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July 27, 2007

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, B.C., V6Z 2N3

Attention: Mr. R.J. Pellatt, Commission Secretary

Dear Sir:

RE: Terasen Gas Inc.
Application for Approval of the Sale of Vacant Land at 3700 2nd Ave, Burnaby, B.C.

Section 52 of the *Utilities Commission Act* (the "Act" or "UCA") provides that, except for a disposition of property in the ordinary course of business, a public utility must not, without first obtaining approval of the British Columbia Utilities Commission ("BCUC" or the "Commission"), dispose of the whole or part of its property. This is an application by Terasen Gas Inc. ("Terasen Gas", "TGI" or the "Company") for Commission approval of the disposition of vacant land at 3700 2nd Avenue, Burnaby, B.C. ("Lochburn").

Terasen Gas is a public utility engaged in the distribution of natural gas throughout the Lower Mainland and Interior of the Province. The head office for Terasen Gas is located in Surrey. The Company has field operations, stores and facilities at its Lochburn site at 3700 2nd Avenue, Burnaby. The utility-related facilities at the Lochburn location consist of three primary buildings and a small storage shed located on 11.89 acres of land. Also at the Lochburn site is a 7.67 acre parcel of land that is no longer used. It is the disposition of this vacant land for which the Company seeks approval.

As discussed below, the Lochburn site was part of the operations of the Mainland Gas Division of British Columbia Hydro and Power Authority ("BC Hydro") until the BC Hydro gas distribution assets in the Lower Mainland were sold to a predecessor of Terasen Gas in 1988. The vacant portion of the Lochburn land was the location of two buildings, one which housed a warehouse and a meter shop, the other which served as a distribution administration building. Those buildings were demolished due to their unsafe condition. Following demolition of the buildings, studies and remediation activities respecting that portion of the Lochburn lands had to be undertaken to address environmental problems that had arisen during the period the land was used to provide utility service.

As can be seen in the photos provided in Appendix A, the entire parcel of land at Lochburn is divided by a stream on the property, which provided a natural divider in locating the buildings on the Lochburn site. The portion of the property on the south side bordering Lougheed Highway and Boundary Road is the property on which the demolished buildings had been located and which is no longer required for utility purposes. The 7.67 acres of vacant land is fenced off from the northern portion of the Lochburn lands. The northern portion (11.89 acres) continues to be used for utility purposes. That is the land on which the three primary buildings and a storage shed are located.

On September 13, 2006 Terasen Gas received an unsolicited offer to purchase the fenced off and vacant portion of the land located at Lochburn, being 7.67 acres of the entire 19.56 Acre parcel.

The offer to purchase the vacant land was received at a time when the studies and remediation activities required to address the environmental problems that had arisen during the period the vacant land was used to provide utility service were nearing completion. The Company again considered if the vacant land at Lochburn would be required for the provision of utility service in future and determined it would not. The Company concluded that the disposition of the land would not cause harm to customers and that the land should be sold. The interests of customers will be served by a sale of the vacant land as the amount in rate base associated with the 7.67 acres of land will be removed from rate base.

Subsequent to the unsolicited offer Terasen Gas undertook a Request for Proposal ("RFP") respecting the vacant Lochburn land to determine its market value. A commercial real estate broker was engaged and a term sheet was issued to the market. A total of 9 offers were received ranging from $8 to $14.85 million. In early 2007, after negotiations with the highest bidder, a Purchase and Sale Agreement was signed with a purchase price of $14,850,000.

Purchase of the Lochburn Lands

Terasen Gas purchased the land at Lochburn in 1988 in a series of transactions related to the purchase of the Mainland Gas Division of BC Hydro by Inland Natural Gas Co. Ltd. ("Inland") (a predecessor of TGI). By agreement dated July 15, 1988 BC Hydro transferred to 74280 B.C. Ltd. (then another corporation owned by the Province and now TGI) the assets relating to the Mainland Gas Division operations of BC Hydro, including the Lochburn lands. The financial consideration was $773 million. By share purchase agreement dated July 20, 1988 Inland Natural Gas Co. Ltd. purchased the shares of 74280 B.C. Ltd. from the Province; the purchase price was $785 million. Both the purchase of the assets by 74280 B.C. Ltd. and the purchase of the shares by Inland included an amount of $44 million, for the net present value of income tax payable to the Province, resulting in a net purchase price of $729 million under the asset transfer agreement and $741 million under the share purchase agreement. 74280 B.C. Ltd. later changed its name to B.C. Gas Inc., which later amalgamated with Inland, Columbia Natural Gas Limited and Fort Nelson Gas Ltd., with the amalgamated entity continuing as BC Gas Inc. BC Gas Inc. later changed its name to BC Gas Utility Ltd. and then TGI.

