



ORDER NUMBER
E-14-21

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

FortisBC Energy Inc.

Filing of a Biomethane Purchase Agreement between FEI and Shell North America (Canada) Inc. pursuant to Section 71 of the *Utilities Commission Act* and BCUC Rules for Natural Gas Energy Supply Contracts

BEFORE:

R. I. Mason, Panel Chair
M. Kresivo, QC, Commissioner
D. M. Morton, Commissioner

on May 28, 2021

ORDER

WHEREAS:

- A. On April 29, 2021, FortisBC Energy Inc. (FEI) filed with the British Columbia Utilities Commission (BCUC) an application for acceptance of a Biomethane Purchase Agreement (BPA) between FEI and Shell North America (Canada) Inc. (SHELL) pursuant to section 71 of the *Utilities Commission Act* (UCA) and BCUC Rules for Natural Gas Energy Supply Contracts (Application);
- B. On April 18, 2010, the Government of British Columbia enacted the *Clean Energy Act* (CEA). The CEA provides that the Lieutenant Governor in Council (LGIC) can enact “prescribed undertakings” that are intended to encourage “the use of electricity, or energy directly from a clean or renewable resource instead of the use of other energy sources that produce higher greenhouse gas emissions”¹;
- C. Section 18(1) of the CEA defines a prescribed undertaking as “...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”²;
- D. By Order G-150-21 dated May 17, 2021, the BCUC established a regulatory timetable outlining the public hearing process to review the Application, which included, among other things, intervener registration, one round of BCUC and Intervener information requests (IR) and submissions on further process;
- E. On May 20, 2021, FEI filed a letter requesting the BCUC amend the regulatory timetable and establish an expedited review process by an oral hearing or Streamlined Review Process (SRP) in order to accommodate

¹ Clean Energy Act, SBC 2010, c. 22, s. 35.

² *Ibid.*, s. 18.

a condition in the BPA that FEI receive BCUC approval to purchase the biomethane on or before May 31, 2021;

- F. By Order G-157-21, dated May 21, 2021, the BCUC amended the regulatory timetable to, among other things, allow for FEI filing of additional evidence (Evidence), established an SRP and provided a letter to FEI and Registered Interveners to outline the topics in scope for the SRP;
- G. On May 25, 2021, the LGIC, by Order in Council (OIC) 306/2021, approved an amendment to the Greenhouse Gas Reduction (Clean Energy) Regulation (GGRR), which among other things, repealed and replaced section 2 (3.8) to state:

(3.8) The public utility acquires renewable natural gas

a) at costs that meet the following criteria, as applicable:

- (i) if the public utility acquires renewable natural gas by purchasing it, the price of the renewable natural gas does not exceed the maximum amount, determined in accordance with section 9, in effect in the fiscal year in which the contract for purchase is signed;
- (ii) if the public utility acquires renewable natural gas by producing it, the levelized cost of production reasonably expected by the public utility does not exceed the maximum amount, determined in accordance with section 9, in effect in the fiscal year in which the public utility decides to construct or purchase the production facility, and

b) that, in a calendar year, does not exceed 15% of the total amount, in GJ, of natural gas provided by the public utility to its non-bypass customers in 2019, subject to subsection (3.9) and section 10;

- H. On May 25, 2021, the BCUC issued a public and confidential IR No. 1 to FEI;
- I. On May 26, 2021, FEI provided responses to BCUC public and confidential IR No. 1, which among other things, stated that, "SHELL requested that FEI keep the facility confidential until BCUC approval is received," and filed Evidence;
- J. By May 27, 2021, the BC Sustainable Energy Association and Residential Consumer Intervener Association had registered as interveners in the proceeding;
- K. On May 28, 2021, the BCUC held an SRP, which included FEI's final oral argument, intervener final oral argument and FEI oral reply argument;
- L. The BCUC has not reviewed the Application from a public interest perspective as BPAs are prescribed undertakings under section 18(1) of the CEA; and
- M. The BCUC has reviewed the Application, Evidence and arguments submitted in this proceeding, determines that the BPA qualifies as a prescribed undertaking under the GGRR and makes the following directives.

NOW THEREFORE, with reasons to follow, and pursuant to section 71 of the UCA, section 18 of the CEA and the GGRR, the BCUC orders as follows:

1. The BCUC accepts for filing the BPA between FEI and SHELL.
2. The BCUC will keep the redacted portions of the Application confidential as requested by FEI as they contain commercially sensitive information.
3. FEI is directed to comply with all directives and reporting requirements as outlined in the reasons for decision to follow.

DATED at the City of Vancouver, in the Province of British Columbia, this 31st day of May 2021.

BY ORDER

Original signed by:

R. I. Mason
Commissioner

FortisBC Energy Inc.

Filing of a Biomethane Purchase Agreement between FEI and Shell North America (Canada) Inc. pursuant to Section 71 of the *Utilities Commission Act* and BCUC Rules for Natural Gas Energy Supply Contracts

Reasons for Decision

August 11, 2021

Before:

R. I. Mason, Panel Chair
M. Kresivo, QC, Commissioner
D. M. Morton, Commissioner

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1.0 Introduction

1.1 Application and Approvals Sought

On April 29, 2021, FortisBC Energy Inc. (FEI) filed with the British Columbia Utilities Commission (BCUC) an application for acceptance of a Biomethane Purchase Agreement (BPA) between FEI and Shell North America (Canada) Inc. (Shell) pursuant to section 71 of the *Utilities Commission Act* (UCA)³ and the BCUC's Rules for Natural Gas Energy Supply Contracts (Gas Supply Rules) (Application). Under the BPA, FEI is to purchase Renewable Natural Gas (RNG) from an anaerobic digestion facility located in Iowa, United States of America, with notional delivery to the Huntingdon interconnection point in British Columbia.⁴ FEI seeks acceptance of the BPA as a prescribed undertaking under section 18 of the *Clean Energy Act* (CEA), pursuant to sections 2(3.7) and 2(3.8) of the *Greenhouse Gas Reduction (Clean Energy) Regulation* (GGRR).

Additionally, FEI requests that the BCUC keep confidential the non-redacted version of the Application filed as Exhibit B-1-1, including the non-redacted version of the BPA filed as Appendix A to Exhibit B-1, FEI's confidential submission of additional evidence and the confidential responses to information requests (IRs) containing commercially sensitive information, filed as Exhibits B-3-3 and B-5, respectively.

1.2 Regulatory Process

On May 17, 2021, by Order G-150-21, the BCUC established a written hearing process for review of the Application which consisted of intervener registration, BCUC IRs, intervener IRs, and responses from FEI.⁵

By letter dated May 20, 2021, FEI requested an amendment to the proposed regulatory timetable to expedite the review of the Application.⁶ By Order G-157-21, dated May 21, 2021, the BCUC amended the regulatory timetable to include, amongst other things, submission of additional evidence from FEI and a Streamlined Review Process (SRP).

By May 25, 2021, the BC Sustainable Energy Association (BCSEA) and Residential Consumer Intervener Association (RCIA) had registered as interveners in the proceeding. The proceeding was heard by way of an SRP, consisting of a presentation from FEI, questions from interveners, BCUC staff, and the Panel. Upon completion of the evidentiary record, the Panel heard oral final arguments from FEI and the interveners, and oral reply argument from FEI. The Panel provided a ruling on the Application at the SRP and accepted the BPA for filing pursuant to section 71 of the UCA.⁷

³ *Utilities Commission Act*, s 71.

⁴ Exhibit B-1, p. 7.

⁵ Exhibit A-2.

⁶ Exhibit B-2.

