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

Attention: Mr. Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

Re: FortisBC Energy Inc. and City of Surrey Applications for Approval of Terms for an Operating Agreement ~ Project No.1598915

We enclose for filing in the above proceeding the Final Submissions of FortisBC Energy Inc, dated May 31, 2018. Two legal authorities are also enclosed.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Matthew Ghikas
Personal Law Corporation

MTG/gvm
Enclosures

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE UTILITIES COMMISSION ACT (THE "ACT")

R.S.B.C. 1996, CHAPTER 473

Application for Approval of Terms for an Operating Agreement with the City of Surrey

Final Submissions of FortisBC Energy Inc.

May 31, 2018

PART ONE: INTRODUCTION AND OVERVIEW

A. INTRODUCTION

1. FEI has been serving residents and businesses in the City of Surrey for over 60 years. FEI has the right to operate in the municipality under a Certificate of Public Convenience and Necessity (CPCN) granted by the Commission's predecessor in 1956 and affirmed by statute.[1] The CPCN, by definition, reflects a determination that FEI's natural gas service in Surrey is in the public interest and necessity. FEI pays municipal taxes to the City of Surrey (Surrey or the City) on all of its utility infrastructure, irrespective of whether the utility works are located on private or public land. FEI remitted $5.179 million in taxes to Surrey in 2017, a cost which was ultimately recovered from FEI customers.[2]

2. FEI and Surrey have had a strained working relationship under their June 1957 Agreement (1957 Agreement), which has governed how FEI and Surrey interact in their operations within the City of Surrey. The 1957 Agreement includes protocols and a methodology for allocating costs when one party requests that the other relocate its facilities but does not provide for an Operating Fee. In recent years, Surrey has disputed the validity of the 1957 Agreement, and FEI disputes Surrey's ability to require municipal permits / authorizations or collect the associated fees in light of the provisions of the *Utilities Commission Act* (UCA). As such, the Parties have recognized there is value in replacing the 1957 Agreement with a new Operating Agreement that will bring operational efficiencies and avoid disputes. The Parties signed an Interim Agreement to have the Commission determine a new Operating Agreement.

3. The Parties have agreed upon a number of new terms that will provide clearer delineation of roles and responsibilities and streamline processes. The question at the heart of this proceeding under section 32 of the UCA is whether Surrey's new financial demands - particularly its expectations regarding an Operating Fee and a new allocation of costs to

[1] The deemed CPCN provision in the UCA, section 45(2).

[2] Exhibit B1-11, FEI Supplemental Evidence, p. 4.

relocate facilities that is much more favourable to Surrey than the 1957 Agreement - are a reasonable price for FEI customers to pay for the promise of more efficient interaction with Surrey, avoiding individual permit fees, and avoiding disputes. Only commercially reasonable terms are justifiable.

4. FEI's Proposed Operating Terms (FEI's Proposed Operating Terms) are commercially reasonable. They incorporate the agreed protocols. The financial terms are fair and balanced. FEI's Proposed Operating Terms represent a compromise on the financial terms commensurate with the benefit that FEI customers stand to receive from FEI entering a new Operating Agreement. They will improve Surrey's position relative to the 1957 Agreement and other municipalities. The financial terms included in the new operating terms proposed by Surrey (Surrey's Proposed Terms), by contrast, would provide a windfall to the City at the expense of FEI customers. FEI respectfully submits that the Commission should approve FEI's Proposed Operating Terms.

B. EXECUTIVE SUMMARY

(a) Agreed Terms

5. The Parties have developed protocols that they believe will work in the context of Surrey. The protocols are much more detailed and sophisticated than those in the 1957 Agreement or any other of FEI's other operating agreements. They specifically address areas that have been the source of friction. The Commission should give weight to the Parties' consensus on these terms.

(b) Operating Fee

6. An Operating Fee is a fee that a public utility agrees to collect and remit to a municipality[3] in consideration of covenants made by the municipality in an operating

[3] Some of the intervener IRs appeared to be premised on the idea that FEI (the shareholder) is benefitting from Operating Fees. This is not the case. FEI does not earn any return on Operating Fees. FEI's corporate interests are fully aligned with the interests of its customers on such matters - adding costs to its operations and adding Operating Fees to customer bills makes gas more costly relative to other energy options. Exhibit B1-8, Robinson-FEI IR 1.4.3.

agreement. Since Operating Fees are contractual consideration, not a municipal entitlement, the amount of any Operating Fee collected from FEI customers should be proportional to what FEI/FEI customers are getting from the municipality in return. It should also recognize other consideration flowing to Surrey under the Operating Agreement. Justifying the inclusion of an Operating Fee in a new Operating Agreement with Surrey requires the Commission to address the following question: *What are FEI customers getting in return for now starting to pay an Operating Fee after 60 years of FEI operating and performing the same type of work without one?*

7. The City is not giving up its right to collect significant taxes on FEI's infrastructure. Rather, Surrey is agreeing to new operating protocols and waiving any rights to require individual permits and collect permit fees. These commitments have value to FEI/FEI customers, such that FEI has offered to pay an Operating Fee calculated as 0.7% of delivery margin. This formula would have yielded a fee of approximately $600 thousand in 2016, which is already approximately $250 thousand more than the permitting fees that Surrey would otherwise have sought to charge FEI based on FEI's activities. The additional $250 thousand yielded by the formula over and above Surrey's claimed permit fees recognizes efficiencies and a notional amount for avoided disputes.

8. Surrey is seeking an Operating Fee calculated as 3% of gross revenues. Gross revenues include both delivery margin and commodity costs, such that the Operating Fee sought by Surrey would vary with commodity prices. Gross revenues are also much more affected than delivery margin by consumption volume changes. Surrey's proposed methodology would have yielded an Operating Fee ranging between $3 million and $6 million over the past number of years.[4] They would have totalled more than $50 million over 10 years during a period of historically low commodity prices.[5] This range is between 10 and 17 times more than the sum of the permit fees that Surrey would otherwise seek to charge based on FEI's current activity levels, the value of the efficiencies that FEI would achieve from improved

[4] Exhibit B1-15, Surrey-FEI IR 2.5.1. E.g., $5,967,074 in 2008 to $3,383,343 in 2016.

[5] Exhibit B1-13, BCUC-FEI IR 2.14.1 (updated the response to BCUC-FEI IR 1.5.3).

protocols, and the value of dispute avoidance. An Operating Fee calculated based on gross revenues will increase further with the expected rise in commodity prices. The disproportionate size of Surrey's proposed Operating Fee relative to what FEI and its customers are getting in return make Surrey's proposed Operating Fee look more like a way for the City to supplement municipal tax revenues than contractual consideration.

9. Surrey offers a superficial rationale for its calculation methodology, largely disconnected from commercial considerations relevant in the context of this municipality. It essentially argues that it should receive an Operating Fee of 3% of gross revenues because other Inland and Vancouver Island municipalities receive an Operating Fee calculated using that formula. Yet, at the same time, Surrey also prefers to be treated differently from Inland and Vancouver Island municipalities when it comes to reimbursement of relocation costs and operating protocols. The superficiality of Surrey's justification for an Operating Fee based on 3% of gross revenues is underscored by the fact that the Lower Mainland municipalities representing the bulk of FEI's customers, sales and infrastructure have never received an Operating Fee.

(c) Allocation of Costs for Requested Relocations

10. Under the 1957 Agreement, a Party can ask the other Party to relocate facilities. While the provision is reciprocal, Surrey is invariably the Party making the relocation request. FEI typically incurs approximately $900 thousand each year to relocate its assets ($500 thousand for High Pressure Pipelines[6] and $400 thousand for Gas Mains[7]), making reimbursement a significant issue for FEI and its customers.

11. Under the 1957 Agreement, the requesting Party must reimburse the facility owner for the full cost of relocating the infrastructure, less a credit for the age of the assets. The way the calculation works (with the age deduction being calculated with reference to *original cost rather than relocation cost*), inflation can outpace the age credit. As a result,

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[6] Exhibit B1-5, CEC-FEI IR 1.9.1.

[7] Exhibit B1-5, CEC-FEI IR 1.3.2.

Surrey is obligated to reimburse most of FEI's relocation costs. FEI's operating agreements with other Lower Mainland municipalities have similar methodologies. Inland and Vancouver Island municipalities must generally reimburse FEI for the full costs of relocating natural gas infrastructure.

12. The Parties have contemplated an approach that requires FEI to consent to relocations and to grant Surrey the permit Surrey requires under the *Oil and Gas Activities Act* (OGAA) for High Pressure Pipeline crossings within an expedited timeframe. The terms preclude FEI from imposing conditions contrary to the Operating Agreement. This concession is highly beneficial to the City, and is only commercially reasonable when the resulting financial implications for FEI/FEI customers are fair. There are two related financial issues that go to the heart of the fairness of the overall Operating Agreement.

13. The first issue is the definition of "Relocation Costs". FEI is proposing the requesting party pay for costs incurred to meet "applicable Laws or sound engineering practices". This proposal reflects cost causation. The costs to meet "applicable Laws and sound engineering practices" (defined as "Relocation Costs") are mandatory or reflect professional expectations. They are being caused by the relocation request because, upon relocation, the facility owner loses the benefit of existing facilities being "grandfathered". Costs incurred to exceed that standard, i.e. are caused by the facility owner's decision to use the opportunity to expand capacity or otherwise improve the facility, are discretionary and excluded from the calculation of Relocation Costs.

14. The second issue is how to allocate "Relocation Costs". FEI has proposed a full reimbursement of Gas Main Relocation Costs as set out in the preceding paragraph, because they would not be incurred but for the relocation request. For High Pressure Pipeline Relocation Costs, FEI proposes to share Relocation Costs equally, which is a material concession to Surrey made in the context of an overall proposal. FEI's Proposed Terms will place Surrey in a better position than under the 1957 Agreement when it comes to allocating the cost to relocate High Pressure Pipelines. The City will also be better off than Vancouver Island and Inland municipalities in this regard, which generally reimburse FEI for all relocation costs on

both Gas Mains and High Pressure Pipelines. The new protocols around estimating and invoicing Relocation Costs impose discipline on the party performing work. The party requesting the relocation can also perform work itself so that it retains control over costs.

15. Surrey, by contrast, advocates that, in addition to FEI consenting to relocation requests and issuing pipeline permits to Surrey, FEI (ultimately customers) should bear 100% of the costs to relocate most Gas Mains and High Pressure Pipelines despite those relocations being necessitated by Surrey's own actions for its own benefit. Surrey cites the default allocation in the *Pipeline Crossing Regulation* as support for this approach, but concedes it has no application to Gas Mains. Moreover, the default allocation would yield a very one-sided result in the context of this Operating Agreement. No other municipality has that arrangement.

16. The *Pipeline Crossing Regulation* is part of a broader framework under the *Oil and Gas Activities Act*. The *Oil and Gas Activities Act* includes two important safeguards for a pipeline owner like FEI against unreasonable relocation requests by a municipality. The safeguards are (1) the right to require Surrey to obtain permission from the Oil and Gas Commission (OGC) for each relocation request on conditions set by the OGC, and (2) FEI's right to have cost allocation determined by Cabinet, overriding the default allocation in the *Pipeline Crossing Regulation*. FEI's agreement to issue permits is a significant benefit to Surrey in saving Surrey from having to make individual applications to the OGC and providing predictability on timing and outcome; it is a significant "give" by FEI in its own right, given the statutory protections being sacrificed. If that "give" were to be combined with an unfair allocation as proposed by Surrey, the Operating Agreement would be heavily skewed in Surrey's favour at the expense of FEI/FEI customers. It would introduce a "moral hazard" by removing operational and financial discipline on Surrey when it comes to requesting relocations. This could result in Surrey requiring FEI to relocate its facilities in circumstances where relocation is a much higher cost than other alternatives that might be available. Surrey's proposal may also incent Surrey to shift costs to FEI even when it is less efficient than avoiding FEI's facilities.[8] Given the number of relocation requests that Surrey makes, Surrey's proposal would materially

[8] Exhibit B1-14, BCUC-FEI IR 2.15.1.

reduce the value of an Operating Agreement for FEI/FEI customers and would expose them to substantial risk.

17. The *Pipeline Crossing Regulation* is not, contrary to Surrey's suggestion, an impediment to a fair result. The Commission can, for instance, condition approval of *other* terms on Surrey's agreement to a fair Relocation Cost allocation. In the event that Surrey is unwilling to agree to a commercially fair Relocation Cost allocation, it is reasonable for the Commission to revisit the appropriateness of FEI agreeing to issue crossing permits and also reduce (or even eliminate) any Operating Fee. This approach will ensure Surrey does not have its proverbial cake and eat it too.

(d) FEI's Proposal is Fair and Should Be Approved

18. The new Operating Agreement must provide for a fair commercial agreement overall. Determinations regarding one financial term must be considered in light of the other financial terms. FEI's Proposed Operating Terms accomplish a commercially reasonable result for FEI/FEI customers and Surrey. They should be approved.

PART TWO: COMMISSION'S JURISDICTION AND APPLICABLE LEGAL PRINCIPLES

A. INTRODUCTION

19. This Part addresses the Commission's jurisdiction and the applicable legal principles, making the following points.

- First, FEI and Surrey agree that section 32 of the UCA applies, and not section 45(8). The new Operating Agreement will not be a "privilege, concession or franchise", as FEI already has the right to operate in Surrey.

- Second, under section 32, the test is whether the new Operating Agreement, viewed in its totality, is commercially reasonable. The terms must be commercially reasonable to justify the costs being recovered from FEI's customers.

- Third, achieving a commercially reasonable and workable new Operating Agreement in the circumstances of this municipality should take priority over maintaining strict uniformity among all municipal operating agreements.

B. THE PARTIES AGREE THAT SECTION 32 OF THE UCA APPLIES

20. Section 32, quoted below, provides for a mechanism whereby the Commission can resolve disagreements between a public utility and a municipality regarding the terms of use of municipal public spaces:

> 32 (1) This section applies if a public utility
>
> > (a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and
> >
> > (b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.

> (2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use.

The Parties agree that section 32 applies in the present circumstances.[9] The two conditions in section 32(1)(a) and (b) for Commission involvement are met, as described below.

(a) First Criterion Satisfied: FEI Has a CPCN and the Right to Operate in Surrey

21. FEI "has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse". Specifically, FEI has the right to construct and operate its system, and extensions to that system, under its CPCN and the provisions of the UCA and the *Gas Utility Act* (GUA).