Order in Council No. 1830/1988 ("OIC 1830"), titled B.C. Gas Inc. Order, established, for the setting of rates and all other purposes under the Act, the appraised value of the plant in service ("rate base") of B.C. Gas Inc. as of July 16, 1988 to be $582,699,000, and allocated the plant in service as set out in Schedule 1 of OIC 1830. Schedule 1 of OIC 1830, which is an allocation of rate base to asset accounts, allocated $24,781,000 to "Land and land rights".

The difference between the purchase price of $729 million for the assets that have provided service to customers of TGI and the $582,699,000 allowed as rate base for those same assets represents the proportion of the purchased assets that were not included for rate making purposes and on which the Company has never earned a return on its investment, i.e. that are considered non-regulated for rate-setting purposes, but which remain on the balance sheet of TGI. In simple terms, 20.07 percent of the shareholders' purchase/investment in the gas

distribution assets acquired, including the land at the Lochburn site, was treated as non-regulated and has always been excluded in the determination of natural gas rates for TGI customers. The calculations are summarized in Appendix B.

The amount included in rate base for the entire 19.56 acres of land at Lochburn is $2,897,418. On a proportional basis, the amount in rate base for the 7.67 acres of vacant land at Lochburn is $1,136,155 (7.67/19.56 x $2,897,418). The proportionate purchase price of the vacant land is $1,421,415 ($1,1,36,155 / 79.93%) as shown in Appendix B.

Problems at the Lochburn Lands

A seismic review by Read Jones Christoffersen in 1989/1990 pointed to structural deficiencies of the two buildings on the 7.67 parcel of land. Buildings on the site were found not to meet building codes and were unsafe.

As part of its 1992 Revenue Requirements application, Terasen Gas (then BC Gas Utility Ltd.) advised the Commission of the structural deficiencies and unsafe condition of the facilities at Lochburn. In its August 5, 1992 Decision the Commission urged the Company to address the Lochburn facility issues and to remedy the situation. The Company was required to demonstrate that it had pursued cost recovery from BC Hydro and others, and to apply for a Certificate of Public Convenience and Necessity ("CPCN") for any new structures.

In 1994 the Commission approved the TGI plans for the temporary relocation of employees housed in the unsafe buildings at Lochburn. The two buildings were subsequently demolished.

Since the demolition of the unsafe buildings and fencing off of the 7.67 acre parcel (shown in Appendix A), the vacant land has not been occupied by Terasen Gas or its employees. The southern 7.67 acre portion of the Lochburn lands has been fenced off with the fence being erected along the line of the stream. The northern portion of the Lochburn lands has continued to be actively used for field operations and other utility purposes. With regard to the vacant 7.67 acres the Company has completed numerous studies, water sampling and soil testing and undertaken soil remediation activities required to address the environmental problems that arose during the use of the land for utility purposes. Environmental issues continue to be present respecting the appropriate treatment of the creosol piles that were the foundation support of the old buildings on the site.

The Coastal Facilities Project

After purchase of the Mainland Gas Division assets from BC Hydro in 1988 it became apparent that new operating facilities were required for the efficient provision of gas service to customers. As part of the purchase from BC Hydro the Company had acquired the facilities at Lochburn and also operation facilities in Surrey (the "Fraser Valley" centre).

The Company filed its first application for a CPCN to construct new buildings at its Lochburn and Fraser Valley operating centres in February 1993. A series of filings and orders followed as the project parameters changed over time. Initial plans for the construction of new operating facilities involved the main operations centre being located at Lochburn with other facilities at

Fraser Valley. Those initial plans involved the construction of new facilities to replace the two buildings at Lochburn deemed to be structurally deficient and unsafe.

Over time the plans changed. The Company concluded that most of the growth in its gas distribution system would occur to the south and east of the Fraser River, with less growth in the more established parts of its system in Vancouver and surrounding municipalities. By 1998 the primary objectives were to ensure that the key operations centre building met seismic/post-disaster standards and that the location of the operations centre would best serve the growth of the natural gas distribution system.

