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September 14, 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. ("Terasen Gas")
Application for the Sale of Land at 3700 2nd Avenue, Burnaby, BC ("Lochburn")
(the "Application")**

Written Submissions of Terasen Gas

On July 27, 2007, Terasen Gas filed the Application as referenced above. In accordance with the Regulatory Timetable set out in Order No. G-86-07, Terasen Gas respectfully submits the attached written submissions with respect to the Application.

If there are any questions regarding the attached, please contact Mr. Tom Loski, Director, Regulatory Affairs at (604) 592-7464.

Yours very truly,

TERASEN GAS INC.

Original signed

Scott A. Thomson

Attachment

BRITISH COLUMBIA UTILITIES COMMISSION

**IN THE MATTER OF the *Utilities Commission Act*,
R.S.B.C. 1996, Chapter 473 (the “*Act*”)**

and

An Application by Terasen Gas Inc.

for the Approval of the Sale of Vacant Land at 3700 2nd Avenue, Burnaby, B.C.

**WRITTEN SUBMISSIONS OF
TERASEN GAS INC.**

September 14, 2007

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**WRITTEN SUBMISSIONS OF
TERASEN GAS INC.**

A. OVERVIEW OF THE APPLICATION

1. This July 27, 2007 Application is an application by Terasen Gas Inc. (“Terasen Gas”, “TGI” or the “Company”) pursuant to section 52 of the *Utilities Commission Act* (the “Act” or “UCA”) for approval of the British Columbia Utilities Commission (“BCUC” or the “Commission”) for the disposal of vacant land at 3700 2nd Avenue, Burnaby, B.C. (“Lochburn”).
2. Section 52 of the Act provides that a public utility must not, without first obtaining the Commission’s approval, dispose of its property except in the ordinary course of business. Terasen Gas considers that the sale of the vacant land at the Lochburn site is a disposal other than in the ordinary course of business, and therefore seeks Commission approval.
3. The entire site at Lochburn in Burnaby consists of 19.56 acres. The Company has utility field operations, stores and facilities at the Lochburn site. The utility-related facilities at the Lochburn location consist of three primary buildings and a small storage shed located on the northern 11.89 acres of Lochburn. The other 7.67 acres of land at Lochburn is vacant and is not required for ongoing utility purposes. It is the sale of this vacant 7.67 acres for which the Company seeks Commission approval.
4. In this application Terasen Gas is also requesting approval to remove from rate base, following the sale of the vacant land, the amount of \$1,136,155, being the rate base value of the 7.67 acres.
5. 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 sale 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 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 the land at Lochburn that is no longer required for the provision of utility service.

6. 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, Terasen Gas is entitled to any gain on the sale of the vacant land. As expedited approval is required in order to preserve the Purchase and Sale Agreement with the potential purchaser of the 7.67 acres. In this Application Terasen Gas has set out that it is prepared, on a without prejudice basis, to provide \$2.5 million of the gain on sale of the vacant land to its customers through a rider¹ in addition to the \$1.1 million of the proceeds of the sale that will go to reduce rate base. 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 land.

B. HISTORY

7. Terasen Gas acquired the land at Lochburn in 1988 as part of the transaction in which BC Hydro sold the assets of what had been its Mainland Gas Division. BC Hydro, which was then and is now a provincially owned authority, sold the Mainland Gas Division assets by means of a July 15, 1988 Asset Transfer Agreement to 74280 B.C. Ltd., then a corporation owned by the Province, for a net purchase price of \$729 million. In a Share Purchase Agreement that closed at the end of September 1988 Inland Natural Gas Co. Ltd. ("Inland") purchased the shares of 74280 B.C. Ltd. for a net purchase price of \$741 million. The total financial consideration in the Asset Transfer Agreement between B.C. Hydro and 74280 B.C. Ltd. was \$773 million and the total financial consideration in the Share Purchase Agreement between the Province and Inland was \$785 million. The difference between the \$773 million and the \$785 million relates to gas distribution assets that were acquired by 74280 B.C. Ltd. between July 15, 1988 when it purchased the assets from BC Hydro and the end of September when the Share Purchase Agreement closed. Both the purchase of the gas distribution assets by 74280 B.C. Ltd. and the purchase of the shares of 74280 B.C. Ltd. by Inland included an amount of \$44 million for the net present value of income tax payable to the Province, which when deducted

¹ Response to BCUC IR No. 1, Q. 23.4; the response to BCUC IR No. 1, Q. 24.1 discusses the mechanism for streaming the \$2.5 million to customers

results in the net purchase prices set out above.² The name of 74280 B.C. Ltd. was changed to B.C. Gas Inc.