22. The Commission's predecessor granted a CPCN to FEI's predecessor in 1956, having determined that the extension of natural gas service to Surrey was in the public interest and necessity.[10] FEI is also deemed to have a CPCN pursuant to section 45(2) of the UCA for the construction and operation of its natural gas system, and extensions thereto, in Surrey. Section 45(2) provides:

> 45 (2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it
>
> (a) to operate the plant or system, and
>
> (b) subject to subsection (5), to construct and operate extensions to the plant or system.

23. The GUA affirms FEI's rights as a gas utility to operate in Surrey under its CPCN. It contemplates a public utility agreeing with a municipality as to the conditions of use of public spaces. Section 2 of the GUA provides in part:

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[9] Exhibit B2-8-1, BCUC-Surrey IR 1.8.2.

[10] Exhibit B1-1, FEI Application, p.3.

> 2(2) A gas utility to which a certificate of public convenience and necessity is granted after April 14, 1954 under the Utilities Commission Act or the legislation that preceded it is authorized and empowered, subject to the Utilities Commission Act, to carry on its business as a gas utility in the municipality or rural area mentioned in the certificate.
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> 2(3) Without limiting subsection (1) or (2), a gas utility authorized under either of those subsections may do one or all of the following:
>
> > (a) produce, generate, store, mix, transmit, distribute, deliver, furnish, sell and take delivery of gas;
> >
> > (b) construct, develop, renew, alter, repair, maintain, operate and use property for any of those purposes;
> >
> > (c) place, construct, renew, alter, repair, maintain, operate and use its pipes and other equipment and appliances for mixing, transmitting, distributing, delivering, furnishing and taking delivery of gas on, along, across, over or under any public street, lane, square, park, public place, bridge, viaduct, subway or watercourse
> >
> > > (i) in a municipality, on the conditions that the gas utility and the municipality agree to,
> > >
> > > (ii) …

24. An operating agreement can be used to set out the agreed conditions contemplated in section 32(3)(c)(i). The inclusion of the phrase "on the conditions that the gas utility and the municipality agree to" does not, however, allow a municipality to veto activity that the Commission has determined is in the public interest and necessity or to otherwise hold a public utility and its ratepayers for "ransom". Section 32 of the UCA comes into play when an agreement in the conditions of use of public spaces is outstanding. Section 32 makes the Commission the final arbiter of disputes over the terms of use, ensuring that both Parties behave in a commercially reasonable manner. Section 32 protects the rights of the utility and the interests of the utility customers who ultimately pay all costs of service.

(b) Second Criterion Satisfied: The Parties Cannot Come to an Agreement

25. With respect to the second condition for invoking section 32, FEI "cannot come to an agreement with [Surrey] on the use of the street or other place or on the terms of the use." The 1957 Agreement has been in place for 60 years, but Surrey now disputes its enforceability. In any event, FEI and the City have been negotiating a replacement Operating Agreement since January 2013 in an effort to improve their operating relationship, modernize and clarify protocols, enhance the dispute resolution process, and settle the treatment of certain costs. The Parties have settled many terms, which are reflected in FEI's Proposed Operating Terms and Surrey's Proposed Operating Terms. The matter has now been referred to the Commission for determination, consistent with the Interim Agreement.[11]

(c) The 1957 Agreement and Proposed Agreement Are Not Franchise Agreements

26. The Parties agree,[12] and the Commission has previously held, that section 45(8) of the UCA does not apply in this context.

27. Section 45(8) applies when a municipality grants a "privilege, concession or franchise". A "privilege, concession or franchise" confers rights to operate within a municipality. Almost all of the older agreements signed by Inland Natural Gas (in the Interior) and Centra Gas (Vancouver Island), for instance, granted exclusive rights to the utilities. In the case of Surrey and every other Lower Mainland municipality, FEI's predecessor obtained a CPCN first, and then entered into non-exclusive operating agreements with each municipality. The new Operating Agreement, like the 1957 Agreement will be an operating agreement establishing the conditions of FEI's operations in municipal public spaces where FEI already has a right to operate.

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[11] Exhibit B1-1, FEI Application, p.7 and Appendix C, sections 1.2 and 1.3.

[12] Exhibit B2-8-1, BCUC-Surrey IR 1.8.2. The Commission asked Surrey whether the Operating Agreement will be a franchise agreement. Surrey responded in part: "In the present applications, Surrey is not granting FEI a franchise or concession within the meaning of section 45 of the UCA. FEI already has CPCNs and pursuant to the Gas Utility Act has rights to operate and expand its gas distribution system in Surrey, subject to the UCA and on the conditions that FEI and Surrey agree to."

28. The Commission confirmed in its decision regarding FEI's current operating agreement with Chetwynd that section 32 applies:

> The Commission agrees with Terasen that Section 32 of the Act is applicable for the review of this Application. Terasen, by virtue of Section 45(2) of the Act, is deemed to have a CPCN that does not expire. Terasen has the authority under Section 45(2) to operate the plant or system and to construct and operate extensions to the system; therefore it meets the requirements of Section 32 of the Act for review of the Application.[13]

The Commission made identical comments (other than saying "FEI" instead of "Terasen") in approving an operating agreement with Coldstream.[14]

C. THE TEST: A COMMERCIALLY REASONABLE AGREEMENT

29. The test under section 32 is whether the terms are commercially reasonable.

(a) Commercially Reasonable Operating Terms Align With "Just and Reasonable" Utility Rates

30. Under section 32, the Commission is tasked with imposing terms when commercial negotiations between sophisticated, arms-length parties have reached an impasse. The Commission's jurisdiction is rooted in its role as a public utility regulator. While the operating agreements are not "rates" *per se*, the costs that flow from those agreements ultimately are recovered from customers through rates. The Commission must have regard to ensuring that the terms on which a public utility operates in municipalities can be justified in the context of "just and reasonable" utility rates. A commercially reasonable operating agreement accomplishes that objective.

31. Section 32, unlike the provisions relating to approvals of a "privilege, concession or franchise", does not specify a public interest test. This makes sense given that section 32 contemplates a commercial agreement between a municipality and a public utility that already has a public interest approval (i.e., a CPCN) to own, operate and maintain its system in the

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[13] Order G-17-06, p.9. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115946/1/document.do.

[14] Order G-113-12, p.10. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/item/118398/index.do?r=AAAAAQAIZy0xMTMtMTIB.

municipality. Nevertheless, it would also serve the public interest to impose commercially reasonable terms, since it will respect the rights of the utility, protect gas customers from unjust and unreasonable rates, and be fair to the municipality.

(b) Operating Terms Should Be Examined Holistically to Ensure Overall Outcome is Commercially Reasonable

32. The Commission's review under section 32 of the UCA should consider the impact of the contractual terms collectively, so as to ensure that the overall agreement is commercially reasonable.

33. The Commission has the discretion to adopt terms that differ from those proposed by either Party. However, in approving a new Operating Agreement, the Commission should give weight to the fact that the Parties are aligned on the majority of the provisions (summarized in Part Three of this Final Submission). Incorporating the agreed provisions in a new Operating Agreement will contribute to an improved operating relationship, ultimately benefitting FEI / FEI customers, and Surrey. The Commission took this approach in approving an operating agreement between FEI and Coldstream,[15] and FEI and Chetwynd.[16]

34. Any financial consideration that FEI must pay to Surrey under an approved Operating Agreement will be recovered from FEI's customers. The Commission's determination on each of the disputed financial terms - principally the Operating Fee and the reimbursement of costs incurred to relocate infrastructure - has the potential to impact the overall economic rationale for FEI to enter into a new Operating Agreement. For instance, FEI was asked about whether a change to its relocation cost allocation proposal would have affected what it had proposed in terms of an Operating Fee. FEI responded in the affirmative:

> The costs that FEI would incur as a result of municipally-requested relocations are potentially very significant in a rapidly developing municipality like Surrey. FEI believes that allocating a greater portion of the costs of relocation to FEI than

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[15] Order G-113-12, and its accompanying decision dated August 29, 2012 (discussed in Exhibit B1-6, BCUC-FEI IR 1.1.2). The Commission approved a form of operating agreement that accepted the terms agreed upon by FEI and Coldstream, imposing terms and conditions on disputed items.

[16] Order G-17-06. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115946/1/document.do.

> what has been proposed would materially erode benefits to FEI under the Proposed Operating Agreement. Any material change like this should be factored into FEI's proposal, directionally reducing the Operating Fee from what FEI has proposed or what the Commission would otherwise approve.[17]

35. The importance of a holistic review becomes apparent when considering that Surrey is seeking:

- an Operating Fee based on a formula that would have yielded an Operating Fee of between $3 million and $5 million in recent years, over and above the millions of dollars that FEI already pays in municipal taxes, when it currently receives no fee and would otherwise claim permit fees totalling only a small fraction of that amount; PLUS

- changing from a formula for reimbursement of Relocation Costs from the one in the 1957 Agreement that required the requesting party (in practice, always Surrey) to reimburse most costs, to one that requires no reimbursement in most situations and only reimbursement of half of the costs in the remaining circumstances.

The nature of the work FEI will be performing is fundamentally the same as what FEI has been doing for the past 60 years. The commitments that Surrey is making to secure the replacement of the 1957 Agreement - streamlined processes to improve efficiency and avoid disputes, not claiming permit fees - are insufficient to warrant the fundamental change in financial consideration sought by Surrey.

(c) The Commission Should Determine this Application Without Wading Into Historical Disputes

36. Surrey spent a significant amount of effort in this proceeding re-hashing past disputes with FEI regarding relocation work and other disputes. Although FEI expressed disagreement with Surrey's version of events, FEI elected not to engage in debate about past

[17] Exhibit B1-4, BCOAPO-FEI IR 1.3.3.

grievances. This proceeding is prospective in nature, and the whole point of the new Operating Agreement is to improve the Parties' working relationship. The Commission can and should determine this Application without wading into the historical sources of friction in the relationship.

D. A FAIR AND WORKABLE OUTCOME IN SURREY SHOULD TAKE PRIORITY OVER UNIFORMITY AMONG MUNICIPALITIES

37. The Parties' respective proposals differ from any other operating agreements. This stands to reason. The new Operating Agreement approved in this proceeding must be both workable and commercially reasonable in light of the operating conditions of this municipality, the historical sources of friction,[18] and the terms currently governing their relationship.

(a) There is Already Diversity Among Operating Agreements

38. There is considerable diversity among operating agreements today. Inland and Vancouver Island municipalities have agreements that are broadly similar, although there have been changes over time. The agreement with Keremeos (Keremeos Agreement) represents the current iteration in the Inland region. While the Vancouver Island and Inland Municipalities are numerous, they collectively represent a minority of FEI's customer base, sales, and facilities. The bulk of FEI's customer base, sales, and facilities is in the Lower Mainland. The financial terms differ markedly as between the Lower Mainland and elsewhere. There are no operating fees in the Lower Mainland, and the allocation of relocation costs in the 1957 Agreement reflects that the party requesting the relocation is driving the costs (cost causation), with an age discount. The Inland and Vancouver Island municipalities pay all the costs when they cause a relocation.

[18] Exhibit B1-6, BCUC-FEI IR 1.2.1.

(b) Commission Has Recognized the Need to Consider Differences Among Municipalities

39. Pursuant to Letter No. L-4-02 dated February 4, 2002, the Commission rejected a request by FEI (then BC Gas) for the Commission to establish a standard form operating agreement between FEI and municipalities. The Commission viewed the concept of a standard form agreement as inconsistent with the Commission's authority under section 32 of the UCA. The Commission confirmed that it would review the circumstances in each municipality and determine the appropriate terms and conditions on an individual basis.

40. The Commission affirmed its position in its Order No. C-7-03:

> In response to a December 6, 2001 application by BC Gas for approval of a standard form agreement between BC Gas and the municipalities in its Inland and Columbia service areas, the Commission issued Letter No. L-4-02. In that letter, the Commission found that it would be inappropriate for it to undertake a general review to establish a general form agreement. Instead, the Commission expected that the Company and the municipalities would make every effort to negotiate new operating agreements. Acknowledging that, due to the commonality of many of the issues, it may be appropriate to review several applications in one proceeding, the Commission stated that it would review the circumstances in each municipality and determine the appropriate terms and conditions on an individual basis. Based on the Commission's findings, BC Gas withdrew its December 6, 2001 application and undertook to file such individual applications as appropriate.
>
> Terasen has already signed, and been given Commission approval for, the renewals of several operating agreements. As noted in the Response to BCUC Staff Information Request question 12, seventeen other municipalities have between three to sixteen years before their CPCN's must be renewed.
>
> While the Commission is not bound by precedent, it finds no reason to change its determination in Commission Letter No. L-4-02.[19]

41. In its decision regarding the Coldstream operating agreement, the Commission emphasized the need to consider the differences among municipalities:

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[19] Decision, p. 3. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115308/1/document.do.

> The Commission notes the Municipality's concerns over the emphasis placed on the Pro-forma Agreement by FEI and is in agreement with the Municipality that, with regard to applications made pursuant to section 32 of the Act, the circumstances in each municipality should be considered to determine the appropriate terms and conditions on an individual basis. The Commission has reviewed submissions from both parties and has included its determination on each of the Specific Terms in Dispute in Appendix A.1. [Emphasis added]

42. The Parties appear to agree on this point. Surrey discusses these Commission decisions in its response to BCUC-Surrey IR 1.3.1, stating:

> The City of Surrey understands that the Commission reviews and evaluates operating agreements on an individual case-by-case basis, and that FEI's most recent form of operating agreement accepted by the Commission can serve as a basis for comparison for future operating agreement applications but it is not intended to be a standard form agreement.

43. There are similarities between the proposed Operating Agreements being considered in this proceeding and the Keremeos Agreement that has been used for a number of other municipalities.[20] However, it would be unrealistic to expect that the Keremeos Agreement could be applied to Surrey without substantial modification. The Keremeos Agreement was designed for a much simpler operating environment than exists in Surrey today or that is projected for the future. The municipalities subject to those terms are less urbanized than Surrey, with limited natural gas facilities, and smaller populations. A number of the more sophisticated protocols and processes are more favourable to Surrey than the Keremeos Agreement, as is FEI's Relocation Cost allocation proposal. Moreover, FEI's proposed Operating Fee methodology, despite being based on a smaller percentage of delivery margin, yields a much larger revenue stream for Surrey than any of the fees received by Inland and Vancouver Island municipalities.

[20] Exhibit B1-6, Attachment 2.1 to BCUC-FEI IR 1.2.1 provides a table with a section by section comparison of the FEI Proposed Operating Terms and the Keremeos Agreement. Many sections are the same.