In August 1998, TGI filed an application for a CPCN for the 1998 Coastal Facilities Project (the "Project"). The Project embodied the concept of a centralized operations centre with the majority of operating functions and related support services relocated to Surrey where greater customer growth was anticipated, instead of Burnaby. The Project also involved a greatly reduced presence at the Company's then head office location in downtown Vancouver at 1111 West Georgia Street. The utility's presence at Lochburn would be reduced to a field operations office and a consolidated storage/shops facility.

The Coastal Facilities Project with the centralized operations centre in Surrey was intended to be, and was, in the best interests of the Company and its customers. The location of the operations centre in Surrey resulted in the 7.67 acres of land at Lochburn being no longer required for utility service, but the purpose of the Project was not to cause that land to no longer be required for utility service.

The Commission, by Order No. C-14-98, granted approval for TGI to construct the Project in accordance with its August 1998 Application, to finance the Project using a "synthetic" lease arrangement and to include the costs of the lease in the Company's cost of service line item that includes other leases. In proposing the synthetic lease arrangement the Company conferred significant savings/benefits onto customers in the form of reduced revenue requirement impacts related to the Project. The effect of the synthetic lease arrangement was 100% debt financing of the Project, with no return on investment for the Company or its shareholders. In its Application the Company proposed the synthetic lease, in part on, the basis that it maintained ownership of the land and would retain those benefits in the future. The Application at page 28 states that:

> *"the difference in revenue requirements is primarily due to the absence of equity financing of the buildings under the Synthetic Lease option. There would not be a gain on land or the related tax consequences at the inception of the Synthetic Lease because the land is not being sold. The Company does, however, retain the right to any potential gains on the capital properties in the future."*

The Commission confirmed that Company shareholders would be protected from the impact of changes to the then current accounting and tax rules, to the extent that the impacts could not be mitigated during the term of the financing and also confirmed that if it was not feasible to renew the lease arrangement, the outstanding costs of the Project may be financed as a traditional rate base item.

The Project was implemented successfully, based on the objectives and technical parameters set in the August 1998 CPCN Application. The approved CPCN budget was $59.1 million and

the actual project expenditures were $58.7 million, so the project was completed at approximately $400,000 under budget. Significant value and cost minimization was achieved throughout the project by utilizing creative value re-engineering methods in co-operation with all parties involved. In addition to the technical aspects of providing value and cost minimization, the project also embodied an effort by executive management to create a flexible, productive workspace to facilitate change to a more entrepreneurial corporate culture. The project was instrumental in facilitating this transition at the least possible long-term cost.

In August 2004 Terasen Gas made an application to the Commission to transfer to rate base the representing the outstanding balance of the Coastal Facilities Project, due to a change in generally accepted accounting principles. The Commission, by Order No. G-112-04, approved the inclusion in rate base of the value of the Coastal Facilities assets for 2005. Terasen Gas transferred $50.3 million to rate base at January 1, 2005.

Through the structuring of the Coastal Facilities Project, Terasen Gas endeavored to pursue project alternatives that protected the public interest and ensured continuity of service that was adequate, safe and efficient, utilizing the lowest cost alternatives. The Company did this in part by foregoing a significant investment and earning opportunity by offering the synthetic lease alternative for the Project where it obtained 100% debt financing, thus ensuring that the impacts to rate payers would be minimized. The benefit to the end of 2004 from the synthetic lease amounted to approximately $6 million for ratepayers.[1]

Coastal Facilities Project Benefits Exceeded Expectations

The move of the Terasen Gas head office and operations centre to Surrey has facilitated an on-going cost structure that is significantly lower than what would have resulted had the Lochburn site been chosen as the location of the main operations buildings and the continued maintenance of leases for the head office at 1111 West Georgia Street in downtown Vancouver. Cost savings from leases and expected energy cost savings compared to the 1998 anticipated benefits have been greatly exceeded. Actual results through 2006 are as follows:

[1] Per Exhibit B1-1, Tab B7, pp1-2 of 2004 Annual Review

<table>
<tr><th>Anticipated benefits in 1998</th><th>2000-2006 Actual Results</th></tr>
<tr><td>1. Expected cost savings from leases

Net cost savings due primarily from reduction in office leasing costs:

2000 $0.9 million
2001 $0.9 million
2002 $2.0 million
2003 $2.0 million
2004 $2.0 million
2005 $2.0 million
2006 $2.0 million

