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British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Ms. Erica M. Hamilton,
Commission Secretary

Dear Sirs/Mesdames:

Re: Application for Reconsideration and Variance of Order G-26-13, dated February 25, 2013 on FortisBC Energy Utilities' Common Rates, Amalgamation, and Rate Design Application

We are counsel for the FortisBC Energy Utilities, consisting of FortisBC Energy Inc., FortisBC Energy (Vancouver Island) Inc. and FortisBC Energy (Whistler) Inc.

Pursuant to section 99 of the *Utilities Commission Act*, the FortisBC Energy Utilities are filing the enclosed Application for Reconsideration and Variance of Order G-26-13, dated February 25, 2013, on the FortisBC Energy Utilities' Common Rates, Amalgamation, and Rate Design Application.

Twelve hard copies of the enclosed will follow by courier.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by Christopher Bystrom]

Christopher Bystrom

CRB/ccm
Encl.
cc (email only): Registered Parties to the FEU 2013-2013 RRA and FEU Common Rates, Amalgamation and Rate Design Application

Application for Reconsideration and Variance of Commission Order G-26-13 on the FortisBC Energy Utilities' Common Rates, Amalgamation, and Rate Design Application

FortisBC Energy Utilities,
(consisting of FortisBC Energy Inc., FortisBC Energy (Vancouver Island) Inc. and FortisBC Energy (Whistler) Inc.)

April 26, 2013

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I. INTRODUCTION

1. The FortisBC Energy Utilities ("FEU"), consisting of FortisBC Energy Inc. ("FEI"), FortisBC Energy (Vancouver Island) Inc. ("FEVI") and FortisBC Energy (Whistler) Inc. ("FEW"), are filing this application ("Reconsideration Application") pursuant to section 99 of the *Utilities Commission Act* ("*UCA*") for a reconsideration and variance of Order No. G-26-13, dated February 25, 2013 on the FEU's *Common Rates, Amalgamation and Rate Design Application* ("Application"). Specifically, the FEU are seeking variance of Order G-26-13 for a determination that the proposed amalgamation of the FEU is in the public interest and the proposed postage stamp rates for the amalgamated utility, excluding the service area of Fort Nelson, are approved.

2. The FEU are filing this Reconsideration Application with support from other stakeholders, and the FEU are also aware of the reconsideration application filed by the Commercial Energy Consumers Association of British Columbia on April 25, 2013. The Ministry of Energy, Mines and Natural Gas has provided a letter of support for this Reconsideration Application, which is attached as **Appendix "A"**. The introduction to the letter states:

> "The purpose of this letter is to advise that the Ministry of Energy, Mines and Natural Gas' (Ministry) supports FortisBC Energy Utilities' request to the British Columbia Utilities Commission (Commission) to reconsider the Common Rates, Amalgamation and Rate Design Application Decision (Decision) dated February 25, 2013. …
>
> From a public policy perspective, the Ministry is of the opinion that a common rate resulting from the proposed amalgamation of FortisBC Energy Utilities will have benefits for all FortisBC Energy customers in British Columbia.
>
> Government policy has been to promote access to energy services on a postage stamp rate basis so that all British Columbians benefit from access to services at the lowest average cost."

The Ministry has indicated that it intends to intervene in this Reconsideration Application and participate actively.

3. There are three broad grounds for this Reconsideration Application.

(a) First, the Commission made three material legal errors in its analysis.

(b) Second, there is just cause for the Commission to reconsider and vary its Order based on the Ministry's articulation of the government policy in favour of postage stamp rates.

(c) Third, the Commission made material errors of fact and drew conclusions that have no basis in the evidence.

4. The FEU respectfully submit that if all of the factors relevant to the public interest are weighed together, the Commission should find that amalgamation and postage stamp rates are in the public interest. The Ministry's articulation of government policy regarding postage stamp rates provides further justification to grant this Reconsideration Application.

5. The sections below set out:

(a) the orders sought by the FEU in this Reconsideration Application;

(b) the applicable procedure on an application for reconsideration and variance; and

(c) each of the grounds for reconsideration and variance.

II. ORDER SOUGHT IN THIS RECONSIDERATION APPLICATION

6. The FEU are seeking an Order that Order No. G-26-13 be varied to order as follows:

   (a) the amalgamation of FEI, FEVI, FEW and Terasen Gas Holdings Inc. is beneficial in the public interest; and

   (b) the FEU's proposal to adopt common rates for natural gas delivery amongst the service areas of FEI, FEVI and FEW, but excluding the service area of Fort Nelson, is approved effective on or before January 1, 2015.

7. The draft order included as Appendix K-2 to the Application shows the detailed list of the approvals required in order to implement amalgamation and postage stamp rates, which would need to be updated to reflect the exclusion of the Fort Nelson service area and the new timeline for implementation of postage stamp rates.

8. The FEU are not seeking reconsideration and variance of Order G-26-13 at this time to the extent that the Commission denied postage stamp rates for the Fort Nelson service area. The basis for this Reconsideration Application relies in part on the section 53 amalgamation request; however, the Fort Nelson service area is already part of FEI. As the FEU submitted during the original proceeding, the exclusion of the Fort Nelson service area is not a barrier to the amalgamation and implementation of postage stamp rates among FEI, FEVI and FEW.[1]

[1] Exhibit B-9, BCUC IR 1.2.3, Final Argument, para. 160, Reply Argument, para. 61.

III. PROCEDURE ON RECONSIDERATION

9. As reflected in the Reconsideration and Appeals section of *"Understanding Utility Regulation: A Participant's Guide to the B.C. Utilities Commission,"* the Commission's default process for addressing reconsideration applications is to proceed in two phases.

10. The first phase is a preliminary examination in which the application is assessed in light of some or all of the following questions:

    (a) Should there be a reconsideration by the Commission?

    (b) If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?

    (c) If there is to be reconsideration, should it focus on the items from the application for reconsideration, a subset of these items or additional items?

11. After the first phase evidence has been received, the Commission generally applies the following criteria to determine whether or not a reasonable basis exists for reconsideration:

    (a) the Commission has made an error in fact or law;

    (b) there has been a fundamental change in circumstances or facts since the Decision;

    (c) a basic principle had not been raised in the original proceedings; or

    (d) a new principle has arisen as a result of the Decision.

12. In addition, the Commission will exercise its discretion to reconsider, in other situations, wherever it deems there to be just cause.[2]

13. This Reconsideration Application is based in part on errors of law and fact. In such circumstances, the Commission applies the following criteria to determine whether the

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[2] British Columbia Utilities Commission, "Understanding Utility Regulation: A Participant's Guide to the B.C. Utilities Commission"

reconsideration application should proceed to the second phase to be considered on its merits:

(a) the claim of error is substantiated on a *prima facie* basis; and

(b) the error has material implications.

14. The FEU submit that this Reconsideration Application establishes a *prima facie* case for reconsideration and variance of Order No. G-26-13 based on the errors of fact and law described, and justifies proceeding to the second phase. The evidence in the Ministry's letter (Appendix A) that the Decision is inconsistent with public policy also provides just cause for the Commission to exercise its discretion to proceed to the second phase.

IV. SUMMARY OF GROUNDS FOR RECONSIDERATION

15. The FEU seek reconsideration and variance of Order G-26-13 on the basis that the Commission made a number of material errors of law and fact in its Decision[3] that formed the basis for Order G-26-13 (the "Decision") and that there is just cause to reconsider given the government's public policy statement in the Ministry's letter included as **Appendix "A"** to this Reconsideration Application.

A. *Material Errors of Law*

16. The FEU submit that a review of the Decision shows three interrelated errors of law which precluded the Commission from giving full consideration to the issues arising in the Application. The FEU summarize below each of the errors of law that the FEU submit was made:

(a) *First, the Commission erred by failing to consider postage stamp rates within the context of an amalgamated entity.*

Amalgamation is a legal precondition of implementing postage stamp rates over the combined FEU service areas. It was therefore necessary for the Commission to conduct its analysis of common rates under sections 59-61 as if amalgamation had already occurred. Instead, the Commission made no determination on the merits of amalgamation and assessed whether the proposed postage stamp rates are "just and reasonable and not unduly discriminatory" as if multiple utilities still existed.

(b) *Second, the Commission erred by relying on the fact that the existing rates of the FEU are approved in the context of separate utilities to preclude a full consideration of whether the proposed postage stamp rates could be "just and reasonable and not unduly discriminatory" in the context of an amalgamated entity.*

---

[3] Decision, In the Matter of FortisBC Energy Utilities Common Rates, Amalgamation and Rate Design Application, dated February 25, 2013.

Approved utility rates are always "just and reasonable and not unduly discriminatory", by definition. Section 75 of the *UCA* requires that each application be considered on its merits. The Commission was required to re-assess what the rates should be in light of the evidence presented and in the context of an amalgamated entity. The Commission's reliance on existing rates for the FEU having been approved precluded a full consideration of whether the postage stamp rate option could be "just and reasonable and not unduly discriminatory" in the context of an amalgamated entity.

(c) *Third, the Commission erred by dismissing the entire Application based solely on its assessment of postage stamp rates under sections 59-61, as this precluded consideration of factors relevant to a public interest assessment of amalgamation under section 53 of the UCA.*

The legal test for approving amalgamation under section 53 of the *UCA* is whether amalgamation is beneficial in the public interest. The Commission, in formulating an opinion regarding the public interest under section 53, must at least consider all evidence relevant to the public interest inquiry. Moving to common rates was central to the FEU's proposal to amalgamate. However, the Commission's assessment of the proposed common rates under sections 59-61 based on rate design principles, combined with its decision not to undertake a distinct section 53 analysis, foreclosed consideration of evidence material to a public interest determination on amalgamation.

B. ***Just Cause***

17. The FEU submit that there is just cause for the Commission to reconsider Order G-26-13 based on the letter of support from the Ministry, which provides a clear and unequivocal policy statement in favour of postage stamp rates (**Appendix "A"**). The decision on whether or not to amalgamate the FEU and implement postage stamp rates impacts British Columbians living in different regions of the Province and should be fully considered in the context of the government policy articulated by the Ministry.

C. ***Material Errors of Fact***

18. The FEU respectfully submit that the Commission also made material errors of fact in the course of its analysis under sections 59-61. These errors included findings that:

(a) the assurances provided by Fortis Inc. in the context of its acquisition of the FEU regarding "local functions" supported the significance of regional differences;

(b) in general, FEI's customers oppose the Application;

(c) postage stamp rates would lead to less customer understanding and acceptance; and

(d) regional rate designs are better able to address the circumstances of each utility's service area, efficiency and rate stability.