PART THREE: THE PARTIES AGREE ON MANY TERMS

44. The fact that the Parties disagree on the financial terms should not overshadow their significant progress towards a workable new Operating Agreement. This Part outlines how FEI and Surrey agree that the settled terms are a step forward. It also explains how a number of these terms are more favourable to Surrey than under the Keremeos Agreement.

A. PARTIES AGREE THAT SETTLED TERMS ARE A STEP FORWARD RELATIVE TO TODAY

45. The protocols in the 1957 Agreement are relatively simple and have not kept pace with the needs of the Parties. This has been rectified.

46. The settled terms that are proposed by both Parties require both Parties to, among other things:

Carry out all work and operations with the due care and attention that is necessary to safeguard the interests of the public, their own employees, and the other Party's employees (section 2.2 and section 10.1)
Provide sufficient detail in estimates and invoicing to the other Party when Company Facilities or Municipal Facilities are relocated at the request of the Party (section 8)
Cooperate to improve respective mapping systems so they are compatible and easily accessible by both the Company and Surrey (section 10.2)
Indemnify each other against all claims by third parties in relation to the each Party's construction and maintenance of their respective facilities except to the extent contributed to by the other's negligence or default (section 11)

47. The settled terms include requirements on FEI to, among other things:

In its use of public places, comply with all Federal and Provincial laws, regulations and codes as well as Municipal bylaws, standards and policies except to the extent that such Municipal

bylaws, standards and policies conflict with the terms of the Operating Agreement or conflict with other legislation governing FEI (section 4.1)
Obtain approvals and permits or provide Surrey with notice for certain types of work in public places (section 5)
Carry out restoration of the public places to municipal standards (section 6.3)
Remove abandoned piping that conflicts with future construction and fill abandoned pipe that is greater than 323mm with structural fill to prevent collapse (section 14)
Obtain and maintain insurance (section 3.3)

48. The settled terms require the City to, among other things:

Not charge fees or require any approvals or permits for work except as specifically set out in the Proposed Operating Terms (section 5.1)
Grant approval to FEI for New Work (as defined in the Proposed Operating Terms) within ten (10) days (section 5.2 (c)) and issue permits within ten (10) days (section 5.3(b))
Not refuse to grant approval to FEI for New Work except for enumerated conditions (section 5.2 (d))
Provide notice to FEI when Surrey undertakes construction or maintenance activities that are likely to affect a part of the Company's Facilities (section 8.2)
Assist FEI in its effort to reduce residences being built over Company Facilities (section 10.3)

49. FEI and Surrey concur that the agreed terms are a step forward.

B. A NUMBER OF AGREED TERMS ARE BETTER FOR SURREY THAN KEREMEOS AGREEMENT

50. In addition to being a step forward for the Parties relative to the previous arrangement in place in Surrey, a number of the more sophisticated protocols and processes are more favourable to Surrey than the Keremeos Agreement. Some examples are:[21]

(a) ***Gas line approval process with the municipality*** – The agreed terms require that FEI follow some municipal approval and permitting processes which are in addition to those required by the Keremeos Agreement. This will provide the City with more detailed information to streamline their approval process.

(b) ***Increased construction requirements –*** The agreed terms may require that gas lines are installed at extra depth of cover and designated backfill materials are used in situations where Surrey is planning to construct municipal infrastructure. This will save the City potential relocation costs as well as time and money when constructing the new roadway.

(c) ***Relocation costs beyond compliance with Laws or sound engineering practices –*** The proposed Operating Agreement requires that FEI pay for costs beyond those associated with compliance with Laws or sound engineering practices.

(d) ***Profile drawings –*** The agreed terms require that FEI prepare a plan and profile drawing when applying for approvals for distribution gas lines that exceed 219 mm diameter and for all High Pressure Pipelines. This information should streamline the approval process for the City, reducing resource requirements and improving turnaround time.

(e) ***Abandonment of gas lines –*** The agreed terms require FEI to remove or fill abandoned gas lines that exceed 323 mm diameter if required by the municipality. No other operating agreements have this provision; pipe is

[21] Exhibit B1-6, BCUC-FEI IR 1.4.5.

abandoned in place. This is potentially a significant benefit to the City, and a significant cost to FEI.

(f) ***Estimating and invoicing –*** The agreed terms require that FEI provide additional details to Surrey on estimates and invoices. Also, specific communications with Surrey are required if changes to scope of work relating to the estimate are determined in the field and in the course of performing the work.

(g) ***Company permits for City work near FEI pipelines –*** The agreed terms provide time limits for FEI to turn-around permits that Surrey requires from FEI under the *Oil and Gas Activities Act* to work in proximity to FEI's gas lines and other significant facilities. This is a significant benefit to the City, as it avoids the need to apply to the Oil and Gas Commission for approval each time relocations of FEI High Pressure Pipelines are required.

51. Surrey stated, for instance:

> As compared to FEI's recent operating agreement with Courtney, most of the differences in the operating agreement terms FEI and Surrey have agreed to benefit both parties:
>
> -agreement provisions have been reorganised into a more logical structure and terminology has been clarified to better align to the business processes of the parties
>
> -procedures and criteria have been improved relating to scoping, cost estimating and coordination of relocation work, and approval of FEI work
>
> -wording has been revised to better align to the statutory and regulatory basis of the agreement
>
> These changes make the agreement more user-friendly and will improve predictability of outcomes, which should reduce disputes going forward.
>
> With the exception of the four areas of disagreement outlined in each party's application to the Commission, both parties agree that the operating agreement terms they have negotiated have many significant improvements (benefiting

> both parties) as compared to other recent FEI operating agreements. The clear and robust contract language in the requested operating agreement should enable both parties to improve the efficiency of their business processes and reduce the number of disputes going forward.[22]

52. Surrey also differentiated itself from less urbanized municipalities, which would include those municipalities subject to the Keremeos Agreement:

> For all of these reasons both the City of Surrey and FEI undertake many projects in the city each year. It is critical that the parties efficiently coordinate their work with each other. Each party needs to know when the other party is working near the party's facilities and/or requires the other party to relocate their facilities. Both parties need to review each other's work plans on predictable timelines and provide timely clear communication to efficiently complete their work. Surrey needs reasonable oversight of FEI's work in the city to ensure FEI does not unreasonably interfere with the public's use of municipal highways and public places, including by obstructing traffic on major roads during peak periods, and to identify potential conflicts with multiple parties (e.g., FEI, developers and BC Hydro) working in the same area at the same time. Surrey needs robust estimates of FEI's reimbursable relocation costs to make prudent project planning decisions. The requested operating agreement sets out these rights and obligations in clear, robust contract language which should minimise disputes going forward.
>
> A municipality that has limited FEI infrastructure (particularly high pressure transmission pipelines), is rural and/or has limited development projects in highways and other public places might not be as concerned about these issues in negotiating an operating agreement.[23]

[22] Exhibit B2-8-1, BCUC-Surrey IR 1.3.1.

[23] Exhibit B2-8-1, BCUC-Surrey IR 1.5.2.

PART FOUR: FEI'S PROPOSED OPERATING FEE IS FAIR AND BALANCED

A. INTRODUCTION

53. Surrey - like all of the Lower Mainland municipalities representing a majority of FEI's customers, infrastructure, and sales - has never received an Operating Fee. Any new Operating Fee will represent a direct cost to FEI's customers over and above the significant municipal taxes that FEI already pays on all of its utility infrastructure in Surrey. There must be a compelling rationale to start collecting an Operating Fee from customers after 60 years of operating in the municipality in essentially the same manner without any Operating Fee. FEI submits that an Operating Fee calculated on the basis proposed by FEI is commercially justifiable because it is commensurate with the benefit FEI/FEI customers would see from replacing the 1957 Agreement. The much larger Operating Fee sought by Surrey would be excessive. It would provide Surrey with a windfall at the expense of FEI customers.

54. FEI makes the following points in this Part:

- First, an operating fee is contractual consideration, not a municipal entitlement.
- Second, FEI's proposed Operating Fee is commercially reasonable financial consideration for a new Operating Agreement, given the permitting fees and other charges that the City would otherwise seek to levy, the anticipated efficiency gains from the new protocols, and the benefit to FEI/FEI customers of dispute avoidance.
- Third, Surrey's proposed methodology (3% of gross revenues) would yield an excessive Operating Fee that is out of proportion to the consideration Surrey is providing to FEI/FEI customers under a new Operating Agreement.
- Fourth, Surrey is being selective in its demand for consistency with Inland and Vancouver Island operating agreements, and ignores the different historical context behind those agreements.

- Fifth, basing an Operating Fee on Surrey's internal costs, rather than the value of the consideration that Surrey is providing to FEI under their commercial agreement, makes the Operating Fee take on the flavour of another tax.

- Sixth, calculating an Operating Fee with reference to delivery margin, rather than gross revenue: (i) provides a more direct link between the Operating Fee and what FEI/FEI customers are receiving in return; (ii) yields more stable revenues; and (iii) affects Sales and Transport customers in the same way.

B. AN OPERATING FEE IS CONTRACTUAL CONSIDERATION, NOT AN ENTITLEMENT

55. Surrey appears to view an Operating Fee as a right or entitlement. It seems to suggest, in effect, that FEI must justify any departure from the 3% of gross revenues collected for most Vancouver Island and Inland municipalities with operating agreements. An Operating Fee is contractual consideration, not an entitlement. There must be a demonstrable commercial rationale, rooted in the overall "puts and takes" of the new Operating Agreement, to allow Surrey to start using FEI's utility bill after 60 years to indirectly collect money from some of its citizens.

(a) Contractual Consideration

56. The operating agreements providing for an Operating Fee identify the Operating Fee as contractual consideration. Consistent with this, the Commission focussed its examination of the Salmon Arm agreement, for instance, on whether or not the fee is "unreasonable for the concessions provided by the municipality."[24]

(b) FEI and Its Predecessors Have Operated in the Lower Mainland for Over 60 Years Without an Operating Fee

57. The fact that Operating Fees are contractual consideration, and not a right or entitlement of a municipality, is evidenced by the absence of any Operating Fee in the 1957 Agreement. FEI and its predecessors have operated in Surrey for over 60 years without

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[24] Order No.C-7-03, p.5. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115308/1/document.do.

collecting an Operating Fee for Surrey. In fact, none of FEI's operating agreements with Lower Mainland municipalities contemplates an Operating Fee.[25] Two municipalities on Vancouver Island (the District of Oak Bay and the District of Esquimalt) also have long-standing operating agreements without Operating Fees.[26] The municipalities that do not receive Operating Fees represent the majority of FEI's business (64% by customer; 69% by gross revenue; 61% by volume).[27]

C. FEI'S PROPOSED OPERATING FEE IS COMMERCIALLY REASONABLE CONSIDERATION

58. FEI's assessment is that an Operating Fee can be justified for Surrey, provided that it is proportionate to the consideration FEI/FEI customers will receive under a new Operating Agreement. FEI submits that its proposed Operating Fee formula is fair, if not generous, based on the overall benefits that FEI's Proposed Operating Terms will provide to FEI/FEI customers and the other consideration flowing to Surrey.

(a) FEI Has the Right to Own and Operate Utility Infrastructure and Pays Taxes

59. Paying an Operating Fee is not a precondition for FEI to operate in Surrey. FEI already has the right to construct and operate its system and extensions to that system under its 1956 CPCN and provisions of the UCA and the GUA. FEI has been operating in the City for decades without paying an Operating Fee, performing the same types of work and activities that will continue under the new Operating Agreement. During that time, FEI has been paying municipal taxes to Surrey, not just as a land owner (for its offices located in the municipality) but also on all of its "specified improvements" located in the municipality. "Specified improvements" includes all of FEI's utility infrastructure, irrespective of whether it is on public or private land.[28] FEI paid approximately $5.2 million in taxes to Surrey in 2017.[29] There must

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[25] Exhibit B1-1, FEI Application, p. 13.

[26] Exhibit B1-1, Section 3.3.3.2 of FEI's Application; Exhibit B1-6, BCUC-FEI IR 1.4.1.

[27] Exhibit B1-6, BCUC-FEI IR 1.4.1.

[28] Local Government Act, s.644 (1) In this section: "specified improvement" means an improvement of a utility company that is

(a) … equipment, machinery, exchange equipment, main, pipe line or structure, other than a building,

(b) erected or placed in, on or affixed to

be an independent contractual justification for Surrey to begin collecting an Operating Fee from FEI customers after 60 years, when the municipality is already collecting taxes from FEI on utility infrastructure within the municipality.

(b) FEI's Proposed Operating Fee Corresponds With What FEI Receives in Return: Avoided Permits and Permit Fees, Efficiency and Dispute Avoidance

60. Under a new Operating Agreement, the City is agreeing to abstain from seeking certain permits and authorizations for FEI's work. Surrey has also agreed to protocols that are expected to facilitate FEI's ability to serve customers in Surrey and avoid disputes. FEI customers are saving the (disputed) authorization costs and are avoiding transaction costs in its dealings with the City commensurate with the level of activities it is undertaking. For that reason, FEI has linked the amount of its proposed Operating Fee to the permit / authorization fees that the City would otherwise be seeking to charge for the activities FEI is undertaking, plus amounts to recognize the value of efficiencies and dispute avoidance.[30]

61. The proposed formula of 0.7% delivery fees was back-calculated from the following amounts from 2016: [31]

Component	2016 Estimate
Permit and Cut Fees	$350,000
Operating Efficiencies	$150,000
Avoidance of Potential Litigation	$100,000
Total:	**$600,000**

- ***Estimated permit and pavement cut fees*** – FEI arrived at the $350 thousand estimate by using fees in effect in Surrey for developers as at January 2017 and

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(i) land in a municipality, or

(ii) a building, fixture or other structure in or on land in a municipality, and

(c) used solely in the municipality or a group of adjoining municipalities by the company for local generation, transmission, distribution, manufacture or transportation of … gas…;

[29] Exhibit B1-11, FEI Supplemental Evidence , p. 4.

[30] Exhibit B1-13, BCUC-FEI IR 2.16.1.

[31] Exhibit B1-1, FEI Application, p.16.

