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September 12, 2012

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC
V6Z 2N3

Attention: Ms. Erica M. Hamilton, Commission Secretary

Dear Ms. Hamilton:

Re: FortisBC Energy Inc. ("FEI")

Application for a Certificate of Public Convenience and Necessity ("CPCN") for Constructing and Operating a Compressed Natural Gas ("CNG") Refueling Station at BFI Canada Inc. ("BFI") and

Application for Variance and Reconsideration and Revised Application for Rates for Fueling Service for BFI

Reply Submissions of FEI

In accordance with the Regulatory Timetable established in the British Columbia Utilities Commission Order No. G-112-12, FEI respectfully attaches its written reply submissions on the above noted matter.

If you require further information or have any questions regarding this submission, please contact Shawn Hill at 604-592-7840.

Yours very truly,

FORTISBC ENERGY INC.

Original signed by: Shawn Hill

For: Diane Roy

Attachments

cc (email only): Registered Parties

A. Introduction

1. On June 15, 2012, FortisBC Energy Inc. ("FEI") submitted an application (the "Application") to the British Columbia Utilities Commission (the "Commission") for reconsideration of certain aspects of Order C-6-12 (the "Reconsideration").

2. The Commission determined that the Reconsideration should proceed to Phase 2 and in Order G-112-12 the Commission established a timetable for the Phase 2 submissions. Further to Order G-112-12, the Application served as FEI's submissions upon which interveners were to reply.

3. BCSEA filed Phase 2 submissions in response to FEI's Application. BCSEA supports the orders sought by FEI, and therefore FEI has no reply to these submissions.

4. BCPSO did not file further submissions for Phase 2 of the proceeding, but instead relies on the submissions that it filed on July 4, 2012, in Phase 1 of this Reconsideration. While BCPSO's Phase 1 submissions generally stated agreement with the grounds for reconsideration that are described in FEI's Application (or takes no position), it raises a point of disagreement with FEI that FEI responds to in these reply submissions.

B. Reply to BCPSO

Order #3

5. In its Phase 1 submissions, which BCPSO relies on for Phase 2, BCPSO agreed with FEI that:

   (a) FEI was deprived of adequate notice and the opportunity to be heard on the issue of creating separate classes of service[1] and that this is an error of law;[2]

   (b) the creation of separate classes of service for CNG and LNG Service is one of the issues being considered in the AES Inquiry;[3] and

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[1] FEI notes that BCPSO uses the phrase "rate class" in its Phase 1 submissions (see para. 3 for example) to describe what FEI refers to as a "class of service", which is the phrase used in section 60(1)(c) of the *Utilities Commission Act*. FEI believes the phrase "class of service" is more appropriate to use in these circumstances than BCPSO's terminology as it is the phrase that is used in the *Utilities Commission Act*. Furthermore, it is common convention to describe different customer groups that are within the same "class of service" as "rate classes." The standard in section 60(1)(c) of considering separate classes of service as self-contained units does not apply to separate rate classes (such as residential, commercial and industrial) within the same class of service.

[2] BCPSO Phase 1 Submissions, para. 7.

(c) there was no evidentiary basis to support the Commission Panel's decision with respect to the creation of an LNG class of service in the BFI proceeding.[4]

6. On this basis, in its Phase 1 submissions BCPSO confirmed that FEI made out a *prima facie* case sufficient to warrant reconsideration of Order #3.[5]

7. FEI supported the Application, in part, by pointing out that the *Greenhouse Gas Reduction (Clean Energy) Regulation* (the "Regulation")[6] is a fundamental change in circumstances that further justifies the variation of Order #3 of Order C-6-12.[7] This is an additional (or alternative) ground to the primary basis for reconsideration described in paragraphs 16 to 30 of the Application that further supports the orders sought.

8. BCPSO disagrees with FEI's submissions with respect to the relevance of the Regulation. BCPSO submits as follows:

> BCPSO does not agree with FEI's submission on the significance of BC Reg. 102/12. This regulation was passed after the Commission Panel's decision in the BFI Proceeding was released. Clearly, BC Reg. 102/12 must be considered in future decisions. However, unless a regulation is expressly given retroactive effect, it is not appropriate for the Commission to revisit previous decisions simply because new legislation has come into effect.[8]

9. FEI's reply to this submission is that the relevance of the Regulation to Order #3 of Order C-6-12 has nothing to do with applying the Regulation retroactively in this proceeding as suggested by BCPSO. Rather, the significance of the Regulation to this proceeding is what it says about the intent of the legislature with respect to the issue of whether there should be separate classes of service within FEI for its CNG and LNG services.

10. In issuing Order #3 of Order C-6-12, the Commission acted under the provisions of the *Utilities Commission Act*, which is provincial legislation concerned with the subject matter of public utility regulation. The Regulation, which FEI submits supports its position regarding Order #3, is also provincial legislation. Both the Regulation and the *Utilities Commission Act* are concerned with the regulation of public utilities, albeit the Regulation is concerned with a more discrete topic within this subject matter. The

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3 BCPSO Phase 1 Submissions, para. 4.

4 BCPSO Phase 1 Submissions, para. 5.

5 BCPSO Phase 1 Submissions, para. 7.

6 B.C. Reg. 102/2012.

7 Application, paras. 31-37.

8 BCPSO Phase 1 Submissions, para. 6.

relevance of these facts is captured in the following passage from a leading text on statutory interpretation:

> Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in *R. v. Loxdale*:
>
> > Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.
>
> The provisions of each are read in the context of the others and consideration is given to whether they are part of a single scheme. The presumption of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act. Definitions in one statute are taken to apply in the others and any purpose statements in the statutes are read together.
>
> In referring to two or more statutes on the same subject the courts rarely inquire which statute was enacted first. When the issue does raise, however, it sometimes causes confusion. The correct view is that previously enacted legislation may be considered and relied on in the same manner and to the same degree as subsequently enacted legislation – and vice versa.[9] [Emphasis added.]