These factual determinations were key to the Commission's disposition of the Application. The errors, whether considered individually or collectively warrant varying Order G-26-13.

V. FAILURE TO CONSIDER POSTAGE STAMP RATES WITHIN THE CONTEXT OF AN AMALGAMATED ENTITY

19. The FEU submit that the Commission erred in failing to consider common rates within the context of an amalgamated entity.

20. The Commission's approach to considering the FEU's Application was to consider the proposed common rates first:[4]

> "Given that the FEU's rationale for amalgamation "is entirely dependent on the adoption of postage stamp rates" and its view that "the primary benefit of amalgamation is that it facilitates implementation of postage stamp rates," the Commission Panel will first consider whether it supports the use of postage stamp rates across all (or some) of the regions served by the FEU. (Exhibit B-3, p. 10; FEU Final Submission p. 10)"

While the Commission accurately characterized the FEU's position that they would not proceed with amalgamation without postage stamp rates, amalgamation of the FEU was still a legal precondition to the implementation of common rates. Logically, the Commission could only properly assess the proposed postage stamp rates from the perspective that amalgamation had occurred. The Commission erred by instead assessing the FEU's proposal to adopt postage stamp rates from the standpoint of the separate utilities continuing to exist.

21. One notable example of this flaw in logic is the Commission's reference to a previous decision, *In the Matter of British Columbia Hydro and Power Authority 2007 Rate Design Application Phases II and III,* dated December 21, 2007, which stated at p. 33: "[d]iscrimination, when applied to rates for utility service, can only be of an "intra-utility" nature and not "inter-utility." The Commission relied on this principle and reasoned that the existing rates approved for each of the FEU cannot be considered to be unduly discriminatory by virtue of there being a rate differential. It noted that rates charged by different utilities are often different.[5]

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[4] Decision, p. 6.

[5] Decision, p. 11.

22. The FEU take no issue with the principle articulated in the 2007 decision. However, the Commission's approach failed to recognize that once amalgamation occurs, the assessment becomes *intra-(amalgamated) utility*, i.e. it no longer requires a comparison of rates charged by different utilities. The rate disparities between the FEVI service area and the FEI service area, for instance, take on a fundamentally different complexion if they are viewed through the lens of a single amalgamated utility than if they are viewed in the context of two distinct utilities. Whereas rates charged by different utilities are routinely different from one another, regional rates within a single utility are the exception, not the norm, in British Columbia and for public utilities generally.[6]

23. Another example of the Commission implicitly assessing the FEU's rate proposal from the perspective of three distinct utilities remaining in place is the Commission's repeated references to the fact that existing rates for each of the FEU have been approved and its comparison "to the *status quo*". For instance, in the context of discussing the rate design principle of fairness, which was a key aspect of the Commission's Decision on common rates, the Commission indicated that cross-subsidization moves away from cost causation and then stated (at p. 22):

> "The Panel notes that the existing rates in each region, as approved by the Commission, are, by necessary implication, fair, just and reasonable, and non-discriminatory."

24. In its conclusion on the fairness principle, the Commission found (at p. 24) that the FEU's proposal to implement postage stamp rates is not fair "as compared to the status quo." Similarly, under the heading "Commission Panel Determination," the Commission noted the resulting cross-subsidization from postage stamp rates and stated (pp. 33-34):

> "Such cross subsidization results in a movement away from the current rates underlying the status quo, which rates have been previously determined to be just and reasonable and not unduly discriminatory, and are based on cost causality."

25. The Commission also referenced the fact that existing rates are approved in its discussion of the existing rate disparities:[7]

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[6] FEU Final Submission, section 3.1.

[7] Decision, p. 11.

> "By necessary implication, postage stamp rates would eliminate rate disparities among the various utilities. However, in the Panel's view, assuming utilities are all operating as going concerns, and other things being equal, the existence of rate disparities among different utilities is common and to be expected. As noted by the Commission at page 33 of its Decision *In the Matter of British Columbia Hydro and Power Authority 2007 Rate Design Application Phases II and III* dated December 21, 2007, "[d]iscrimination, when applied to rates for utility service, can only be of an "intra-utility" nature and not "inter-utility." The status quo in this case, therefore, does not present a problem in terms of the existence of disparate rates." [Emphasis added.]

26. The Commission's reliance on existing approvals ignored the fact that the existing rates were approved in the context of three separate utilities, rather than an amalgamated utility. Put another way, the Commission's analysis under sections 59-61 ought to have proceeded on the basis that the alternative to common rates was regional rates within an amalgamated entity, not "the *status quo*" of different utilities. The *status quo* was only relevant in the context of considering whether it is in the public interest to proceed with amalgamation at all. The Commission expressly declined to consider the FEU's request to amalgamate, and had it done so the Commission would also have had to consider a number of other factors relevant to the public interest.

27. The Commission's approach of evaluating the proposed common rates as if FEVI, FEW and FEI continued to operate as distinct utilities effectively foreclosed the need for the Commission to consider the policy evidence regarding postage stamp rates. To that point, the Commission never addressed in its Decision the evidence regarding the prevalence of postage stamp rates for public utilities.

28. In summary, the FEU's Application was not capable of being assessed on the basis that separate utilities continued to exist, and the Commission's approach was in error.

VI. RELIANCE ON THE FACT THAT EXISTING RATES ARE APPROVED

29. A rate application under sections 59-61 of the *UCA* requires the Commission to reassess existing rates in light of the evidence before it. The FEU submit that the Commission erred in relying on the fact that the FEU's existing rates had previously been approved as a rationale for dismissing the Application without considering the full scope of public interest considerations.

A. *The Law*

30. The *UCA* is explicit that the Commission must consider applications on their merits. Section 75 provides:

> 75. The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions.

31. Section 75 reflects the common law rule against administrative tribunals fettering their discretion. In *Bell Canada v. Canada (AG)*, 2011 FC 1120,[8] the Court found that the Canadian Radio-television and Telecommunications Commission ("CRTC") was not bound by precedent and had a legal obligation not to fetter its discretion. On the topic of the CRTC's ability to rely on its previous decisions, the Court stated at paras 90-92:

> "The principle that an administrative tribunal cannot use its previous decisions to fetter its discretion was established in *Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.), at 486. The Ontario Court of Appeal held in that case that it would have been an error of law for the Ontario Municipal Board to use precedent to limit the number of issues that it needed to address. Administrative tribunals are permitted to rely on principles articulated in previous decisions as long as the tribunal gives "the fullest hearing and consideration to the whole problem before it."
>
> The prohibition on exclusive reliance by an administrative tribunal on previous decisions includes not only factual and policy decisions but also legal determinations and is essential to ensure that administrative tribunals have the flexibility to respond to new circumstances on a case-by-case basis. The need for flexibility is particularly acute in the case of policy and factual determinations, such as those at issue in Decision 2010-805 and the Petition.

[8] Available online at: http://www.canlii.org/en/ca/fct/doc/2011/2011fc1120/2011fc1120.html.

> The CRTC also did not have before it in its previous decisions Bell's new wireless HSPA+ technology proposal, which Bell characterized as establishing new facts, resulting in a new application. In my view, the CRTC could not have considered [i.e. would not have been able to consider] competitive bidding in light of these new facts in its previous decisions any more than the CRTC could have considered [i.e. would have been able to consider] Bell's new wireless HSPA+ technology in its previous decisions. The relevant facts, quite simply, were not previously before the CRTC." [Emphasis and parenthetical clarification added.]

32. The Commission can refer to past decisions to assist in a full consideration of the evidence and issues before it, but it is an error of law for the Commission to rely on existing decisions to limit the issues that the Commission should have considered.

B. ***Application of the Law to the Present Case***

33. The Commission relied on the fact that the existing rates of the FEU had been previously approved in a manner that precluded a full consideration of the issues based on the evidence filed.

34. Any utility's approved rates are, by definition, "just and reasonable and not unduly discriminatory". Each and every rate application filed by a utility requires a re-assessment of existing approved rates in light of the evidence before the Commission. Rates are routinely changed. The FEU's Application presented new facts and evidence to the Commission. In fact, the proposed postage stamp rates were premised on there being an amalgamated entity, which was a fundamentally different set of circumstances than the circumstances before the Commission when it had approved the existing rates for FEI, FEVI and FEW.

35. The Commission relied on existing rates to demonstrate that the existing rates are "not a problem".[9] However, the fact that existing rates were approved did not in any way address the challenges associated with the approved rates that the FEU had identified. Put another way, while the rates were "not a problem" in the sense that they were "just and reasonable and not unduly discriminatory", they <u>were</u> a problem for public interest reasons. The Commission's assessment that the rates were "not a problem" because they

[9] Decision, p. 11.

had been approved foreclosed a consideration of whether based on the current circumstances it is in the public interest to amalgamate and adopt common rates.

36. Moreover, the proposed rates could result in movement away from existing approved rates and still be "just and reasonable and not unduly discriminatory". For example, the fact that the existing rates of the FEU are based on cost causation, does not preclude the conclusion that the proposed postage stamp rates are also based on cost causation. The FEU proposed to use FEI's existing rate design and each customer class would recover the costs attributable to that class, just as is done under FEI's existing approved postage stamp rates. It was incorrect to rely on the fact that the existing rates were approved to conclude that the proposed rates were not based on cost causation to an acceptable degree. Doing so precluded a full consideration of whether the proposed rates were sufficiently based on cost causation to be just and reasonable.

37. Returning to the *Bell* case, the Court determined that "[a]dministrative tribunals are permitted to rely on principles articulated in previous decisions as long as the tribunal gives 'the fullest hearing and consideration to the whole problem before it.'" The Commission was not relying on "principles articulated in previous decisions"; rather, it was relying on the mere fact that the Commission had previously approved the existing rates, despite that decision having been made under different circumstances. The Court's conclusion that an error had been made because "[t]he relevant facts, quite simply, were not previously before the CRTC," could be equally said of the FEU's Application.

38. In summary, the Commission's reliance on the existing rate approvals precluded a full consideration of whether existing rates were "a problem" from a public interest perspective, and even whether the postage stamp rate option could be "just and reasonable and not unduly discriminatory" in the context of an amalgamated entity. This improper fettering of discretion was a legal error justifying reconsideration and variance of Order G-26-13.