FEI's construction activities in 2016.[32] The City's own evidence discusses permit and pavement cut fees of approximately the same value.[33] FEI's position is that such fees are not applicable to FEI, and the City has never received cut fees; however, the amount indicates the approximate fees that would be charged to a non-utility developer performing similar work. The breakdown of FEI's calculation is as follows:

Road Use Permit Calculation: New Services (1,151) + New Mains (91) + Abandonments (461) X $60 per Permit	$102,180
Traffic Obstruction Permit Calculation: 305 road repairs X $170 per Permit	$51,850
Pavement Cut Fees and Degradation Permit Calculation: 305 bell holes X $540	$164,700
Pavement Cut Fees and Degradation Permit Calculations: 500 metres of pavement cut X $80 per square metres of pavement cuts	$40,000
TOTAL: (rounded down)	$350,000

- ***$150 thousand for operating efficiency –*** FEI employees and contractors interact with the City on a day-to-day basis with respect to FEI's own work and operations, the works of third parties, and the City's work affecting FEI infrastructure. FEI anticipates that improved protocols will reduce the staff time and resources required to interact with Surrey relative to what would be required in the absence of a new Operating Agreement. FEI does, however, expect to incur additional labour costs to provide the City with the more detailed invoices as set out in Section 8.4 (b) of FEI's Proposed Operating Terms.[34] The amount included in the derivation of the formula ($150 thousand) represents approximately 1.5 FTEs that FEI estimates would otherwise have to be hired.

- ***$100 thousand for avoidance of disputes and litigation*** – FEI also included $100 thousand as a notional amount to recognize the potential benefit of dispute

[32] Exhibit B1-1-1, FEI Errata to Application, p.15.

[33] Exhibit B2-8-1, BCUC-Surrey IR 1.2.4.

[34] Exhibit B1-13, BCUC-FEI IR 2.16.2.

avoidance.[35] FEI reasoned that the additional certainty associated with having agreed terms and conditions may have the following benefits:

- Some differences will be resolved through an efficient and cost effective dispute resolution process, which contemplates mediation and arbitration;
- Clear allocation of costs for the relocation of High Pressure Pipelines will resolve a dispute over what pressures of gas lines are covered in the 1957 Agreement; and
- Clearer terms and conditions will reduce the risk of disputes around permitting and approval requirements, construction of Company Facilities, and the determination of Relocation Costs.

While it is not possible to predict legal costs, reflecting some amount of avoided legal costs in the Operating Fee as part of an overall agreement to maintain a strong working relationship with the City can be justified as being in the overall interest of FEI customers.

(c) FEI's Proposal is Generous in Recognizing Full Value of Avoided Permit Fees

62. FEI's proposal to base the formula on the full value of all permit fees that Surrey would seek to charge to a developer already overstates the value of Surrey's agreement to refrain from charging permit fees to FEI.

FEI's Proposed Formula Yields an Operating Fee 10 Times More Than Past Permit Fees Paid to Surrey

63. FEI has only ever paid for traffic obstruction permits, and the practice has been inconsistent (payments have been driven by pragmatic considerations, without acknowledging

[35] Exhibit B1-1, FEI's Application, Section 3.3.3.1.

the legality of the fees[36]). FEI provided a rough estimate of the permit fees paid by FEI in recent years, which is summarized in the table below. FEI and its contractors never paid more than approximately $40 thousand per year in permit fees until 2017, when permit fees increased to $63,541.[37] This amount is roughly one-tenth of the amount that would have resulted from applying FEI's proposed Operating Fee formula.

Traffic Obstruction Permit Fees Paid to Surrey

2008 to 2012	2013	2014	2015	2016	2017
Not available	Contractor only	Contractor and FEI	Contractor and FEI	Contractor and FEI	FEI and Contractor
N/A	$10,944	$36,911	$37,818	$47,175	$63,541

64. As discussed next, FEI continues to dispute Surrey's entitlement to collect any permit fees from FEI at all.

Surrey's Ability to Charge Individual Permit Fees is Very Much in Question

65. The premise of FEI's calculation methodology is that Surrey can lawfully charge permit fees to FEI in the absence of FEI's agreement. This is very much in dispute. FEI's position that Surrey cannot levy permit fees from a public utility operating under a CPCN is supported by section 121 of the UCA and a Commission decision. An Operating Fee calculated on the undiscounted basis proposed by FEI can reasonably be regarded as generous.

66. Section 121 of the UCA provides:

> 121(1) Nothing in or done under the Community Charter or the Local Government Act
>
> (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
>
> (b) relieves a person of an obligation imposed under this Act or the Gas Utility Act.

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[36] Exhibit B1-1, FEI Application, p.6.

[37] Exhibit B1-6, BCUC-FEI IR 1.5.5; Exhibit B1-13, BCUC-FEI IR 2.16.2. Surrey's records (summarized in BCUC-Surrey IR 1.2.4) show amounts in the same order of magnitude, but generally lower than FEI's numbers.

(2) In this section, "authorization" means

(a) a certificate of public convenience and necessity issued under section 46,

67. FEI has been operating in Surrey under a CPCN - an authorization - since 1956. Surrey's bylaws governing permit fees were passed under the *Local Government Act*, which section 121 subordinates to the CPCN.

68. The inclusion of section 121 in the UCA reflects the outcome of litigated dispute between FEI's predecessor and Surrey over the initial grant of CPCN in 1956. Surrey had sought to exercise its bylaw-making powers to dictate which utilities could operate within its boundaries, with the objective of precluding BC Electric from operating. The Supreme Court of Canada confirmed in *Surrey v. British Columbia Electric Company Limited*[38] that a Commission-regulated public utility is able to operate within a municipality with a CPCN alone. The judgment of the majority of the Supreme Court of Canada, in considering the precursor to the UCA that included similar language to today's version,[39] emphasized the paramountcy of the Commission's jurisdiction relative to municipalities:

> The whole tenor of the Act [i.e. the precursor to the UCA] shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and those which might be asserted by a municipality to regulate the operations of such companies under s.58, cls. 55 and 109, were intended to co-exist. […]
>
> In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, inter alia, to the right of municipalities of insuring a supply

[38] [1957] S.C.R. 121.

[39] R.S.B.C. 1948, c. 277

> of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission [i.e., a municipal utility]. This right the Commission was careful to preserve.[40] [Emphasis and parenthetical added.]

69. The same policy articulated by the Supreme Court of Canada applies in the context of permits for utility work being performed by FEI to meet its duties as a gas utility under the GUA and UCA. Requiring individual municipal permits accords the municipality an effective veto over activities that the relevant statutory body (the Commission) has determined are in the public interest. Public utilities carrying out authorized activities should not be held for ransom either by withholding permits or municipal demands for concessions under an operating agreement.

70. The Commission cited section 121 of the UCA in the context of dismissing Coldstream's demands to include in its operating agreement with FEI a requirement for FEI to adhere to municipal bylaws. The Commission, presenting its analysis in table format, stated:

Issue	Section of Operating Agreement	FEI Application Operating Terms	FEI Revised Operating Terms	Coldstream Proposed Operating Terms	Commission Determination
3	**5.1 Non-discriminatory Standards for FortisBC**	"In its use of Public Places, FortisBC shall comply with all Federal and Provincial laws, regulations and codes and shall comply with all Municipal bylaws, standards and policies except that FortisBC shall not have to	Only minor change to (a): "conflict with ~~terms of~~ these terms or limit any rights or concessions granted to FortisBC by the Municipality under these terms; or"	The following sentence is added to the end of the first paragraph: "...are in direct conflict with provincial or federal legislation governing the operations of FortisBC."	**The revision proposed by the Municipality is not approved.** The Commission notes section 121 of the Act, which states the following:
		comply with such Municipal bylaws, standards and policies that: (a) conflict with terms of these terms or limit any rights or concessions granted to FortisBC by the Municipality under these terms; or (b) conflict with other legislation governing FortisBC. Further, where the Municipality has established requirements and standards for work in Public Places, the Municipality shall apply them in a fair, reasonable and non-discriminatory manner consistent with the manner that the Municipality establishes requirements on other Utilities."		Section (a), (b) and the final paragraph are deleted	121 (1) Nothing in or done under the Community Charter or the Local Government Act (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or (b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*. Section 121 of the Act requires that a municipality may not enact bylaws, standards and policies that conflict with an authorization granted to a public utility. Therefore, the Commission considers that paragraph (a) and (b) add clarity to the scope of the agreement in regards to any bylaws that might otherwise apply to FEI's operations in public places. The Commission considers that the final paragraph adds clarity to the Revised FEI Operating Terms to ensure that fair requirements and standards are applied to FEI's work in the Municipality's public places.

[40] *Surrey* at paras. 15, 17.

...

19	**12 OTHER APPROVALS, PERMITS OR LICENSES**	"Except as specifically provided in these terms, the Municipality will not require FortisBC to seek or obtain approvals, permits or licenses."	Same as FEI Application Operating Terms	"Except as specifically provided in these terms or as required by Municipal bylaws, provincial or federal legislation ~~these terms~~, the Municipality will not require FortisBC to seek or obtain approvals, permits or licenses."	**The revision proposed by the Municipality is not approved.** The proposed revision is not approved as it places undue restrictions on FEI's operations. The Commission is in agreement with FEI that the proposed revision would reduce the benefit that ratepayers obtain from the agreement. For example, FEI would be required to obtain permits and pay the applicable permit fees in order to comply with *Building and Plumbing Bylaw No. 1442*. The following is an excerpt from the Act:
					Relationship with Local Government Act 121 (1) Nothing in or done under the Community Charter or the Local Government Act (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or (b) relieves a person of an obligation imposed under this Act or the Gas Utility Act.

71. The Commission does not, strictly speaking, need to make a determination on the applicability and effect of section 121. However, the fact that there is doubt around Surrey's ability to charge permit fees at all reinforces the reasonableness of FEI calculating an Operating Fee as if the City could charge FEI permit fees. It also further underscores the excessive nature of Surrey's proposed Operating Fee.

D. SURREY'S PROPOSED OPERATING FEE: A WINDFALL FOR SURREY AT THE EXPENSE OF FEI CUSTOMERS

72. Surrey conceded that its proposal for an Operating Fee "is mainly based on"[41] the fact that a number of other municipalities receive an Operating Fee calculated at 3% of gross revenues. Surrey's heavy reliance on this justification, rather than justifying the formula on the merits in the context of this municipality, is not surprising. As explained below, an Operating Fee calculated based on Surrey's proposal is far too large to be justified with reference to the consideration that would flow to FEI and its customers under a new Operating Agreement. The bill impacts of this windfall to Surrey on FEI customers would be material. In the context of Surrey, an Operating Fee calculated based on 3% of gross revenues would look more like a tax than contractual consideration.

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[41] Exhibit B2-4, BCOAPO-Surrey IR 1.1.1.

(a) Surrey's Proposed Operating Fee is Many Multiples of the Permit Fees it Would Otherwise Seek to Charge

73. The following table provides estimates of the Operating Fee under Surrey's proposal and FEI's proposal had these formulae been in place over the past 10 years.[42] The data shows that:

- Over the last 10 years, Surrey's proposed methodology would have produced an Operating Fee that was between 8 and 15 times larger than the output of FEI's proposed formula. As stated above, FEI's proposal already yields an Operating Fee greater than the sum of individual permit / authorization fees that Surrey would otherwise be seeking to charge FEI (i.e. undiscounted for the disputed legality) under the 2016 Revised Bylaw.

- The total Operating Fees over the past 10 years under Surrey's proposed methodology would have been over $50 million - and that was during a period of historically low commodity prices, which have suppressed FEI's gross revenues.

[42] Exhibit B1-13, BCUC-FEI IR 2.14.1 (updated the response to BCUC-FEI IR 1.5.3); Information on Surrey's delivery margin is not available for 2007.

Operating Fees that Would Have Been Yielded By Both Formulas
2007 to 2017

Year	Operating Fee Under City of Surrey Proposal (2) x 3%	Operating Fee Under FEI Proposal (3) x 0.7%
2007	5,319,288	
2008	5,967,074	394,209
2009	5,518,743	411,052
2010	4,814,125	410,951
2011	4,785,333	458,267
2012	4,454,450	460,976
2013	4,157,538	476,063
2014	4,263,776	468,479
2015	3,633,751	432,148
2016	3,383,343	498,436
2017	3,960,635	595,009

(b) Surrey's Proposal Would Have a Material Impact on Customers

74. FEI customers in Surrey will bear the full cost of any Operating Fee. The table below outlines the estimated annual and monthly bill impacts (at FEI rates as of Q4 2017) of FEI's proposed Operating Fee and Surrey's proposed Operating Fee for residential, commercial and industrial customers.[43] The windfall under Surrey's proposal comes at the cost of much greater customer bill impacts.

[43] Exhibit B1-6, BCUC-FEI IR 1.5.2.

FEI Rate Schedule	2016 City of Surrey Average Annual Use Rates (GJs)	*Annual Bill Impact 0.7% of Delivery Margin*	*Monthly Bill Impact 0.7% of Delivery Margin*	*Annual Bill Impact 3% of Gross Revenues*	*Monthly Bill Impact 3% of Gross Revenues*
1 - Residential	92	$4	$0.31	$25	$2
2 - Small Commercial	242	$8	$0.67	$57	$5
3 - Large Commercial	3,050	$75	$6	$589	$49
23 - Large Commercial Trans.	4,973	$122	$10	$539	$45
5 - General Firm	11,729	$220	$18	$1,897	$158
25 - General Firm Trans.	16,659	$267	$22	$1,178	$98

* Slight differences may exist due to rounding

[1] In accordance with current practice, 3.09% is reflected in the City of Surrey proposed operating fee bill impacts due to the inclusion of the 3% operating fee in calculation and collection of gross revenues

(c) If it Looks Like a Tax and Smells Like a Tax…

75. An Operating Fee that is out of proportion to the benefits flowing to FEI/FEI customers under the new Operating Agreement would have the flavour of a tax on citizens who use natural gas, rather than being part of the consideration flowing between two contracting commercial parties. FEI customers would bear the burden of payments that the City would really be using as an indirect way to supplement taxation revenues. FEI stated:

> An Operating Fee, if approved, would be paid by FEI's 113 thousand customers in Surrey, which would provide a source of revenue for the City to apply to its municipal budget. To the extent that revenues from an Operating Fee reduce requirements for municipal taxes, then one would expect that municipal taxpayers in the City of Surrey would benefit as a whole. An Operating Fee cannot be approached like a tax, and is over and above the tax FEI pays on all of its infrastructure (irrespective of whether it is on public or private land).
>
> This shifting of responsibility for revenue generation from one group of people (all Surrey taxpayers) to a subset of those people (FEI's 113 thousand customers in Surrey who are also taxpayers) may be appropriate if FEI customers are also obtaining a commensurate benefit from the City under the operating agreement to justify the fee as something other than an indirect tax. Otherwise, the shifting effect, which is less transparent than proper taxation, is difficult to justify. The

> fact that Surrey's proposal yields such a disproportionately large Operating Fee should be a concern.[44]

76. One resident of Surrey who filed a letter of comment in this proceeding similarly compared an excessive Operating Fee to a tax:

> Allowing The City of Surrey to collect 3% of every Surrey Tax payer's Fortis bill is tantamount to permitting circumvention of proper City of Surrey budget approval process. What is the fiscal plan and budget? Where is the obligation to properly inform Surrey Tax payers? Fortis suggests that costs can be covered for less that (sic) 1%, and it has the math to backup it's statement.
>
> …
>
> If The City of Surrey is proposing what amounts to a tax increase, then allow the electorate to vote on the proposal in the next election. ….[45]

77. Surrey already collects taxes from FEI on all of its natural gas infrastructure. It has taxation powers in respect of its citizens. The Commission should ensure that any Operating Fee retains the quality of contractual consideration, and avoid conferring a windfall upon Surrey at the expense of FEI customers.

