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Natural Gas Vehicles in British Columbia: At the Intersection of Public Policy and Utility Regulation

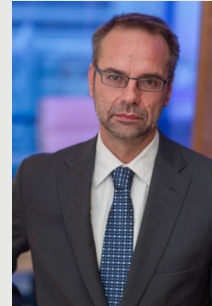
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FortisBC is the dominant natural gas service provider in British Columbia, serving nearly a million customers in over 125 communities in the province.¹ It is a public utility regulated by the British Columbia Utilities Commission (BCUC), under the Utilities Commission Act (UCA).

In a series of applications since 2009 FortisBC has sought BCUC orders allowing it to develop and expand service to natural gas-powered vehicles (NGVs).² The BCUC's responses to those applications have been marked by a consistent concern to ensure no incremental burden on FortisBC's "non-bypass" customers - those mostly smaller residential and commercial customers with no practical alternative to monopoly natural gas service. This concern has been maintained even as the Province has expressed increasing levels of commitment to NGV fuel-switching as a means to further its greenhouse gas (GHG) reduction policies.³ That is, subject to the specific requirements of recent enactments, the BCUC has not embraced the policy objective of expanding NGV service, at least at the potential cost to FortisBC's non-bypass customers. This case comment looks at recent NGV decisions of the BCUC against the backdrop of evolving NGV policy and concludes that it has done no more than apply the traditional regulatory framework, and that any failure to advance the provincial policy objectives beyond that framework was quite predictable.

BFI Application

On February 29, 2012 FortisBC applied to the BCUC for approval to construct and operate a compressed natural gas fuelling station at the premises of a customer, BFI Canada Inc (BFI). BFI operates a fleet of waste collection



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¹ Through three companies, FortisBC Energy Inc., FortisBC Energy (Vancouver Island) Inc, and FortisBC Energy (Whistler) Inc, collectively referred to in this case comment as FortisBC. A sister company also provides regulated electricity service in British Columbia.

² See for example BCUC Orders G-65-09, regarding a pilot program to provide liquefied natural gas service; G-128-11, regarding the establishment of a compressed natural gas fuelling station; and G-88-13, regarding a proposal to establish the 2009 pilot on a permanent basis.

³ The displacement of gasoline by natural gas results in a reduction in GHG emissions, all else being equal.

trucks powered by natural gas. FortisBC also applied for approval of the rates to be charged to the customer. After a short written process, the BCUC approved the construction of the facilities, but flatly refused to approve the proposed NGV rates on the basis that they failed to recover the full cost of service.⁴ Of particular import was the fact that under the UCA, the sale of compressed or liquefied natural gas is not a public utility service, except insofar as it is provided by an entity already a public utility.⁵ Had FortisBC not already been a regulated public utility, it would not have needed any BCUC approvals to establish the new NGV service. In these circumstances, the Commission's concern was to ensure that FortisBC's non-bypass customers faced no more cost or risk exposure than if FortisBC's NGV service had in fact been unregulated. A further apparent concern of the BCUC was fairness to unregulated would-be competitors of FortisBC.⁶

Provincial Natural Gas Policy and GHG Regulation

More or less contemporaneously with the hearing of the BFI application, British Columbia announced a new policy focus on the development of natural gas resources in British Columbia, which cites the substitution of natural gas for diesel fuel for fleet use.⁷ Consistent with and further to the policy statement, the Province also issued the Greenhouse Gas Reduction (Clean Energy) Regulation in May 2012 (**GHG Regulation**).⁸ Among other things, the GHG Regulation describes four NGV initiatives that FortisBC may undertake and which, pursuant to section 18 of the *Clean Energy Act*, the BCUC may not interfere with. Further, the BCUC is obliged to allow FortisBC to recover the costs of those NGV initiatives in its regulated rates up to \$104.5 million in a five-year period.⁹ Each of the policy statement, section 18 of the *Clean Energy Act*, and the GHG Regulation are silent on the allocation between FortisBC's customers of those costs. However, the implicit effect of the enactments is to impose on non-bypass customers the risk that NGV customer revenue will be less than the cost of service.

Reconsideration of BFI Decision

Upon application by FortisBC, and in light of the newly expressed natural gas policy and the GHG Regulation, the BCUC reconsidered the BFI Decision.¹⁰ In doing so the BCUC considered and rejected the argument of FortisBC that the GHG Regulation was necessarily to be understood as a Provincial policy favouring further subsidization by non-bypass customers in favour of FortisBC's would-be NGV customers: "However, a further intent of the Regulation is arguably to limit the potential subsidies provided by a utility's ratepayers to finance

⁴ *An Application by FortisBC Energy Inc. for a Certificate of Public Convenience and Necessity for Constructing and Operating a Compressed Natural Gas Refuelling Station at BFI Canada Inc.* (April 30, 2012), BCUC Order No. C-6-12 and Reasons for Decision at Appendix A (BFI Decision).