⁷ Order E-14-21, dated May 31, 2021.

2.0 Legislative Framework and Previous Relevant Decisions

2.1 Legislative Framework

On April 18, 2010, the government of British Columbia enacted the CEA. The CEA provides that the Lieutenant Governor in Council (LGIC) may make regulations to define “prescribed undertakings” that are intended to encourage “the use of electricity, or energy directly from a clean or renewable resource instead of the use of other energy sources that produce higher greenhouse gas emissions.”⁸ Specifically, section 35(n) of the CEA allows the LGIC to “make regulations...for the purposes of the definition of “prescribed undertaking” in section 18...” of the CEA.

The CEA defines “clean or renewable resource” to mean “biomass, biogas, geothermal heat, hydro, solar, ocean, wind or any other prescribed resource.”⁹

Section 18(1) of the CEA defines a prescribed undertaking as “...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.”¹⁰

Sections 18(2) and 18(3) of the CEA establish the BCUC’s role in the setting of rates related to prescribed undertakings in these terms:

(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.

(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 section (2) from carrying out a prescribed undertaking.¹¹

On May 14, 2012, the LGIC issued Order in Council (OIC) No. 295 approving the GGRR, which describes classes of prescribed undertakings pursuant to section 18 of the CEA.

Section 2(3.8) of the GGRR approved by OIC No. 295 establishes the acquisition of renewable natural gas as a prescribed undertaking:

(3.8) The public utility acquires renewable natural gas
(a) for which the public utility pays no more than \$30 per GJ, and
(b) that, subject to subsection (3.9), in a calendar year, does not exceed 5% of the total volume of natural gas provided by the public utility to its non-bypass customers in 2015.

⁸ *Clean Energy Act*, SBC 2010, c. 22, s. 35.

⁹ *Clean Energy Act*, SBC 2010, c. 22, s. 1.

¹⁰ *Clean Energy Act*, SBC 2010, c. 22, s. 18.

¹¹ *Clean Energy Act*, SBC 2010, c. 22, s. 18.

OIC No. 306/2021

On May 25, 2021, the LGIC issued OIC No. 306/2021, which amended the GGRR. The changes relevant to the Application are set out below.

OIC No. 306/2021 added the following definitions to section 1 of the GGRR:

“annual percentage change” means the annual percentage change in the annual average All-items Consumer Price Index for British Columbia, as published by Statistics Canada under the authority of the Statistics Act (Canada);

“fiscal year” means the period from April 1 in one year to March 31 in the next year;

OIC No. 306/2021 added the following subsection to the GGRR:

- (3.71) For the purpose of subsection (3.8) “acquires renewable natural gas” includes producing renewable natural gas by producing or purchasing biogas and upgrading it to renewable and upgrading it to renewable natural gas, and

OIC No. 306/2021 repealed subsection 3.8 of the GGRR and substituted the following:

(3.8) The public utility acquires renewable natural gas

(a) at costs that meet the following criteria, as applicable:

- (iii) if the public utility acquires renewable natural gas by purchasing it, the price of the renewable natural gas does not exceed the maximum amount, determined in accordance with section 9, in effect in the fiscal year in which the contract for purchase is signed;
- (iv) if the public utility acquires renewable natural gas by producing it, the levelized cost of production reasonably expected by the public utility does not exceed the maximum amount, determined in accordance with section 9, in effect in the fiscal year in which the public utility decides to construct or purchase the production facility, and

(b) that, in a calendar year, does not exceed 15% of the total amount, in GJ, of natural gas provided by the public utility to its non-bypass customers in 2019, subject to subsection (3.9) and section 10;

OIC No. 306/2021 added the following sections to the GGRR:

9 For the purpose of sections 2 (3.8) (a), 6 (c), 7 (2)(b) and 8 (1) (b),

(a) The maximum amount in effect in the 2021/2022 fiscal year is \$31 per GJ,
and

(b) For fiscal years subsequent to the 2021/2022 fiscal year, the maximum amount is calculated on April 1 of each year by multiplying

(i) The maximum amount in effect in the immediately preceding fiscal year, and

(ii) The sum of

(A) 1, and

(B) The annual percentage change for the previous calendar year.¹²

10. If a public utility does 2 or more of the following:

(a) acquires renewable natural gas in accordance with section 2 (3.8);

(b) produces or purchases hydrogen in accordance with section 6;

(c) purchases synthesis gas in accordance with section 7;

(d) purchases lignin in accordance with subsection 8,

the aggregate amount of all products must not exceed 15% of the total amount of natural gas, in GJ, provided by the public utility to its non-bypass customers in 2019.

In this Decision, all references to the GGRR refer to the GGRR as amended by OIC No. 306/2021 unless otherwise noted.

Utilities Commission Act and BCUC Gas Supply Rules

Energy supply contracts (ESCs) are required to be filed with the BCUC pursuant to section 71 of the UCA. The BCUC may hold a hearing to determine if an ESC is not in the public interest. In determining whether an ESC is or is not in the public interest, the BCUC must consider the criteria set out in section 71(2.1) of the UCA.

By Order G-130-06, dated October 27, 2006, the BCUC established the Gas Supply Rules to facilitate the review of natural gas energy supply contracts pursuant to section 71 of the UCA.

2.2 Previous Relevant Decisions

In Decision and Order G-122-19 dated June 6, 2019, the BCUC set out a three-part test for a prescribed undertaking under section 2(3.8) of the GGRR, as follows:¹³

¹² Province of British Columbia, Lieutenant Governor in Council, Order in Council No. 306, approved and ordered May 25, 2021.

¹³ FortisBC Energy Inc. Application for Acceptance of the Biogas Purchase Agreement Between FortisBC Energy Inc. and the City of Vancouver, BCUC Decision and Order G-122-19, dated June 6, 2019, p. 8.

To avail itself of the benefit of section 18(3) of the CEA, however, FEI must demonstrate to the reasonable satisfaction of the [BCUC] that the BPA or the Project qualifies as a prescribed undertaking as defined under Section 2(3.8) of the GGRR, which sets out a three-part test:

- The public utility must be acquiring renewable natural gas (as opposed to some other form of commodity);
- The utility must pay no more than \$30 per GJ [gigajoule] for that renewable natural gas; and
- Subject to certain exceptions, the annual volume of renewable natural gas acquired must not exceed 5% of the total volume of natural gas the utility provided to its non-bypass customers in 2015.

In Decision and Order G-40-20, dated February 27, 2020, the BCUC determined, in FEI's application for acceptance of a BPA with Tidal Energy Marketing Inc. (Tidal BPA), that a contractual obligation to purchase RNG from a facility located outside of the Province of British Columbia and to take delivery at the Huntingdon interconnection point met the definition of "acquire" as outlined in the GGRR.¹⁴

3.0 The Shell Biomethane Purchase Agreement

The BPA between FEI and Shell (Shell BPA) establishes the terms and conditions for the purchase of RNG from Shell. The contract specifies that the RNG is sourced from a specific anaerobic digestion facility in Iowa, with notional delivery to FEI at the Huntingdon interconnection point.

FEI's Shell BPA uses the Gas Electronic Data Interchange (GasEDI) standard forms of contract, consistent with the form of contract used for FEI's out-of-province purchases of conventional natural gas. FEI asserts that the standard terms and conditions of the GasEDI contract cover the elements of BPAs that are common to most natural gas transactions. The additional Transaction Confirmation addresses items not covered in the general terms, including contract term, delivery point, quantities, nominations, environmental attributes (EA), audit rights, carbon intensity and default termination payment.¹⁵

4.0 Criteria for Establishing a Prescribed Undertaking

To evaluate the Shell BPA under section 71 of the UCA, the Panel must first consider whether the BPA constitutes a prescribed undertaking pursuant to sections 2(3.7) to 2(3.9) of the GGRR. If determined to be a prescribed undertaking, the BCUC is precluded from exercising its power in a manner that would directly or indirectly prevent FEI from carrying out the prescribed undertaking pursuant to section 18(3) of the CEA.

