Order G-38-19 (subject to the above), s. 99 of the *UCA* provides for reconsideration not simply of an "order" but also of a "decision". (This wording is also reflected in Rule 25.01.) What the BCUC issued on February 19, 2019 was described as "Decision and Order G-38-19".

(e) Considerations of efficiency

If the reconsideration request were to await a final determination of the BCUC on the merits of the CEV BCUC Application:

- the BCUC would have potentially based a second decision on the February BCUC Decision, which was made on a flawed basis involving material errors and a lack of procedural fairness. There is a greater likelihood in this context that the second decision would be exposed to challenge; and

- the CEV Defendants could not expect to have any ability to rely on "findings of fact" in the meantime that they say were made as part of the earlier decision. If PCL does not have a practicable opportunity to challenge any such findings, in fairness nor can the CEV Defendants rely on them until there is a decision encapsulating them that can be challenged.

G. Whether the Evidentiary Record Would Be Reopened

CEV states on page 13 of the CEV Response that "*[t]he request for the BCUC to suspend consideration of the Application does not ask the BCUC to reopen the evidentiary phase of the proceeding for further process on the merits of the Application*" (underlining in original). However, in the context of the reconsideration, Rule 29.04 provides:

> The BCUC will determine the regulatory process for the reconsideration hearing, which may include, but is not limited to: … b) a determination as to whether any new evidence or evidence of a change of circumstances will be permitted on the reconsideration hearing and the timing of submissions on these issues

This question remains open given that PCL remains at the stage of seeking permission to request reconsideration.

H. Conclusion

In all the circumstances, we reaffirm the requests for relief set out in the October PCL Letters.

Yours truly,

FARRIS LLP

Per: 

Ludmila B. Herbst, Q.C.

LBH/trw
c.c.: Paul Miller
Ian Webb, Daniel Parlow, Shane Coblin, Devin Lucas and Kristin Apan
Registered Interveners in the BCUC Proceedings
Emily Kirkpatrick
Client