Total 2000-2006 $11.8 million

Estimate of $2.0 million annually from 2002 until the end of the lease in 2013.</td><td>The actual net cost savings have exceeded projections due to additional staff relocations and consolidations, resulting in the elimination of more leased office space. For vacated office space with remaining lease terms, sublease revenues have been generated from contracting subtenants:

<table><tr><th></th><th>Lease cost savings</th><th>Sublease revenues</th><th>Total benefits</th></tr><tr><td>2000</td><td>$0.9 million</td><td>$ ---</td><td>$0.9 million</td></tr><tr><td>2001</td><td>$1.9 million</td><td>$0.1 million</td><td>$2.0 million</td></tr><tr><td>2002</td><td>$1.9 million</td><td>$0.7 million</td><td>$2.6 million</td></tr><tr><td>2003</td><td>$2.0 million</td><td>$1.3 million</td><td>$3.3 million</td></tr><tr><td>2004</td><td>$2.0 million</td><td>$2.1 million</td><td>$4.1 million</td></tr><tr><td>2005</td><td>$2.0 million</td><td>$2.3 million</td><td>$4.3 million</td></tr><tr><td>2006</td><td>$2.0 million</td><td>$2.4 million</td><td>$4.4 million</td></tr><tr><td colspan="3">Total 2000-2006</td><td>$21.6 million</td></tr></table>
Annual sublease revenues of $2.4 million are expected until the end of 2007. Annual cost savings are expected to be approximately $4.0 million until 2013.</td></tr>
<tr><td>2. Expected energy cost savings

Energy efficient facilities will result in approximately 30% reduction in related consumption.</td><td>Although it is difficult to measure actual reduction in consumption, due to the number of facilities occupied prior to the relocation, project management has indicated that actual energy consumption has been 30-40% below relevant industry averages using relevant industry benchmarks. As reported in 2001, the operations centre and the education building in the Fraser Valley were awarded national recognition for energy efficiency under the Federal Commercial Building Incentive Program.</td></tr>
</table>

The 1998 CPCN application and supporting material showed that the Project would not require all of the land that Terasen Gas held at Lochburn and that the surplus land might be sold. Order No. C-14-98 stated that:

> *"The Commission has reviewed the August 20, 1998 application and finds that approval of the Project is necessary and in the public interest."*

Prior CPCN applications first brought forth the possibility that once the Coastal Facilities Project was complete, that the excess land at Lochburn (as shown in Appendix A outlined in red) would no longer be required for utility purposes.

In granting a CPCN for the 1998 Coastal Facilities Project, the Commission recognized that the surplus land at Lochburn would eventually no longer be required for the provision of utility services, and the sale would not cause any harm to rate-paying customers**.**

The Company recognizes that the Commission has authority under the Act to ensure that the disposition of property by a public utility will not degrade the quality, or reduce the quantity, of the regulated service so as to harm customers. The disposition of the 7.67 acres of vacant land at Lochburn for which Commission approval is sought will not result in degradation of natural gas service and will not harm customers of TGI. While the Commission has such authority

under the Act, the Commission must also respect and protect the property rights of the public utilities it regulates, as has been confirmed by the Supreme Court of Canada. The Commission's jurisdiction, which is principally related to the setting of rates, does not extend to the distribution of the net gain from the sale of property that is no longer required for the provision of utility service.

Terasen Gas is the owner of the 7.67 acres of vacant land that is no longer required for the provision of utility service. As owner, TGI is entitled to any gain on the sale of the vacant land, after crediting to rate base the amount of $1,136,155, being the proportional amount included in rate base for the 7.67 acres. As discussed above, historically the Company's investment in the land at Lochburn has in part been excluded from the determination of customer rates. Notwithstanding the fact that only a portion of the cost of the land was used in the determination of rates, all of the land at Lochburn had been used for the provision of utility services. 7.67 acres of the Lochburn land is no longer required for utility service and the owner of that land is now entitled to any gain on the sale of the land.

The Law

The relevant portion of section 52 of the UCA is as follows:

> 52 (1) Except for a disposition of its property in the ordinary course of business, a public utility must not, without first obtaining the commission's approval,
>
> (a) dispose of or encumber the whole or a part of its property, franchises, licences, permits, concessions, privileges or rights, or
>
> (b) by any means, direct or indirect, merge, amalgamate or consolidate in whole or in part its property, franchises, licenses, permits, concessions, privileges or rights with those of another person.
>
> (2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.

The recent decision by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, dealt with the Alberta legislation that is the equivalent of section 52 of the UCA.

