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BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-67-13

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by FortisBC Energy Inc. for
Approval of the Rate Treatment of Expenditures
under the Greenhouse Gas Reductions (Clean Energy) Regulation and
Prudency Review of Incentives under the 2010 – 2011 Commercial NGV Demonstration Program

BEFORE: L.F. Kelsey, Commissioner April 30, 2013

O R D E R

WHEREAS:

A. On May 14, 2012, the Lieutenant Governor in Council approved the Greenhouse Gas Reduction (Clean Energy) Regulation, B.C. Reg.102/2012 (the GGRR);

B. On August 21, 2012, FortisBC Energy Inc. (FEI) applied to the British Columbia Utilities Commission (the Commission), pursuant to sections 59 to 61, and 90 of the *Utilities Commission Act*, for approval of deferral accounts and the accounting and rate treatment methodology for the three prescribed undertakings established by the GGRR (the Application);

C. FEI also seeks an order from the Commission that past natural gas vehicle (NGV) incentive expenditures totaling $5.6 million (the 2010-2011 Incentives), were prudently incurred and can be recovered through rates from FEI's non-bypass natural gas customers. FEI proposes that the 2010-2011 Incentives be considered within the $62 million expenditure cap that is established in section 2(1)(c) of the GGRR;

D. By Order G-44-12 dated April 12, 2012, the Commission approved the creation of a NGV Incentives deferral account on the basis that it attracts no return;

E. The Commission determined the Application should be reviewed in three phases:

- Phase 1 – "Prescribed Undertaking 1: Vehicle Incentives or Zero Interest Loans";
- Phase 2 – "Prescribed Undertaking 2: CNG Stations & Prescribed Undertaking 3: LNG Stations";
- Phase 3 – "Prudence of Past Incentives" and associated cost recovery.

F. By Order G-154-12 dated October 18, 2012, the Commission established a written hearing process for the review of Phase 3 of the Application;

. . . /2

G. By Order G-161-12 dated October 29, 2012, the Commission approved a non-rate base deferral account (the NGT Incentives Account) to capture all grants and costs, including a portion of the application costs related to prescribed undertaking 1 for the period until December 31, 2013. The account is to be transferred to rate base, effective January 1, 2014, will continue to capture the actual incentives granted by year for 2014 and onwards, and be amortized over a 10 year period into the delivery rates of all non-bypass natural gas customers;

H. The Commission received written submissions on Phase 3 from FEI, the Commercial Energy Consumers Association of British Columbia, the B.C. Sustainable Energy Association and the British Columbia Pensioners' and Seniors' Organization;

I. The Commission has reviewed the Application, considered the evidence and the submissions on Phase 3.

NOW THEREFORE pursuant to sections 59-61 of the *Utilities Commission Act*, the Commission orders as follows:

1. The $5.6 million of 2010-2011 Incentives were prudently incurred and are recoverable through rates from FEI's non-bypass natural gas customers.

2. FEI is directed to transfer the $5.6 million from the NGV Incentives deferral account to the NGT Incentives Account. Following the transfer, the NGV Incentives deferral account is to be closed.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of April, 2013.

BY ORDER

Original signed by:

L.F. Kelsey
Commissioner

Attachment

IN THE MATTER OF

AN APPLICATION BY FORTISBC ENERGY INC. FOR APPROVAL OF RATE TREATMENT OF EXPENDITURES UNDER THE GREENHOUSE GAS REDUCTIONS (CLEAN ENERGY) REGULATION AND PRUDENCY REVIEW OF THE INCENTIVES UNDER THE 2010-2011 COMMERCIAL NGV DEMONSTRATION PROGRAM

Phase 3
REASONS FOR DECISION

April 30, 2013

BEFORE:

L.F. Kelsey, Panel Chair / Commissioner

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EXECUTIVE SUMMARY

On August 21, 2012, FortisBC Energy Inc. (FEI) submitted an application to the British Columbia Utilities Commission (Commission) for approval of the Rate Treatment of Expenditures under the Greenhouse Gas Reductions Regulation (GGRR; Regulation) and Prudency Review of Incentives under the 2010 - 2011 Commercial Natural Gas Vehicles (NGV) Demonstration Program (together, the Application).