VII. THE COMMISSION DID NOT CONSIDER FACTORS RELEVANT TO THE PUBLIC INTEREST

39. The FEU submit that it was an error for the Commission to conclude that its assessment of postage stamp rates under sections 59-61 was sufficient to dispose of the FEU's entire Application. Addressing the FEU's Application required the Commission to undertake a broad public interest assessment. The approach taken in the Decision of using rate design principles to assess common rates and amalgamation foreclosed consideration of facts relevant to the public interest.

A. *Applicable Law Governing Application to Amalgamate*

40. Section 53(1) of the *UCA* specifies a public interest test for amalgamation. It provides:

> 53 (1) A public utility must not consolidate, amalgamate or merge with another person
>
> (a) unless the Lieutenant Governor in Council
>
> (i) has first received from the commission a report under this section including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, and
>
> (ii) has, by order, consented to the consolidation, amalgamation or merger, and
>
> (b) except in accordance with an order made under paragraph (a).
>
> [Emphasis added.]

41. The scope of a public interest assessment is broad. The Federal Court of Appeal in *Nakina (Township) v. Canadian National Railway Co. (1986), 69 N.R. 124 (F.C.A.)("Nakina")*[10], which dealt with the jurisdiction of the Railway Transport Committee, observed (at para. 5): 'by definition, the term "public interest" includes the interests of all the affected members of the public.' Similarly, in the context of an application for a certificate of public convenience and necessity, which is also a public interest determination, the Commission's 2006 decision in relation to the Vancouver Island Transmission Reinforcement Project stated: "The Commission Panel accepts the

[10] *Nakina (Township) v. Canadian National Railway Co.* (1986), 69 N.R. 124 (F.C.A.) is attached as **Appendix "B"** to this Reconsideration Application.

submissions of BCTC that there is a broad range of interests that should be considered in determining whether an applied-for project is in the public convenience and necessity."[11]

42. Where a tribunal is required to have regard to the public interest, it is an error of law for the tribunal to fail to consider interests relevant to the public interest. In ***Nakina***, the Court held that the Railway Transport Committee erred in law in failing to consider, where it was required to have regard to the public interest, evidence of the effect of the closing of a railway station on the economy of the local community. The Court said (at para. 5):

> "…I would have thought that, by definition, the term "public interest" includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. Some may be given little or no weight; others much. But surely a body charged with deciding in the public interest is "entitled" to consider the effects of what is proposed on all members of the public. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is according, in my view, an error of law justifying the intervention of this court." [Emphasis added.]

43. The Court in *Nakina* went on to say (at para. 10):

> "For clarity, however, I would emphasise that the error lies simply in the failure to consider. Clearly the weight to be given to such consideration is a matter for the discretion of the Commission, which may, in the exercise of that discretion, quite properly decide that other considerations are of greater importance. What it could not do was preclude any examination of evidence and submissions as to the adverse economic impact of the proposed changes on the affected community." [Emphasis added.]

44. In this regard, the B.C. Court of Appeal in *Tsawwassen Residents Against Higher Voltage Overhead Lines Society v. British Columbia*, 2006 BCCA 537,[12] (an appeal from this Commission), having referenced *Nakina*, states (at para. 29):

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[11] Decision, In the Matter of British Columbia Transmission Corporation, Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project, dated July 7, 2006, p. 15. Online at: http://www.bcuc.com/Documents/Decisions/2006/DOC_12041_1-VITR%20Decision-July%207%202006%20-%20Web.pdf.

[12] Online at: http://www.courts.gov.bc.ca/jdb-txt/ca/06/05/2006bcca0537.htm.

> "Had the Commission limited its consideration of the factors put before it by the participants in the proceedings to matters of cost only, that would have been an error of law, as demonstrated by ***Nakina***, and a question of general importance as to the jurisdiction of the Commission."

45. In summary, the consideration of the public interest is broad and it is an error of law to fail to consider a relevant category of interests.

B. ***Application of the Law to the Present Case***

46. The present case is a circumstance where the Commission has precluded examination of evidence and submissions relevant to the public interest under section 53 by virtue of disposing of the entire Application by reference to rate design principles.

47. The Commission concluded that the proposed postage stamp rates were not "just and reasonable" based on its interpretation and weighting of rate design principles as articulated in the Decision.[13] The Commission recognized that the amalgamation and rate approvals sought were distinct,[14] but considered that the finding regarding the proposed rate structure was dispositive of the entire Application because the FEU would not proceed with amalgamation in the absence of postage stamping. The Commission stated:

> "Given its determination on the issue of postage stamp rates, it was unnecessary for the Panel to consider whether amalgamation would be "beneficial in the public interest" in accordance with section 53 of the Utilities Commission Act."[15]
>
> …
>
> "Given the FEU's position that they will not amalgamate without postage stamp rates, it is not necessary for the Panel to consider this issue."[16]

48. The two components of the Application - amalgamation and adoption of common rates - were interrelated because the FEU's primary rationale for amalgamation was the ability to implement postage stamp rates. However, it was an error for the Commission to

[13] Decision, p. 19.
[14] Decision, p. 3.
[15] Decision, p. i.
[16] Decision, p. 35.

conclude that "it is not necessary for the Panel to consider [amalgamation]" based on a determination on postage stamp rates.

49. The issue of whether or not to amalgamate and adopt postage stamp rates across all three utilities is a policy issue. The public interest inquiry under section 53 of the *UCA* requires the Commission to determine whether, in light of the benefits articulated by the FEU of amalgamating and adopting postage stamp rates, there is any public interest justification for maintaining three separate entities any longer. It is evident from the Decision that this question was not addressed.

50. The discussion in the Decision of "Issues Proposed to be Addressed Through Postage Stamp Rates" was very brief. The Commission's discussion of the existing rate disparities was limited to an observation that rates in different utilities typically differ:[17]

> "By necessary implication, postage stamp rates would eliminate rate disparities among the various utilities. However, in the Panel's view, assuming utilities are all operating as going concerns, and other things being equal, the existence of rate disparities among different utilities is common and to be expected. As noted by the Commission at page 33 of its Decision In the Matter of British Columbia Hydro and Power Authority 2007 Rate Design Application Phases II and III dated December 21, 2007, "[d]iscrimination, when applied to rates for utility service, can only be of an "intra-utility" nature and not "inter-utility." The status quo in this case, therefore, does not present a problem in terms of the existence of disparate rates." [Emphasis added.]

The assumption that "utilities are all operating as going concerns" begs the very question that is at the heart of the section 53 analysis: should the utilities continue operating separately "as going concerns" in light of the evidence presented, or should they be amalgamated to eliminate the rate discrepancies amongst the FEU to resolve the challenges faced by FEVI and FEW, ensure more equitable treatment of the customers of all three utilities, and capture other efficiencies and benefits? Similarly, the relevant question was not whether the existing disparate rates were unjust and unreasonable, but rather whether there was an approach that better served the public interest.

[17] Decision, p. 11.

51. The Commission's second and final point regarding the issues to be addressed by postage stamping suffered from the same circularity:[18]

> "The Commission Panel notes that FEU's proposed solution to higher rates on Vancouver Island due to the loss of government subsidies has the effect of replacing the government subsidy with a subsidy from the ratepayers of FEI."

The fact that the ratepayers of FEI would be covering a portion of the cost of service currently attributable to serving the ratepayers of FEVI and FEW after amalgamation was self-evident from the existing rate disparity. The relevant question, which the Commission never asked, was whether it was appropriate, for broad public interest reasons, to allow this result through the adoption of common rates following the amalgamation of the entities.

C. ***Relevant Public Interest Considerations Identified by the FEU and Not Considered***

52. Arriving at an opinion on whether amalgamation for the purpose of adopting common rates is in the public interest required the Commission to weigh all of the factors that the FEU had identified as favouring amalgamation for the purpose of adopting postage stamp rates against the Commission's concerns. The Commission did not address all of the relevant considerations. The variety of public interest factors that were not considered are summarized below to underscore the materiality of the Commission's omission.

i. *Public Policy*

53. As the FEU discussed in section 3 of their Final Submission, amalgamating and implementing postage stamp rates is favoured by public policy. Postage stamp rates permit the equitable treatment of utility consumers regardless of location. Government has now spelled out in the appended letter what it considers to be the broad public policy considerations in favour of postage stamp rates.

ii. *Regulatory Practice*

54. Postage stamp rates are already extensively used in the Province, and are the norm across Canada.[19] FEI effectively has postage stamp rates across its wide and diverse customer

[18] Decision, p. 12.

base, as does FortisBC Inc. Additionally, BC Hydro has postage stamp rates that extend over the Lower Mainland, Whistler and Vancouver Island. Within each postage stamped area, there is cross-subsidization amongst and within regions, communities and neighbourhoods. In short, the type of cross-subsidization engendered by postage stamp rates is already considered "just and reasonable" and not "undue" in most areas of the Province.

55. Previous Commission decisions have also explicitly supported postage stamp rates, as discussed by the FEU in section 3.2.1.1 of their Final Argument. In particular, Order No. G-87-07 related to the community of Big White shows that the Commission has affirmed the application of postage stamp rates in similar circumstances.[20] The discussion on page 15 of the Big White Decision (Appendix A to Order No. G-87-07) states that the Big White area has differences in costs that are no different than what is seen between other sub-regions within the service area. This is consistent with the FEU's position in the original proceeding, i.e. that there is as much variation in the costs to serve customers within each of the FEU as there is amongst the FEU. This is also consistent with the decisions of many other regulatory tribunals across Canada when considering similar issues.[21]

iii. *Energy Choices*

56. Another factor is how the decision of whether or not to amalgamate and adopt postage stamp rates affects consumers' choice between natural gas and electricity within the service areas of FEVI and FEW, given the postage stamp rates in place for BC Hydro. The FEU addressed this issue under the heading "competiveness" in their Final Submission, but it is also an efficiency issue.

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[19] FEU Final Submission, section 3.1.

[20] Online at: http://www.bcuc.com/Documents/Decisions/2007/DOC_16323_Decision_FBC_Big-White-RD-Reasons.pdf. Also included at Tab 2 of the FEU's Book of Authorities for its Final Submissions.

[21] FEU Final Submission, section 3.2.