E. SURREY IS SELECTIVE IN DEMANDING CONSISTENCY WITH OTHER MUNICIPALITIES

78. Surrey's main argument in support of its proposed Operating Fee formula is that the Commission has approved operating agreements with other municipalities that included fees based on 3% gross margin.[46] As explained below, the City's demand for consistency with other agreements when it comes to an Operating Fee is selective and self-serving. Surrey also overlooks the relatively small size of most of the municipalities and the historical context that led to a 3% Operating Fee being part of most Inland and Vancouver Island operating agreements.

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[44] Exhibit B1-13, BCUC-FEI IR 2.17.1.

[45] Exhibit E-14.

[46] For instance, Surrey's counsel stated in Exhibit B2-10, p.2: "The City has been clear that the operating fee it requests is calculated on the same basis as the operating fees FEI is currently remitting to 75 other municipalities in the province (e.g., 3% of gross revenues excluding taxes), none of which are calculated on the basis of the respective municipality's costs."

(a) Surrey's Justifications Boil Down To Wanting What Other Municipalities Have

79. Surrey was initially clear that its proposal for an Operating Fee "is mainly based on" the fact that a number of other municipalities receive an Operating Fee calculated at 3% of gross revenues.[47] In response to questions from the Commission Panel, Surrey suggested there were other "qualitative considerations". However, the four "qualitative considerations", inserted below for ease of reference, are simply four different re-statements of the same argument that other municipalities receive a 3% operating fee:

> For greater certainty, the City's position is not based solely on the fact that 70 (corrected to 75) other municipalities receive an operating fee calculated on the basis of 3.0 percent of the gross revenues (excluding taxes) received by FEI for provision and distribution of gas consumed in the municipality. The City's position considers the following qualitative matters:
>
> - no municipality in the province receives an operating fee from FEI other than 3.0 percent of gross revenues
> - the BCUC previously rejected a municipality's request for an operating fee other than 3.0 percent of gross revenues, and directed that the municipality's operating fee shall be 3.0 percent of gross revenues (refer to BCUC Order G-17-06 dated February 2, 2006)
> - adopting the same operating fee structure as is used for other municipalities in the province substantially supports transparency, public interest and consistency among FEI ratepayers, most of whom are also municipal taxpayers
> - FEI and the BCUC continue to approve operating agreements with operating fees of 3.0 percent of gross revenues (refer to BCUC Orders C-4-17 dated April 6, 2017 and C-1-18 dated March 1, 2018)

(b) Surrey Only Favours Consistency When it is Advantageous to the City

80. Surrey's commitment to the principle of uniformity among municipalities changes depending on whether or not Surrey favours the provisions of the other operating agreements. Contrast Surrey's justification of its proposed Operating Fee with its defense of newly negotiated Operating Terms that it favours:

> The City of Surrey understands that the Commission reviews and evaluates operating agreements on an individual case-by-case basis, and that FEI's most recent form of operating agreement accepted by the Commission can serve as a

[47] Exhibit B2-4, BCOAPO-Surrey IR 1.1.1. See also BCOAPO-Surrey IR 1.2.3 and Exhibit B2-14, BCUC-Surrey IR 2.14.1.

basis for comparison for future operating agreement applications but it is not intended to be a standard form agreement.[48]

81. Moreover, there are significant differences among existing operating agreements, so "consistency" depends on the frame of reference:

- The municipalities representing a majority of FEI's customers, sales, and infrastructure are located in the Lower Mainland. None of the Lower Mainland municipalities has ever received an Operating Fee.[49] Consistency with the Lower Mainland municipalities - municipalities that more closely resemble Surrey than the much smaller Vancouver Island and Inland municipalities - would suggest that Surrey should not receive any Operating Fee at all.

- Even when it comes to the Interior and Vancouver Island municipalities, Surrey prefers inconsistency when it comes to the allocation of Relocation Costs. Inland and Vancouver Island municipalities reimburse FEI for all costs that FEI incurs as a result of a municipal request to relocate utility facilities. Applying that Relocation Cost allocation would be less favourable to Surrey than the terms proposed by either Party.

- Surrey also wants different operating protocols from Vancouver Island and Inland agreements. The Parties have recognized that the operational processes outlined in other operating agreements are insufficient in the context of a large city like Surrey. As a result, the Parties have agreed on more sophisticated, mutually beneficial, protocols. A workable and fair outcome in the context of Surrey should be the objective for other provisions of the Operating Agreement as well.

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[48] Exhibit B2-8-1, BCUC-Surrey IR 1.3.1.

[49] Exhibit B1-1, FEI Application, p.13 and Exhibit B1-13, BCUC-FEI IR 2.12.1.

(c) The 3% Formula is Currently Being Used For Much Smaller Municipalities

82. Surrey's appeal for an Operating Fee like the much smaller Inland and Vancouver Island municipalities is focussed on having the same formula, not the results of applying that formula. The same formula (3% of gross revenues) yields a very different result when it is applied to a city like Surrey.

83. The Interior and Vancouver Island municipalities with Operating Fees are, relative to Surrey, much smaller and more sparsely populated. The 3% of gross revenue formula thus yields a relatively small Operating Fee in absolute terms. The Village of Keremeos, for which the template Keremeos Agreement was approved, had a population of 548 in 2016, and received a fee of $10,955. Other municipalities with operating agreements are even smaller than Keremeos. Sixty percent of the municipalities that receive fees have fewer than 10,000 people. Over half of the municipalities that received Operating Fees in 2016 (40 of 75) received $50 thousand or less. Two-thirds (52 of the 75) of the municipalities received less than $100 thousand.[50] In all such cases, the Operating Fee is sufficiently small that the difference between using the 3% of gross revenues formula and another formula is relatively modest in absolute terms.

84. Surrey's proposal, had it been in place for 2016, would have meant that FEI would have collected from customers and remitted to the City $3.4 million in 2016 (down from over $5 million in prior years due to historically low gas prices). An Operating Fee of $3.4 million would be 1,000 times larger than the smallest Operating Fee collected in 2016.[51]

(d) Operating Fees Are a Legacy of Centra Gas' and Inland Natural Gas' Exclusive Franchise Agreements

85. Surrey is overlooking the historical context underlying fees based on 3% of gross revenues. There does not appear to have ever been a principled basis for the 3% methodology in the Inland and Vancouver Island regions. There is even less rationale for extending it to the Lower Mainland.

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[50] A table of the municipalities and associated fees is included in FEI's response to Exhibit B1-6, BCUC-FEI IR 1.4.2.

[51] Exhibit B1-6, BCUC-FEI IR 1.5.3.

Inland and Vancouver Island Municipalities Granted Exclusive Franchises

86. As discussed above, all municipalities that currently receive an Operating Fee are located in the former service areas of Centra Gas (Vancouver Island) and Inland Natural Gas.[52] Municipal agreements granting exclusive rights to the utility were an integral part of the original development of natural gas distribution service in these service territories. It is clear that the fees had originally been part of the consideration paid by the legacy utilities for exclusivity in the municipalities.

87. The following bullets describe how the fees paid by Centra Gas and Inland Natural Gas were contractual consideration for the municipalities' conferral of exclusive rights upon the utilities:

- ***Inland*** – The old Inland Natural Gas agreements provided that the franchise fee was contractual consideration for the exclusive grant of franchise and the use of public places. The franchise was the legal authorization for Inland to construct and operate public utility infrastructure. For instance, the applicable provision of the 1979 City of Castlegar Franchise Agreement stated in part:[53]

> 1. The Company agrees to obtain a supply of gas subject as hereinafter provided, to distribute and sell gas within the boundary limits of the Municipality, and, subject as hereinafter provided, the Municipality insofar as and to the extent that it is able and so empowered, hereby grants to, bestows and confers upon the Company the exclusive charter, right, franchise or privilege to supply gas by pipeline to the Municipality and its inhabitants and to consumers or customers situated within its boundary limits for the term of Twenty-one (21) years from the date of the expiry of that Franchise Agreement dated the 24th day of April, 1958, which expired on the 30th day of August, 1977.
>
> …
>
> 23. As compensation for the use by the Company of the public thoroughfares, highways, roads, streets, lanes, alleys, bridges,

[52] Exhibit B1-9, Surrey-FEI IR 1.2.10.1; Exhibit B1-4, BCOAPO-FEI IR 1.4.1; Exhibit B1-7, Landale-FEI IR 1.9A; Exhibit B1-1, FEI Application, Section 3.3.3.2.

[53] Exhibit B1-13, BCUC-FEI IR 2.12.1, Attachment 12.1.

> viaducts, subways, public places, squares and parks as provided in Clause Three (3) hereof, and for the exclusive charter, right, franchise, or privilege to supply gas by pipeline as provided in Clause One (1) hereof, the Company shall pay to the Municipality on the first days of November in each of the years 1977 to and including 1997 or such earlier year in which this Agreement may expire under the provisions hereof a sum equal to Three (3%) per cent of the amount received in each immediately preceding calendar year by the Company for gas consumed within the boundary limits of the Municipality, but such amount shall not include revenues from gas supplied for resale, and, ….[emphasis added]

Two of the early Inland Natural Gas agreements with municipalities, those with Chetwynd and 100 Mile House, were called "Operating Terms" rather than a franchise agreement. While they established terms for the use of public spaces, they provided no franchise, exclusive or otherwise. Inland Natural Gas did not collect and remit any Operating Fee for these two municipalities.[54]

- ***Vancouver Island*** – The original agreements with Centra Gas (Vancouver Island) similarly secured exclusive rights in consideration for an Operating Fee (although subsequent legislation prevented municipalities on Vancouver Island from collecting such fees for many years until it was repealed).[55] For example, Centra Gas' standard agreement provided in part:

[54] Exhibit B1-13, BCUC-FEI IR 2.12.1.

[55] Exhibit B1-1, FEI Application, p.17.

2. Grant of Operating Rights. The Municipality, to the extent that it is empowered, grants to the Company subject to the terms and conditions of this Agreement and subject to compliance with applicable federal and provincial statutes and bylaws of the Municipality, the exclusive right to supply Gas by pipeline to consumers located within the Municipality.

3. Exclusivity of Operating Rights. The Municipality shall not grant to any other person the right to supply or deliver Gas by pipeline within the Municipality or the right to use Highways or Public Lands to supply or deliver Gas by pipeline, so long as the Company complies with the terms and conditions of this Agreement and this Agreement remains in force.

The Basis for 3% of Gross Revenues Was Murky Even in 1977

88. In 1977, the Energy Commission held an inquiry into franchise fees (a copy of the Decision, which was discovered by counsel after the close of evidence, has been provided). The Energy Commission found that franchise fees were not in the public interest. It issued an order cancelling all franchise fees in the province. (That aspect of the order was overturned on appeal for reasons relating to procedural fairness, and there does not appear to have been any further process. The new statute in 1980 included a deemed CPCN and a provision that nullified franchise agreements in existence.) The Energy Commission made a number of observations that underscore the murky origins of, and questionable rationale for, the practice of calculating a franchise fee based on 3% of gross revenues:

> The reason for the level of the fee is even more obscure than the origin of the franchise agreement. Apart from the prevalence of a "most favoured nations clause" in the existing franchise agreements, there appears to be no clear reason that the fee has been set at 3% of the gross revenue in virtually all of the cases where it applies. There does not appear to have been any quantification of costs to be reimbursed or of values recognized in the determination of the fees. There was no evidence in the inquiry which would support their existing level. Historically, the utilities have been able to include as a part of their utility cost-of-service the full amount of the franchise fees paid to the municipalities. There has, therefore, been little motivation, other than concern for the competitive price advantage of gas, for the utilities to limit the amount of the fee.

> Certain of the industrial consumers evinced a concern, shared by the Commission, that the application of a fixed percentage fee to the gross revenue of the utility constitutes an unreasonable basis for the franchise payment. As has been indicated, no evidence was available as to the reason the 3% was originally set. Even assuming there was some logical basis for it in the first instance and there was some significant relationship between the cost and prospective revenue at that time, the same relationship between costs of service and revenue does not now exist. The municipalities were unable to provide any evidence of actual costs which would be covered by the fee. There are, no doubt, some costs to the municipalities associated with the operation and maintenance of a gas distribution system. It should be noted, however, that direct costs arising out of the laying of mains, extensions or connection services are borne by the utility on a project-by-project basis. Municipal costs associated with utility operations relate to unforeseen direct costs and indirect administrative costs. However, the cost of gas bears no necessary relationship to either the additional costs imposed on a municipality by virtue of the use of its facilities by the utility or to the value of the franchise itself. The rather arbitrary nature of the fee is only exacerbated by the introduction of additional external arbitrary costs, such as the cost of gas. It is well known that the cost of gas has increased very substantially over the past three years beyond the control of the utility or the municipality; the imposition of the 3% on this increased cost of gas has contributed substantially to the revenue flowing to the municipalities from the franchise fee. Certain municipalities have enjoyed substantial increases in revenue resulting from annexation of outlying areas in which the heavy concentration of industry results in increased franchise fees disproportionate to any costs involved. [Emphasis added.]

89. The Energy Commission's wholesale rejection of franchise fees in 1977 is distinguishable from the current case in the sense that today we are dealing with an operating agreement of a public utility that already has rights in the municipality, rather than a franchise for a utility without a CPCN that is subject to a public interest test. However, the Energy Commission's finding that franchise fees are contrary to the public interest does underscore FEI's point that there must be a commercial rationale for an Operating Fee rooted in the puts and takes of the overall Operating Agreement. The Energy Commission's concerns about the lack of a principled basis for a franchise fee based on 3% of gross revenues, and about the windfall benefitting a municipality when the price of gas and throughput increase, are also pertinent in this context.