On September 14 and September 18, 2012 respectively, the Commission issued Orders G-125-12 and G-127-12 which determined that the Application should be reviewed in three phases:

Phase 1 – "Prescribed Undertaking 1: Vehicle Incentives or Zero Interest Loans";
Phase 2 – "Prescribed Undertaking 2: CNG Stations & Prescribed Undertaking 3: LNG Stations";
Phase 3 – "Prudence of Past Incentives" and associated cost recovery.

The preliminary regulatory timetables established in these Orders incorporated a Streamlined Review Process (SRP) to address Phases 1 and 2 of the Application. Pursuant to Order G-154-12 issued on October 18, 2012, Phase 3 of the Application was to be reviewed through a written hearing process.

Following an SRP held on October 24, 2012, the Commission issued Order G-161-12, which approved the grant related requests and other matters related to Phase 1 and Phase 2 of the Application.

Phase 3 of the Application deals with the "Prudence of Past Incentives" and associated costs, specifically FEI's commitment to approximately $5.6 million under its Commercial NGV Demonstration Program (the 2010-2011 Incentives). This Decision deals with Phase 3 matters.

For the Reasons provided in this Decision, the Commission Panel determines that:

- There is insufficient evidence on the record in this proceeding to persuade the Panel that the presumption of prudence has been overcome in the case of the 2010-2011 Incentives;
- The same accounting treatment that is approved in Order G-161-12 for prescribed undertaking 1 will also apply to the 2010-2011 Incentives;
- FEI is to include the $5.6 million for the 2010-2011 Incentives as part of the $62 million funding limit established for prescribed undertaking 1 under the GGRR. In other words, FEI is not permitted to spend more than $56.4 million in any further funding in this area;
- FEI is to transfer the $5.6 million for the 2010-2011 Incentives from the old NGV Incentives deferral account approved by Order G-44-12, to the NGT Incentives Account approved by Order G-161-12. Subsequently, the NGV Incentives deferral account is to be closed following the transfer.

1.0 INTRODUCTION

1.1 The Regulatory Review Process

On August 21, 2012, FortisBC Energy Inc. (FEI) filed an application with the British Columbia Utilities Commission (Commission; BCUC) for approval of the Rate Treatment of Expenditures under the Greenhouse Gas Reductions Regulation (GGRR; Regulation) and Prudency Review of Incentives under the 2010 – 2011 Commercial Natural Gas Vehicles (NGV) Demonstration Program (together, the Application).

The Commission previously issued Orders G-125-12 and G-127-12 on September 14 and September 18, 2012, and determined that the Application should be reviewed in three phases:

Phase 1 – "Prescribed Undertaking 1: Vehicle Incentives or Zero Interest Loans";
Phase 2 – "Prescribed Undertaking 2: CNG Stations & Prescribed Undertaking 3: LNG Stations";
Phase 3 – "Prudence of Past Incentives" and associated cost recovery.

The preliminary regulatory timetables in the above Orders incorporated an SRP to review Phases 1 and 2 of the Application while Phase 3 was to be reviewed through a written hearing process. On September 14 and September 18, 2012 respectively, the Commission issued Orders G-125-12 (for Phase 1) and G-127-12 (for Phase 2). The preliminary regulatory timetables established in the two Orders incorporated an SRP to review Phases 1 and 2 of the Application. On October 18, 2012, the Commission issued Order G-154-12 for Phase 3 of the Application providing for a written hearing process for that Phase.

The SRP was held on October 24, 2012. On October 29, 2012, the Commission issued Order G-161-12 which approved the grant related requests for Phase 1 and Phase 2 of the Application with reasons to follow. On April 11, 2013, the Commission issued Order G-56-13 which provides the Reasons for Decision for the grant related requests addressed in Order G-161-12, and the Commission's determinations on the non-grant related issues that Order G-161-12 contemplated the Commission would also address by further Order. These Reasons deal only with Phase 3 matters.