To qualify under section 18 of the CEA as a prescribed undertaking, FEI must demonstrate that the BPA qualifies as a prescribed undertaking as defined under section 2(3.8) of the GGRR:

¹⁴ FortisBC Energy Inc. Application for Acceptance of the Biomethane Purchase Agreements between FortisBC Energy Inc. and Tidal Energy Marketing Inc, BCUC Decision and Order G-40-20, dated February 27, 2021, p. 6.

¹⁵ Exhibit B-1, p. 8.

- FEI must be acquiring renewable natural gas;
- FEI must pay no more than the maximum price as set out in section 2(3.8)(a) of the GGRR; and,
- subject to certain exceptions, in a calendar year, FEI's acquisition of renewable natural gas must not exceed the total volume criteria as set out in section 2(3.8)(b) of the GGRR.

4.1 Acquires Renewable Natural Gas

In considering whether FEI is carrying out a prescribed undertaking, the Panel must consider whether FEI's purchase of RNG under the Shell BPA satisfies the first requirement of section 2(3.8) of the GGRR and that FEI has demonstrated it is acquiring RNG as opposed to some other commodity.

Evidence Provided by FEI Regarding Acquisition

FEI states that it is acquiring RNG through the Shell BPA. FEI explains that there is no physical difference between a molecule of natural gas and a molecule of RNG and that what differentiates a natural gas molecule from a RNG molecule is the way in which the molecule is produced and the environmental attributes associated with the RNG molecule.¹⁶

The anaerobic facility producing the RNG to be purchased by FEI uses biosolids and commercial and industrial organic waste as feedstock. FEI affirms that the facility is not producing conventional natural gas and that the seller has warranted that it is selling RNG to FEI. FEI further states that it has the contractual right to all environmental attributes associated with each GJ of RNG being produced, further supporting its position that it is acquiring RNG.¹⁷

FEI notes that the most important aspect of the environmental attributes is the carbon intensity associated with the RNG being purchased, as the owner of the carbon intensity environmental attribute may claim the credit for the carbon reduction.¹⁸ Carbon intensity is a measurement of the amount of carbon used to produce the RNG.¹⁹ FEI explains that "there is no particular carbon intensity required for RNG; however, the lower the carbon intensity, the greater the value of the RNG, as it will count more towards GHG [Green House Gas] reduction targets."²⁰ The BPA outlines the maximum carbon intensity that the facility in Iowa must not exceed, which is transferred with the environmental attributes upon purchase of RNG.²¹

FEI states, "There are no regulatory and reporting frameworks in B.C. for GHG emission accounting for acquisitions of RNG outside of B.C."²² However, FEI notes that the purpose of the broad nature of the contract is

¹⁶ Exhibit B-7 dated May 28, 2021, slide 4.

¹⁷ Exhibit B-1 dated April 29, 2021 p. 8.

¹⁸ Transcript dated May 28, 2021, p. 10.

¹⁹ Transcript dated May 28, 2021, p. 35.

²⁰ Exhibit B-3, p. 2.

²¹ Exhibit B-1, p. 8; Exhibit B-4, pp. 13–14, 20–21.

²² Transcript dated May 28, 2021, p. 11.

to ensure the environmental attributes cannot be double counted in other legislative schemes²³ or sold to anybody else.²⁴ FEI confirmed in its evidentiary submission that “it does not sell the environmental attributes from its RNG acquisitions to other companies or entities, other than through the customers of its RNG program.”²⁵

Delivery of the RNG pursuant to this contract is by way of notional delivery. FEI, in defining notional delivery of natural gas states:

“Notional delivery and delivery by displacement are generally used interchangeably.”

...

“The notional delivery of conventional natural gas or RNG is part of supply transactions and commercial arrangements.”

...

“The RNG produced at the facilities in Iowa will cause an equivalent reduction in the amount of gas that generally flows West to East, thereby displacing conventional natural gas molecules and reducing the amount of conventional natural gas that is produced and injected into the system.”²⁶

Position of FEI

FEI’s position can be broken down into three distinct arguments: the Shell BPA meets the GGRR definition of “acquiring” RNG; the location of the RNG facility does not need to be in the province of British Columbia in order to satisfy the GGRR definition of “acquiring” RNG; and the gas being purchased by FEI is RNG.

Firstly, FEI submits that the Shell BPA meets the definition of the GGRR in “acquiring renewable natural gas.” FEI submits that the word “acquire” has a “broad meaning” which includes “purchasing.”²⁷ Since the Shell BPA is a purchasing agreement between FEI and Shell, FEI contends that the BPA therefore meets the GGRR definition of “acquiring” RNG.

Secondly, FEI submits that “there is no requirement in the Clean Energy [sic] Act or the GGRR that the renewable natural gas must be produced in B.C.” in order to satisfy the GGRR definition of “acquiring” RNG.²⁸ Therefore, FEI argues, as long as the facility where the natural gas is purchased is using a renewable process, the location of the facility is irrelevant with respect to the term “acquires renewable natural gas.”

²³ Transcript dated May 28, 2021 p. 44.

²⁴ Transcript dated May 28, 2021 p. 13.

²⁵ Exhibit B-4, BCUC IR 7.4.4.

²⁶ Exhibit B-4 dated May 26, 2021, p. 13.

²⁷ FEI Final Argument, Transcript pp. 105–106.

²⁸ FEI Final Argument, Transcript p. 22, lines 19–21.

Furthermore, FEI states it:

reports to the Ministry on all of its prescribed undertaking as it is required to do under section 18 of the Clean Energy [sic] Act and if the Ministry was of the view that FEI's acquisitions were going beyond its intent it could amend the words of the GGRR to restrict acquisitions to within B.C. or Canada. However, the GGRR was recently amended and no such changes were made. It is left unrestricted in that sense.²⁹

Finally, FEI submits that “the Shell BPA by its terms is...for the purchase of biomethane defined as pipeline quality gas derived from the decomposition of organic matter. The seller has warranted that it is selling biomethane to FEI.”³⁰

FEI further submits:

the only B.C. statutory definition of biomethane, the *Carbon Tax Act*, that biomethane is methane produced from biomass. And this reflects the key feature of renewable natural gas, which is that it is a renewable substitute [sic] for conventional natural gas. It is not extracted from the earth's crust, i.e. a fossil fuel, but it is derived [sic] for [sic] organic matter that is already -- such that the carbon is already in circulation.³¹

FEI contends that natural gas derived from renewable sources as opposed to being derived from fossil fuels can be distinguished based on the environmental attributes associated with the production of RNG and acknowledges “it really isn't RNG if you don't have the [environmental] attributes.”³²

FEI submits:

The [environmental attributes] clause is there to ensure that the supplier doesn't strip the environmental attributes from the methane and sell the two separately. So it is potentially possible that a supplier could, you know, under a different framework, could actually sell a carbon reduction on its own. So that's why we don't only take the physical RNG, we also, in our contracts, ensure that there is no possibility it could change, they could sign away those environmental -- the carbon reduction benefits.³³

²⁹ FEI Final Argument, Transcript p. 23, lines 16–24.

³⁰ FEI Final Argument, Transcript p. 24, lines 4–8.