Subsection 26(2) of the Alberta *Gas Utilities Act* ("GUA") states:

> "No owner of a gas utility … shall (d) without approval of the Board (i) sell, lease, mortgage or otherwise dispose of or encumber its property … , but nothing in this clause shall be construed to prevent in any way the sale, lease, mortgage disposition … of any of the property of an owner of a gas utility … in the ordinary course of the owner's business."

Subsection 15(3) of the Alberta *Energy and Utilities Board Act* (AEUBA") states:

"… the Board may do all or any of the following:

> (d) with respect to an order … , make any further order and impose any additional conditions that the Board considers necessary in the public interest."

The combined effect of those two sections is that approval of the AEUB is required for the sale of or other disposition of the property of a gas utility (similar to clause 52(1)(a) of the UCA) and, to the extent it has jurisdiction the AEUB may impose additional conditions that the Board considers necessary in the public interest, similar to subsection 52(2) of the UCA.

The *ATCO* case dealt with the sale of property by ATCO Gas-South ("AGS"), a division of ATCO Gas and Pipelines Ltd. The property sold by AGS was located in Calgary and known as the Calgary Stores Block (the "Stores Block"). The Stores Block consisted of land and buildings. By application dated August 28, 2001 AGS applied for AEUB approval of the sale. In that application AGS stated that the Stores Block was no longer used nor useful for the provision of utility services, the sale would not cause any harm to customers and would mitigate any stranded cost issues. In the application AGS requested that the sale be approved, the proceeds first be used to retire the remaining net book value of the property sold and disposition costs, with the balance being recognized as a profit from the sale that should go to shareholders.

By Decision 2001-78 the AEUB approved the sale based on evidence that customers did not object to the sale, would not suffer a reduction in service and would not be exposed to the risk of financial harm as a result of the sale. In that Decision the AEUB stated that it would advise the company and interested parties of the process it intended to follow with respect to the disposition of the proceeds. A written proceeding was then established in which parties were provided the opportunity to make submissions respecting the appropriate allocation of the proceeds from the disposition. In its Decision 2002-37 the AEUB provided its determinations relating to the allocation of the proceeds. The total proceeds on the sale of the Stores Block were $6,085,000. The AEUB allocated that amount between customers and the company in accordance with Appendix A of its Decision 2002-37. The result was approximately two-thirds of the proceeds were allocated to customers and approximately one-third to AGS and its shareholders.

AEUB Decision 2001-78 was appealed to the Alberta Court of Appeal by ATCO. The Court of appeal concluded that the AEUB acted beyond its jurisdiction by misapprehending its statutory and common law authority and therefore, the AEUB's decision should be set aside.

The Court of Appeal found (para 52) that there was no provision in the legislation that grants the AEUB authority to allocate proceeds from the sale of property belonging to an owner of a public utility. The Court found that while section 26 of the GUA requires Board approval if the sale is outside the ordinary course of business, it is silent on the AEUB's power to deal with sale proceeds. The Court of Appeal went on a paragraph 53 to say:

> 53. None of the express provisions by necessary implication grant the Board jurisdiction to allocate sale proceeds. When fixing fair and reasonable rates, the Board is permitted to consider factors such as the cost of property, depreciation and amortization. Such consideration, however, does not necessarily imply the jurisdiction to order a

> reallocation of property. In these circumstances, where the utility owner seeks approval for a sale of property owned by the utility and sold outside the ordinary course of business and where the application is not part of a general rate application proceeding, the Board's enabling legislation has not given it the power to redistribute the proceeds from the sale strictly on the basis that it would be fair and reasonable.

The Court of Appeal referred the matter back to the AEUB with directions to allocate to AGS the proceeds after crediting to the customers the accumulated depreciation associated with the buildings on the property. The City of Calgary, an Intervenor in the proceedings, then appealed to Supreme Court of Canada arguing that the AEUB had jurisdiction to allocate a portion of the net gain on the sale to rate paying customers. ATCO cross appealed, questioning the jurisdiction of the AEUB to allocate any of the proceeds from the sale to customers. The Supreme Court of Canada dismissed the appeal of the City of Calgary and allowed the cross appeal of ATCO. The majority judgment of the Supreme Court of Canada is that of Mr. Justice Bastarache. The minority in the Supreme Court would have allowed the appeal of the City.