The following parties registered as Interveners in Phase 3:

- Commercial Energy Consumers Association of British Columbia (CEC)
- B.C. Sustainable Energy Association (BCSEA)
- British Columbia Pensioners' and Seniors' Organization (BCPSO)
- The Ministry of Energy, Mines and Natural Gas (the Ministry)
- Ferus Inc., LNG Division (Ferus LNG)
- Ledcor Resources & Transportation LP (LEDCOR)

FEI filed its Final Submission on Phase 3 on November 30, 2012. BCPSO, BCSEA, and CEC filed their Final Submissions on December 14, 2012, and FEI filed its Reply Submission on December 21, 3012.

1.2 The Application and Orders Sought

Phase 3 of the Application deals with the "Prudence of Past Incentives" and associated costs, specifically FEI's commitment to approximately $5.6 million under its Commercial NGV Demonstration Program (the 2010-2011 Incentives). The customers who received the 2010-2011 Incentives, along with the dates and amounts of FEI NGV payments, are described in Table 1 below:

Table 1 – FortisBC Energy Inc. NGV Payments

Customer	Date	Amount
City of Surrey	30-Sep-10	$ 13,350
Waste Management	15-Dec-10	$ 401,780
Vedder Transport	24-Dec-10	$ 2,196,650
Waste Management	15-Apr-11	$ 401,780
Kelowna School District	15-Apr-11	$ 181,643
Kelowna School District	29-Jul-11	$ 181,643
Vedder Transport	12-Dec-11	$ 878,660
Vedder Transport	23-Feb-12	$ 571,129
Vedder Transport	24-Apr-12	$ 571,129
Vedder Transport	12-Jul-12	$ 175,732
Total:		**$ 5,573,496**

(Source: Exhibit B-15, BCUC IR 2.2.2)

Specifically, FEI seeks approval of the following:

- That the 2010-2011 Incentives were prudently incurred and are recoverable through rates from FEI's non-bypass natural gas customers.
- That the 2010-2011 Incentives will be subject to the accounting and rate treatment that FEI has described in Section 5 of the Application for all expenditures incurred under the prescribed undertaking established by section 2(1) of the GGRR (Prescribed Undertaking 1) and as approved by BCUC Order G-161-12 for Prescribed Undertaking 1 expenditures.

1.3 Legislative Framework

Sections 58-60 of the *Utilities Commission Act* (*UCA*) provide the Commission with its rate setting jurisdiction over public utilities. Subsection 60(1) provides in part:

> *"60(1) In setting a rate under this Act*
> *(a) the commission must consider all matters that it considers proper and relevant affecting the rate,*
> *(b) the commission must have due regard to the setting of a rate that*
> *(i) is not unjust or unreasonable within the meaning of section 59,*
> *(ii) provides the public utility for which the rate is set a fair and reasonable return on any expenditure made by it to reduce energy demands,*
> *(iii) encourages public utilities to increase efficiency, reduce costs and enhance performance,*

> …
> *(c) if the public utility provides more than one class of service, the commission must*
> *(i) segregate the various kinds of service into distinct classes of service,*
> *(ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and*
> *(iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates set for any other unit."*
> …

Subsection 59(5) provides that a rate is "unjust" or "unreasonable" if the rate is:

> *"(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,*
> *(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or*
> *(c) unjust or unreasonable for any other reason."*

Section 18 of the *CEA* modifies the Commission's rate setting powers under the *UCA* where a public utility is carrying out a prescribed undertaking as defined in that section. In addition it prevents the Commission from exercising a power under the *UCA* that would "directly or indirectly" prevent a public utility "from carrying out a prescribed undertaking."