8. Order in Council No. 1830/1988 (“OIC 1830”)³, titled “B.C. Gas Inc. Order” established, as of July 16, 1988 (the day after the date of the Asset Transfer Agreement), 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. (the company then owning the gas distribution assets in the Lower Mainland) 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”. OIC 1830 uses the term “appraised value of the plant in service” because those are the words that appear in what is now clause 59(5)(b) of the UCA. OIC 1830 makes it clear that the appraised value and the rate base value are the same thing.⁴

9. B.C. Gas Inc. (the former 74280 B.C. Ltd.) subsequently amalgamated with Inland, Columbia Natural Gas Limited and Fort Nelson Gas Ltd., with the amalgamated entity continuing as BC Gas Inc. BC Gas Inc. changed its name to BC Gas Utility Ltd. and then later changed its name to Terasen Gas Inc.

10. The difference between the purchase price of \$729 million for the gas distribution 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 purchase price of those assets that was not included for rate making purposes and on which TGI has never earned a return on its investment, i.e. that has been considered non-regulated for rate-setting purposes, but which remains on the balance sheet of TGI. In simple terms, 20.07 percent of the amount paid for the gas distribution assets acquired by 74280 B.C. Ltd. (now, through amalgamation, TGI), 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 calculation of the 20.07% (sometimes referred to as the “premium” in this submission) is summarized in Appendix B of the Application.

11. The difference between the price paid to BC Hydro for the gas distribution assets by 74280 B.C. Ltd. (now TGI) and the rate base value of those assets set for rate making purposes

² Response to BCUC IR No. 1, Q. 1.4, Attachment 1.4: Asset Transfer Agreement and Share Purchase Agreement

³ Response to BCUC IR No. 1, Q. 1.2, Attachment 1.2: OIC 1830

⁴ Response to BCUC IR No. 1, Q. 3.12.1 and 7.1

by OIC 1830 established the premium (\$146 million or 20.07% of the net purchase price of the assets). The premium is not a “share purchase premium” and does not relate to the price paid by Inland for the shares of 74280 B.C. Ltd. that it purchased from the Province.⁵

12. The Company has, since 1988, reflected the premium as a permanent difference (among others) in reconciling between the financial statements for the Terasen Gas legal entity and the regulated utility operations included in the utility financial statements presented for the regulated entity in Commission filings. The premium continues to represent the proportion of assets purchased from BC Hydro that are not included for rate-making purposes and on which the Company has never earned a return on its investment.⁶ The undepreciated net book value of the premium as of December 31, 2006 was \$104,093,000.⁷

13. Schedule 1 of OIC 1830 provides an allocation of rate base to asset accounts, allocating \$24,781,000 to “Land and land rights”. 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 7.67 acres was \$1,421,415 (\$1,136,155/ 79.93%) as shown in Appendix B of the Application.⁸

14. When the gas distribution assets were purchased from BC Hydro in 1988 the main operating facilities for the Lower Mainland were at Lochburn (located at the intersection of Lougheed Highway and Boundary Road in Burnaby) and at the Fraser Valley site at 16705 Fraser Highway in Surrey.

15. The Lochburn site, when purchased from BC Hydro, consisted of the 19.56 acres of land on which five buildings and a storage shed were located. In the response to BCUC IR No. 1, Question 1.5, Attachment 1.5, Appendix B contains a photograph of the Lochburn site, showing the old buildings on that site. The facilities at the Lochburn site were constructed in the 1950’s when natural gas service was introduced in the Greater Vancouver area.

16. After the purchase of the gas distribution assets from BC Hydro it became apparent that there were problems with the facilities at the Lochburn site. A seismic review by Read Jones

⁵ Responses to BCUC IR No. 1, Q. 7.2.6, and 7.3.1 through 7.3.4

⁶ Response to BCUC IR No. 1, Q. 7.2.6, and 7.3.1 through 7.3.4

⁷ Responses to BCUC IR No. 1, Q. 3.12.1 and 7.1

⁸ Response to BCUC IR No. 1, Q. 7.2.5 and 7.2.6

Christoffersen in 1989/1990 pointed to structural deficiencies resulting from a design error in two buildings (the building that housed employees from the meter shop and operations groups and the Central Stores/Office Complex) on the southerly portion of the Lochburn site that made it necessary to move employees into leased facilities. The structural and building code deficiencies in the buildings at Lochburn led to the determination that the buildings would be inefficient and uneconomic to upgrade and thus should be demolished.

17. In addition to the problems with the buildings at the Lochburn site the Fraser Valley operating facility was seriously overcrowded, and made use of temporary trailers that had first been installed in 1981.⁹

18. The Company examined its operational requirements, and in 1995 applied to the Commission for a certificate of public convenience and necessity ("CPCN") to construct new building facilities. A CPCN was granted by the Commission, but the Company then underwent a major reorganization and the building requirements were re-assessed.