11. FEI's submission regarding the Regulation is based on an application of the principles described in these paragraphs. FEI's submission is that in applying the provisions of the *Utilities Commission Act*, the Commission must consider other enactments from the provincial legislature that deal with the same subject matter (i.e. the regulation of public utilities). The Commission should endeavour to interpret the *Utilities Commission Act* and regulate public utilities in a manner that gives coherence and consistent expression to all of the enactments of the legislature that deal with public utility regulation. Put another way, the Commission should strive to avoid making orders under the *Utilities Commission Act* that will frustrate the intent of the Regulation, and vice versa.

12. FEI's submission is that the Regulation demonstrates a legislative intent that CNG and LNG services should be contained within FEI's natural gas class of service, and not

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[9] R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), p. 412, excerpt attached.

separated into separate classes of service (FEI will not repeat those submissions here as they were made in the Application).[10] What the above passage from the text states is that this intention should be considered by the Commission in applying the provisions of the *Utilities Commission Act*. The Commission should strive to avoid an interpretation and application of the *Utilities Commission Act* that is inconsistent with the legislative intent demonstrated by the Regulation. In FEI's submission, by making Order #3, the Commission will be regulating FEI's CNG and LNG services in a manner that is inconsistent with the intent of the legislature as expressed by the Regulation.

13. For these reasons, FEI does not agree with BCPSO's submissions regarding the significance of the Regulation. The Regulation is relevant as an indication of legislative intent that bears directly on the class of service issue that is raised by Order #3 of Order C-6-12. The date upon which the Regulation came into effect, as the text makes clear, is irrelevant when considering legislative intent, and there is simply no issue of retroactivity raised in these circumstances.

Order #5(b)

14. BCPSO took no position in respect of Order #5(b) in its Phase 1 submissions and therefore FEI has no reply in respect of this order.

C. Conclusion

15. For the reasons stated in the Application and in its submissions, FEI respectfully submits that pursuant to section 99 of the *Utilities Commission Act* the Commission should reconsider and vary Order C-6-12 as follows:

(a) Order #3 of Order C-6-12 should be rescinded, and the Commission should direct that FEI is permitted to provide service to BFI within the natural gas class of service;

(b) if the Commission does not vary Order #3 to allow FEI to provide the service to BFI within the existing natural gas class of service, then the Commission should rescind Order #5(e) of Order C-6-12; and

(c) Order #5(b) of Order C-6-12 should be rescinded.

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[10] See FEI's Reconsideration Application, paras. 31 to 37, and Appendix A to the Application, paras. 14 to 26.

All of which is respectfully submitted.

Dated: September 12, 2012

[original signed by David Curtis]

David Curtis
Counsel for FortisBC Energy Inc.

Sullivan on the Construction of Statutes

Fifth Edition

by

Ruth Sullivan

Professor of Law
University of Ottawa

LexisNexis®

When courts examine a provision in the context of the statute book as a whole, they are concerned primarily with two things. One is avoiding conflict with the provisions of other statutes. It is presumed that the legislature does not intend to contradict itself; it is presumed to create coherent schemes. Therefore, interpretations that avoid the possibility of conflict or incoherence among different enactments are preferred.[3]

The other thing courts look for is patterns. Patterns may be substantive, reflecting recurring legislative preferences, or formal, reflecting recurring habits of expression. When a pattern appears frequently throughout the statute book, a departure from it may be significant. The more established and striking the pattern, the more persuasive the inference that can be drawn when the legislature varies or disregards it.

Statutes on the same subject (statutes in pari materia). Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in *R. v. Loxdale*:

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.[4]

The provisions of each are read in the context of the others and consideration is given to whether they are part of a single scheme. The presumptions of coherence and consistent expression apply as if the provisions of these statutes were part of a single Act. Definitions in one statute are taken to apply in the others and any purpose statements in the statutes are read together.

In referring to two or more statutes on the same subject the courts rarely inquire which statute was enacted first. When the issue does arise, however, it sometimes causes confusion.[5] The correct view is that previously enacted legislation may be considered and relied on in the same manner and to the same degree as subsequently enacted legislation — and vice versa.[6]

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[3] See, for example, *Turner v. Carosella* (1912), 7 D.L.R. 818 (Alta. Dist. Ct.); *R. v. Croft*, [1979] N.S.J. No. 810, 35 N.S.R. (2d) 344 (N.S.C.A.).

[4] (1758), 1 Burr. 445, at 447, 97 E.R. 394. See *Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] S.C.J. No. 92, [1981] 2 S.C.R. 437, at 9, (S.C.C.) *per* Estey J.: "While each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes, sometimes assistance in determining the meaning of the statute can be drawn from similar or comparable legislation within the jurisdiction or elsewhere." See also *Fishing Lake Metis Settlement v. Metis Settlements Appeal Tribunal Land Access Panel*, [2003] A.J. No. 563, 15 Alta. L.R. (4th) 8, at 36 (Alta. C.A.); *Armbrust v. Ferguson*, [2001] S.J. No. 703, at para. 39ff (Sask. C.A.); *Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd.*, [2001] A.J. No. 864, at paras. 21-22 (Alta. C.A.).

[5] See the dissenting judgment of Pratte J. in *Township of Goulbourn v. Ottawa-Carleton (Regional Municipality)*, [1979] S.C.J. No. 118, [1980] 1 S.C.R. 496 at 23 (S.C.C).

[6] *Ibid.*, at 15-16; *Hayes v. Mayhood*, [1959] S.C.J. No. 36, [1959] S.C.R. 568, at 504 (S.C.C.).