Subsection 18(1) of the *CEA* defines a "prescribed undertaking" as follows:

> *"18(1) In this section, "prescribed undertaking" means a project, program, contract or expenditure that is in a class of projects, programs, contracts or expenditures prescribed for the purpose of reducing greenhouse gas emissions in British Columbia."*

Subsections 18(2) and (3) provide:

> *"18(2) In setting rates under the Utilities Commission Act for a public utility carrying out a prescribed undertaking, the commission must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking."*
>
> *"18(3) The commission must not exercise a power under the Utilities Commission Act in a way that would directly or indirectly prevent a public utility referred to in subsection (2) from carrying out a prescribed undertaking."*

Under subsections 18 (4) and (5), a public utility must report on the prescribed undertakings to the Minister of Energy, Mines and Natural Gas (the Minister). The Minister has the responsibility of establishing the reporting requirements, both in terms of timing and the information required. The subsections specifically provide as follows:

> *"18(4) A public utility referred to in subsection (2) must submit to the minister, on the minister's request, a report respecting the prescribed undertaking."*

"18(5) A report to be submitted under subsection (4) must include the information the minister specifies and be submitted in the form and by the time the minister specifies."

On May 14, 2012, the Lieutenant Governor in Council approved and ordered the GGRR which established three prescribed undertakings for the purposes of section 18 of the *CEA*. The GGRR is in effect until March 31, 2017, but does not specify a start date.

1.4 Background and Other Relevant Commission Decisions

A number of proceedings and Commission Decisions that preceded this review have raised issues regarding FEI's 2010-2011 Natural Gas for Transportation (NGT) business.

i) Energy Efficiency and Conservation (EEC)

On April 16, 2009, the Commission issued the *EEC Decision* in which found that there was "insufficient evidence with respect to the nature and scope of the proposed program, and accordingly reject[ed] the Innovative Technologies, NGV and Measurement program expenditures at this time."[1] The Commission had also indicated that FEI (then, Terasen Gas Inc. or TGI)[2] may wish to bring forward projects in this program area at a later time for consideration by the Commission as they become more fully developed.[3]

The Project described in the "Innovative Technologies, NGV and Measurement program" area included NGV-Natural Gas Vehicles projects and was described as "utilizing liquefied natural gas in heavy-duty vehicle applications or utilizing renewable or hydrogen in combination with natural gas in specific transportation applications." The notion of providing vehicle grants to customers not otherwise eligible for grants under Rate Schedule 6 through a vehicle grant fund was also raised as an issue. The total amount of the approval sought in this program area was $3.0 million and was expressly rejected in Commission Order G-36-09.

ii) 2010-2011 Revenue Requirement Application (2010-2011 RRA)

In its 2010-2011 RRA, FEI (then TGI) included Natural Gas Vehicle offerings under its "Alternative Energy Solutions" which were separate and distinct from its "Energy Efficiency and Conservation Programs." FEI indicated at that time that "Innovative Technologies" are an EEC program (i.e. not one of the Alternative Energy Solutions) whereby customers will receive incentives for Hydronic Heating Systems, Integrated Energy Systems, Solar Thermal and Ground Source Heat Pumps.

[1] *In the Matter of Terasen Gas Inc. and Terasen Gas (Vancouver Island) Inc. Energy Efficiency and Conservation Programs Application;* Decision and Order G-36-09, April 16, 2009.
[2] In the *EEC Decision*, TGI and Terasen Gas (Vancouver Island) Inc. were collectively referred to as Terasen.
[3] *EEC Decision*, p. 26.

The 2010-2011 RRA was the subject of a Negotiated Settlement Agreement (NSA) which was approved by the Commission in Order G-141-09.[4] In advance of the settlement negotiations, the Commission issued a document prepared by the Commission Panel titled "Issues of Particular Concern to the Commission Panel." The funding of the NGV program by natural gas ratepayers was one of the issues of concern identified by the Commission Panel and addressed in section 14 of "Part II –Agreed Changes from the Application" of the NSA. Section 14 identified the Commission Panel's concern relating to NGVs as follows:

> "14. Natural Gas for Vehicles ("NGV")"

The Commission Issue No. 2 in the Commission Panel's "Issues of Particular Concern to the Commission Panel" stated:

> "Natural Gas Vehicles ("NGV") – if NGV is to proceed why should the natural gas ratepayer fund this initiative rather than Terasen's non-regulated businesses or the competitive market?"