19. In August 1998 the Company applied to the Commission for a CPCN for the Coastal Facilities Project (which is discussed further in Part D of this Submission). The concept underlying the Coastal Facilities Project was that the main centralized Operations Centre would be located at the Fraser Valley site in Surrey, which would contain the majority of the operating functions and support services, and the Fraser Valley site would also have office facilities. A smaller field operations office was to be located at the Lochburn site, which would also provide some administrative and support functions, with the Lochburn site acting as a muster point and providing backup to the primary gas control and field dispatch functions at the Fraser Valley site in the event of equipment failure or emergencies. Four of the pre-existing buildings at the Lochburn site were to be demolished as part of the Coastal Facilities Project. A CPCN was granted by the Commission and the Coastal Facilities Project proceeded to completion.

C. CURRENT STATUS OF LOCHBURN SITE

20. The northern portion (11.89 acres) of the Lochburn site (the entrance is from 2nd Avenue on the north side of the property) is used for utility operations. This portion of the Lochburn site has located on it three primary buildings (one original building and two new building complexes

⁹ Refer to Response to BCUC IR No. 1, Q. 1.5, Attachment 1.5, 1998 CPCN Application, pages 6 through 8 for further details of the facilities at the Lochburn and Fraser Valley sites

constructed as part of the Coastal Facilities Project) and a storage shed. The buildings on the northern 11.89 acres house office space, mustering facilities, emergency operations centre backup facilities (the Burnaby Operations Centre), welding and fabrication shops and stores facilities as well as employee parking and outside heavy equipment storage.¹⁰ The new buildings combine modernized fabrication and storage facilities with office space for staff, replacing some of the office space lost in the structurally deficient buildings that had to be demolished on the southern portion of the Lochburn site. The balance of building space lost due to the old buildings being demolished was replaced in the facilities constructed at the Fraser Valley site in Surrey as part of the Coastal Facilities Project.

21. While the Burnaby Operations Centre at the Lochburn site is equipped to provide emergency back up in the event a disaster were to isolate the Surrey Operations Centre, it is the operation centre in Surrey that acts as the primary facility for the Lower Mainland due to its central location and proximity to the key growth areas in the Company's distribution territory in the Lower Mainland. The Surrey facilities house approximately 700 staff and is the primary work location for utility operations including Distribution, Gas Supply and Transmission groups including Gas Control and SCADA facilities, Dispatch Call Centre, Marketing and Communications, Engineering, Business and IT services, HR and Operations, Governance and the Finance and Regulatory groups. The Surrey facility acts as a muster station, as well as providing the primary education and training facilities for the entire province. In addition to the Surrey facility, there are 13 regional muster facilities around the Lower Mainland, including the muster at Lochburn, with distributed materials stores to facilitate timely emergency response.

22. The northern 11.89 acres at Lochburn can meet all current and all anticipated future utility requirements. The growth areas on the TGI gas distribution system in the Lower Mainland are primarily located in the suburban and rural areas of the Fraser Valley where relatively less expensive land is available for building projects, such as the Surrey, Mission, Langley and Abbotsford areas. These growth areas are better served from the Surrey Operations Centre. The Company has no plans for facilities development in the Lower Mainland that involve muster locations or emergency response facilities that might be served from the Lochburn site. The Burnaby Operations Centre at Lochburn is the backup operations centre that is fully equipped to manage emergency situations, and is not affected by the proposed sale of the vacant land at Lochburn.

¹⁰ Response to BCUC IR No. 1, Q. 5.2 provides details of the utility activities at the Lochburn site

23. The Company believes it can accommodate any staffing growth that could reasonably be expected over the next twenty years without any need for land in the Burnaby area beyond the 11.89 acres at Lochburn that is being retained for utility purposes. In the unlikely event that growth required the construction of new facilities at the Lochburn site, such facilities could be accommodated on the land being retained. As can be seen from the photograph that is Appendix A of the July 27, 2007 Application, there is a large open area within the 11.89 acres on which no buildings are constructed.

24. TGI intends to sell the southerly 7.67 acre portion of the Lochburn site. The 7.67 acres is vacant land. This 7.67 acre portion is not required for ongoing utility purposes.

25. The southern portion of the Lochburn site, bordering Lougheed Highway and Boundary Road, is the portion of site on which the demolished buildings had been located and which is no longer required for utility purposes. This 7.67 acres of vacant land is fenced off from the northern portion of the Lochburn lands. There are no buildings on the 7.67 acres of vacant land. The vacant 7.67 acres of land can be seen in Appendix A of the July 27, 2007 Application.

26. The southerly 7.67 acres of the Lochburn site has been vacant since the two unsafe buildings were demolished in 2001. Since 2001 the 7.67 acres has not been in use except for studies and remediation activities required to address the environmental problems that had arisen during the period the land was used to provide utility service. Remediation activities included numerous studies, water sampling and soils testing and removal of contaminated soil. Hazardous wastes have been removed.¹¹ The requirement to remediate the land arose from the use of the property for utility purposes, and costs associated with remediation are properly utility costs.¹² The remediation activities have been required to conclude the utility use of the land. The remediation activities are now substantially complete and upon final clearance certificate the 7.67 acres will no longer be required for utility purposes.