3% Operating Fee in Renewed Agreements is a Negotiated Hold-Over

90. The Operating Fees in the renewed agreements negotiated with Vancouver Island and Inland municipalities are a negotiated hold-over from the original arrangements. FEI explained the context on Vancouver Island[56]:

> Prior to agreeing to a 3 percent Operating Fee, the Company considered four key factors that made the circumstances of the negotiations with the Vancouver Island municipalities unique.
>
> 1. 26 Vancouver Island municipalities were in need of new operating agreements (9 were expiring and 17 had expired or did not have prior agreements;
>
> 2. Existing and expired operating agreement terms already included a provision for the collection of an Operating Fee at 3 percent of gross revenue;
>
> 3. AVICC and the Municipalities were working with government to achieve an amendment to the VINGPA to enable them to collect Operating Fees and were firm in their intent to levy an Operating Fee of 3 percent on gross revenue; and
>
> 4. Implementation of an Operating Fee was being contemplated in the context of the amalgamation of the gas utilities and the three-year phase in to common rates. In that circumstance, implementing a 3 percent Operating Fee for Vancouver Island customers in order to reach agreement on all other operating terms would not negatively impact customers' bills. The 3 percent Operating Fee would be more than fully offset by the rate reduction for Vancouver Island customers due to amalgamation (approximately a 25 percent rate reduction once fully phased in).
>
> Given those unique circumstances and in order to achieve unanimous agreement on all operating terms with all the parties, the Company agreed to the Operating Fee at 3 percent of gross revenues for the 26 Vancouver Island municipalities. The Commission accepted the executed operating agreements for the 26 Vancouver Island municipalities by Orders C-6-15 dated June 11, 2015, C-7-15 dated June 18, 2015, and C-8-15 dated June 25, 2015.

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[56] Exhibit B1-1, FEI Application, p.19.

91. In other words, the negotiated renewals took into account the Parties' rights and obligations under the prior agreements. Taking a similar approach in the context of Surrey leads to a result where there is no Operating Fee at all. The agreements with the Lower Mainland municipalities that were originally served by BC Electric, and the agreement with Oak Bay, were different. None of those agreements is an exclusive franchise agreement. None contemplates the collection of an Operating Fee. For example, the Oak Bay agreement specifically states that it is not an exclusive franchise:

> **14. It is hereby mutually agreed by and between the parties hereto and this agreement is made upon the distinct and express understanding that nothing herein contained shall be deemed or construed as a grant to the Company of the exclusive right to the privileges herein contained and that the Corporation shall be at liberty at any time it may desire to grant the same or similar privileges to any other person persons or corporation.**

92. FEI's agreement with Langley similarly states:

> 13. It is hereby mutually agreed by and between the parties hereto and this agreement is made upon the distinct and express understanding that nothing herein contained shall be deemed or construed as a grant to the Company of the exclusive right to the privileges herein contained and that the Corporation shall be at liberty at any time it may desire to grant the same or similar privileges to any other person, persons or Corporation or to engage in the manufacture distribution and sale of gas and to instal and operate its own gas system and to supply gas to its inhabitants in such manner and upon such terms as it may deem proper without thereby incurring any obligation whatever to the Company.

93. While there was a budgetary rationale to continue with the same fee as part of renewed operating agreements with Vancouver Island and Inland municipalities, the same logic does not hold where Surrey (i) has never received an Operating Fee in the 60 years since

natural gas service was extended to the area, and (ii) never granted an exclusive franchise.[57] The approval of any Operating Fee for Surrey, let alone an Operating Fee based on 3% of gross revenues, will represent a marked departure from prior approvals.

F. AN OPERATING FEE SHOULD NOT BE JUSTIFIED BASED ON SURREY'S OWN COSTS

94. Surrey had initially been unequivocal that it was not justifying its proposed Operating Fee based on its internal costs. Counsel for Surrey stated in a procedural submission[58]:

> The City has been clear that the operating fee it requests is calculated on the same basis as the operating fees FEI is currently remitting to 75 other municipalities in the province (e.g., 3% of gross revenues excluding taxes), none of which are calculated on the basis of the respective municipality's costs.
>
> …
>
> The Aplin Martin report [included in the response to BCUC-Surrey IR 1.4.2] is not central to the City's requested operating fee. It was submitted in response to the Commission's IR. …

Surrey similarly stated in its second round responses:

> Accordingly, while the operating fee clearly is used by the municipality to offset the municipality's costs, to date the operating fee amount has not been determined on the basis of the individual municipality's actual costs due to FEI. It is not clear why in this current proceeding it is being suggested[59] that the City of Surrey's operating fee should be determined on an actual cost causation basis when such principle has not been relevant or applied before.[60]

Surrey shifted its position when pressed in Commission Panel IRs for a rationale for such a significant Operating Fee. Surrey stated, with reference to the Aplin Report, that "The City also submitted quantitative analysis [the Aplin Report] in support of its requested operating fee."[61] FEI submits below that the value of the consideration that Surrey is providing to FEI under their

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[57] Exhibit B1-6, BCUC-FEI IR 1.4.4.

[58] Exhibit B2-10.

[59] FEI is not making that suggestion; this appears to be a reference to the Commission's information request.

[60] Exhibit B2-14, BCUC-Surrey IR 2.16.2.

[61] Exhibit B2-16, Panel IR 1.2.

commercial agreement, not Surrey's internal costs, should be the measure of a reasonable Operating Fee.

(a) Surrey Charges Permit Fees, Not Restitution

95. There is a fundamental logical flaw with basing an Operating Fee on an estimate of the costs that the municipality incurs in its dealings with FEI. Municipalities do not operate on the basis that third parties wishing to operate or perform work in public spaces are billed for all of the City's related operating, overhead, administrative, and capital costs. Rather, municipalities charge published fees for permits and approvals. (This is true for private developers, let alone for a public utility with the right to operate under a CPCN.) To the extent that the municipal fees charged do not offset the municipality's full costs, the residual amount is part of the municipality's overall operating budget that is recovered through other means (e.g., taxes).[62]

96. Calculating an Operating Fee to recover Surrey's internal costs would, in essence, be treating the Operating Fee as a tax.[63] FEI already pays taxes to Surrey for all of its facilities and operations in the City (including offices, buildings, stations, all pipe assets, and services). In 2017, FEI paid to Surrey approximately $5.2 million in taxes. This amount alone exceeds, by a wide margin, the amount that the City is asserting that it incurs annually as a result of FEI's gas infrastructure being located within the City's public spaces.[64] FEI has also challenged significant aspects of the City's estimate.[65]

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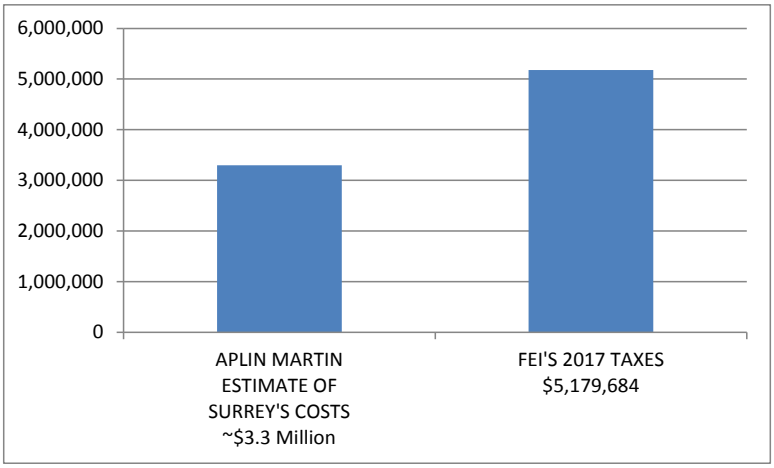
[62] Exhibit B1-11, FEI Supplemental Evidence, p.2.

[63] Exhibit B1-13, BCUC-FEI IR 2.17.3.

[64] In Exhibit B2-14, BCUC-Surrey IR 2.16.6, Surrey stated: "The cost estimated in Alpin Martin's report and those identified and quantified in this response sum to $3.64 million to $3.84 million, exclusive of indirect costs due to traffic inconvenience, temporary loss of park amenities, public acceptance with visual trench patches and road cuts, and other similar matters. This suggests that if the City's operating fee was designed to recover actual costs as a result of FEI, the operating fee value would probably be more than $4 million / year in 2017 Canadian dollars."

[65] Exhibit B1-11, FEI Supplemental Evidence, Section 1.3.

FEI Already Pays Taxes in Excess of Surrey's Reported Internal Costs



The City's analysis also takes no account of the benefits to the City of having natural gas available in Surrey, including attracting businesses that use natural gas in commercial applications.[66]

97. The Operating Fee is not intended to be a tax. It should not be calculated as if it is just another tax.

(b) FEI's Rights Predated Municipal Ownership of Roads

98. Another logical problem with calculating an Operating Fee with reference to what FEI supposedly costs Surrey through its presence in the municipality is that FEI's rights predate Surrey's ownership of the roads. Surrey did not obtain ownership of the roads in the municipality until January 1, 2004,[67] decades after FEI had obtained its CPCN, started using the roads and had acquired rights of way. FEI obtained its rights in Surrey by a regional CPCN, not from the municipality by the grant of franchise. Moreover, Surrey did not purchase the roads from the Province. Rather, it obtained title by law and "inherited" FEI as an occupier. Surrey took ownership without payment and subject to all subsurface conditions, limitations, third party infrastructure, and all rights and privileges which accrue to those parties. In these

[66] Exhibit B1-11, FEI Supplemental Evidence, Section 1.2.

[67] *Community Charter*, RSBC 2003, c.26, s.35(4)(b).
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/03026_03#section35

circumstances, it would be unreasonable to calculate an Operating Fee on the premise that the City's inherited ownership is somehow diminished by the presence of rights that predated municipal ownership.

G. AN OPERATING FEE SHOULD BE CALCULATED USING DELIVERY MARGIN, NOT GROSS REVENUES

99. FEI's proposal calculates the Operating Fee as a percentage of delivery margin, rather than as a percentage of gross revenues. This section describes how the use of delivery margin provides other benefits, including: (i) a closer relationship between the Operating Fee and FEI's facilities and operations in the municipality; (ii) increased fee stability and predictability for customers and the municipality; and (iii) consistent treatment of FEI's Sales and Transport customers.[68]

(a) Using Delivery Margin Provides Closer Link to Costs and Activity Levels

100. Calculating an Operating Fee as a percentage of delivery margin, rather than as a percentage of gross revenues, provides a closer link between the Operating Fee and FEI's facilities and operations in Surrey.

101. FEI's delivery rates are based on its cost of service, including the operating expenses and depreciation expense calculated on the book value of the installed infrastructure.

102. Gross revenues, unlike delivery rates, are significantly affected by the price of the commodity. The market price of the commodity flowing through the pipes has nothing to do with FEI's activity levels in Surrey that drive FEI's interaction with the City and Surrey's claim to individual permit fees.[69]

103. The effect of volume on the gross revenues is much greater than the effect on delivery margin. Utility infrastructure, and interaction with Surrey, is required irrespective of the amount of natural gas flowing through the pipes or the price of natural gas. The same type

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[68] Exhibit B1-6, BCUC-FEI IR 1.5.4.

[69] Exhibit B1-6, BCUC-FEI IR 1.5.4.

of pipe can deliver significantly different volumes of gas, depending on the attachment ratio per main.

104. The methodology based on 3% of gross revenues was developed in the context of Inland municipalities that are much smaller and more sparsely populated than Surrey. Most of the Inland and Vancouver Island agreements are with small municipalities. Large urban areas in the Lower Mainland have a higher customer attachment ratio per main as compared to small municipalities and towns. A Gas Main extension in a more rural area may only attach a few customers, whereas a similar sized project in an urban area may attach several hundred customers. A single residential tower, of which there are many in Surrey, can drive significant load with little additional gas infrastructure. This results in greater utilization of the system and more volume consumed by more customers for similar construction work. In other words, the same utility infrastructure and interaction with the municipality will produce much higher gross revenues.[70] Any increase in commodity prices has a more significant impact on gross revenues in urban municipalities with significant load. These factors translate into an inflated Operating Fee under Surrey's proposed formula.

(b) Using Delivery Margin Will Stabilize the Operating Fee

105. Delivery margin is largely based on the fixed costs of operating the utility and is only adjusted annually. Gross revenues, by contrast, are also driven by commodity costs that are subject to market forces and quarterly adjustments. As such, an Operating Fee calculated based on a percentage of delivery margin, as opposed to a fee based on gross revenues, will result in a more consistent bill impact for FEI customers. It will also produce a more stable revenue stream for the City.

106. In 2003, the Commission identified as a concern the volatility inherent in using gross revenues to calculate Operating Fees. It directed FEI to examine the use of delivery margin instead:

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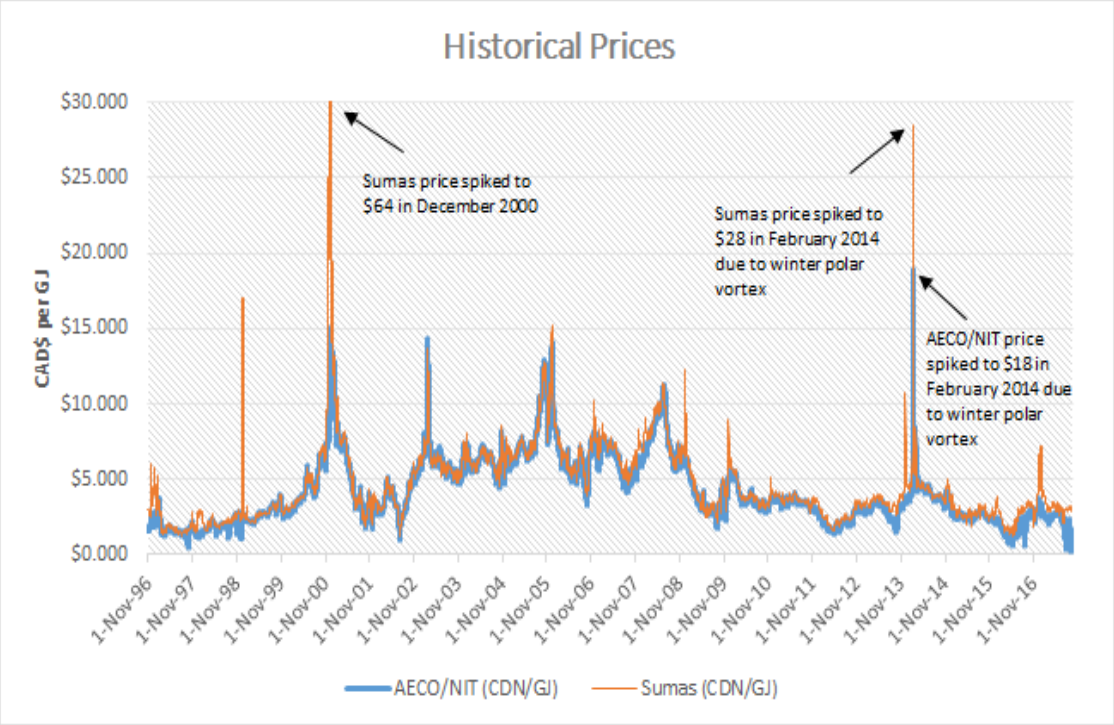
[70] Exhibit B1-6, BCUC-FEI IR 1.4.4.