Section 14 then describes the agreement that was reached by the parties on the NGV issue. In essence, FEI withdrew certain requests regarding NGVs on a without prejudice basis to its right to bring forward similar requests in the future[5].

iii) Agreement with Waste Management Canada Corporation (WM Agreement)

On January 14, 2011, the Commission issued Order G-6-11 approving the WM Agreement on an interim basis but also questioned whether FEI (then TGI) had approval to make the incentive payments to Waste Management outside those contemplated in existing Rate Schedules. The Commission expressed the view that "…Terasen is at risk of not being able to recover incentive payments to Waste Management in its rates."[6]

At that time, the Commission had proceeded with a review of the WM Agreement on a narrow basis which does not consider EEC incentives. As a result, the Commission determined that all references to EEC incentive grants and Vehicle Reimbursement must be removed from the WM Agreement before it is approved as a Tariff Supplement.

iv) Energy Efficiency and Conservation Programs 2010 Annual Report (2010 EEC Annual Report)

During 2010 and 2011, FEI committed to a total of $5.587 million in incentives for NGVs. In its 2010 EEC Programs Annual Report, FEI and FEVI (the Companies) took the position that they had acted within the guidelines and approvals of past regulatory decisions for EEC funding for NGVs. The Companies took the further position that the use of "Innovative Technologies Program" area EEC funding for NGV initiatives is consistent with past Commission Orders.[7]

[4] *In the Matter of An Application by Terasen Gas Inc. for Approval of 2010 and 2011 Revenue Requirements and Delivery Rates*; Order G-141-09, November 26, 2009 (*TGI 2010-2011 RRA Decision*).
[5] *TGI 2010-2011 RRA Decision* p. 10
[6] *In the Matter of An Application by Terasen Gas Inc. for Approval of a Service Agreement for Compressed Natural Gas Service and for Approval of General Terms and Conditions for Compressed Natural Gas and Liquefied Natural Gas Service;* Decision and Order G-6-11, January 14, 2011 (*Waste Management Interim Decision*) at p. 5.
[7] 2010 EEC Annual Report at pp. 201-203.

Given that the 2010 EEC Annual Report was a compliance filing to Order G-36-09,[8] the Companies asked the Commission to address the Companies' use of EEC funds as incentives for NGV's. In response, the Commission initiated the NGV Incentives Review, discussed next.

v) NGV Incentives Review

By letter dated April 18, 2011, the Commission initiated the NGV Incentives Review to determine the appropriate use of the Companies' EEC funds as NGV incentives. The review considered the following three questions:

1. Was it appropriate for the Companies to change the scope of the Innovative Technologies program to include NGV purchase incentives via the EEC Stakeholder Group and the EEC Program 2009 Report (filed March 31, 2010)?
2. If the scope of the Innovative Technologies program was appropriately changed, does the associated NGV purchase incentive funding become: (a) a Commission-approved expenditure; or (b) an approved EEC expenditure; or (c) an expenditure eligible for cost recovery from rate payers in whole or in part?
3. If NGV purchase incentive funding is found to be inappropriately included in the Innovative Technologies program, should incentive payments already made by the Companies be eligible for cost recovery from rate payers in whole or in part?

In the letter, the Commission stated its concern that the Companies believed that it was appropriate to significantly change the scope of an approved EEC program's content and activities to include an initiative that was specifically excluded in prior Decisions and Orders (G-36-09, G-140-09 and G-141-09) through a compliance filing such as the 2010 EEC Annual Report[9].

The Commission's decision in the NGV Incentives Review was issued on August 15, 2011. With respect to the first question, the Commission decided that FEI did not have approval to use EEC monies to provide incentives for NGVs. As a result, the Commission did not address the second question.

With respect to the third question, the Commission found that the NGV program was a load-building exercise, and does not meet the definition of a "demand-side measure" as defined in the *Clean Energy Act* and used in the *Utilities Commission Act*[10].