³¹ FEI Final Argument, Transcript p. 24, lines 14–22.

³² FEI Final Argument, Transcript p. 46, lines 18–19.

³³ FEI Final Argument, Transcript p. 33, lines 3–12.

While unable to provide an exhaustive list of all environmental attributes acquired during the purchase of RNG under the Shell BPA³⁴, FEI submits “the purpose of the contract...is to be very broad to capture any possible environmental attributes”³⁵ and to make sure that FEI acquires those attributes.³⁶

Position of BCSEA

BCSEA opposes the splitting of the environmental attributes from the RNG. BCSEA submits that it:

... would oppose the concept of separating or unbundling environmental attributes from the [renewable] natural gas on two grounds. One being that from the perspective of the purchasers of the [renewable] natural gas that would highly -- the purchasers of the renewable natural gas that would be undesirable. And secondly from the point of view of the appropriate role of the Commission, I think that's a matter for the Ministry or the Lieutenant Governor in Council under the GGRR to address rather than the Commission. But in any event, that topic doesn't require comment or a decision by the panel in this particular proceeding.³⁷

Panel discussion

The Panel finds that FEI is acquiring RNG under the terms of the Shell BPA. There are two aspects to this finding: that FEI is acquiring something, and that what is being acquired is RNG.

With regards to the first aspect of this test, the Panel agrees with FEI that it is acquiring something because it is purchasing something under the terms of the Shell BPA. This is consistent with how “acquire” is defined in section 29 of the *Interpretation Act*³⁸ – “to obtain by any method and includes accept, receive, purchase, be vested with, lease, take possession, control or occupation of, and agree to do any of those things, but does not include expropriate” [emphasis added]. The Panel notes that no interveners contested this point.

We agree with FEI that there is nothing in the GGRR to suggest that, in order to qualify as a prescribed undertaking, the RNG being acquired must be produced in any specific jurisdiction or geographic location. As FEI points out, it reports to the Ministry of Energy, Mines and Low Carbon Innovation on all its prescribed undertakings, including those involving the purchase of RNG produced outside BC, and the government has not taken the opportunity in the recent revisions to the GGRR to restrict purchases of RNG in this regard. The BCUC, therefore, has no power to deny an application for a BPA on the basis that the RNG being acquired is being produced outside BC.

In addition, the BCUC has no power to deny an application for a BPA on the basis that the RNG being acquired is not physically delivered to the acquirer’s distribution network in BC. In this instance, the RNG being acquired by FEI from Shell is notionally delivered to FEI’s gas distribution network at Huntingdon; that is, the RNG that FEI

³⁴ FEI Final Argument, Transcript dated May 28, 2021, pp. 42–44.

³⁵ FEI Final Argument, Transcript dated May 28, 2021, p. 44.

³⁶ FEI Final Argument, Transcript dated May 28, 2021, pp. 12–13.

³⁷ BCSEA Final Argument, Transcript pp. 111–112.

³⁸ Province of British Columbia, *Interpretation Act*, cc. 238, s 29.

acquires is being injected by the RNG producer into a natural gas distribution system in Iowa, and Shell is delivering an equivalent amount of natural gas to FEI at Huntingdon. None of the RNG produced by the facility in Iowa, despite being acquired by FEI, is physically delivered to FEI's distribution system. As FEI notes, "The physical delivery of the RNG molecules is not required for FEI's acquisition of RNG to be a prescribed undertaking under the GGRR or for FEI's customers to claim the GHG reductions resulting from the RNG."³⁹

For these reasons, it is clear that the meaning of "acquire" in the GGRR is broad, as FEI has argued.⁴⁰ For a BPA to be considered a prescribed undertaking, all the GGRR requires for RNG to be considered "acquired" is that RNG is being purchased.

The second aspect of this test is to determine that what is being purchased under the Shell BPA is renewable natural gas. However, there is no definition of RNG in the GGRR or in the CEA. The Panel considers that a definition of RNG would be beneficial to provide clarity for future applications to the BCUC for acceptance of BPAs as prescribed undertakings.

The Panel is satisfied that what FEI is acquiring in the Shell BPA is RNG, because the gas is methane sourced from an anaerobic digestion facility and comes with the associated environmental attributes.

4.2 Pays no more than the maximum price

Next, the Panel considers whether FEI satisfies the cost criteria pursuant to the GGRR.

Evidence Provided by FEI

FEI states that the operative sections of the GGRR are the definition of a "fiscal year" in section 1, section 2(3.8) (a) and section 9. FEI submits section 9(a) sets out the maximum price for BPAs signed in the 2021/2022 fiscal year, and section 9(b) sets out the maximum price for BPAs signed in subsequent fiscal years.

FEI states the Shell BPA was signed on March 24 and March 25, 2021, prior to the 2021/2022 fiscal year, and the GGRR does not address or set the maximum price for BPAs signed prior to the 2021/2022 fiscal year.⁴¹

FEI relies upon section 35 of the *Interpretation Act*⁴²:

35 (1) If all or part of an enactment is repealed, the repeal does not

(a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect,

(b) affect the previous operation of the enactment so repealed or anything

³⁹ Exhibit B-3, pp. 3–4.

⁴⁰ Transcript, p. 22, lines 16–18.

⁴¹ Exhibit B-3-1, p. 2

⁴²RSBC 1996, c. 238, s 35.

done or suffered under it,

(c) affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed,

(d) subject to section 36 (1) (d), affect an offence committed against or a contravention of the repealed enactment, or a penalty, forfeiture or punishment incurred under it, or

(e) affect an investigation, proceeding or remedy for the right, obligation, penalty, forfeiture or punishment.

(2) Subject to section 36 (1), an investigation, proceeding or remedy described in subsection (1) (e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.

FEI states that the BPA with Shell is a fixed price energy contract and “the Shell BPA price is well below \$30”⁴³ and that “...section [10] of the agreement stipulates that the price can never exceed \$30 per GJ.”⁴⁴ FEI is not providing any capital investment into the facility in the US, and the cost of the RNG is inclusive of the cost of transportation.⁴⁵

Position of FEI

FEI submits that the price of RNG in the Shell BPA is consistent with the maximum price criterion as set out in the GGRR. FEI submits the applicable price limit for this BPA is \$30 per GJ, as the BPA was signed prior to May 21, 2021 and therefore, in this instance, the repealed section 2(3.8) of the GGRR is still the effective criterion. Therefore, as the agreed upon contract price is below \$30 per GJ, this criterion is met.⁴⁶

FEI submits that the amendments to the GGRR by OIC No. 306/2021 are not retroactive, stating:

The amended GGRR does not set a maximum price for BPAs signed prior to the 2021/2022 fiscal year. Section 9(a) of the GGRR, as amended, sets out the maximum price for BPAs signed in this fiscal year. And then 9(b) of the amended GGRR sets out the maximum price for BPAs signed in subsequent years. But there's no provision for BPAs signed in prior years.⁴⁷

FEI further argues:

The contract was signed in March 2021, when the previous version of the GGRR was in force. The Shell BPA was at that time a prescribed undertaking as it met the criteria of the GGRR as it read at that time. And as indicated by the Interpretation Act, the repeal of the old 2(3.8) does

⁴³ Transcript dated May 28, 2021, pp. 27–28.

⁴⁴ Transcript date May 28, 2021, p. 9. In the Transcript, FEI referred in error to section 9 of the Shell BPA. Exhibit B-1, Appendix A identifies that the contract price is addressed in section 10.

⁴⁵ Exhibit B-4, p. 23., Transcript date May 28, 2021, p. 9.