The opening paragraphs (paras 1 and 2) of the judgment of Bastarache J. provide useful background:

> At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider, whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.
>
> Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another. More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction, they cannot trespass in areas where the legislature has not assigned them authority. [citations not included]

The Supreme Court of Canada noted (para 43) that there was no dispute that the GUA contains a prohibition against the owner of a utility selling or otherwise disposing of its property outside the ordinary course of business without the approval of the Board. As discussed above, a similar prohibition is in section 52 of the UCA.

Paragraph 46 of the judgment contained an important general statement of the law relating to the regulation of utilities. The Supreme Court noted that the City of Calgary argued that section 15 of the Alberta *Energy and Utilities Board Act* authorizes the AEUB to impose any condition to an order as long as the condition is necessary in the public interest, and that section 37 of the Alberta *Public Utilities Board Act* ("PUBA") provided that the AEUB may, in any matter within its jurisdiction, make any order pertaining to that matter that is not inconsistent with any applicable statute. The majority judgment of the Supreme Court of Canada said:

> These provisions on their own are vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to an order it makes. Furthermore, the concept of "public interest" found in s. 15(3) is very wide and elastic; the Board cannot be given total discretion over its limitations.

The Supreme Court concluded (para. 47) on its initial review of the Alberta legislation that the legislation is silent as to the AEUB's power to deal with the proceeds on a disposition of property (as is section 52 of the UCA), so the Court then went on to examine the purpose and scheme of the legislation, the legislative intent and the relevant legal norms (commencing at para. 48). At paragraph 50 the judgment said:

> Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada (Canadian Radio-Television and Telecommunications Commission,* [1989] 1 S.C.R. 1722, at p. 1756:
>
> > The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes."

The majority judgment went on to say that the mandate of the court allows for the application of the "doctrine of justification by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature. The judgment said (para. 51):

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

At paragraph 52 of the majority judgment the Supreme Court of Canada stated their understanding of the arguments of the City of Calgary as being: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. Mr. Justice Bastarache, for the majority of the Court, said that he could not accept either of those arguments of the City which were, in his view, diametrically contrary to the state of the law (para. 52). Mr. Justice Bastarache then scrutinized the context of the Alberta utility regulation.

Paragraphs 54 through 61 provide historical background to utility regulation in Alberta and set out certain express powers of the AEUB. At paragraph 60 the judgment says:

> Although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates ….

It is equally true that under the UCA the principal function of the BCUC is the determination of rates, and its powers to supervise the utilities and their operations is incidental to fixing rates.

At paragraph 61 the majority judgment said that the process by which the AEUB sets the rates is therefore central and deserves attention in order to ascertain the validity of the first argument of the City [the argument that the customers obtain a right to the property of the utility]. Commencing at paragraph 62 was an examination of the rate setting functions of the AEUB. At paragraph 63 the judgment stated:

> These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price – nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated …. [citations not included]

And at paragraph 64 the said:

> Therefore, when interpreting the broad powers of the Board, one cannot ignore this well-balanced regulatory arrangement which serves as a backdrop for contextual interpretation. The object of the statutes is to protect both the customer and the investor The arrangement does not, however, cancel the private nature of the utility. In essence, the Board is responsible for maintaining a tariff that enhances the economic benefits to consumers and investors of the utility. [citations not included]

At paragraph 69 the Court agreed with a statement in the argument on behalf of ATCO that said:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory …

The majority judgment adopted a conclusion of Mr. Justice Wittmann in the Alberta Court of Appeal when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when they have paid only for the use of those assets. [Emphasis added by the Court]

An important finding of the Court was that the AEUB misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned by the utility. The fact that assets are reflected in the rate base should not cloud the issue of determining who is the owner. Legislative provisions such as section 52 of the UCA and the equivalent provisions in Alberta protect the customers by ensuring that utilities cannot

sell an asset used in the utility service to create a profit and thereby restrict the quality or increase the price of service, but those legislative provisions do not provide customers with an interest in the assets.

At paragraph 71 Mr. Justice Bastarache said:

> From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates …. But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility. [citations not included]

In the paragraph above it was noted that regulatory boards do not have the authority to retroactively adjust rates. That general legal principle is applicable to the BCUC. Allocating the proceeds of the sale of utility property to customers would have the effect of deciding that the past rates paid by customers were higher than they should have been, and should be adjusted by providing the customers with the proceeds of the sale. Just as the AEUB lacked jurisdiction to so retroactively adjust rates, the BCUC also lacks such jurisdiction.