[8] *EEC Decision*.
[9] Commission Letter L-30-11.
[10] *In the Matter of FortisBC Energy Inc and FortisBC Energy (Vancouver Island) Inc. Energy Efficiency and Conservation Program Natural Gas Incentives Review;* Decision and Order G-145-11, August 15, 2011 (*NGV Incentives Review Decision)* at pp. 8-11.

vi) FEU 2012-2013 Revenue Requirement and Natural Gas Rate Application Decision

In the last RRA for the FortisBC Energy Utilities, the Commission approved the creation of the NGV Incentives deferral account. FEI included the $5.6 million Incentives in this deferral account with a recovery period to be determined pending a future prudency review. The Commission determined that this deferral account was to attract no return[11].

vii) GGRR Phase 1 and 2 Decision

The Commission has recently issued its Reasons regarding Phase 1 and 2 of the GGRR proceeding on April 11, 2013.[12] In that decision, the Commission provided its interpretation of the approval term of the GGRR since the Regulation did not specify a start date for the prescribe undertakings. The Commission determined that the first year of the undertaking is from April 1, 2011 to March 31, 2012.[13]

2.0 VIEWS OF FORTISBC ENERGY INC.

2.1 Proposed Rate Treatment and Cost Recovery

FEI submits that the 2010-2011 Incentives of $5.6 million are similar in nature to those that will be issued under Prescribed Undertaking 1 and therefore similar financial treatment is appropriate. FEI submits that the benefits from the incentives were intended to flow to all non-bypass customers and therefore recovery of the incentives amounts from all non-bypass customers is appropriate. (FEI Final Submission, p. 20)

FEI also submits that it intends to count any recoveries approved from the 2010-2011 Incentives towards the $62 million funding limited established by the GGRR for Prescribed Undertaking 1, such that, if the entire $5.6 million is approved in rates, it will not spend more than $56.4 million in further funding. (Ex. B-1, p. 44-45)

2.2 Prudency of Expenditures

FEI submits that it had a reasonable and good faith belief that it had approval under previous Commission orders to issue the incentives as EEC expenditures, and that there is no evidence in this proceeding that can be pointed to that rebuts the presumption of prudence. FEI submits that the expenditures were reasonable under the circumstances that were known to FEI at the time they were made and were therefore prudently incurred. FEI also believes that in issuing the incentives, it was exercising a discretion contemplated in the *EEC Decision* to introduce new programs within the approved EEC Innovative Technologies Program area that had been approved by Order G-141-09. (FEI Final Submission, pp. 1-3, 7)

[11] *In the Matter of an Application by the FortisBC Energy Utilities (comprising FortisBC Energy Inc., FortisBC Energy Inc. Fort Nelson Service Area, FortisBC Energy (Whistler) Inc., and FortisBC Energy (Vancouver Island) Inc.) for Approval of 2012-2013 Natural Gas Rates;* Decision and Order G-44-12, April 12, 2012 (*2012-2013 FEU RRA Decision*), at pp. 113-114.
[12] *In the Matter of An Application by the FortisBC Energy Inc. for Approval of Rate Treatment of Expenditures under the Greenhouse Gas Reductions (Clean Energy) Regulation and Prudency Review of Incentives under the 2010-2011 Commercial NGV Demonstration Program,* Decision and Order G-56-13, April 11, 2013 (*GGRR Phase 1 and 2 Decision*).
[13] *GGRR Phase 1 and 2 Decision at* p. 19

FEI submits that the legal test, under the two-stage prudency reviews for public utilities expenditures[14], first requires a party who is challenging FEI's presumption of prudence to provide evidence that would rebut the presumption. FEI submits that under this stage one review, the presumption of prudence is not rebutted for the following reasons:

- the absence of prior approval does not rebut the presumption of prudence;
- the amounts issued were appropriate in the circumstances;
- the incentives will provide a delivery margin benefit for customers;
- the incentives will provide long term benefits;
- the incentives will produce greenhouse gas (GHG) reductions;
- complementary benefits;
- the past and current legislative contexts support the recovery of the expenditures.

(FEI Final Submission, pp. 7-15)

Further, FEI submits that if the Commission does not agree with FEI's submissions regarding stage one of the prudency review then as part of stage two of the review, FEI submits that its decision to issue the incentives was reasonable under the circumstances that were known to, or ought to have been known to, FEI at the relevant times. Specifically, FEI submit that at the time the incentives were committed to the respective customers:

- the incentive amounts issued were appropriate at the time;
- anticipated delivery margin benefits;
- anticipated long term benefits;
- anticipated GHG benefits;
- complementary benefits;
- the legislative context.