⁴⁶ FEI Final Argument, Transcript p. 25, lines 8–11.

⁴⁷ FEI Final Argument, Transcript p. 25, lines 14–20.

not affect a right or obligation acquired, accrued, accruing, or incurred under the enactment so repealed. Therefore, the rights and obligations accrued by the Shell BPA being a prescribed undertaking are not affected by the recent appeal of section 2(3.8) as it used to read. So the end result is that the maximum price under the GGRR that's applicable to Shell BPA is \$30 because that is the maximum price under the section 2(3.8) of the GGRR before it was amended.⁴⁸

Finally, FEI deems:

the end result is that the maximum price under the GGRR that's applicable to Shell BPA is \$30 because that is the maximum price under the section 2(3.8) of the GGRR before it was amended...it's not controversial that the Shell BPA price is well below \$30. And for that reason, the Shell BPA meets the maximum price requirement.⁴⁹

Panel discussion

The Panel finds that the Shell BPA meets the condition set out in the GGRR with regards to the price paid for the RNG.

The Shell BPA was signed in March 2021, which is prior to April 1, 2021, the start of the 2021/2022 fiscal year. As a result, section 3.8(a) of the GGRR (as amended by OIC No. 306/2021) does not apply. Instead, pursuant to section 35(1)(c) of the *Interpretation Act*, section 3.8(a) of the GGRR prior to its repeal by OIC No. 306/2021 applies, and therefore the price of the Shell BPA must be “no more than \$30 per GJ.”

FEI submits that the price of the RNG acquired under the Shell BPA is less than \$30 per GJ, and the Panel, having reviewed the confidential evidence, agrees. The Panel notes that no intervener contests this view.

4.3 Does not exceed the maximum annual volume

To satisfy the third requirement, FEI must demonstrate that the volume of RNG purchased will not cause FEI to exceed the maximum volumes set out in section 2(3.8) of the GGRR, which provides the following volume limitation on acquisitions:

(3.8) The public utility acquires renewable natural gas

(b) that, in a calendar year, does not exceed 15% of the total amount, in GJ, of natural gas provided by the public utility to its non-bypass customers in 2019, subject to subsection (3.9) and section 10.⁵⁰

⁴⁸ Transcript dated May 28, 2021, pp. 27–28.

⁴⁹ Transcript dated May 28, 2021, p. 28.

⁵⁰ Order in Council No. 306, p. 3.

Evidence Provided by FEI

For calendar years up to and including 2020, FEI states that the amendments to the GGRR made by OIC No. 306/2021 were not yet in force, therefore, the maximum volume cap for these previous calendar years is the cap in the GGRR prior to the amendment; that is, “5% of the total volume of natural gas provided by the public utility to its non-bypass customers in 2015.” FEI states that actual RNG acquisitions in 2020 and in previous calendar years have been below this cap.⁵¹

FEI states that “Under the GGRR as amended it applies to -- the maximum volume cap applies to calendar years, which is from January to December, so that includes the entire calendar year.”⁵² For the 2021 calendar year, and future calendar years, the maximum volume cap for a calendar year is as set out in the amended GGRR and this cap is 15% of the total amount, in GJ, of natural gas provided by the public utility to its non-bypass customers in 2019, subject to subsection (3.9) and section 10. FEI submits that its acquisitions of RNG to date are well below this new cap.⁵³

FEI states that the maximum volume of RNG acquisition that would qualify under section 2(3.8) (b) of the GGRR is approximately 30,079,000 GJs per calendar year.⁵⁴ FEI submits that the combined total maximum supply from all BPAs will increase the contracted maximum supply volume to 9,233,650 GJs per calendar year, or approximately 30 percent of the maximum amount specified in the GGRR. FEI submits that the volume it expects to acquire in a calendar year, including the Shell BPA, will only be 6,687,375 GJs per calendar year, or approximately 22 percent of the maximum amount specified in the GGRR.⁵⁵

FEI states that it has not yet acquired any hydrogen, synthesis gas, or lignin, referred to in section 10 of the GGRR.⁵⁶

Position of FEI

FEI argues that in all contracts, the contract amounts may be in excess of actual production at the facility and in excess of any anticipated purchases. It justifies its position referring to the variation in supply on an annual basis stating:

I think, you know, that's the way we've approached it so far [looking at the contractual maximum of BPAs] in the sense that that is a very conservative way to do it. In the sense, hey, look, even if we managed to get every gigajoule out of this project, we would still be under the maximum limit. And that is the, kind of, most conservative way to do it. But I think the volume limit actually applies to the actual acquisitions in a given year. And so, what -- and what happens is, and as we've tried to explain, is that you get variation in the supply from these various

⁵¹ Exhibit B-3-1, p. 4.

⁵² Transcript dated May 28, 2021 p. 61.

⁵³ Exhibit B-3-1, p. 4.

⁵⁴ FEI Final Argument, Transcript p. 28, lines 21–24.

⁵⁵ Exhibit B-7, dated May 28, 2021, slide 13.

⁵⁶ Exhibit B-3, p. 7.

projects. So, you don't actually expect to get the maximum volume consistently year over year, month over month. There's going to be variations, it's an organic process, you know, the production of RNG. And so it's only through a portfolio of projects that you can actually get a consistent level.

So, what we don't want is the maximum volume interpreted in a way that so that you would actually never possibly get there because you can't get up to your maximum volume.

So let me try and bring this back. I think the acquires is -- I think you have to be assured when you're accepting a BPA that's a prescribed undertaking that that -- that we're not going to be using it to acquire at that time RNG over the limit.

I think it's really not an issue at this point, so I think it's going to be more of an issue where we get closer to that limit. And I think at that time when you get a contract that could potentially move you over the maximum, that's when we could address that more precisely. But, as we said, we do have mechanisms to sell those things -- the RNG at full price if we go over the limit. And I think the ultimate check is if we go over the limit that those amounts won't be a prescribed undertaking anyways, and that will be transparent to the Commission through all the reporting that happens. So there is a back-end process to ensure that any amounts over the limit are addressed.

And I apologize for the rambling [sic] answer. It's a good question and it's frankly a difficult one in terms of interpreting the Act. But I think the primary point is that it's not really an issue now and that I think that it's probably best addressed on the back-end where you actually have an acquisition over the limit.⁵⁷

Panel discussion

The Panel finds that the Shell BPA does not cause FEI to exceed its allowable maximum volume of RNG purchases permitted by section 3.8 (b) of the GRR.

Section 3.8 (b) of the GRR (as amended by OIC No. 306/2021) applies in this case because the test related to annual volume does not, unlike the test for the BPA price, apply based on the date the BPA was signed. Rather, the amendment to the GRR replaces the previous test of annual volume for all BPAs considered from now on.

The test for the annual volume in section 3.8 (b) of the GRR provides that FEI may not acquire, in a calendar year, RNG in a volume greater than 15 percent of the volume of natural gas delivered to its non-bypass customers in 2019. Further, for the purposes of the test, the RNG volume must include the volume of hydrogen, synthesis gas and lignin acquired, purchased or produced by FEI. FEI states that it has not acquired, purchased or produced any hydrogen, synthesis gas, or lignin, and the Panel accepts this.

⁵⁷ FEI Final Argument, Transcript p. 78 line 26 to p. 80, line 20.

FEI submits that its total volume of RNG purchased per year once the Shell BPA is approved does not exceed the new limit of 30,079,000 GJ, being 15 percent of the natural gas FEI delivered to its non-bypass customers in 2019.