57. In Exhibit B-12, BCRUCA IR 2.1.1, the FEU had stated:

> "Postage stamp rates would provide a better market signal for decisions about which energy source (electricity or natural gas) for residential consumers to use in end-use applications that can be served by natural gas. All residential consumers will use electricity in their homes for purposes such as lights and appliances, so the question of gas versus electricity (or other energy sources such as geo-exchange systems) comes into play mainly for thermal end-uses such as space heating and water heating. Since electricity rates in BC Hydro's service territory are postage stamped across the province, efficient decision making with regard to energy choices would be facilitated by having the same natural gas rates in place in the various parts of the FEU's service territories. Having postage stamp rates for both electricity and natural gas would mean that the analysis and value proposition on the choice of energy systems would be similar throughout the province, rather than having some areas such as FEI and FEFN with a stronger business case and other areas (FEVI and FEW) with a weaker one."

58. Maintaining existing rates for FEVI will mean that FEVI's rates will increase due to the loss of government subsidies. This will increase the potential for inefficient energy choices described above, given that the higher regional gas price will be compared to the postage stamped electric price when making fuel choices.

iv. *Cost Savings and Regulatory Efficiencies*

59. The FEU identified cost savings as a benefit of amalgamation. The FEU estimated the benefits of amalgamation and postage stamp rates to be in the range of $901,000 to $3,128,000 per year, depending on the average short-term debt that would be applicable to the FEVI service area.[22] In addition, the FEU identified other regulatory savings due to streamlined filings and applications under an amalgamated entity with one unified regulatory structure and a harmonized tariff.[23] As the FEU noted, these savings would extend to intervenor and Commission cost savings due to fewer regulatory applications and proceedings. Although it is difficult to quantify these savings, given that a major regulatory proceeding usually costs customers between $300,000 and $1.5 million,[24] this is potentially a significant cost saving. For example, if the FEU do not amalgamate and

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[22] Exhibit B-9, BCUC IR 1.5.11; Exhibit B-15, BCUC IR 2.1.2. A working excel spreadsheet supporting the NPV analysis was provided in Attachment 2.1 to Exhibit B-15 (as referred to in response to BCUC IR 2.2.1).

[23] Exhibit B-3, p. 123, section 6.6.1.

[24] Exhibit B-3, p. 123.

implement postage stamp rates, multiple revenue requirements, rate design and cost of capital proceedings will be required, all of which tend to cost customers in the higher range of the cost estimates provided above.

60. The way in which the Decision addressed this evidence underscores why the Commission ought to have undertaken a public interest assessment of amalgamation, rather than dispensing with the entire Application based on its findings regarding common rates. The Decision states (at p. 27):

> "Potential cost savings, which are modest at best, would appear to flow more from the amalgamation proposal than from postage stamping (i.e. debt financing, reporting costs). (Exhibit B-3, p. 154) The fact that the FEU will not amalgamate in the absence of postage stamping does not transform any potential savings from amalgamation into savings from postage stamping."

61. The Commission's approach precluded from consideration the cost savings attributable to amalgamation. In effect, the Commission declined to consider cost savings in its analysis because it concluded that the savings were associated primarily with amalgamation, not postage stamping. All of the cost savings were relevant in the context of a section 53 public interest analysis and should have been fully considered.

62. The Commission also made a factual error in concluding that the potential cost savings flowed more from the amalgamation proposal. While some of the identified savings could flow from amalgamation alone, the FEU's evidence was that without postage stamp rates: the regulatory efficiencies would not be achieved, financial efficiencies would be limited and the debt financing savings (i.e. short-term interest savings) were uncertain as they depended on FEI maintaining its credit rating.[25] With respect to the reference to page 154 of Exhibit B-3 in the quote above, this page discussed how the debt financing savings were incorporated into the cost of service for the purposes of postage stamp rates, which is an unrelated matter.

[25] Exhibit B-9, BCUC IR 1.5.11; Exhibit B-15, BCUC 2.30.1 and 2.30.1.2.

63. The FEU also identified other regulatory efficiencies of amalgamation and postage stamp rates that were not considered.[26] Specifically, the FEU described the efficiencies realized by facilitating consistent access to service offerings as a result of amalgamation and postage stamp rates.[27] The Commission did not address whether the public interest is served by the facilitation of consistent access to service offerings.

v. *Government Energy Policy*

64. The FEU's evidence was that its proposed amalgamation and adoption of postage stamp rates were consistent with government energy policy.[28] The FEU summarized the evidence in paragraphs 148-149 of their Final Submission:

> "One of the proposals in the Province's "Natural Gas Strategy: Fueling B.C.'s Economy for the Next Decade and Beyond,"[29] is to work "to promote natural gas as a transportation fuel". Since the release of the strategy document in February 2012, the *Greenhouse Gas Reduction (Clean Energy) Regulation*[30] has come into force making incentives for natural gas vehicles and expenditures on CNG and LNG fueling stations prescribed undertakings under section 18 of the *Clean Energy Act.*
>
> …The reduced rates in the FEVI and FEW service areas that would result from amalgamation and postage stamp rates would improve the economics of adopting natural gas as a transportation fuel in these service territories. This would be expected to help customers in these service areas make a decision to move to NGT by reducing one of the barriers that could be impeding their decision.[31]"

65. The FEU also submitted at paragraph 151 of their Final Submission:

> "As discussed above, to the extent that lower rates in the FEVI and FEW service areas fosters natural gas as a transportation fuel, this should lead to reduced GHG emissions all else equal.[32] More affordable natural gas prices also have the potential to encourage customers to switch from

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[26] FEU Final Submission, Section 5.

[27] FEU Final Submission, Section 5.2.

[28] The FEU provided an overview of provincial energy policy in section 4.1.4 (pp. 63 to 65) and Appendix G-0 of the Application. Appendices G-1 through G-9 contained supporting documents.

[29] Exhibit B-3-1, Appendix G-8, "Natural Gas Strategy: Fueling B.C.'s Economy for the Next Decade and Beyond", 3 February, 2012.

[30] O.I.C. No. 295, dated May 14, 2012.

[31] Exhibit B-9, BCUC IR 1.40.1 and 1.40.5 and Exhibit B-15, 2.47.3, 2.54.2 and 2.55.1.

[32] Exhibit B-3, Application, p. 128.

> higher GHG emitting energy resources, such as furnace oil and propane, in the FEVI service area where there still exists reliance on other fossil fuels for space heating and hot water. Using natural gas in place of other fossil fuels, all else equal, will reduce the amount of GHG in BC.[33] Switching from heating oil to natural gas may occur since a home using heating oil will generally be appropriately configured to accommodate natural gas heating equipment.[34]"

66. As the Commission never undertook a public interest analysis, it never considered the fact that amalgamation and postage stamp rates are aligned with government energy policy, would promote natural gas as a transportation fuel, and would encourage switching away from higher carbon fuels.

67. In summary, the FEU submit that the full range of benefits of amalgamation and postage stamp rates should have been considered by the Commission. When all the factors in favour of amalgamation and postage stamp rates are considered as part of a public interest assessment, it is only reasonable to conclude that amalgamation to be followed by the adoption of postage stamp rates is in the public interest and should be approved.

[33] Exhibit B-3, Application, p. 129.

[34] Exhibit B-15, BCUC IR 2.52.1.

VIII. JUST CAUSE: GOVERNMENT LETTER REGARDING PUBLIC POLICY

68. Government has expressed its support for the FEU's Reconsideration Application and has indicated that it intends to seek registered intervenor status should the Commission undertake a reconsideration proceeding. The Ministry's letter in **Appendix "A"** identifies three policy rationales favouring reconsideration of the Decision: (a) equality of investment and job creation opportunities; (b) regulatory efficiency; and (c) customer rate impacts. The FEU submit that there is just cause to reconsider Order G-26-13 given that the letter of support from the Ministry shows that the Decision and Order G-26-13 are inconsistent with public policy.

A. *Equality of Investment and Job Creation Opportunities:*

69. The Ministry states (Appendix A, p. 2):

> "The Ministry is concerned about the impacts to business mobility in the absence of postage stamp rates. For example, under the current structure, investment in the regions served by FortisBC Energy's Vancouver Island System (Sunshine Coast and Vancouver Island) and Whistler system are disadvantaged by higher rate in the order of 50% or more than the corresponding commercial rates in the mainland service areas of FortisBC Energy Inc. That means that investors looking to add value to provincial natural gas resources, as supported by the Province's Natural Gas Strategy, by developing opportunities such as liquefied natural gas or chemical production would look elsewhere in the Province to locate. This results in a competitive advantage for the areas served by FortisBC Energy Inc. that has implications for customer fairness from a broader public policy perspective. While many factors may affect the competitive position of commercial enterprises in a particular locale, a disadvantage in the area of energy input costs may be significant and lead to diminished economic development and job creation opportunities as a result. ..."

70. The letter from the Ministry provides further details and then states (Appendix A, p. 3):

> "From a provincial, price fairness perspective postage stamp rates would provide consistent pricing for the program resulting in a greater economic incentive throughout British Columbia to use natural gas in the heavy duty transportation sector."

B. *Regulatory Efficiency:*

71. On the topic of regulatory efficiency, the Ministry states (Appendix A, p. 3):

> "Government policy is to achieve reductions in regulatory requirements and red tape. Having only one revenue requirement, long-term resource plan, return on equity finding, service offering applications, and common programs, instead of three separate processes for the three utilities creates a savings that can be passed on to customers. Having the two smaller utilities merged with the large one also effectively spreads risk across a larger organization more able to mitigate/accept those risks, and provides more stable rates to customers over the long term."

C. ***Customer Rate Impact:***

72. On customer rate impacts, the Ministry states (Appendix A, p. 3-4):

> "The Ministry is of the opinion that the next several years will be an opportune time for transitioning to postage rates given forecasts for continued low natural gas commodity prices. This will help minimize rate spikes for customers. The increases of 5% for the majority of customers (which are located in the Lower Mainland, Interior and Columbia regions) are small compared to fluctuations in customer bills that have been driven by changes in the commodity cost of natural gas over the past decade. …"

73. The FEU agree with the Ministry that now is an opportune time to transition to postage stamp rates. The following table shows the annual changes in the residential burner tip bill for FEI Rate Schedule 1 customers since 1999. As shown in the table below which is based on Commission-approved rate increases, the annual percentage changes to the residential burner tip bill have decreased and increased by well over 5% in several years, and have been decreasing in recent years due to lower commodity costs.