(FEI Final Submission, pp. 16-19)

3.0 VIEWS OF INTERVENERS

The CEC and BCSEA support FEI's Application, while the BCPSO argues against the recovery of FEI's 2010-2011 Incentives.

[14] *Enbridge Gas Distribution Inc. vs. Ontario (Energy Board)*, [2006] O.J. No. 1355 (Ont. C.A.) (*Enbridge Gas*)

The CEC reiterates its strong and steady support for FEI initiatives aimed at transforming the NGV market and therefore supports the recovery of the $5.6 million incentive amounts from all non-bypass customers of FEI without offsetting these amounts in the GGRR prescribed undertaking. The CEC further submits that the incentives were a legitimate part of FEI's EEC funding and agrees with FEI that there is no evidence on record to rebut the presumption of prudence. The CEC also discusses six types of concerns which might be used to rebut the presumption of prudence: 1) flawed procedure; 2) flawed policy alignment; 3) flawed scope; 4) flawed expectations of outcomes; 5) flawed execution, and 6) flawed results. It provides its reasons for dismissing each of the concerns.

The CEC submits that it would be patently unfair, unjust and unreasonable rate making for customers of FEI to accept the benefits flowing from the NGT market development and deny recovery of the costs of the incentives offered to develop those benefits. The CEC supports the notion that the NGT market in BC would not have occurred as effectively without the FEI offered incentives. (CEC Final Submission)

The BCSEA submits that with benefit of hindsight, the evidence establishes that the 2010-2011 Incentives Expenditures:

- will reduce GHG emissions;
- will reduce conventional air pollutants;
- were in appropriate amounts;
- have a positive net present value (NPV) due to delivery margin benefit;
- are supported by the legislative policy and government energy objectives.

Therefore, the BCSEA submits that FEI should be entitled to recover the $5.6 million in rates. The BCSEA also submits that the 2010-2011 incentives were prudent at the time they were made because the incentives:

- would reduce GHG emissions;
- would reduce conventional air pollutants were in appropriate amounts;
- would have a positive NPV due to delivery margin benefit;
- were supported by the legislative policy and government energy objectives in place at the time.

(BCSEA Final Submission)

The BCPSO submits that the Commission lacks the jurisdiction to approve the 2010-2011 Incentives, but does have the authority to determine what assets constitute utility property that is used to provide utility service. The BCPSO argues that in order for rates to be just and reasonable, the rate must be appropriately tied to the provision of service. As such, it does not consider the 2010-2011 Incentives to be tied to the utility's acquisition of property and is not necessary to provide utility service. Furthermore, the 2010-2011 Incentives are not expenditures made to increase the utility's efficiency, reduce its costs, or enhance its performance, rather they are a load-building exercise. Regarding the issue of prudency of the Incentives, BCPSO's main argument appears to be that FEI had not established that the Incentives provided were the minimum required to induce the recipients to invest in NGVs.

4.0 ISSUES AND DETERMINATIONS

4.1 Prudency

For the reasons below, **the Panel finds that there is insufficient evidence on record in this proceeding to persuade the Panel that the presumption of prudence has been overcome in the case of the 2010-2011 Incentives.**

In assessing the prudency of the 2010-2011 Incentives, the Panel recognizes the appropriateness of applying the 2 stage prudency review process, established in *Enbridge Gas*. In the normal course of business, a utility is entitled to a presumption of prudence. It is during the first stage of a prudency review that the party who challenges this presumption has the onus of pointing to evidence that would rebut the presumption of prudence. In this case, the Panel notes that there are two parties supporting FEI's position and one party challenging the applicant's position.

The Panel finds that while the *EEC Decision* had explicitly rejected $3 million relating to NGVs at the time, the Commission in its decision also indicated that projects in this program area could be considered in the future with a proposal by FEI. Also, TGI's 2010-2011 RRA NSA suggested that certain requests regarding NGVs could be brought forward in the future by FEI. However, the Panel does note that despite the invitations for future consideration, FEI did not bring any specific NGV programs to the Commission for approval (as at the date of the Application). Had FEI brought specific incentive expenditures for approval by the Commission, the ambiguity on the prudency of these expenditures may have been clarified at the onset. The Panel does agree with FEI, however, that the absence of prior approval may not necessarily rebut the presumption of prudence and finds that it does not in this case.