There is some uncertainty as to what test is applicable in determining the total volume of RNG purchased per year. In prior applications, FEI referred to the maximum contractual volume as the criteria to be applied. In the current Application FEI argued that the criterion is the amount that FEI actually purchases per year and reports to the Ministry, which may vary significantly from the sum of the maximum contractual amounts set out in each BPA.

As FEI notes in the transcript quoted above, the difference between the two tests makes no difference to the determination of this Application, as the maximum contractual volume of RNG in this BPA when added to the total RNG FEI is purchasing is still significantly lower than the revised annual limit in the GGRR.

The Panel, having reviewed the confidential evidence, agrees that the Shell BPA does not cause FEI to exceed the annual limit set out in section 3.8(b) of the GGRR, regardless of which method is used to calculate the anticipated volume of RNG FEI will acquire in each calendar year. Therefore, the Panel makes no determination of which method is the appropriate method as defined by section 2(3) of the GGRR. The Panel recommends that the BCUC consider the proper interpretation of section 2(3) of the GGRR and determine the correct method to calculate the annual volume test in an appropriate review or proceeding.

4.4 There is no fourth test

Position of FEI

FEI submits there is no “fourth branch” to the test stemming from the definition contained in section 18 of the CEA.⁵⁸ FEI contends that section 18(1) of the CEA is a definition that explains that a prescribed undertaking is an undertaking for the purposes of reducing GHGs in BC and that it would be an error of the law to interpret section 18(1) as imposing any legal requirements for a prescribed undertaking⁵⁹.

To further this position, FEI argues that:

1. “definitions do not contain substantive law;”
2. “purpose statements do not create legally binding rights or obligations;” and
3. “the purpose statement is actually a guide to the LGIC for drafting the GGRR.”⁶⁰

FEI submits that “section 18(1) of the CEA, -- sub (1), identifies what a prescribed undertaking is but should not be read as including substantive content such as a legal test that requires a certain amount of physical greenhouse gas emission reductions to occur in B.C.”⁶¹

⁵⁸ FEI Final Argument, Transcript p. 107, line 12.

⁵⁹ FEI presentation, Transcript pp. 13–14.

⁶⁰ FEI presentation, Transcript p. 14, lines 4–8.

⁶¹ FEI presentation, Transcript pp. 15–16, lines 22–1.

FEI also submits that the purpose statement in section 18(1) of the CEA does not create legally binding rights or obligations. On their face, the words "for the purpose of reducing greenhouse gas emissions in British Columbia," in FEI's view, do not impose a requirement that the GHG reductions from the classes of prescribed undertaking must physically occur within BC or Canada alone.⁶²

Finally, FEI claims section 18(1) is making clear the intent of the enactment for the LGIC, whereby its purpose is the reduction of GHGs in BC. In that sense, it provides guidance to the LGIC for the drafting of the GGRR and, therefore, regulations comprising the GGRR are pursuant to the LGIC.⁶³

Panel discussion

The Panel agrees with FEI that the three-part test set out above is the entire test to determine whether the Shell BPA is a prescribed undertaking and requires no further review or consideration.

In particular, the Panel agrees that the phrase "for the purpose of reducing greenhouse gas emissions in British Columbia" in section 18 (1) of the CEA is not a matter for review in this proceeding. It is a direction from the legislature to the LGIC when the latter is creating regulations pursuant to section 35 (n) of the CEA. Therefore, any regulation issued by the LGIC in this manner, including the GGRR, is deemed to be for the purpose of reducing greenhouse gas emissions in BC.

5.0 Overall determination

Positions of the parties

FEI submits that the Shell BPA is a prescribed undertaking pursuant to section 18 of the CEA and the GGRR as it meets the three tests set out above, and there is no further analysis required. As a result, the BCUC must accept the Shell BPA "in the public interest."⁶⁴

BCSEA and RCIA both support FEI's submission that the proposed Shell BPA constitutes a prescribed undertaking under the CEA.

BCSEA submits that it "supports Commission acceptance of the BPA with Shell for filing under section 71," and that it concurs with FEI's legal analysis, in particular with regards to there being no fourth test imposed by section 18(1) of the CEA.⁶⁵ BCSEA reiterated its support for ensuring that the environmental attributes cannot be separated from the RNG being purchased. In other words, the BCSEA would oppose the concept of separating or unbundling environmental attributes from the natural gas.⁶⁶

⁶² FEI presentation, Transcript p. 17, lines 10–19.

⁶³ FEI Presentation, Transcript p. 18, lines 18–24.

⁶⁴ FEI final argument, Transcript p. 107, lines 4–9.

⁶⁵ BCSEA Final Argument, Transcript p. 110, lines 8–14, p. 111, lines 14–17.

⁶⁶ Transcript dated May 28, 2021, pp. 110–111.

RCIA “does not object to the Shell BPA being deemed a prescribed undertaking under section 18 of the CEA and GGRR.” RCIA has concerns regarding the cost allocation of the RNG to FEI customers and requests greater transparency from FEI regarding the associated costs with RNG, while respecting the need for confidentiality. In its final argument, RCIA requested that a ledger accounting system be created for all environmental attributes obtained from BPAs. It submits that FEI’s customers should have a clear and exact definition of the environmental attributes acquired through the purchase of RNG, as the environmental attributes are purchased for the ratepayer and that FEI’s customers should know exactly what they are purchasing when they buy RNG from FEI.⁶⁷

In its reply argument, FEI submits that, through its various reporting activities, such as “the annual review, the fourth quarter gas report and the BBA [sic] filing,” all the volumes and costs are accounted for.⁶⁸ As such, it is FEI’s opinion that there is no need for further reporting at this point, but submits that it is a topic that can be covered under the comprehensive review.⁶⁹

Panel Determination

The Panel determines that the Shell BPA qualifies as a prescribed undertaking pursuant to section 18 of the CEA and sections 3.8 and 3.9 of the GGRR, and on this basis accepts the BPA between FEI and Shell for filing pursuant to section 71 of the UCA.

The Panel is satisfied that the Shell BPA meets the three-part test to be a prescribed undertaking pursuant to section 18 of the CEA and sections 3.8 and 3.9 of the GGRR, for the reasons set out above, and that there is no fourth test to be a prescribed undertaking.

As the Shell BPA is a prescribed undertaking, the Panel has not reviewed the Application from a public interest perspective.

6.0 Request for confidentiality

FEI states that the Shell BPA contains confidential and commercially sensitive terms, including negotiated rates and volumes, and that the public disclosure of this information could compromise FEI’s ability to negotiate favourable terms with other biomethane suppliers which could serve to increase overall costs of the Biomethane Program and potentially impact rates for all non-bypass customers. FEI requests that the confidential, unredacted version of this Application, including the unredacted version of the Shell BPA attached as Appendix A to the Application, and the confidential financial schedules attached as Appendix B to the Application, be treated as confidential by the BCUC, pursuant to section 71(5) of the UCA, Section 18 of the

⁶⁷ Transcript dated May 28, 2021, p. 113.

⁶⁸ Transcript dated May 28, 2021, p. 115.

⁶⁹ Transcript dated May 28, 2021, p. 115.

BCUC's Rules of Practice and Procedure regarding confidential documents adopted by Order G-15-19, and Section 6.0 of the Rules for Natural Gas Energy Supply Contracts.⁷⁰

Panel determination

The Panel agrees to keep the following documents confidential, due to their commercially sensitive nature:

1. the unredacted version of this Application, including the unredacted version of the Shell BPA attached as Appendix A to the Application, and the confidential financial schedules attached as Appendix B to the Application;
2. confidential additional evidence filed as Exhibit B-3-3; and
3. confidential responses to BCUC information requests filed as Exhibit B-5.