FEI-Mainland Rate Schedule	1998	1999	2000	2001	2002	2003	2004	2005
RS1 - Residential								
Annual Prorated Burner Tip Bill	$ 550	$ 616	$ 816	$ 1,140	$ 996	$ 1,131	$ 1,107	$ 1,194
Annual Percentage Change		11.9%	32.4%	39.8%	-12.7%	13.6%	-2.1%	7.9%

FEI-Mainland Rate Schedule	2006	2007	2008	2009	2010	2011	2012	2013
RS1 - Residential								
Annual Prorated Burner Tip Bill	$ 1,221	$ 1,187	$ 1,292	$ 1,062	$ 1,092	$ 995	$ 906	$ 889
Annual Percentage Change	2.3%	-2.8%	8.8%	-17.8%	2.9%	-8.8%	-9.0%	-1.9%

D. ***Conclusion***

74. The FEU submit that the Commission should reconsider the Decision in light of the government policy set out by the Ministry in its letter. This letter underscores that there are benefits to amalgamation and postage stamp rates from a broad public policy perspective and that the Decision and Order G-26-13 are inconsistent with that policy. This is a significant factor that the FEU submit should be considered and given weight in the Commission's assessment of amalgamation and postage stamp rates.

IX. ERRORS OF FACT AND CONCLUSIONS NOT SUPPORTED BY EVIDENCE

75. The Commission's analysis of the proposed postage stamp rates was based on a number of factual errors and factual determinations that were not supported by the evidence. These errors, both individually and collectively, were material to the Commission's analysis regarding the proposed common rates, and consequently affected its disposition of the Application as a whole.

A. *The FEU are Already Operationally Integrated*

76. The FEU maintained in the proceeding that the high level of operational and physical integration among the FEU was a factor favouring amalgamation and the adoption of postage stamp rates. The Commission made a factual error regarding the current level of integration among the FEU, and relied on this error as a factor supporting maintenance of regional rate structures.

77. The Application described how operational integration among the FEU started in 2003 as part of the Utilities Strategy Project.[35] The integration project has long since been completed. The FEU are fully integrated and effectively operate as a single utility, with costs allocated for accounting and regulatory purposes.[36] As stated in Exhibit B-15, BCUC IR 2.11.2:

> "The FEU manage and operate on a fully integrated basis as a single system and have common management control and decision making systems, common distribution, transmission, and business support operations, and optimize the supply of natural gas based on managing the needs of a portfolio of resources that minimizes costs for all customers."

78. The FEU's expert EES Consulting explained why the high level of operational and physical integration among the FEU is a factor that supports amalgamation and the adoption of postage stamp rates:[37]

> "Postage stamp pricing better reflects the fact that utility systems have a high level of interconnection, and facilities are most often shared among

[35] Exhibit B-3, p. 51.

[36] Exhibit B-3, p. 51; Exhibit B-15, BCUC IR 2.11.2.

[37] Exhibit B-3-1, Appendix D-1, EES Consulting, "Natural Gas Cost of Service Review," pp. 6-7.

> large groups of customers. Facilities closer to the customer, like distribution facilities, are more closely tied to local groups of customers, while facilities upstream from the customer, like transmission, are generally used by all customers on the system. When the FEU service areas had separate ownership they were operated as stand-alone entities and needed to rely on their own facilities to deliver gas to customers. Each separate utility had postage stamp rates within their service areas. The acquisition of the different utilities led to operational efficiencies and resulting cost savings. This includes greater integration of existing facilities and installation of new facilities that benefit the entire utility. As the systems become more and more integrated, the application of postage stamp pricing across all regions becomes more appropriate.
>
> With a continuation of regional rates, any facilities that are used for multiple regions would need to have a special allocation arrangement to share the costs equitably. These allocations are already in place for existing facilities, such as the Mt. Hayes storage facility. While it is possible to continue with this approach, the planning and sharing of costs for facilities that benefit customers in multiple regions is simplified under a postage stamp pricing approach, and is not open to contention in the allocation among the regional customers."

79. The Decision was premised on an assumption that there is a much lower degree of integration among the FEU than currently exists. This is evident in the Commission's reference to Fortis Inc.'s undertaking at the time of its acquisition of the FEU, which the Commission characterized as being related to maintaining "local functions" for each of the FEU (at p. 26):

> "The Commission Panel notes the assurances given by Fortis Inc. (Fortis) at the time of its acquisition of the shares of Terasen Inc. – of which Terasen Gas Inc., Terasen Gas (Vancouver Island) Inc., and Terasen Gas (Whistler) Inc. were wholly owned subsidiaries - relating to the maintenance of local functions. The Commission specifically noted, in the Reasons for Decision attached as Appendix A to Order G-49-07 approving the purchase, Fortis' assurance that:
>
> > "(h)as with all the utilities which Fortis owns, Fortis intends to operate the Terasen Utilities [defined as Terasen Gas Inc., Terasen Gas (Vancouver Island) Inc., Terasen Gas (Whistler) Inc., and Terasen Energy Services Inc. at p.1] on a stand-alone basis. In keeping with its policy and normal practice, Fortis plans to maintain existing head offices and to implement, as soon as is reasonably practical, significant independent, local representation on the boards of the Terasen Utilities..."

> This assurance reinforces the significance of the regional differences among the FEU utilities."

80. The meaning of these assurances was not addressed during the proceeding, and the Commission has misinterpreted them. Fortis Inc.'s assurances did not relate to maintaining local functions of each of the Terasen Utilities (as the FEU were then called). At the time of the Fortis Inc. acquisition in 2006 when the referenced assurances were made, the full operational integration among the three Terasen Utilities had already been completed.[38] The assurance to operate the Terasen Utilities on a stand-alone basis indicated that Fortis Inc. was not going to begin operating the utilities from one of its other areas of operation, such as from Alberta. The assurance to maintain existing head offices referred to the fact that Fortis Inc. would not be operating the Terasen Utilities out of its head office in St. John's, Newfoundland and Labrador, for instance. There were no head offices in the FEVI and FEW service areas in 2006, and there are none today. Finally, implementing local representation on each of the boards of the Terasen Utilities referred to local B.C. representation as opposed to representation from other FortisBC areas of operation. The FEU reject any suggestion that these assurances in any way support a determination that the different regions served by the FEU are significant. To the contrary, the operational integration of the FEU since 2003 has made such distinctions less significant.

81. Further, the Decision approving the Fortis Inc. acquisition imposed (at p. 15) the conditions that had been imposed on Kinder Morgan Inc. ("KMI"), which had explicitly addressed restrictions on the geographical location of existing functions. One of the referenced conditions set out in Commission Decision and Order No. G-116-05 in respect to the KMI acquisition addressed "Location of Functions and Data" as follows (at p. 50):[39]

> "In order to address privacy concerns and other concerns, the Commission Panel determines that it would be appropriate to attach a condition to approval of the Transaction that requires KMI not to change the

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[38] Exhibit B-3, p. 51.

[39] Decision, In the Matter of an Application by Kinder Morgan, Inc. and 0731297 B.C. Ltd. for the Acquisition of Common Shares of Terasen Inc., dated November 10, 2005. Online at: http://www.bcuc.com/Documents/Proceedings/2005/DOC_9223_KMI-Terasen%20Decision_FINAL2.pdf

> geographic location of any existing functions or data currently in Terasen Gas' service area without prior approval of the Commission." [Emphasis added.]

82. Commission Letter No. L-30-06 clarified what "existing functions" the Commission was referring to:[40]

> '[b]y "functions," the Commission intended to include not only those functions performed by TGI on behalf of the Terasen Utilities but also those functions performed by Terasen Inc. for the Terasen Utilities.'

Letter No. L-30-06 explicitly recognizes the extent to which Terasen Gas Inc. and Terasen Inc. already performed functions for all of the Terasen Utilities on an integrated basis. The Letter also makes clear that the conditions did not relate to maintaining functions within the FEVI and FEW service areas. This made sense because, even at the time of the KMI acquisition, the operational integration among the FEU had already taken place.

83. The FEU submit that the Commission erred in using the assurances of Fortis Inc. out of context as a basis to conclude that regional differences among the FEU are significant. Instead, the FEU submit that the high degree of integration should have been considered as a factor that weighed *against* maintaining regional distinctions.

B. ***FEI Customers are Not Generally Opposed***

84. The Commission stated (at p. 25) that "In general…customers of FEI…are understandably opposed". This statement, which appears to be based on the letters of comment filed, does not align with the positions of intervenors in the proceeding or the evidence on the results of the FEU's stakeholder engagement program.

85. The following intervenors representing cross-sections of FEI customers were supportive of the Application:

- British Columbia Pensioners' and Seniors' Organization, et al. (collectively, "BCPSO");

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[40] BCUC Letter No. L-30-06, dated June 26, 2006. Online at: http://www.bcuc.com/Documents/Orders/2006/DOC_12024_L-30-06_Clarification-Rsp-KMI-Decision.pdf

- BC Residential Utility Customers Association ("BCRUCA");
- Commercial Energy Consumers Association of British Columbia ("CEC"); and
- Rental Owners and Managers Society of BC ("ROMSBC").

86. Leaving aside the Fort Nelson service area, the only FEI customer to actively intervene and oppose the Application was Mr. Robinson.

87. Although there were a number of letters of comment from FEI customers filed in opposition to the Application, they only represented a small percentage of FEI customers and should not have been treated as representative of customers as a whole. The results of customer polls undertaken by Vision Critical[41] and other stakeholder engagement demonstrated that FEI customers were split between support for, and opposition to, the Application. As summarized in response to BCUC IR 1.101.1:[42]

> "With regards to FEI, market research indicates that approximately 37-38% of FEI customers feel that the move to common rates makes sense for FortisBC customers, while approximately 36-39% oppose the move. In addition, approximately 36% of FEI respondents feel that the Application is fair, while approximately 37-39% do not. Based on the Public Information Sessions' feedback and Commercial & Industrial customer surveys, FEI results are split evenly between support and opposition for customers paying the same rate for natural gas regardless of where they live."

88. The Commission noted in its Decision the understandable reaction of many customers to assess fairness based on whether the rate design favours them.[43] The extent of FEI customer *support* for the Application, despite recognition that FEI rates would increase as a result, was a notable fact that should have been considered and given weight.

C. ***Customer Understanding and Acceptance***

89. The Commission cited the rate design principle of promoting customer acceptance and understanding, and determined that the implementation of postage stamp rates would

[41] Vision Critical is a leading third party research firm. Exhibit B-3, p. 232.

[42] Exhibit B-9.