Concerning BCPSO's submissions, the Panel does not agree that the Commission lacks the jurisdiction to approve the NGV incentive expenditures. More broadly speaking, under section 23 of the *Utilities Commission Act (Act)* the Commission has the power to oversee the general supervision of public utilities. More specifically, section 23(e) in combination with sections 59-61 of the *Act* requires the Commission to oversee and approve the setting and filing of rates. As such, the items to be recovered in rates are clearly within the jurisdiction of the Commission by default. Further, while the Panel does recognize that the 2010-2011 Incentives may not be considered utility assets or necessary to provide utility service, there are, however, offsetting benefits (in the form of increased delivery margin benefits) that will accrue to the natural gas ratepayers as a result of these incentive expenditures. The BCPSO, in its Final Submission, did not appear to discuss the link between the recipients of the benefits and the costs involved to obtain those benefits. The BCPSO asks the Commission to consider only those benefits that are reasonably certain to accrue but make no concrete calculations as to why it believes FEI's estimates are speculative. As a result, BCPSO's position on the treatment of the related delivery margin benefits is unclear to the Panel. The Panel is of the view that it would be unfair for the natural gas ratepayers to receive the associated benefits without having to bear the costs through rates to obtain those benefits.

Although the BCPSO argues that the incentive payments were not prudent, it does not distinguish which arguments were relevant to either stage one or stage two of the 2-stage prudency review process. More specifically, it would have been helpful to the Panel for BCPSO to pinpoint the evidence that would suggest that the presumption of prudence had been overcome in stage one.

Finally, the Panel finds that the general premises underlying the $5.6 million Incentives, issued by FEI under the Commercial NGV Demonstration Program, are consistent with and generally supportable by the same policy considerations that underpin the prescribed undertakings for vehicle incentives in the GGRR.

Given the Panel's determination that the presumption of prudence has not been overcome in the stage one prudency review process, the Panel finds that it is unnecessary to address the second stage of the prudency review.

4.2 Proposed Rate Treatment

The Panel believes that the same accounting treatment that is approved in Order G-161-12 for prescribed undertaking 1, should also apply to the $5.6 million 2010-2011 Incentives.

In the *GGRR Phase 1 and 2 Decision*, the Commission has interpreted the first year for the prescribed undertakings to be April 1, 2011 to March 31, 2012. FEI's breakdown of the $5.6 million 2010-2011 Incentives, listed in Table 1 of this Decision, clearly indicates that some of the 2010-2011 Incentives were paid out prior to the start date of April 1, 2011. The Panel notes that while interveners have provided their views on the prudency of the expenditures, they did not specifically provide submissions on the specific rate treatment for those expenditures in the event that the Commission found the expenditures to be prudent.

While some of the expenditures were made prior to the commencement date for year 1 of the prescribed undertakings, the Panel is nonetheless satisfied that the expenditures were made with the belief that they were aligned with the government's intent at the time they were made. Therefore, rather than to burden ratepayers with an additional $5.6 million in expenditures, which would otherwise become an incremental cost to ratepayers, **the Panel finds that the most fair and reasonable treatment is to include these expenditures as part of the $62 million funding limit established for prescribed undertaking 1 under the GGRR**. As a result, **FEI is not permitted to spend more than $56.4 million in any further funding in this area**. The Panel finds that the 2010-2011 incentives are consistent with the provisions of the GGRR and prescribed undertaking 1 and therefore should be given the same rate treatment. Further, the recipients of these incentive grants must be subject to the same conditions as established in section 2(1) of the GGRR (prescribed undertaking 1) and as approved by Order G-161-12.

FEI is directed to transfer the $5.6 million for the 2010-2011 Incentives from the old NGV Incentives deferral account approved by Order G-44-12 to the NGT Incentives Account approved by Order G-161-12. The NGV Incentives deferral account is to be closed subsequent to the transfer.