27. 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 the southerly 7.67 acres. This occurred at a time when remediation activities on that land were significantly advanced.

¹¹ Response to BCUC IR No. 1, Q. 3.11 and 5.1

¹² As set out in the response to BCUC IR No. 1, Q. 3.7.5, the manner in which the disposition of proceeds have been laid out in the Application has the effect of the shareholder absorbing remediation costs out of the proceeds. TGI is not revising the approach set out in the Application, but if the contemplated transaction were not to proceed, TGI would reconsider that treatment of remediation costs.

28. On receipt of the unsolicited offer the Company again considered if the vacant land at Lochburn would be required for the provision of utility service 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.

29. Following receipt of the unsolicited offer TGI undertook a Request for Proposal (“RFP”) process 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. Nine offers were received with offers 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

D. COASTAL FACILITIES PROJECT AND APPLICATION

30. The July 27, 2007 Application discusses the Coastal Facilities Project. The Coastal Facilities Project is relevant to this Application only because it recognized the need to demolish the buildings at the Lochburn site and the appropriateness of locating the major new Operations Centre of the Company in Surrey with a reduced presence at the Lochburn site; and resulted in the construction of the utility-related facilities that are now on the northern 11.89 acres of the Lochburn site. As a by-product of the Coastal Facilities Project, the 7.67 acres of land at the Lochburn site became vacant.

I. Coastal Facilities Project:

31. The Coastal Facilities Project involved the construction of three major new buildings (a centralized Operations building, a Multi-Use Building, and a Stores Building) at the Fraser Valley site in Surrey and the construction of two new buildings (a Field Operations building and a Stores and Shops building) at the Lochburn site to replace four of the old buildings (one old building at Lochburn was not demolished and remains at the site for storage use).

32. The reasons underlying the Coastal Facilities Project were described in the August 20, 1998 Application¹³ for a certificate of public convenience and necessity (the “1998 CPCN

¹³ Response to BCUC IR No. 1, Q. 1.5, Attachment 1.5, 1998 CPCN Application

Application”) for the construction of the facilities. Section 4.1 of the 1998 CPCN Application stated:

The scope of this application covers the integrated facility requirements for the Lower Mainland region of the BC Gas service area. It addresses the head office, the two current operating facilities at Lochburn and Fraser Valley, the fifteen muster points located throughout the Lower Mainland and the temporary leased facilities.

A long-term planning window has been used to determine the facility needs and to minimize related capital expenditures. This eliminates the need to respond to short-term needs through facility additions or changes, which often result in poorly integrated facilities and higher overall capital costs.

The objectives of this review are:

- To rationalize facilities against long term operating requirements;
- To ensure the most cost-effective sizing and placement of individual work groups in order to maximize operating efficiencies of the Lower Mainland facilities over the long term; and
- To ensure the least-cost long term facilities plan which maintains maximum operating efficiencies over the long term.

33. As discussed above, It had been determined that the two buildings at Lochburn were unsafe and had to be demolished. After much investigation of alternatives, and knowing that those two buildings could no longer be used, the Company determined that the best project to meet the operations and space requirements of the utility was the 1998 Coastal Facilities Project as set out in the August 1998 CPCN Application. The purpose of the Coastal Facilities project was not to free up land so that vacant land could be sold with the gain going to the Company and its shareholders; rather the purpose of the Coastal Facilities project was to proceed with the project that provided the best solution from the perspective of the utility’s requirements and the need to serve customers. The Commission considered the Coastal Facilities Project, recognized that it was in the interests of the utility and its customers, and issued a CPCN. The Coastal Facilities Project was in the interests of the utility and its customers, whether or not any land was sold at Lochburn.

34. The Coastal Facilities Project was not the simple “replacement” of buildings at Lochburn with buildings at another location. Because the two buildings at Lochburn had to be demolished, effectively those two buildings no longer existed for purposes of replacement. The Coastal Facilities Project was a stand-alone project that was in the interests of the utility and its

customers independent of what might happen in the future with the land at Lochburn that would become vacant as a result of the Project. The evidence in the Application demonstrates that the benefits of the Coastal Facilities Project have occurred, and are greater than forecast.

II. 1998 CPCN Application for Coastal Facilities Project

35. On August 20, 1998 TGI (then called BC Gas Utility Ltd.) applied to the Commission for a certificate of public convenience and necessity for the construction of the utility-related facilities known as the Coastal Facilities Project (described above).

36. The 1998 CPCN Application was for a certificate of public convenience and necessity. The 1998 CPCN Application did not request Commission approval for the disposition of property, and specifically did not request Commission approval for the sale of land at the Lochburn site. The 1998 CPCN Application was not an application pursuant to section 52 of the UCA.