⁵ See definitions of "public utility" and "petroleum industry" in section 1 of the UCA.

⁶ At page 18 of BFI Decision.

⁷ *British Columbia's Natural Gas Strategy*, February 3, 2012, at page 5:

http://www.gov.bc.ca/ener/natural_gas_strategy.html

⁸ BC Regulation 102/2012, pursuant to section 18 of the *Clean Energy Act*, S.B.C. 2010, c. 22.

⁹ *In the Matter of FortisBC Energy Inc – Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives* (December 27, 2012), BCUC Order No. G-201-12, at page 51.

¹⁰ *Application for Variance and Reconsideration and Revised Application for Rates for Fuelling Service for BFI Canada Inc.* (October 17, 2012), BCUC Order No. G-150-12 and Reasons for Decision at Appendix A (Reconsideration Decision).

eligible natural gas vehicles and build CNG/LNG¹¹ fueling infrastructure...”¹² In the result, the BCUC re-affirmed its earlier conclusion that non-bypass customers should be kept whole from the costs of a service offering that could be provided in a competitive marketplace by non-regulated entities subject only to the mandated assumption of NGV revenue risk. It varied its earlier orders in minor ways, and allowed FortisBC to file a new rate proposal.

BFI Compliance Filing

In November 2012, FortisBC applied again for BCUC approval of its NGV rate for BFI. Once again the BCUC was critical of FortisBC arguments that supported relatively low cost allocations to NGV customers, and reiterated again its concern for the protection of non-NGV customers. With regard to the GHG Regulation, the BCUC wrote: “The *Greenhouse Gas Reduction Regulation* [GHG Regulation] specifically limits the amounts which can be spent on incentives, including incentives relating to safety practices, as well as costs related to administration, marketing, training and education. In the Panel’s view, it is not reasonable to allocate the majority of general overhead costs relating to the NGT [NGV] market to non-bypass customers [non-NGV customers] without regard to specific activities. To the extent that any portion of such costs are sought to be borne by non-bypass customers, these costs should be specifically identified and accounted for as expenditures pursuant to the *Greenhouse Gas Reduction Regulation* and not buried in broader overhead.”¹³

Discussion

The BCUC’s NGV decisions can be understood, in part, as resistance to the argument that government policy statements, at least insofar as they are manifest in legislative exemptions from normal regulatory processes, ought to necessarily inform the BCUC’s exercise of discretion. In the main, this seems appropriate, in circumstances where the legislative exemption is focussed and discrete and the BCUC’s otherwise applicable scope of discretion is quite broad, as has been the case in the NGV proceedings. Under the UCA, and indeed the enabling statutes of many utility regulators, the BCUC does not simply approve rates, it determines and sets them.¹⁴ Rather than simply an oversight function, rate-setting is a primary responsibility of the regulator, not the utility (or the Province). Commensurate with that responsibility comes a broad discretion. Where that discretion is restricted by enactment in the narrow circumstances of a particular initiative – NGV rates, in this case – one would think that the independence that regulators enjoy does not simply allow but in fact requires them to read no more into the policy impetus underlying the enactment than is consistent with the exercise of its statutory obligations. In its NGV decisions the BCUC has not required bypass customers to subsidize NGV customers any more than required by law. In so doing it has given full effect to both the GHG Regulation and its overarching statutory obligations in a foreseeable and even predictable way.¹⁵

¹¹ CNG refers to compressed natural gas; LNG refers to liquefied natural gas.

¹² Reconsideration Decision, at page 7, emphasis added. The specific issue was whether the GHG Regulation could be construed as favouring the provision of NGV service within the class of FortisBC’s existing natural gas service thus indirectly providing for a greater degree of subsidy to NGV customers.

¹³ *British Columbia Utilities Commission Order G-150-12 Compliance Filing and Revised Application for Rates for Fuelling Service for BFI* (May 14, 2013), BCUC Order No. G-78-13 and Reasons for Decision at Appendix A, at pages 6-7.

¹⁴ Section 58 of the UCA.

¹⁵ One argument that seems not to have been raised is that subsidies in favour of NGV customers would reduce the risk to bypass customers of NGV load not materializing.

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