[43] Decision, pp. 25-26.

decrease customer acceptance and understanding. However, this finding was explicitly based on two errors of fact previously discussed and overlooked important evidence.

90. The Commission referred to opposition from FEI customers (an over-generalization, as discussed above), and went on to state the following (at p. 26):

> "The Commission Panel notes that the vast majority of FEU customers will be facing rate and bill increases under the postage stamp rate proposal, which may indicate reduced, rather than improved, customer acceptance.
>
> Further, given the regional differences that have been identified, the Commission Panel is not convinced that postage stamp rates will enable better customer understanding. The Commission Panel notes the assurances given by Fortis Inc. (Fortis) at the time of its acquisition of the shares of Terasen Inc. – of which Terasen Gas Inc., Terasen Gas (Vancouver Island) Inc., and Terasen Gas (Whistler) Inc. were wholly owned subsidiaries - relating to the maintenance of local functions. …
>
> This assurance reinforces the significance of the regional differences among the FEU utilities. In the Panel's view, customer understanding will not be improved, but might actually be reduced, as the effects of regional differences are minimized or lost."

91. The FEU submit that this conclusion is based on the errors of fact discussed above regarding the opposition from FEI customers and the integration of the FEU. First, the level of support for postage stamp rates would suggest a significant degree of acceptance of the impacts of postage stamp rates. Second, given the level of integration of the FEU, the removal of the regional rate differences would be more consistent with the customer experience. As the FEU are already integrated, there would be no changes to any "local functions" due to amalgamation and postage stamp rates.

92. All of the evidence suggested that amalgamation would improve the level of customer understanding and acceptance. For instance:[44]

(a) There is currently a significant complexity in the different rates applicable amongst the FEU, which generates customer confusion.

[44] Exhibit B-3, pp. 115-116.

(b) Customers are familiar with postage stamp rates because they are in place for the electric utilities in the Province.

(c) During the Common Rates Public Information Sessions, when asked whether they agree with the statement "Common natural gas pricing structures will be simpler and easier to understand", 57% of the customers agreed or strongly agreed that common rates would be simpler and easier to understand, while 13% of the customers neither agreed nor disagreed with the statement.

(d) Postage stamp rates facilitated simplified administration, information requirements and billing procedures, due to a reduced number of billing determinants, rate categories and classes.

None of this evidence was referenced by the Commission in the Decision.

93. The FEU therefore submit that there was no reasonable basis for the Commission to conclude that postage rates would reduce customer understanding or acceptance.

D. ***Benefits of Regional Rate Design***

94. A material aspect of the Decision was the Commission's reliance on apparent benefits of regional rate designs. The Decision includes a number of comments on the benefits of regional rates, which the FEU submit are not reasonably based on the evidence. Each of these is addressed below.

i. *Low Consumption and High Carbon Heating Fuels*

95. The Commission erred when it stated that a region-specific rate design can more readily address low consumption and the use of high carbon heating fuels.

96. The Decision stated in this regard (at pp. 23-24):

> "…the Panel finds certain characteristics which tend to be somewhat unique to Vancouver Island, such as the low consumption rate as well as the ongoing use of alternative high carbon heating fuels (allowing the promotion of natural gas furnaces in that jurisdiction) are more readily addressed through a region-specific customized rate design and use of incentives which are arguably not appropriate for the other regions."

97. There was no evidence that a "region-specific customized rate design" offers better options for addressing low consumption customers than the proposed postage stamp rates. In either a "region-specific" or postage stamp scenario, a rate could be developed for a low-consumption rate class. While it is true that FEVI in total has a lower average use per customer than FEI, low consumption is not unique to FEVI. FEI has almost three times as many "low consumption" customers as does FEVI.[45] Under a postage stamp rate design, low consumption customers anywhere in the FEU service areas would be able to be targeted with a rate class if the Commission were to determine that such an approach were appropriate.

98. Moreover, a postage stamp rate offers more flexibility. The proposed postage stamp rates would lower delivery rates in the FEVI and FEW service territories, and therefore could allow for a higher basic charge or other more suitable rate restructuring alternatives without discouraging new customers or encouraging existing customer to switch fuels.[46] In the absence of postage stamp rates over all the FEU regions, the higher basic charge would have the impact of raising the already high rates for low-consumption FEVI and FEW customers, encouraging them to switch to other energy sources such as electricity for which rates are postage stamped.[47] This could lead to inefficient energy choices and further exacerbate the challenges facing FEVI and FEW[48] as load would be reduced, further increasing rates, and so on.

99. In addition, regional rate designs are not better able to address "the ongoing use of alternative high carbon heating fuels (allowing the promotion of natural gas furnaces in that jurisdiction)".[49] While the reference is unclear, the FEU assume that the Commission was referring to demand-side measures aimed at incentives to switch to natural gas from higher carbon heating fuels. The Commission appears to have made the error that regional rates can better address the use of high carbon heating fuels within FEVI's service territory because incentives to encourage the switch to natural gas are

[45] FEU Final Submission, pp. 35-36; Exhibit B-15, BCUC IR 2.39.2;
[46] Exhibit B-15, BCUC IR 2.39.3.
[47] Exhibit B-15, BCUC IR 2.39.7.2.
[48] Exhibit B-3, Section 4.
[49] Decision, p. 23-24.

"arguably not appropriate for the other regions."[50] It would be a mistake of law to conclude that the use of incentives to promote the use of natural gas away from alternative high carbon heating fuels may not be "appropriate" for other regions. Section 4(1.3) of the *Demand Side Measure Regulation*, B.C. Reg. 326/2008, refers to "a demand-side measure that encourages a switch from the use of oil or propane to the use of natural gas or electricity such that the switch would decrease greenhouse gas emissions in British Columbia." As this type of demand-side measure is explicitly contemplated in the *Demand Side Measure Regulation*, it would be appropriate for *any* region to implement provided it passes the appropriate cost-benefit analysis and other requirements.

100. The FEU therefore submit that the evidence does not reasonably support the Commission's conclusion that regional rate design is better able to address low consumption customers or the ongoing use of alternative high carbon heating fuels.

ii. *Efficiency and "One-size fits all" Approach*

101. There was no evidentiary basis for the Commission's factual determinations regarding efficiency. In the context of efficiency, the Decision states (at p. 24):

> "Rather, the Panel finds that efficiency can be better improved through customized rate designs, in those regions where efficiency issues exist, than through the "one size fits all" postage stamping proposal."

102. There is no evidence that efficiency can be "better improved" through regional rate designs. The Commission has mischaracterized postage-stamp rates as a "one-size fits all" approach. Postage stamp rates include the ability to have different rates for different classes of customers (as do the existing postage stamp rates for each of the FEU). The ability of postage stamp rates to accommodate different classes of customers is no different than the ability of the existing rates to accommodate such differences.

103. In support of its conclusion that regional rate designs can better improve efficiency, the Decision relies on two pieces of evidence from the FEU, stating (at p. 25):

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[50] Decision, p. 23-24.

> "In fact, the FEU advise that if postage stamp rates are not approved, they may consider non-traditional rate designs for FEVI and FEW. They also note FEVI's view that the benefits which may be realized from a combined gas portfolio would not outweigh the impacts of reduced flexibility for it to manage its own gas portfolios and related price risk management strategies that take into account its unique circumstances. (Exhibit B-9, BCUC IR 1.87.1; 1.46.1.1)"

104. The FEU submit that this is not a fair characterization of the FEU's evidence. First, the FEU did not say in response to BCUC IR 1.87.1 that they believed that such non-traditional rate designs had any particular benefits or would be successful. To the contrary, the FEU pointed out the problems with a non-traditional rate design for FEVI, namely:

(a) Setting rates higher than the cost of service would increase FEVI's already high rates and further compound FEVI's challenges; and

(b) Setting rates lower than the cost of service would accumulate a large revenue deficiency for recovery from future customers which would exacerbate the future rate challenges that FEVI already faces due to the loss of government subsidies.

The fact that FEVI may have to adopt a non-traditional rate design if postage stamp rates are not approved is evidence of the challenges faced by FEVI, not the benefits of a regional rate design.

105. Second, in Exhibit B-9, in response to BCUC IR 1.46.1, the FEU explained why they would not proceed with amalgamation of the gas portfolios if amalgamation and postage stamp rates are not approved. The decision was largely driven by the Commission's previous decisions to limit the number of strategies available to manage natural gas price volatility. In short, the FEU determined that if amalgamation and postage stamp rates were not approved, then FEVI would need to have different strategies than FEI to help mitigate FEVI's cost and competitiveness challenges with the expiry of the royalty revenues. These strategies are not linked in any way to regional rate design and would not be needed if amalgamation and postage stamp rates were approved. Again, this is not evidence of any superiority of regional rate designs, but evidence of the challenges faced by FEVI.

106. Furthermore, as addressed above, the relationship between natural gas and electricity rates in the province is such that having regional natural gas rates for Vancouver Island and postage stamp electricity rates for Vancouver Island sends the wrong price signals and leads to inefficient energy choices.[51]

107. The FEU therefore submit that there is no evidence that regional rate designs are superior to a postage stamp rate design at improving efficiency.

iii. *Regional Rate Design does not Address Identified Rate Stability Issues*

108. The Decision appears to dismiss the rate stability issues facing FEVI and FEW in part in the belief that regional rates would be able to fix the problem. The Decision states for example at p. 30:

> "However, the issue is the cost of stability rather than the fact of stability itself. Rate stability and predictability can be achieved through any number of means. For example, the use of deferral accounts is a common method used to smooth potential rate fluctuations. Capitalization of the cost of an asset involves expensing the asset over its useful life as opposed to recognizing the entire expenditure when made. Fixed charges, as well, are, by definition, not subject to variation and are a simple matter of rate design."

109. The use of deferral accounts, capitalization of assets or fixed charges may be able to help smooth out short-term rate stability issues.[52] However, these mechanisms cannot lower FEVI's or FEW's existing rates without accumulating a revenue deficiency. Furthermore, they provide only a short-term solution to the loss of government subsidies, which is a unique rate stability issue faced by FEVI.[53] While FEVI is amortizing capital costs and using the Rate Stabilization Deferral Account to smooth rate increases, these mechanisms defer, but do not avoid, rate increases caused by the loss of the government subsidies.

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[51] E.g., Exhibit B-12, BCRUCA IR 2.1.1.

[52] However, see the FEU's submissions above regarding the adverse effects of increasing the basic charge in the absence of postage stamp rates.