Starting at paragraph 72 the majority judgment of the Court examined the second argument of the City, which was a submission that the AEUB's power to allocate the proceeds from the sale of a utility's assets is necessarily incidental to the express powers conferred by the legislation. The Court noted that the City argued that the AEUB must necessarily have the power to allocate sale proceeds as part of its discretionary power to approve or refuse to approve the sale of assets. The judgment also noted that the City submitted that this results from the fact that the AEUB is allowed to attach any condition to an order that it makes approving such a sale. The Supreme Court disagreed with the submission of the City, as discussed below.

At paragraph 74 the majority of the Court said that the "doctrine of jurisdiction by necessary implication" is of less help in the case of broadly drawn powers than for narrowly drawn ones; broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework. The judgment (at para. 75) said that section 15 of the AEUBA, which allows the AEUB to impose additional conditions when making an order, appears at first glance to be a power having infinitely elastic scope. However, in the opinion of Mr. Justice Bastarache (for the majority of the Court) the attempt by the City to use that section of the AEUBA to augment the powers of the Board must fail. At paragraph 77 the judgment said "In order to impute jurisdiction to a regulatory body to allocate proceeds of a sale, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislation". The Court accepted that the requirement for approval of the disposition of assets is for the three reasons set out below:

1. It prevents the utility from degrading the quality, or reducing the quantity, of the regulated service so as to harm consumers;

2. It ensures that the utility maximizes the aggregate economic benefits of its operations, and not merely the benefits flowing to some interest group or stakeholder; and

3. It specifically seeks to prevent favouritism toward investors.

The Court said that in order "to meet these three goals, it is not necessary for the Board to have control over which party should benefit from the sale proceeds. The public interest component cannot be said to be sufficient to impute to the Board the power to allocate all the profits pursuant to the sale of assets".

The requirement for Commission approval of the disposition of the property of a British Columbia public utility is in section 52 of the UCA. The B.C. and Alberta statutory provisions are very similar, with there being nothing in the B.C. legislation that suggests that the UCA should be interpreted in a manner that differs from the interpretation of the Alberta legislation. In order to meet the goals of section 52 of the UCA (which goals can only properly be interpreted as the same as the goals in the Alberta legislation) there is no need to impute to the Commission the power to allocate the gain on the sale of a portion of the Lochburn lands.

In paragraph 78 Mr. Justice Bastarache made a strong statement saying:

> In my view, allowing the Board to confiscate the net gain of the sale under the pretence of protecting rate-paying customers and acting in the "public interest" would be a serious misconception of the powers of the Board to approve a sale; to do so would completely disregard the economic rationale of rate setting, as I explained earlier in these reasons. Such an attempt by the Board to appropriate a utility's excess net revenues for ratepayers would be highly sophisticated opportunism and would, in the end, simply increase the utility's capital costs. … At the risk of repeating myself, a public utility is first and foremost a private business venture which has as its goal the making of profits. This is not to the legislative scheme, even though the regulatory compact modifies the normal principles of economics with various restrictions explicitly provided for in the various enabling statutes. None of the three statutes applicable here provides the Board with the power to allocate the proceeds of a sale and therefore affect the property interests of the public utility. [citation not included]

At paragraph 79 the Court stated a more general legal proposition:

> It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation.

The conclusion of the majority of the Supreme Court of Canada was set out in paragraphs 86 and 87 of their judgment:

> This Court's role in this case has been one of interpreting and enabling statutes using the appropriate interpretive tools, i.e. context, legislative intention and objective. Going further than required by reading in unnecessary powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.
>
> The Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset; its decision did not meet the correctness standard. Thus, I would dismiss the

> City's appeal and allow ATCO's cross-appeal, both with costs. I would also set aside the Board's decision and refer the matter back to the Board to approve the sale of the property belonging to ATCO, recognizing that the proceeds of the sale belong to ATCO.

It is the position of the Company that the Supreme Court of Canada has made it very clear that in circumstances such as the sale of the vacant land at Lochburn the capital gain on the sale of the land belongs to the Company and its shareholders. The Supreme Court of Canada has also made it very clear that authority to make approval subject to conditions and requirements considered necessary or desirable in the public interest, pursuant to subsection 52(2) of the UCA, does not provide the Commission with jurisdiction to allocate to customers the capital gain on the disposition of property in these circumstances.