7.0 Other matters arising

7.1 FEI submissions under section 18 (4) of the CEA

FEI states that it reports to the Ministry of Energy, Mines, and Low Carbon Innovation on all of its prescribed undertakings as it is required to do so under section 18 of the CEA.⁷¹ When requested by the Panel, FEI submitted that it "would agree to file it with the Commission on a confidential basis."⁷²

Panel determination

The Panel directs FEI to file in its annual report to the BCUC, on a confidential basis if necessary, beginning with the 2021 calendar year, all information FEI has submitted to the Ministry under section 18 (4) of the *Clean Energy Act* in the preceding year. Further, FEI is directed to file with the BCUC within 30 days of this order all information FEI has submitted to the Ministry prior to the 2021 calendar year under section 18 (4) of the *Clean Energy Act*.

7.2 Future process for BPAs

FEI submits:

we think the way we're approaching these contracts and bringing them forward to the Commission for approval with the subject conditions in the contracts is a good way to proceed. It provides the Commission with the opportunity to review them before they become fully affective. And we thought that that is a good way to proceed and a respectful one. And we're happy to continue to proceed on that basis, but we're also pleased to hear any comments from

⁷⁰ Exhibit B-1, p. 2.

⁷¹ Transcript p. 23, line 16.

⁷² FEI Final Argument, Transcript p. 109, lines 16–19.

the Commission in the future about how we might proceed differently. And we can consider that going forward.⁷³

Panel discussion

An ESC filed under section 71 of the UCA is deemed to be in the public interest unless, after a hearing, the BCUC determines it is not in the public interest, in which case the BCUC may declare the contract unenforceable, either wholly or to the extent the BCUC considers proper.⁷⁴ Utilities are, therefore, not required under section 71 of the UCA to file ESCs prior to their execution date.

FEI is aware that the BCUC may require a hearing for a BPA, especially if it raises novel issues. The BCUC held hearings for the City of Vancouver BPA⁷⁵, the first BPA with a price based on a levelized cost including FEI's capital costs, and for the Tidal BPA⁷⁶, the first BPA to consider notional delivery of RNG from another Canadian province. The Shell BPA is the first BPA filed by FEI which involves notional delivery of RNG from outside Canada. FEI should not have been surprised that the BCUC decided to hold a hearing into whether this BPA qualifies as a prescribed undertaking or, if it is not a prescribed undertaking, whether it is in the public interest.

The BCUC went to considerable effort to reorganize the proceeding to reach a decision prior to the start date of the Shell BPA. However, this reorganization might not have been necessary if FEI had explicitly requested approval by May 31, 2021 when FEI first made its application on April 29, rather than requesting it on May 20, once the proceeding timetable was underway. In the future, the Panel requests that FEI allow sufficient time for the BCUC to hold a hearing subsequent to the filing of a BPA, especially if a BPA raises any further novel issues.

The Panel suggests that FEI consider in future applying for an advance ruling of a proposed ESC under section 71 (2.3) of the UCA, allowing the BCUC sufficient time to explore novel issues prior to FEI signing such contracts.

7.3 Inconsistency in the evidentiary record

There may be an inconsistency in the evidence submitted by FEI in the Tidal BPA proceeding of 2020 when compared to evidence submitted in this proceeding. In the FEI Tidal BPA proceeding, in response to BCUC IR 1.1, FEI stated:

While the purchase of RNG is physical, transportation to a physical interconnection point on FEI's system may be physically delivered or may be notionally delivered depending on whether transportation costs are included as part of that purchase transaction. [emphasis added]⁷⁷

⁷³ FEI Final Argument, Transcript p. 109, lines 1–13.

⁷⁴ UCA section 71.

⁷⁵ BCUC Order G-235-19.

⁷⁶ BCUC Order G-40-20.

⁷⁷ FortisBC Energy Inc. Application for Acceptance of Biomethane Purchase Agreements between FortisBC Energy Inc. and Tidal Energy Marketing Inc., Exhibit B-2, IR 1.1.

This appears to imply that the inclusion of transportation costs will determine that delivery of RNG is physical, whereas absence of transportation costs will determine that delivery of RNG is notional, and that there is a choice of delivery type.

However, in the transcript reproduced below, FEI agrees with Commissioner Morton that there are transportation costs included in all BPAs, whether the RNG delivery to FEI's system is notional or physical.⁷⁸

COMMISSIONER MORTON: That part's notional but there is delivery of a physical substance in every case. So in every case there would be transportation costs. Is that what I'm hearing?
Mr. BENNETT (FEI): That is correct.

The Panel invites FEI to clarify the evidentiary record at its earliest convenience.

7.4 BCUC inquiry into RNG issues

Notwithstanding the Panel's determination that the Shell BPA is a prescribed undertaking, this proceeding has raised a number of novel issues regarding public utilities' acquisition of RNG, including:

- What is an appropriate definition of the word "acquire" in the GGRR with respect to RNG?
- What is notional acquisition of RNG?
- What is an appropriate definition of RNG?
- What is the appropriate calculation when performing the annual volume test in section 2(3.8)(b) of the GGRR?

Definition of "acquire"

The BCUC has previously approved FEI's acquisition of RNG from sources, such as the City of Vancouver,⁷⁹ whereby the RNG is injected directly in FEI's distribution network. The BCUC has also approved FEI's acquisition of RNG from sources such as Tidal Energy Marketing Inc.⁸⁰, where the RNG is delivered "by displacement"; that is, the RNG is injected into a different gas distribution system which is physically connected to FEI's gas distribution system. FEI states that the RNG acquired under the Shell BPA is also delivered "by displacement."⁸¹ To date, FEI has not submitted a BPA where the RNG is notionally delivered, but the purchased RNG is injected into a gas distribution system not physically connected to FEI's gas distribution system.

⁷⁸ Transcript p. 85, line 25 to p. 86, line 3.

⁷⁹ FortisBC Energy Inc. Application for Acceptance of the Biogas Purchase Agreement between FortisBC Energy Inc. and the City of Vancouver, Decision and Order G-122-19, dated June 6, 2019.

⁸⁰ FortisBC Energy Inc. Application for Acceptance of the Biomethane Purchase Agreements between FortisBC Energy Inc. and Tidal Energy Marketing Inc, BCUC Decision and Order G-40-20, dated February 27, 2021, p. 6.

⁸¹ Exhibit B-3, p. 3.

The Panel notes the GGRR is silent on whether acquired RNG must be physically delivered to FEI's gas distribution network in order to be a prescribed undertaking. Hypothetically, then, it appears that the GGRR would consider as a prescribed undertaking FEI's purchase of RNG from any source, anywhere, as long as the counterparty from which FEI was acquiring the RNG delivers the equivalent volume of natural gas to FEI's distribution system. The source could be in BC, Ontario, Ohio or Oman. The Panel questions whether this was the intention of the provincial government when the GGRR was drafted.

Notional acquisition of RNG

This Application provides for the notional acquisition of RNG. This means that the actual RNG molecules being purchased under the Shell BPA are both produced and consumed outside of BC, thereby displacing natural gas that would have been consumed in that jurisdiction. Therefore, viewed purely from a physical perspective, there is an argument that the reduction of GHG emissions does not take place in BC.

However, there is an argument that, given the nature of the environment, the reduction of GHG emissions anywhere is equivalent to the reduction of GHG emissions in BC in that the benefits of that reduction will presumably accrue to all of the world's population. Further, the terms of the Shell BPA provide that there can be no environmental credits that accrue to the jurisdiction in which consumption of the physical gas occurs. Instead, these environmental credits, or attributes, are effectively transferred to British Columbia and are therefore considered to be indistinguishable from environmental attributes of RNG physically produced and consumed here. From an accounting perspective, this acquisition contributes to the reduction of GHG emissions that BC has committed to making.