37. The 1998 CPCN Application presented three alternative methods for the financing of Coastal Facilities Project: Own; Sale-Leaseback; and Synthetic Lease. At page 5 the 1998 CPCN Application said a Sale-Leaseback would be financed with a pension fund or other third party while the Synthetic Lease structure would have the Company retain ownership of the land and lease the buildings with the option of Company Ownership at the end of the lease term. Page 5 went on to say the analysis indicates that, of the three options, a Synthetic Lease is more beneficial to customers and is endorsed by the Company.

38. In discussing the Synthetic Lease option, page 29 of the 1998 CPCN Application says

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.

39. Models for the financing options discussed in the 1998 CPCN Application were provided to Commission Staff in August 1998. The models for each of the three options appear to contemplate a sale of land at Lochburn.

40. The financial models for the three options that were provided to Commission Staff factored the 20% acquisition premium into the analysis of each of the options, so as to retain that 20% portion of any capital gain on the sale of land at Lochburn for the shareholder. The

models show proceeds of \$6,080,000 (80% of the estimated sale price of \$7,600,00) from the sale of land at Lochburn, and a gain before taxes from the sale of that land which is calculated as \$4,403,000 (\$6,080,000 less cost of \$1,677,000). It is apparent from the cost of land that this was a different (larger) parcel of land than that which is now to be sold.

41. As all the financial models of all three of the options appear to contemplate the sale of land at Lochburn, and all three of the models show the Company (shareholder) retaining 20% of any gain on the sale of land at Lochburn, the possible sale of land has the same impact in all three of the options and did not cause one option to be favoured over another. In other words, the contemplated sale of land at Lochburn played no part in the determination of which of the three options best served the interests of the utility and its customers.

42. Furthermore, the discussion of the Synthetic Lease option, and only the discussion of that option, expressly set out that the Company retained the right to any potential capital gains in the future.

43. In the 1998 CPCN Application the Synthetic Lease option was shown to have the lowest net present value cost. In proposing the Synthetic Lease arrangement the Company conferred significant savings/benefits to customers in the form of reduced revenue requirements related to the Coastal Facilities Project. The effect of the Synthetic Lease was 100% debt financing of the Project, with no return on investment for the Company or its shareholders.

III. Commission Order No. C-14-98

44. On September 3, 1998 the Commission issued Order No. C-14-98 that granted to TGI (then BC Gas Utility Ltd.) a certificate of public convenience and necessity to construct the 1998 Coastal Facilities Project (the "CPCN Order"). Preamble O of that Order says:

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

45. The preambles to the CPCN Order list a history of applications and orders relating to BC Gas Utility Ltd., the safety concerns regarding buildings at the Lochburn site, and various proposals to construct new facilities. Preamble M notes that on August 20, 1998 BC Gas Utility Ltd. filed the 1998 CPCN Application.

46. Preamble N of the CPCN Order says:

The August 20, 1998 application and supporting material show that the Project will not require all of the land that BC Gas holds at Lochburn and that the surplus land will be sold, with 80 percent of the sale proceeds used to mitigate the net book value of the buildings that are removed;

47. Preamble N is of interest in two respects. First, it acknowledges that all of the land at the Lochburn site would not be required for ongoing utility purposes, and that the sale would not cause harm to utility customers. Second, it acknowledges that the Company had not proposed that all of the capital gain on the sale of land at the Lochburn site would be for the benefit of customers.

48. Section 1 of the operative portion of the CPCN Order grants to BC Gas Utility Ltd. (now TGI) a certificate of public convenience and necessity.

49. The granting of the certificate of public convenience and necessity in the CPCN Order is not conditioned on the sale of land at the Lochburn site. Nor is the granting of the certificate of public convenience and necessity in the CPCN Order subject to any other condition except for requirements to file updated cost estimates and monthly progress reports.

50. Section 5 of the CPCN Order approved the financing of the Coastal Facilities Project using the Synthetic Lease arrangement and confirmed that the Company shareholders would be protected if there were changes to accounting and tax rules.

51. Section 4 of the CPCN Order states:

The Commission approves the sale of surplus land at Lochburn providing the net proceeds are used for the benefit of utility ratepayers. If BC Gas proposes to credit less than 100 percent of the net proceeds of the land sales to utility ratepayers, it is directed to request and justify Commission approval for its proposed course of action.

52. Section 4 of the CPCN Order does not purport to be an approval for the disposition of land at the Lochburn site pursuant to section 52 of the Act. As noted above, the August 20, 1998 CPCN Application did not seek approval for the sale of land at Lochburn or elsewhere, and that application did not refer to section 52. Likewise, the CPCN Order did not refer to section 52.