[53] Exhibit B-3, Section 4, p. 112.

110. In short, in the FEU's submission, there is no evidentiary basis for the Commission's conclusion that regional rate mechanisms will resolve the rate stability challenges for FEVI and FEW that were identified by the FEU in the Application.

X. CONCLUSION

111. The FEU respectfully submit that the legal and factual errors identified above, individually and collectively, were material to the Commission's analysis. The Commission should reconsider and vary Order G-26-13 as sought based on a full assessment of the range of public interest considerations, including the public policy in favour of postage stamp rates as articulated by the Ministry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated: April 26, 2013

[original signed by Christopher Bystrom]

Christopher Bystrom
Fasken Martineau DuMoulin LLP
Counsel for the FortisBC Energy Utilities

APPENDIX “A”

BRITISH COLUMBIA

Ministry of
Energy, Mines
and Natural Gas

CLIFF NO.: 77536

April 15, 2013

Ms. Diane Roy
Director, Regulatory Affairs - Gas
FortisBC Energy Inc.
16705 Fraser Highway
Surrey, BC V4N 0E8

Dear Ms. Roy:

The purpose of this letter is to advise that the Ministry of Energy, Mines and Natural Gas' (Ministry) supports FortisBC Energy Utilities' request to the British Columbia Utilities Commission (Commission) to reconsider the Common Rates, Amalgamation and Rate Design Application Decision (Decision) dated February 25, 2013. The Ministry requests that the FortisBC Energy Utilities include this letter in their application to the Commission for reconsideration.

From a public policy perspective, the Ministry is of the opinion that a common rate resulting from the proposed amalgamation of FortisBC Energy Utilities will have benefits for all FortisBC Energy customers in British Columbia.

Government policy has been to promote access to energy services on a postage stamp rate basis so that all British Columbians benefit from access to services at the lowest average cost.

We provide three examples of the confirmation of this policy. In 1962, BC Electric and the BC Power Commission amalgamated to form the BC Hydro and Power Authority (BC Hydro). In that year, a postage stamp electric rate was established for all residential customers in areas served by BC Hydro. While there were different capacity and energy charges for industrial customers for Vancouver Island and the North Coast from the Lower Mainland, in 1975, postage stamp rates were implemented for BC Hydro. More recently, on May 27, 2003, then Minister Neufeld confirmed the Province's position with regard to postage stamp rates for BC Hydro (see attachment).

Other provinces have seen the amalgamation of natural gas utilities such as Centra Gas in Manitoba. In Manitoba a series of corporate acquisitions and regulatory approvals over a

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Assistant Deputy Minister
Electricity and Alternative Energy Division
Mailing Address:
PO Box 9314, Stn Prov Govt
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1810 Blanshard Street
Victoria

number of years led to several smaller utilities being amalgamated into one utility (Centra Gas Manitoba, now part of Manitoba Hydro) and eventually to postage stamp rates across the utility. Amalgamation of smaller natural gas utilities has also occurred in Ontario with Ontario Energy Board approval. The predecessor utilities of FortisBC Energy Inc., Inland Natural Gas, Columbia Natural Gas, Fort Nelson Gas and the Gas Division of BC Hydro, were amalgamated and, with the exception of Fort Nelson, have regulatory proceedings on a consolidated basis and postage stamp rates.

The Ministry notes that most interveners for the Common Rates, Amalgamation and Rate Design Application indicated that they were in favour of postage stamp rates with the exception of interveners representing the interests of Fort Nelson Customers. The Ministry also notes that the Industrial Electricity Policy Review Task Force process is considering postage stamp rates and submissions to the Task Force support continuation of postage stamp rates. This point is addressed in further detail below.

Based on a broad public policy perspective, there are three areas where the Ministry supports a reconsideration of the Commission Panel's Decision.

1. **Equality of Investment and Job Creation Opportunities:**

   The Ministry is concerned about the impacts to business mobility in the absence of postage stamp rates. For example, under the current structure, investment in the regions served by FortisBC Energy's Vancouver Island system (Sunshine Coast and Vancouver Island) and Whistler system are disadvantaged by higher rates, in the order of 50% or more than the corresponding commercial rates in the mainland service areas of FortisBC Energy Inc. That means that investors looking to add value to provincial natural gas resources, as supported by the Province's Natural Gas Strategy, by developing opportunities such as liquefied natural gas or chemical production would look elsewhere in the Province to locate. This results in a competitive advantage for the areas served by FortisBC Energy Inc. that has implications for customer fairness from a broader public policy perspective. While many factors may affect the competitive position of commercial enterprises in a particular locale, a disadvantage in the area of energy input costs may be significant and lead to diminished economic development and job creation opportunities as a result.

   As part of the Industrial Electricity Policy Review, a Task Force comprised of Messrs. Newton, Ostergaard, and Trumpy has been established. As noted on the website [1] and in the Terms of Reference [2], industrial economic development and postage stamp rates were raised in the Dawson Creek/Chetwynd Area Transmission Application by

[1] http://www.empr.gov.bc.ca/EPD/Pages/IndustrialElectricityPolicyReview.aspx
[2] http://www.empr.gov.bc.ca/EPD/Documents/Industrial%20Electricity%20Policy%20Review%20Terms%20of%20Reference-FINAL.pdf

BC Hydro to the Commission. The TaskForce has published a number of Issue Papers including one on postage stamp rates, and has received a number of responses on this issue. For example Canadian Association of Petroleum Producers notes that "[p]ostage stamp ratemaking is a common method of setting rates for many utilities in Canada," and they see "no reason to change from current postage stamp rate-setting methodology." The Association of Major Power Customers of BC states that they "[do] not propose any changes to postage stamp rates, and submits that they are practically necessary and an underlying principle to other tariff structures in BC." Clean Energy BC "fully supports Postage Stamp Rates."

In May of 2012, the Lieutenant Governor in Council issued the *Greenhouse Gas Reduction (Clean Energy) Regulation*, under s. 18 the *Clean Energy Act* prescribing the circumstances for natural gas incentives and infrastructure for use in the transportation sector. This regulation evidences the province's desire for increased use of natural gas in the heavy duty transportation sector throughout British Columbia, since the regulation applies to all utilities. From a provincial, price fairness perspective, postage stamp rates would provide consistent procing for the program resulting in a greater economic incentive throughout British Columbia to use natural gas in the heavy duty transportation sector.

2. Regulatory Efficiency:

Government policy is to achieve reductions in regulatory requirements and red tape. Having only one revenue requirement, long-term resource plan, return on equity finding, service offering applications, and common programs, instead of three separate processes for the three utilities creates savings that can be passed on to customers. Having the two smaller utilities merged with the larger one also effectively spreads risk across a larger organization more able to mitigate/accept those risks, and provides more stable rates to customers over the long term.

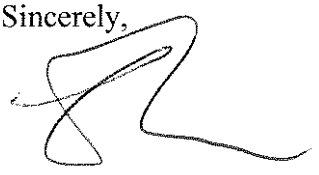
3. Customer Rate Impact:

The Ministry is of the opinion that the next several years will be an opportune time for transitioning to postage rates given forecasts for continued low natural gas commodity prices. This will help minimize rate spikes for customers. The increases of 5% for the majority of customers (which are located in the Lower Mainland, Interior and Columbia regions) are small compared to fluctuations in customer bills that have been driven by changes in the commodity cost of natural gas over the past decade. The current low commodity cost environment is an opportune time to implement postage stamp rates. While there was discussion in the hearing process about the phasing-in of postage stamp rates, the Ministry notes that no consideration was given to what an appropriate level of cost sharing should be by Vancouver Island and Whistler customers from a regulatory fairness perspective. Establishing a postage stamp rate along with appropriate rate riders could ameliorate the impact.

The Ministry is of the view that reconsideration has merit based upon the above discussion. The Ministry intends to seek registered intervenor status should the Commission undertake a reconsideration proceeding.

Thank you for your consideration.

Sincerely,



Les MacLaren
Assistant Deputy Minister
Electricity and Alternative Energy Division
Ministry of Energy, Mines and Natural Gas

BRITISH COLUMBIA

VANCOUVER 2010 CANDIDATE CITY

IT'S OUR TIME TO SHINE

MAY 27 2003

Ms. Patricia A. Wallace
President
Union of British Columbia Municipalities
60 - 10551 Shellbridge Way
Richmond, BC V6X 2W9

Dear Ms. Wallace:

Thank you for your letter of March 19, 2003 conveying the Union of British Columbia Municipalities' (UBCM) additional views concerning the Government's new Energy Plan: "Energy for Our Future: A Plan for BC."

With respect to electricity rates, the heritage contract will lock in the value of the existing low-cost generation for the benefit of all British Columbians. Low-cost heritage power will be made available to the distribution arm of BC Hydro. It will be blended with other sources of electricity, such as power purchases from independent power producers (IPPs). Customer electricity rates will be set to reflect the average cost of electricity, just as they are set today. To ensure electricity rates are as low as possible, the British Columbia Utilities Commission (BCUC) will review BC Hydro's electricity rates, as well as the contracts between BC Hydro and IPPs, to ensure the contracts represent the best deal for customers.

Electricity rates will be set on a postage stamp basis. This means all customers within a particular customer class will receive the same rate, regardless of their location in the Province. New rate structures will be developed, initially for large customers, to provide them with an opportunity to save on their electricity bills through efficiency investments, load shifting, or sourcing their electricity from other suppliers. I wish to stress these new rates are to provide large customers with an opportunity to reduce their electricity costs, not to increase their costs.

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Ministry of Energy and Mines
Office of the Minister
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Victoria
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BCUC reviews are public reviews, and all stakeholders, including local governments, are welcome to participate and to provide input. The BCUC is currently reviewing the Vancouver Island Generation Project, proposed for Nanaimo, as well as the terms of the proposed heritage contract. The UBCM and its members are welcome to participate in these proceedings. BC Hydro will also apply to the BCUC for a rate review by March 2004, and local governments are welcome to participate in that process as well.

The contact for background information on the BCUC, and how to participate in the ongoing Vancouver Island Generation Project and heritage contract reviews, is as follows:

Mr. Robert J. Pellatt
Commission Secretary
British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Box 250
Vancouver, BC V6Z 2N3
Telephone: (604) 660-4700
Facsimile: (604) 660-1102
BC Toll Free: 1-800-663-1385
Website: http://www.bcuc.com.