> …the Commission considers that the inclusion of the gas commodity cost in the calculation of fees for Sales Service customers has led to considerable volatility in recent years. The Commission directs Terasen to seek a method in future agreements to convert the fee to a charge on Utility Margin [i.e., delivery margin], so as to stabilize the costs to utility customers.[71]

107. Surrey dismisses the Commission's comments as being specific to the circumstances in 2003, and suggests they are no longer valid.[72] However, price volatility continues in the natural gas marketplace. Despite the abundance of shale gas, supply and demand balances can change quickly in response to many market factors.[73] The figure below shows the historical daily spot prices for AECO/NIT and Sumas hubs. As recently as winter 2013/14, market gas prices spiked due to the winter polar vortex, with regional Sumas daily spot prices climbing to over $28 per GJ and AECO/NIT reaching $18 per GJ. FEI expects the potential for this level of price volatility to continue in the future.[74]



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[71] Order C-7-03, Appendix A, page 5.

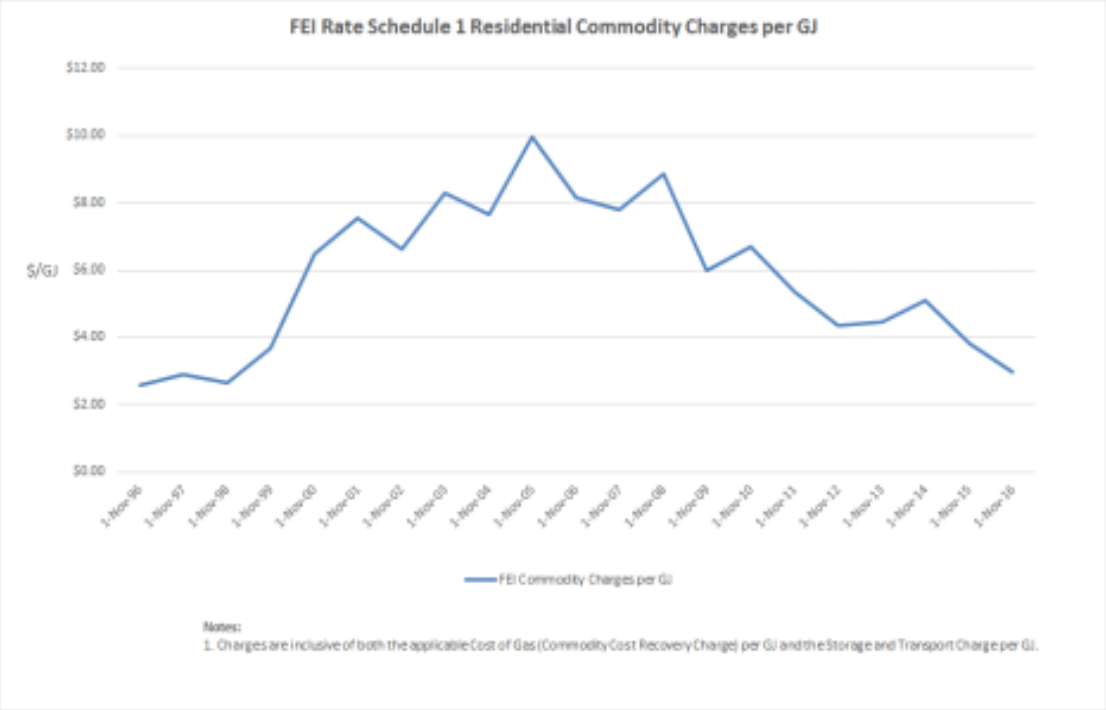
[72] Exhibit B2-8-1, BCUC-Surrey IR 1.2.3

[73] Exhibit B1-9, Surrey-FEI IR 1.2.15.5.

[74] Please also refer to the response to Exhibit B1-9, Surrey-FEI IR 1.2.15.5 for a discussion on historical gas commodity cost volatility and outlook.

108. FEI's regulatory accounts smooth out the daily volatility, but changes in commodity costs are still reflected in quarterly commodity rate changes.[75] The continued volatility in FEI commodity rate changes since 2003 is self-evident in the following figure:[76]

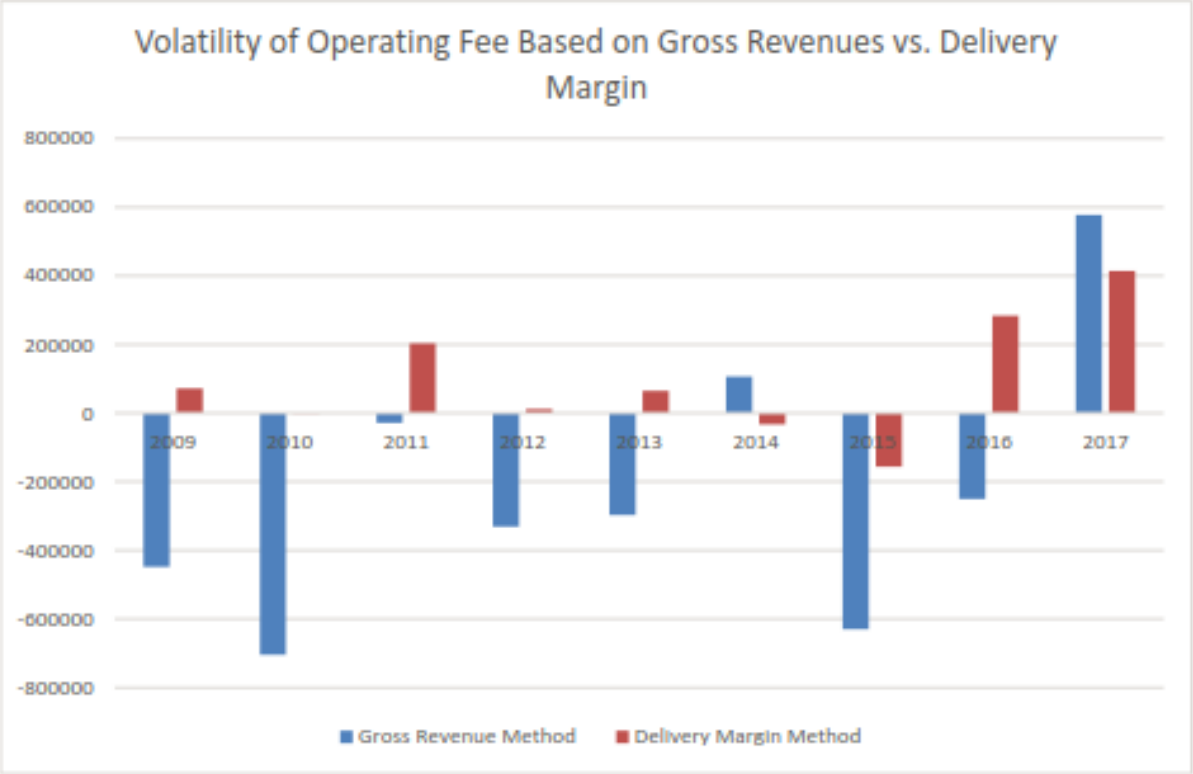
Figure 2: FEI Cost of Gas including Storage and Transportation - Rate Schedule 1 (Nov. 1996 to Nov. 2016)



109. The concerns expressed by the Commission in 2003 are validated by the relative annual volatility in Operating Fees that would have been collected over the past decade assuming both calculation approaches had been in place. The results of this comparison are depicted in the table below.

[75] Exhibit B1-9, Surrey-FEI IR 1.2.15.3.

[76] Exhibit B1-15, Surrey-FEI IR 2.5.2.



110. FEI's proposal based on delivery margin would have resulted in a relatively stable cost to FEI's customers in Surrey, and a relatively stable revenue stream for Surrey. Surrey's proposal based on gross revenues would have produced an Operating Fee that fluctuated between approximately eight and 15 times more than the Operating Fee produced by FEI's proposal.[77]

111. The Alberta Utilities Commission (AUC) has more recently expressed similar concerns about using gross revenues. In the 2003 and 2006 AltaGas decisions cited in Surrey's Supplemental Evidence,[78] the AUC determined that a franchise fee should be based on distribution revenues, excluding the natural gas commodity:

> 30 The Commission finds that basing the franchise fee on the distribution charges will reduce the volatility in revenue and utility billings that may be experienced by municipalities and customers respectively compared to a

[77] Exhibit B1-6, BCUC-FEI IR 1.5.1; Exhibit B1-6, 1.5.3 (Table, Column 5).

[78] Exhibit B2-11.

franchise fee that is based on both distribution and commodity charges. The Commission considers this will lead to rates that are just and reasonable.[79]

(c) Rising Natural Gas Prices Will Otherwise Increase Surrey's Windfall and Customer Burden

112. The period 2007 to 2016, over which Surrey's proposal would have generated an Operating Fee fluctuating between eight and 15 times higher than FEI's proposal, was a period of historically low commodity costs. The proposed Operating Agreement between FEI and Surrey is for a 20 year term. Natural gas prices are forecast to increase over that period.[80] An increase in commodity costs during the term of the new Operating Agreement will increase the Operating Fee under Surrey's proposal relative to FEI's proposal. As FEI stated: "Basing an Operating Fee on Gross Revenues in a period of rising gas prices will exacerbate the annual bill impacts for customers at a time when they are already facing higher costs." [81] Rising commodity costs would provide an additional windfall to Surrey at the expense of FEI customers, since FEI's activity levels in the municipality would not increase in lock-step with rising natural gas prices. (In anything, activity levels might arguably be more inclined to decrease if the price increases result in gas being less price competitive with other energy options).

(d) Using Delivery Margin Treats Transport and Sales Customers the Same

113. Sales customers (which include residential and commercial classes) and Transport customers in Surrey will be treated the same with an Operating Fee calculated based on delivery margin, but would be treated differently with an Operating Fee based on gross revenue. Sales and Transport customers all pay a delivery rate. While Sales customers also pay a commodity charge to FEI, Transport customers are able to self-procure natural gas or purchase the commodity from a marketer. Under Surrey's proposed Operating Fee formula, Transport customers would not pay the Operating Fee based on the commodity that they procure themselves or through a marketer. However, all of the natural gas that those

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[79] Exhibit B2-11.

[80] Exhibit B1-9, Surrey-FEI IR 1.2.15.5.

[81] Exhibit B1-15, Surrey-FEI IR 2.5.1.

Transport customers consume flows through the pipes in Surrey. The fact that all of FEI's customers in Surrey use the utility infrastructure located in the municipality reinforces the reasonableness of calculating any Operating Fee based on delivery margin.[82]

114. The Commission recognized this benefit in its 2003 decision relating to Salmon Arm:

> Although Transportation Service has created an anomaly between Sales Service and Transportation Services the Commission does not find it to be unduly discriminatory. Even though the development of competition in the provision of gas commodity to industrial and large commercial customers since the mid 1980's has resulted in a change to the gross revenues of the Utility, the Commission accepts that the changes in gross revenue and franchise payments continued to be calculated in accordance with the franchise agreement and did not result in an undue discrimination to either party. However, a fee structure based on the Utility Margin, exclusive of gas commodity cost, would avoid the current anomaly. Whether other utilities operating in the Municipality collect such fees is not a relevant issue here.[83] [Emphasis added.]

(e) FEI's General Terms & Conditions Accommodate Using Delivery Margin

115. Surrey states that the definition of "Municipal Operating Fees" in the FEI Tariff General Terms and Conditions (GT&Cs) "accurately reflects the City of Surrey's understanding of the purpose and nature of an operating fee."[84] Surrey asserts that "[t]he pertinent components of the definition provide that the operating fee is for FEI's use of public places within the municipality to construct and operate its utility business, relating to the revenues received by FEI for gas delivered and consumed within the municipality."[85] Surrey argues that FEI's proposed Operating Fee based on delivery margin is inconsistent with FEI's GT&Cs. FEI submits that the existing FEI GT&Cs accommodate an Operating Fee, regardless of how it is calculated. There is no requirement that Operating Fees be based on gross revenues. Surrey's characterization of the "pertinent components" of the definition of "Municipal Operating Fees"

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[82] Exhibit B1-6, BCUC-FEI IR 1.5.4.

[83] Order No. C-7-03, p.8. https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115308/1/document.do.

[84] Exhibit B2-14, BCUC-Surrey IR 2.15.1.

[85] Exhibit B2-14, BCUC-Surrey IR 2.15.1.

in the GT&Cs glosses over the **"or"** in the definition. An Operating Fee based on delivery margin fits within (a) of the definition:

> Means the aggregate of all monies payable by FortisBC Energy to municipalities or First Nations
>
> (a) for the use of the streets and other property to construct and operate the utility business of FortisBC Energy within municipalities or First Nations lands (formerly, reserves within the Indian Act),
>
> (b) relating to the revenues received by FortisBC Energy for Gas consumed within the municipalities or First Nations lands (formerly, reserves within the Indian Act), **or**
>
> (c) relating, if applicable, to the value of Gas transported by FortisBC through municipalities or First Nations lands (formerly, reserves within the Indian Act). [Emphasis added.]

116. Regardless, the Commission should be making the decision on the Operating Fee based on the merits of the Parties' respective proposals. GT&Cs can be changed. Surrey's argument about the GT&Cs is an instance of the proverbial tail wagging the dog.

PART FIVE: FEI HAS PROPOSED A FAIR ALLOCATION OF RELOCATION COSTS

A. INTRODUCTION

117. The 1957 Agreement, like other operating agreements, contemplates that either party may require the other party to relocate its facilities. FEI and Surrey have both proposed to retain this right to request relocations. The frequency of Surrey's relocation requests, and the magnitude of the costs that FEI must incur to relocate natural gas infrastructure, make reimbursement a very significant issue for FEI and its customers. The allocation methodology is key to the overall fairness of the new Operating Agreement, particularly given that Surrey is also demanding a significant Operating Fee.