53. Further, section 4 of the CPCN Order does not purport to give general approval for the sale of land at the Lochburn site. At best, the CPCN Order purports to give some unspecified

form or approval only under one circumstance, and that is if “the net proceeds are used for the benefit of utility ratepayers”. As set out in Preamble N of the CPCN Order, the Company had not contemplated a sale of Lochburn land in which 100 percent of the net proceeds would be credited to ratepayers. In this Application Terasen Gas does not propose that all of the net proceeds from the sale of the 7.67 acres of vacant land at the Lochburn site be used for the benefit or utility ratepayers, and the first sentence of section 4 of the CPCN Order is not applicable to this Application.

54. Ultimately what was in the 1998 CPCN Application and supporting material respecting possible sale of land at Lochburn (as referenced in Preamble N to the CPCN Order) was not accepted by the Commission. The 1998 CPCN Order deferred any decision on the treatment of potential future proceeds of the sale of land at Lochburn if the Company proposed to do anything with the net proceeds other than provide 100 percent of the benefit to customers. The Coastal Facilities Project under the Synthetic Lease was found to be in the public interest; it was the lowest cost alternative regardless of the inclusion or exclusion of any proceeds on sale of land.

55. In BCUC information requests the Company was asked questions that related to the jurisdiction of the Commission pursuant to the sections of the Act that pertain to certificates of public convenience and necessity. For the reasons given in the responses, and in particular in the responses to questions 12.1, 12.2, 12.3.1 and 12.3.2, the Commission does not have jurisdiction under sections 45 and 46 of the Act to allocate the proceeds from the sale of land that is no longer required for utility purposes and does not have jurisdiction to impose a “net proceeds” condition as a condition of a certificate of public convenience and necessity. In any event, the extent of the Commission’s jurisdiction regarding attaching conditions to a certificate of public convenience and necessity is academic in this proceeding since Order No. C-14-98 did not make the CPCN granted conditional on any specific treatment of the proceeds from the sale of land at Lochburn.

56. BCUC IR 12.3.1 asked whether this Application should be considered as a request “to reconsider the “net proceeds” condition attached to the approval of the sale” in the 1998 CPCN Order. As discussed in the response to that information request, this July 27, 2007 Application is not an application for reconsideration of Order No. C-14-98, which provided for the granting of a certificate of public convenience and necessity. This Application is an application pursuant to section 52 of *the Utilities Commission Act* for Commission approval of the disposition of a 7.67

acre parcel of land at Lochburn. There has been no previous application for the required section 52 approval. Further, as discussed above the 1998 CPCN Order ultimately deferred a decision on the sale of Lochburn land to a future application by the Company.

57. Further, as said in the response to BCUC IR 12.3.1, in any event, each application to the Commission must be considered on its merits and on the basis of the facts then known, taking into account the legislative framework and the Commission's jurisdiction. The Commission's obligation to consider this Application, and to make a legally correct decision, is not to be fettered by a decision or determination that the Commission made in the past.

58. As discussed in Part E below, it is the position of the Company that the Supreme Court of Canada has made it very clear that in circumstances such as the proposed sale of the vacant land at Lochburn the capital gain on the sale of the land belongs to the Company and its shareholders; and has also made it very clear that the Commission does not have jurisdiction to allocate to customers the capital gain on the disposition of property in the circumstances of the proposed sale of 7.67 acres of vacant land at Lochburn. The relevant portion of the UCA has not changed since 1998; and accordingly in 1998 the Commission did not have jurisdiction to allocate to customers the capital gain on sale of land not required for utility purposes.

59. As noted above, Preamble N of the CPCN Order says that the August 20, 1998 application and supporting material show that the Coastal Facilities Project will not require all the land at Lochburn and that some of the land will be sold with 80 percent of the sale proceeds going to the benefit of customers. That treatment would have provided a rate base reduction benefit to benefits and an additional benefit, on a before-tax basis, estimated to be approximately \$4.4 million dollars (which is not materially different than the \$2.5 million that, on a without prejudice basis, TGI is prepared to provide to customers). That treatment of the sale proceeds from land at Lochburn contemplated in the 1998 material was not accepted by the Commission in 1998; and Terasen Gas is not proposing such treatment in this Application. As discussed below, the time that has elapsed since 1998 has demonstrated that the benefits of the Coastal Facilities Project have been greater than originally anticipated. Since 1998 there has been clarification of the jurisdiction of the Commission with respect to proceeds from the sale of property that is no longer required for utility purposes.¹⁴ In today's circumstances, and in consideration of what has occurred since the CPCN Application was made in August 1998, Terasen Gas believes that the without prejudice proposal set out in its July 27, 2007 Application,

which will provide benefits to customers of more than \$2.5 million, is reasonable. The Commission should approve, pursuant to section 52 of the UCA, the disposition of the 7.67 acres of vacant land at the Lochburn site.