With respect to local government involvement in IPPs siting and development, regulatory agencies, such as the Environmental Assessment Office and Land and Water British Columbia Inc., always confer with local governments during the review of proposals. Local governments have authority over local zoning and planning issues and, as such, can influence how or where projects are developed. As you may know, new legislation is being considered that will require proponents to work with local approval authorities to resolve issues. I understand you have had discussions on this issue with Honourable Kevin Falcon, Minister of State for Deregulation.

On the issue of communities producing some or all of their own power, there is nothing in the Energy Plan preventing this type of activity. Municipally owned utilities are not subject to regulation by the BCUC for the electricity services they provide within municipal boundaries. However, service outside municipal boundaries is subject to BCUC regulation. There are currently six municipal utilities in British Columbia. Except for the City of Nelson, which owns a hydro-electric generating station on the Kootenay River, these utilities source their power primarily from Aquila Networks Canada and BC Hydro.

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The issue of revenue sharing is a complex one which will evolve. Accordingly, I am not able to provide you with further information at this time. However, you may be aware the new BC Heartlands Economic Strategy, announced in the Throne Speech, will see economic development plans implemented across the Province, including investments in transportation infrastructure, new opportunities for tourism, sport and recreation, and a revitalized forest industry. As well, there will be job creation in coal bed methane, and further activity in oil and gas exploration and development.

Your comment with regard to local government grants-in-lieu is noted. The Energy Plan addresses your comments regarding resource adequacy, alternative energy, and energy conservation, in a number of ways. For example, utilities, including BC Hydro, have a responsibility to ensure they have sufficient supply to meet the needs of their customers. The BCUC, as part of its supervisory functions, will review utility plans to ensure utilities have adequate resources to meet their customers' demands for electricity.

Alternative energy development is encouraged by the Energy Plan's requirement that electricity distributors pursue a voluntary goal to acquire 50 percent of new supply from BC Clean Electricity over the next 10 years.

The Energy Plan also has a number of Policy Action items to promote conservation. These include:

- updating and expanding the *Energy Efficiency Act*;
- working with the building industry, governments and others to improve energy efficiency in new and existing buildings;
- stepped rates to provide better price signals to large electricity consumers; and
- amending the *Utilities Commission Act* to remove a disincentive for energy distributors to invest in conservation and energy efficiency.

I trust this letter (along with my previous letter to you of March 5, 2003) will clarify the issues raised by the UBCM Executive.

Sincerely,

ORIGINAL SIGNED BY MINISTER

Richard Neufeld
Minister

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pc: Honourable Kevin Falcon
Minister of State for Deregulation

Mr. Robert J. Pellatt
Commission Secretary
British Columbia Utilities Commission

APPENDIX “B”

CANADIAN NATIONAL RAILWAY CO. v. NAKINA (TOWNSHIP)
(A-80-86)

Federal Court of Appeal
Pratte, Urie and Hugessen, JJ.
June 26, 1986.

Summary:
CN applied to the Canadian Transport Commission for leave to abandon a station. The town in which the station was located opposed the application. The Railway Transport Committee of the Commission granted leave. The town appealed.

The Federal Court of Appeal allowed the appeal and remitted the matter to the Committee.

Railways - Topic 1126
Regulation - Abandonment of stations - Considerations - Public interest - Effect on community - CN applied for leave to abandon the Nakina station - The town presented evidence to show adverse effects of abandonment on the community - The Railway Transport Committee of the Canadian Transport Commission ruled that, although it could consider the public interest, it had no jurisdiction to consider the effects of abandonment on the community - The Federal Court of Appeal held that the effects of abandonment on the community were obviously part of the public interest and should have been considered by the Committee.

Statutes Noticed:
Railway Act, R.S.C. 1970, c. R-2, s. 120 [para. 1].

Counsel:
John H. Hornak, for the appellant Township;
Terrence H. Hall, for the respondent CN;
Diane Nicholas, for the Canadian Transport Commission.

Solicitors of Record:
Petrone, Hatherly, Hornak & Associates, Thunder Bay, Ontario, for the appellant;
Canadian National Railway Co., Montreal, Quebec, on its own behalf;
Canadian Transport Commission, Hull, Quebec, on its own behalf.

This case was heard on June 11, 1986, at Ottawa, Ontario, before Pratte, Urie and Hugessen, JJ., of the Federal Court of Appeal.

On June 26, 1986, Hugessen, J., delivered the following judgment for the Federal Court of Appeal:

[1] Hugessen, J.: The Canadian National Railway Company (CN) proposes changes in its freight train operations between Hornepayne and Armstrong, in Northern Ontario. The changes involve a "run-through" and consequent closing or abandonment of the station at Nakina. Accordingly, leave of the Canadian Transport Commission was required pursuant to section 120 of the **Railway Act**, R.S.C. 1970, c. R-2:

> "120. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of section 119 are fully complied with, nor remove, close, or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees, without leave of the Commission; and where any such change is made the company shall compensate its employees as the Commission deems proper for any financial loss caused to them by change of residence necessitated thereby."

[2] The Railway Transport Committee of the Commission held hearings in connection with the proposed closure or abandonment. At those hearings, the appellant, the Corporation of the Township of Nakina, appeared and presented evidence and argument tending to show that the proposed changes would have a drastic effect upon the economy of the region.

[3] The Committee's decision, which forms the subject matter of the present appeal, granted the requested leave to CN. On the matter of the Town-

ship's intervention, the Committee stated the problem before it in the following terms:

> "Section 120 of the **Railway Act** merely provides that a railway company shall not remove, close or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees without leave of the Commission. (emphasis added). In the Committee's opinion, it is an accepted principle that where no limits or guidelines are placed on the discretion of the Committee, the Committee may consider the public interest in deciding whether or not to grant leave. While this is clear, it was not apparent how broadly the Committee should define the public interest in the context of section 120. That is, should the Committee examine only those aspects of the public interest that impact directly on railway operations or are all aspects of the public interest relevant?" (Case Book, p. 16-17).

[4] After extensively reviewing the case law on the question, none of which it found to be directly on the point, the Committee concluded as follows:

> "On balance, then, the Committee is of the opinion that it is not entitled, by the words of section 120 of the **Railway Act**, to take into consideration the effects of a run-through on the Township of Nakina." (Case Book, p. 23).

[5] I find this conclusion startling. The Committee concedes that it must have regard to the public interest. I would have thought that, by definition, the term "public interest" includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. Some may be given little or no weight; others much. But surely a body charged with deciding in the public interest is "entitled" to consider the effects of what is proposed on all members of the public. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is accordingly, in my view, an error of law justifying the intervention of this court.

[6] But there is more. In its rationale for limiting its view of what was the public interest, the Committee, quite correctly in my view, stated:

> "... the question of how broadly it should define the public interest must be answered not only with reference to section 120, but by taking into consideration the **Railway Act** as a whole." (Case Book, p. 22-23).

[7] It then went on to give the following analysis of the general scheme of the **Act:**

> "The **Railway Act** is legislation dealing with the running of railways and, by its terms, it gives the Railway Transport Committee of the Canadian Transport Commission jurisdiction in the areas of the technical operation of the railways, the safe operation of the railways and the service provided by the railways in their operation. In a general sense, the Committee is under a duty to exercise this jurisdiction for the public benefit. However, this cannot mean that in all operational, safety and service matters that the Committee must look beyond the immediate issue and adjudicate between the particular railway's interest and the interests of the public in general. This being the case, a narrow interpretation of the factors to be considered in granting leave would be in keeping with the well recognized aim of preserving harmony within the **Act.**" (Case Book, p. 23).

[8] I confess that I am at a loss to understand this passage. While it is true, of course, that the **Railway Act** gives the Commission special responsibilities in the three areas identified by the Committee, namely, technical

operation, safety and service, its power of decision making is by no means limited to a narrow consideration of those matters only. Indeed in some cases the Commission is directed to decide in only the most general terms such as in accordance with the public convenience and necessity. To put the matter another way, while the Commission may have the jurisdiction, in the public interest, to regulate questions of technical operation, safety and service, those fields of jurisdiction do not themselves constitute either a limitation or a definition of what the public interest is, either generally or with regard to any particular case.

[9] If evidence is relevant to the determination of the question of public interest, it must be admitted and considered. For my part, I find it impossible to say that evidence dealing with the probable economic effects of the proposed changes on the surrounding communities would not be relevant to the question of the public interest. By the same token, I could not say that, for example, evidence as to the probable environmental effects of the proposed changes would not be relevant. Relevance is, of course, always a matter of degree and will vary from case to case depending on the surrounding circumstances; that, however, goes to weight rather than admissibility.

[10] Accordingly, it is my opinion that it would have been error for the Committee not to admit the appellant's evidence; having admitted it, it was error for the Committee to hold that it could not consider it. For clarity, however, I would emphasise that the error lies simply in the failure to consider. Clearly the weight to be given to such consideration is a matter for the discretion of the Commission, which may, in the exercise of that discretion, quite properly decide that other considerations are of greater importance. What it could not do was preclude any examination of evidence and submissions as to the adverse economic impact of the proposed changes on the affected community.

[11] I would allow the appeal and certify to the Commission the opinion that, in considering whether or not to grant leave to close or abandon the station at Nakina pursuant to section 120 of the **Railway Act**, the Commission is entitled to take into consideration the effects of a run-through on the Township of Nakina.

Appeal allowed.

Editor: David C.R. Olmstead
clw

CÔTÉ v. CANADA EMPLOYMENT AND IMMIGRATION COMMISSION
(A-178-86)

Federal Court of Appeal
Pratte, Marceau and LaCombe, JJ.
July 4, 1986.

Summary:

Côté was employed by Canada Post and took early retirement in November 1985 when his position was terminated. Côté received a pension and unemployment insurance benefits. In January 1986 Côté's unemployment insurance benefits were reduced because of an amendment to s. 57 of the Unemployment Insurance Regulations requiring that pensions of the claimant be considered in determining benefits payable under the Unemployment Insurance Act. Côté's appeal to the board of referees created under the Unemployment Insurance Act was dismissed. Côté appealed on the ground that he had a vested right to the benefits and that the amendment was ultra vires because the Commission did not have authority to enact it.

The Federal Court of Appeal dismissed the appeal.

Statutes - Topic 1803

Interpretation - Intrinsic aids - Bilingual statutes - Interpretation of both versions - In determining the power of the Unemployment Insurance Commission to "define and determine earnings" pursuant to s. 58(g) of the Unemployment Insurance Act, the Fed-