Summary of Application

While the capital gain on the disposition of the 7.67 acres of vacant land properly belongs with the Company, and not its customers, the sale will benefit customers by removing the cost of the land from rate base ($1,136,155) and reducing future revenue requirements of TGI.

The sale of the land at Lochburn that is no longer used or required for utility purposes will have no detrimental effect on the provision of natural gas service, now or in the future. Natural gas service by TGI will continue to be reliable, safe, and efficient after disposition of the 7.67 acres. Terasen Gas submits that customers do not acquire any proprietary right in the Company's assets through the payment of rates. Terasen Gas, rather than its customers, purchased the property, holds legal title to it, and therefore is entitled to any gain on its sale.

In this application Terasen Gas is seeking Commission approval for the disposition of the vacant land at the Lochburn site. As expedited approval is required in order to preserve the Purchase and Sale Agreement with the potential purchaser of the land, Terasen Gas is prepared to treat a portion of the capital gain on the sale of the 7.67 acres as income in the determination of earnings sharing under the 2004-2007 Performance Based Rate Plan ("PBR") settlement agreement that is currently used for the determination of the rates of TGI. In indicating that it is so prepared to treat a portion of the capital gain, Terasen Gas is not waiving any of its rights and is not conceding that its customers have any entitlement to, or interest in, the gain on the sale of the lands.

If in response to this Application the Commission approves the disposition of the 7.67 acres, the Company will prorate the proceeds on sale, net of costs, on a basis consistent with the original rate base cost treatment, i.e. 79.93% to regulated operations and 20.07% to non-regulated as shown in a sample calculation in Appendix C. Customers will benefit from the rate base reduction of $1.136 million. Further, strictly without prejudice and without waiving any of its rights, the Company will include $5 million of the remaining portion of the net proceeds in its calculation of earnings to be shared under PBR, resulting in a net benefit to customers of $2.5 million. This provides an estimated total economic benefit to customers of more than $3.6 million inclusive of the rate base reduction on which future rates will be based. Terasen Gas is prepared to make this concession to customers to preserve the currently contemplated transaction and to obtain expedited approval. Terasen Gas does not believe this treatment is required under PBR.

REQUEST FOR APPROVAL

TGI requests Commission approval for the following:

1. Pursuant to section 52 of the *Utilities Commission Act,* the disposition of the vacant land at Lochburn, consisting of 7.67 acres of the entire parcel of land.

2. Removal of the amount of $1,136,155 from the rate base of Terasen Gas Inc. following the sale.

All of which is respectfully submitted.

Yours very truly,

TERASEN GAS INC.

Original signed by: Guy Leroux

For: Scott A. Thomson

Appendix A


3700 2nd Ave, Burnaby, BC
Boundary Rd.
Lougheed Hwy
3700 2nd Ave, Burnaby, B.C.
"Lochburn"
Appendix A

Appendix B

Purchase Premium Calculation

Purchase Price	**$729,000,000**	**100%**
Rate Base per Order in Council 1830	**582,699,000**	**79.93%**
Non- Regulated portion of purchase	**$146,301,000**	**20.07%**
($729,000,000 - $582,699,000)		
Land and Land Rights per Order in Council 1830	**$24,781,000**	

Rate Base and Cost calculation of vacant land

Rate Base of 19.56 acres of Lochburn Land	**$2,897,418**
Rate Base of 7.67 acres of vacant Lochburn Land	**$1,136,155**
($2,897,418 * 7.67/19.56)	
Purchase Price of vacant Lochburn Land	**$1,421,415**
($1,136,155/79.93%)	

Appendix C

Example Sale Calculation

Gross Sale Price		**$ 14,850,000**
Estimated Costs		
Sales Commission	500,000	
Environmental Costs	495,000	
Subdivision Related Costs	1,800,000	
Other Costs	100,000	
Consultant and Legal	100,000	
Estimated Gross Proceeds	**$ 11,855,000**	**$ 11,855,000**
Cost of Land		1,421,415
Estimated Taxes on Capital Gains		2,103,151
Estimated Net Proceeds after tax		**$ 8,330,434**
Non - Regulated Portion on assets never included for rate setting	**20.07%**	**$ 1,671,918**
Balance of gain		**$ 6,658,516**
Terasen proposal to include for earnings sharing purposes		**$ 5,000,000**
50/50 share to reduce rates as proposed		**$ 2,500,000**
Reduction in Rate Base		**$ 1,136,155**
Total Customer Benefit		**$ 3,636,155**