IV. The Benefits of the Coastal Facilities Project Exceeded Expectations

60. Pages 5, 6 and 7 of the July 27, 2007 Application discuss the fact that the benefits actually realized from the Coastal Facilities Project have exceeded the benefits anticipated in 1998.

61. The relevance of the fact that the actual benefits exceeded the anticipated benefits is that it demonstrates that the Coastal Facilities Project was in the public interest, and further demonstrates that the achievement of benefits from the Coastal Facilities Project was not dependent on the sale of land at the Lochburn site.

62. As noted in the July 27, 2007 Application, the benefits presented in the business case far exceed those that had been presented for the 1998 CPCN application. The Synthetic Lease has saved customers \$6 million since 1998 and lease cost savings have been \$9.8 million better than originally anticipated.

E. THE LAW

63. This is an application for Commission approval for the disposition of property. Section 52 of the Act states:

- 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.

¹⁴ Response to BCUC IR No. 1, Q. 13.5

64. The recent decision by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, (Attachment 1.6 to the TGI responses to BCUC information requests) dealt with the Alberta legislation that is the equivalent of section 52 of the Act. The Alberta legislation is set out on pages 7 and 8 of the Application. Subsection 15(3) of the Alberta *Energy and Utilities Board Act* says that the Board may “make any further order and impose any additional conditions that the Board considers necessary in the public interest”; wording similar to subsection 52(2) of the UCA.

65. The Supreme Court of Canada decision was on an appeal from a decision of the AEUB. The decision of the AEUB and the court decisions dealt with the proceeds from the sale of land that ATCO had used to provide utility service, but was no longer required for utility purposes. There was a capital gain of approximately \$6 million on the sale of the land. The Alberta Board allocated approximately two thirds of the net proceeds from the sale of land to customers and approximately one third to ATCO and its shareholders. The utility appealed to the Alberta Court of Appeal which decided in its favour, and the City of Calgary (a customer) then appealed to the Supreme Court of Canada. The decision of the Supreme Court of Canada is extensively addressed in the Application, commencing at page 7.

66. Subsection 52(2) might appear to allow the Commission to attach to an order approving the disposition of land any condition that the Commission considered to be necessary or desirable in the public interest. However, the Supreme Court of Canada has made it clear that such an interpretation of section 52 of the UCA would be incorrect. At paragraph 46 of the judgment Mr. Justice Bastarache, for the majority of the Supreme Court, the similar Alberta legislation is discussed and the judgment then states:

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.

67. The Supreme Court of Canada then considered the interpretation of the Alberta legislation. In doing so the Court noted that the Alberta legislation did not contain express authorization for the AEUB to allocate the proceeds from the sale of property that was no longer required for utility purposes. The Court considered the doctrine of jurisdiction by necessary implication in its interpretation of the legislation. Application of that doctrine requires that purpose of the legislation be determined. The Court found that the principal function of the

AEUB in respect of public utilities is the determination of rates, and the Board's powers to supervise the finances of utilities and their operations is in practice incidental to fixing rates (paragraph 60 of the judgment). It is equally true that under the UCA the principal function of the Commission is the determination of rates, and its powers to supervise the utilities and their operations is incidental to fixing rates.

68. At paragraph 77 of the judgment it says "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 considered the rationale for the requirement that the regulatory tribunal approve the disposition of assets and accepted that the requirement is for the three reasons set out on pages 12 and 13 of the July 27, 2007 Application. Paraphrasing, the three reasons are to prevent the utility from degrading service; to ensure the utility maximizes the aggregate economic benefits of its operations; and to seek to prevent favouritism toward investors. Paragraph 77 of the judgment, follows the reference to those three reasons. Following paragraph 77 are paragraphs 78 and 79, which are referenced on page 13 of the July 27 Application. In those paragraphs Mr. Justice Bastarache stated that allowing the AEUB 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 AEUB to approve a sale.

69. The Commission's jurisdiction under subsection 52(2) of the Act to attach a condition to its approval of the disposition of property owned by a public utility is limited to circumstances where the exercise of that power is a practical necessity for the Commission to accomplish the three reasons identified by the Supreme Court of Canada as reasons why there is a requirement for regulatory tribunal approval of a sale of property by a public utility. In other words, if a condition were required to prevent the utility from degrading service, or were required to ensure that its operations are maximized, or were required to prevent favouritism toward investors, such a condition would come within the jurisdiction of the regulatory agency. In the circumstances of this Application, none of those reasons is present. The sale of the 7.67 acres of vacant land at Lochburn will not degrade service. The 7.67 acres is not required to ensure the efficient or economic operation of the utility. The sale of the 7.67 acres is the sale of land that is not required for ongoing utility service; the sale is not being undertaken to remove utility assets from service so as to benefit the investors in the Company.