Although the acquisition of RNG is notional, and none of the physical RNG being purchased under the Shell BPA makes its way to BC, for every molecule of RNG that FEI "acquires", a physical molecule of natural gas is delivered to Huntington. It can be argued that all deliveries of natural gas – and indeed any commodity – are thus some combination of physical and notional. A customer can rarely, if ever, identify the specific molecule of natural gas they purchase.

Thus, one way to look at the Shell BPA is that every molecule of RNG acquired is actually a molecule of natural gas which is combined with an intangible environmental attribute that was obtained through the contract with Shell and, by extension, Shell's contract with the biomethane producer.

This issue of whether RNG should be considered to be the sum of these two components – a physical molecule of natural gas plus specific environmental attributes – was raised in the proceeding. FEI argues against that approach, taking the position in this proceeding that RNG is not extracted from the earth's crust, is not a fossil fuel, is derived from organic matter, and "really isn't RNG if you don't have the [environmental] attributes."⁸² BCSEA in this proceeding opposes the unbundling of environmental attributes from the RNG. However, in the Panel's view, there is little, if any, practical difference between purchasing RNG that is notionally delivered and purchasing natural gas and environmental attributes separately. This approach is common in electricity markets. As nothing in this proceeding turns on this issue, we decline to make a determination.

⁸² FEI Final Argument, Transcript p. 46, lines 18–19.

However, in our view there are significant broader public interest issues to consider. Much of the natural gas distribution system in BC is unbundled, that is, the supply of the natural gas commodity is competitive. Ensuring that there is opportunity for the supply of RNG to be similarly competitive may be in the public interest. This could potentially include large customers acquiring their own RNG – or simply acquiring natural gas and environmental attributes – directly from a supplier.

Definition of “RNG”

There are no definitions of RNG in the GGRR or in the CEA. However, there are other relevant references in BC legislation:

- The GGRR states that acquiring renewable natural gas “includes producing renewable natural gas by producing or purchasing biogas and upgrading it to renewable natural gas”, implying that renewable natural gas is derived from biogas, but does not define biogas.
- Section 1 of the CEA states that biogas is a “clean or renewable resource”.
- The *Carbon Tax Act* defines biomethane as “methane produced from biomass”⁸³.
- The GGRR defines biomass, for the purposes of section 7 of the GGRR, as “non-fossilized plants or parts of plants, animal waste or any product made of either of these, other than a fuel product, and includes wood and wood products, agricultural residues and wastes, biologically derived organic matter found in municipal and industrial wastes, black liquor and kraft pulp fibres”.

Similarly, there are no definitions of environmental attributes in the GGRR or in the CEA. Further, it is not clear whether natural gas which is not otherwise biomethane and was extracted from the earth’s crust and subsequently associated with environmental attributes is RNG.

The BCUC has previously defined “biogas” as:⁸⁴

raw gas from any organic source that is capable of being purified or upgraded to pipeline quality gas, such as raw gas substantially composed of methane that is produced by the organic breakdown of matter in the absence of oxygen.

and “biomethane” as:

biogas that is purified or upgraded to meet the public utility's specifications for injection into its natural gas pipeline.

The Panel considers it would be valuable to have definitions of RNG, biogas, biomass, and environmental attributes for the BCUC to use in future proceedings considering RNG contracts. Such definitions would make

⁸³ *Carbon Tax Act*, [SBC 2008] c. 40, section 1.

⁸⁴ BCUC Order G-126-13, dated August 20, 2013, p. 2.

future BPA proceedings more efficient and ensure the BCUC is correctly interpreting the GRR when approving prescribed undertakings. It will also assist the BCUC when considering other initiatives by gas distributors in BC to ensure that the product they deliver meets BC's GHG emission reduction targets.

Annual volume test

In this proceeding, FEI assesses its compliance with the GRR's annual volume test by estimating its future RNG acquisition volume in each calendar year. However, in previous proceedings, FEI has used the contractual maximum volume it may acquire in each calendar year to demonstrate compliance with this test.

The Panel is concerned that FEI's approach in this proceeding to assessing compliance with the annual volume test does not appear to comply with the wording of the GRR. The annual volume test in the GRR uses the present tense when it provides that a public utility "does not exceed" 15 percent of its 2019 total volume. The BCUC must apply the GRR prospectively when determining whether a BPA is a prescribed undertaking, and in the past has considered the contractual maximum volume that may be purchased for all contracts in all future calendar years.

If the BCUC were to take the approach FEI suggests in this Application, it would be possible for FEI to underestimate the volume it will receive under its RNG contracts and find later that, despite all FEI's RNG contracts being approved as prescribed undertakings, FEI was acquiring more RNG than is permitted under the GRR.

The Panel considers that there is merit in the BCUC evaluating the different approaches to assessing compliance with the GRR's annual volume test.

Panel recommendation

The Panel recommends that the BCUC inquire further into the acquisition of RNG by public utilities in BC to bring clarity to the issues listed above. The Panel further recommends that the BCUC invite the provincial government to participate in the inquiry to ensure that its policy objectives with regard to the GRR and its broader GHG reduction goals are represented.

7.5 Scope of BERC rate proceeding

In addition to the issues above regarding public utilities' procurement of RNG, the RCIA raises the issues of:

- How the costs of RNG are allocated when they are recovered from customers of the RNG program;⁸⁵
- How environmental attributes and GHG reduction credits are accounted for;⁸⁶ and

⁸⁵ Transcript, p. 113, line 21 to p. 114, line 1.

⁸⁶ Transcript, p. 114, lines 2–10.

- What is the most cost-effective way of achieving the objectives of the GGRR.⁸⁷

The Panel agrees with the RCIA that these issues are important for the RNG program, although beyond the scope of this proceeding. The Panel recommends that the BCUC consider including these issues in the scope of the BCUC's upcoming review of FEI's RNG program.

7.6 Compliance reporting

FEI is directed to file a public and, where necessary, confidential yearly compliance report that includes the following information:

- **Summary table of all BPAs entered into to date, including:**
 - **The facility name, location, technology type, date of contract execution, delivery start date, contractual minimum, maximum and expected volumes, actual delivered volumes, contract price, escalation factor and incremental rate impact.**
- **Accounting of all environmental attributes obtained every year by FEI through each BPA (or other means, such as unbundled purchases);**
- **Accounting of all environmental attributes in FEI's inventory;**
- **Valuation of all environmental attributes, as applicable, identifying the method of valuation;**
- **Quantum of environmental attributes in equivalent CO₂ and their associated carbon intensity calculation; derivation from carbon intensity;**
- **Accounting of the retirement, transfer or sale of environmental attributes, including valuation, as applicable;**
- **Activity reports that reconcile receipt of environmental attributes with gas purchases at BC delivery hubs and any retirement or sale of environmental attributes that are reconciled with RNG customer consumption/transfer values; and**
- **Accounting of non-carbon environmental attributes or environmental benefits, including, but not limited to tax credits obtained through any BPA and their respective values, if any. Activity reports should be included for these attributes recorded as received, purchased, sold, transferred or retired.**

⁸⁷ Transcript, p. 114, lines 11–25.

DATED at the City of Vancouver, in the Province of British Columbia, this 11th day of August Year.

Original signed by: _____

R. I. Mason
Panel Chair/Commissioner

Original signed by: _____

M. Kresivo, QC
Commissioner

Original signed by: _____

D. M. Morton
Commissioner