70. The customers of Terasen Gas will benefit from the sale of the 7.67 acres of vacant land at Lochburn as there will be a reduction in rate base of approximately \$1.1 million, and as Terasen Gas has proposed, on a without prejudice basis, to provide an additional \$2.5 million to customers through a rate rider.¹⁵

71. The shareholders of Terasen Gas will benefit from the sale of the 7.67 acres of vacant land at Lochburn since there will be a capital gain on the sale, and the balance of the capital gain will be received by the Company and its shareholder. The Supreme Court of Canada has made it clear that it is not the role of the Commission to prevent the Company and its shareholders from benefiting from the gain on the sale of land that is not required for utility purposes. The judgment refers to the “regulatory compact” which ensures that all customers have access to utility service at a fair price – nothing more. Customers do not obtain any right to utility property as a result of paying the rates established by the regulatory tribunal. At paragraph 64 the judgment says:

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]

72. The Commission has approved rates for customers served by TGI that have been just and reasonable. The Commission does not have authority to, in effect, retroactively adjust rates by allocating the proceeds from the sale of the vacant Lochburn land to the benefit of customers. As said at paragraph 71 of the judgment in the ATCO case:

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. ... 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.

73. The AEUB did not, and this Commission does not, have jurisdiction to allocate the gain on the sale of the vacant land at the Lochburn site to customers so as to ensure that the

¹⁵ Refer to the response to BCUC IR No. 1, Q. 24.1, TGI is suggesting a special purpose rider should be the mechanism used to stream the benefit back to customers

Company and its shareholders do not benefit from the sale, by deciding that such allocation is in the public interest. At paragraph 78 of the judgment in the ATCO case it says:

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]

74. The fact is that the 7.67 acres of vacant land at the Lochburn site is not required for ongoing utility purposes. Terasen Gas submits that the Supreme Court of Canada has made it very clear that in circumstances such as the proposed sale of the vacant land at Lochburn the capital gain on the sale of the land belongs to the Company and its shareholders. Terasen Gas further submits that the Supreme Court of Canada has also made it very clear that 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 the circumstances of the proposed sale of the 7.67 acres of vacant land at Lochburn.

F. CONCLUSION

75. In this Application 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.

76. The 7.67 acres of vacant land at the Lochburn site will not be required for utility purposes. That portion of the Lochburn site has not yet been removed from the utility rate base since studies and remediation activities were required to address the environmental problems that had arisen during the period the land was used to provide utility service. Those activities are now nearing completion, which will allow the land to be sold. The sale of the land will not degrade utility service and will not harm customers.

77. Terasen Gas is the owner of the 7.67 acres of vacant land that will no longer be required for the provision of utility service. As owner, Terasen Gas is entitled to all of the gain on the sale of the vacant land. As discussed above, the Supreme Court of Canada has interpreted legislation very similar to section 52 of the UCA, and has made it clear that the Commission does not have jurisdiction to “confiscate” the gain on the sale of land not required for utility purposes for the benefit of customers.

78. There is the additional fact that 20.07% of the price that was paid for the land has always been regarded as non-regulated, and upon any disposition of property that involves a gain that fact should be taken into account. In the circumstances of the proposed sale of the vacant land at the Lochburn site the existence of the 20.07% premium does not affect the entitlement of Terasen Gas to all of the gain on the sale of the land, but it does further demonstrate the reasonableness of what the Company has proposed in this Application.

79. The jurisdiction of the Commission on this Application pursuant to section 52 of the Act is to approve or not approve the disposal of the 7.67 acres. The evidence is clear that the 7.67 will not be required for utility purposes, and there is no proper basis for the Commission to fail to grant its approval of the disposal. Terasen Gas submits there is no jurisdiction for the Commission to allocate a portion of the proceeds of the sale to customers.

80. In this Application Terasen Gas has set out that, on a strictly without prejudice basis and without waiving any of its rights, the Company will provide a net benefit to customers of \$2.5 million, in addition to the rate base reduction of approximately \$1.1 million, resulting in a net benefit to customers of more than \$3.6 million.

81. The Company believes that the without prejudice offer to provide \$2.5 million of the gain on sale of the vacant land to its customers through a rate rider provides a further economic benefit to customers and justification for Commission approval. Terasen Gas is prepared to make this concession to customers to preserve the currently contemplated sale of the vacant land and to obtain expedited approval. Terasen Gas does not believe this treatment is required under the existing PBR arrangement.

82. There are no parties intervening in opposition to this Application of Terasen Gas. The July 27, 2007 Application was distributed to the Terasen Gas 2006 Annual Review and Mid-term Settlement Review participants when the Commission issued Order No. G-86-07 establishing the written process and regulatory timetable.

83. Terasen Gas submits that the Commission should provide the approvals sought in the July 27, 2007 Application and set out in paragraph 75 above.

All of which is respectfully submitted.

Original signed

S.A. Thomson

September 14, 2007