118. FEI makes the following points in this Part:

- First, FEI has been incurring $900 thousand annually to relocate its infrastructure at Surrey's request. Costs that are not reimbursed by Surrey are ultimately recovered in customer rates.

- Second, FEI's proposal that the Party requesting a relocation pay the costs "required to comply with applicable Laws or sound engineering practices" (called "Relocation Costs" in FEI's Proposed Terms) reflects cost causation, since the existing "grandfathered" infrastructure must now meet current standards.

- Third, FEI's proposed allocation of "Relocation Costs" is reciprocal, is based on cost causation, and is more favourable to Surrey than under the 1957 Agreement as well as other municipal operating agreements.

- Fourth, Surrey's proposal would undermine the commercial reasonableness of the overall Operating Agreement, particularly if the other financial consideration flowing to the City remains unchanged from FEI's Proposed Operating Terms.

- Fifth, the Commission is not constrained by the default allocation in the *Pipeline Crossing Regulation* from achieving a commercially reasonable outcome overall.

B. SURREY MAKES MANY RELOCATION REQUESTS AT SIGNIFICANT COST TO FEI/FEI CUSTOMERS

119. Surrey requests many more relocations than other municipalities, necessitating FEI incurring substantially greater costs.[86] The table below compares the number of relocation requests made by Surrey, and the associated relocation costs that FEI incurred, relative to a sample of other municipalities. It shows, for instance:

- The cost FEI incurs to relocate Gas Mains in Surrey has averaged approximately $400 thousand annually for the past six years.[87]
- High Pressure Pipeline relocations have been less frequent, but they are more costly; annual costs have averaged approximately $500 thousand for the past six years.[88]
- Over the five year period 2012 to 2016, FEI incurred *472 times more* relocation costs in Surrey relative to Victoria.
- FEI incurred *37 times more* relocation costs in Surrey relative to Kelowna.

[86] Exhibit B1-9, Surrey-FEI IR 1.1.1.

[87] Exhibit B1-5, CEC-FEI IR 1.3.2.

[88] Exhibit B1-5, CEC-FEI IR 1.3.2.

	Victoria	Nanaimo	Kelowna	Keremeos	Coldstream	Surrey
Number of Gas Line Relocations						
2012						
DP	-	-	3	-	-	41
IP						6
2013						
DP	-	-	-	-	2	44
IP	-	-	-	-	-	6
TP	-	-	-	-	-	4
2014						
DP	-	1	16		-	31
2015						
DP	-	-	3	-	-	11
TP	-	-	1	-	-	-
2016	-	-				
DP	1	-	2	-	-	10
Total:	**1**	**1**	**25**	**-**	**2**	**153**
FEI has not paid to relocate any municipal infrastructure for the installation of any Gas Mains or High Pressure Pipelines.						
Total Cost of Gas Line Relocations						
2012						
DP	$ -	$ -	$ 13,576	$ -	$ -	$ 183,479
IP	$ -	$ -	$ -	$ -	$ -	$ 959,325
2013						
DP	$ -	$ -	$ -	$ -	$ 3,612	$ 541,773
IP	$ -	$ -	$ -	$ -	$ -	$1,443,011
TP	$ -	$ -	$ -	$ -	$ -	$ 533,749
2014						
DP	$ -	$ 1,783	$ 96,971	$ -	$ -	$ 757,651
2015						
DP	$ -	$ -	$ 8,468	$ -	$ -	$ 135,582
TP	$ -	$ -	$ 833	$ -	$ -	
2016						
DP	$ 9,708	$ -	$ 3,326	$ -	$ -	$ 33,536
Total:	**$ 9,708**	**$ 1,783**	**$ 123,174**	**$ -**	**$ 3,612**	**$4,588,106**

120. Although the provision is reciprocal, Surrey has not relocated any municipal facilities at FEI's request in the past 10 years.[89] In fact, FEI has no record of paying to relocate any municipal infrastructure for the installation of any Gas Mains or High Pressure Pipelines in any BC municipality over the last 10 years.[90] FEI has made several informal requests of the City

[89] Exhibit B1-6, BCUC-FEI IR 1.7.2; and Exhibit B2-8-1, BCUC-Surrey IR 1.7.2.

[90] Exhibit B1-9, Surrey-FEI IR 1.1.1.

but has been instructed by the City of Surrey to work around their facilities, which ultimately results in higher costs for all natural gas customers.[91]

121. Given the significant cost of relocating natural gas infrastructure, the allocation approach incorporated in the new Operating Agreement should provide a financial incentive to Surrey to make only efficient and cost-effective relocation requests. It should ensure that FEI customers do not end up subsidizing municipal projects.

C. REQUESTING PARTY SHOULD PAY COSTS TO COMPLY WITH APPLICABLE LAWS AND SOUND ENGINEERING PRACTICES

122. Under the new Operating Agreement, the definition of "Relocation Costs" will determine the costs that are subject to allocation. FEI's proposed definition of "Relocation Costs" is as follows:[92]

> "Relocation Costs" means the costs of a party to:
>
> > (i) realign, raise, lower, by-pass, relocate or protect the party's facilities to accommodate the work of the other party;…
> >
> > (ii) excavate material from around the facilities as needed to complete the work in (i);
> >
> > (iii) backfill the material referred to in (ii) and restore the surface; and
> >
> > (iv) flush water mains, shut down customer gas supply and customer relights as needed,
>
> and includes administration and overhead charges at rates consistent with the party's policy, or standard rates, for such charges, which rates must be reasonable, on the costs of labour, equipment and materials in items (i), (ii), (iii) and (iv), above, and applicable taxes, <u>but excludes the value or incremental costs of any upgrading and/or betterment of the party's facilities of third parties beyond that which is required to comply with applicable Laws or sound engineering practices</u>; [Emphasis added.]

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[91] Exhibit B1-6, BCUC-FEI IR 1.7.2.

[92] Exhibit B1-1, FEI Application, p.21.

The effect of the exclusion relating to "applicable Laws or sound engineering practice" is that the owner of relocated facilities (invariably FEI) will pay for any improvements to its facilities made at the time of relocation "beyond that which is required to comply with applicable Laws or sound engineering practices". As discussed below, FEI's proposal reflects cost causation. It is a clear proposal that can be implemented in practice. It is consistent with Surrey's own bylaws, and other legal and regulatory principles.

(a) Guiding Principle of FEI's Proposal Is Cost Causation

123. FEI's proposal reflects cost causation. Requiring FEI to assume the costs of any improvements, whether or not those improvements were required by law or otherwise, could lead to unfair and unreasonable outcomes - a windfall to Surrey at the expense of FEI customers.[93]

Work Is Triggered to Meet Municipal Purpose

124. The very purpose and intended outcome of relocation work initiated by the City is to accommodate and enable a Municipal Project to proceed. By its definition, such a project is an undertaking "for a municipal purpose and community benefit".[94]

The Relocation Request is Proximate Cause Due to Loss of Grandfathering

125. The facility owner (in this case FEI) would not be incurring costs to comply with "applicable Laws or sound engineering practices" but for the relocation request.[95]

126. FEI installs its assets in accordance with code requirements at the time of installation. As the code evolves, the installed facilities are essentially "grandfathered". In most cases, FEI is only required to upgrade its facilities to comply with current laws, codes, standards, and sound engineering practices at the time when an existing asset is disrupted as a result of relocations or other activities. FEI explained:

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[93] Exhibit B1-9, Surrey-FEI IR 1.3.1.

[94] Exhibit B1-9, Surrey-FEI IR 1.3.5.

[95] Exhibit B1-12, FEI Rebuttal Evidence, p.5.

> Where there is no perceived risk to the safety and reliability of the system and where no other disruption has caused the existing assets to be disturbed, FEI is not required to initiate construction to comply with laws, codes, standards, or sound engineering practice.[96]

127. Changes in applicable laws, codes, and standards since the time of installation can result in the need for various changes upon relocation, the most common of which include:[97]

- Pipe material;
- Pipe wall thickness;
- Casings and pipe protection;
- Weld upgrades;
- Depth of cover and structural backfill; and
- Ground stabilization.

128. Some of the more common changes that would fall under sound engineering practices could include:

- Pipe material change (steel to PE) which typically reduces costs compared to steel for steel;
- Removal or upgraded replacement of obsolete fittings; and
- Site specific pipeline or main protection.[98]

129. The "grandfathering" of installed facilities is of significant value to FEI and its customers. FEI does not replace its facilities based on a definitive formula or financial

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[96] Exhibit B1-14, CEC-FEI IR 2.13.6.

[97] Exhibit B1-14, CEC-FEI IR 2.13.2.

[98] Exhibit B1-14, CEC-FEI IR 2.13.3.

depreciation (i.e., the period of time over which the book value of the pipelines are recovered from customers). Many factors influence the future projection of an asset's fitness for use including material type, soil conditions, pipe coating, cathodic protection and ongoing maintenance. Using continual monitoring programs, FEI projects asset longevity segment by segment. Age can be a factor in some cases, but well-maintained facilities can also last a very long time.[99]

130. The financial end of life (64 years for distribution mains and 65 years for transmission pipelines) is not an indication of the physical life of individual assets. Customers continue to benefit from fully depreciated assets. There is circularity to considering the financial end life in the allocation of Relocation Costs. The financial end life is significantly impacted by relocation requests. The financial life would be much longer if third parties were not requesting relocations.[100]

Some Costs Should Be Paid By the Facility Owner

131. It is commercially reasonable to expect the City to pay for the costs FEI and its customers would not have incurred but for the relocation request.[101] However, as discussed later in this section, FEI accepts that it should bear the costs for relocating gas assets already identified for near-term replacement in FEI's asset management plan. In such cases, FEI's decision to replace the asset (and not the City's relocation request) is the proximate cost of the replacement.

132. Moreover, FEI's proposal is that the facility owner (invariably FEI) will remain responsible for the costs of any upgrades or betterments (avoidable improvements) that are above and beyond those required under applicable Laws and sound engineering practices (e.g., FEI takes the opportunity to increase the pipe size, capacity, or otherwise improve the facilities). This also reflects cost causation.

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[99] Exhibit B1-5, CEC-FEI IR 1.10.5.

[100] Exhibit B1-9, Surrey-FEI IR 1.3.3.

[101] Exhibit B1-9, Surrey-FEI IR 1.3.1.

133. FEI's Rebuttal Evidence outlines what approaches and materials would generally be the lowest cost replacement.[102]

(b) FEI's Proposal Is Clear and Workable

134. Surrey has sought to portray FEI's proposal as unclear. It is clear.

- Applicable Laws refers to those laws, regulations, orders, etc. required to construct, operate and maintain the natural gas infrastructure. They are listed in FEI's response to Exhibit B1-6, BCUC-FEI IR 1.6.1.

- "Sound Engineering practices" and similar terms/variations are commonly applied in the construction industry and in construction related documents to reflect the exercise of good judgment in the circumstances, generally taking into account such factors as applicable laws (including those noted in the response to Exhibit B1-6, BCUC IR 1.6.1), codes and standards and best practices of other natural gas utilities within North America, and site and/or work specific conditions that require more than minimum design standards for a safe installation.[103]

The Language is Already Used in Agreed Terms

135. The phrasing of "applicable Laws and sound engineering practices" is the same wording used in the mutually acceptable provisions relating to the obligation to perform all work (whether New Work, Service Line Work, relocation work, etc.). It would be inconsistent to, on one hand, use the language to impose a positive obligation (in practice, normally on FEI) and then, on the other hand, determine the language is too uncertain to use to determine cost recovery. FEI elaborated:

> The obligation to comply with Laws and sound engineering practices has been adopted in other Operating Agreements and incorporated into both FEI's and

[102] Exhibit B1-12, FEI Rebuttal Evidence, p.4.

[103] Exhibit B1-6, BCUC-FEI IR 1.6.2.

Surrey's Proposed Operating Agreement terms. Section 4.1(a) of the Proposed Operating Agreements states, in part:

> 4.1(a) In its occupancy and use of Public Places, including conduct of Work, FortisBC shall conform to sound engineering practices and comply with all applicable Laws…

For FEI to be obligated to perform relocation work and to do so in accordance with applicable laws and through accepted operating terms (including by Surrey in its own application), but without the corresponding right to recover those associated costs, penalizes FEI for compliance with mandatory obligations and quite simply creates an unjust and unreasonable outcome.[104]

136. Surrey had no difficulty articulating in an IR response what was meant by the term "sound engineering practices".[105]

The Language is Used in Other Approved Operating Agreements

137. The proposed language is also used in other agreements, including the Keremeos Agreement.[106] The Commission specifically ordered that the phrase "sound engineering practices" be used in the Coldstream operating agreement with respect to the work that FEI performs:

> The addition of (b) is approved, in part. The Commission directs FEI to include the following in Section 6.4 of the Revised FEI Operating Terms:
>
> > All work carried out by FortisBC on Public Places shall be carried out in accordance with sound engineering practices.
>
> The Commission directs FEI to incorporate the aforementioned revision into future operating agreements with municipalities.
>
> The Commission agrees that the inclusion of "sound engineering practices" is required to ensure that the appropriate professional judgement is applied by FEI

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[104] Exhibit B1-9, Surrey-FEI IR 1.3.4.1.

[105] Exhibit B2-8-1, BCUC-Surrey IR 1.6.6.

[106] Exhibit B1-6, BCUC-FEI IR 1.2.1, Attachment 2.1, Keremeos column, Sections 5.1 (Row R63) and Section 6.4 (Row R108) and the Proposed Operating Agreement column FEI Proposed Operating Agreement, Section 4.1 (Row R63); Exhibit B1-6, BCUC-FEI IR 1.6.2.

in its engineering within the Municipality. The Commission disagrees with the inclusion of "...diligently in a good and workmanlike manner ..." as this is a broad statement that adds little clarity to the Revised FEI Operating Terms.[107]

FEI Has Articulated How the Provision Will Apply in Practice

138. FEI identified the types of scenarios that typically arise, and presented them in the following table.[108] FEI proposes to include the scenarios in the approved Operating Terms for additional specificity.

Scenario	Outcome	Rationale	Responsibility for Payment
1. **The** facilities that the **other party** has requested be relocated are already identified for replacement under **owner's** asset management plans	Relocation Costs do not include these costs	The decision to replace is merely accelerated by the request	Owner pays
2. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; and • identical replacement CAN be made under prevailing laws and sound engineering practices	Relocation Costs include the lesser of (a) the actual costs for the identical replacement; or (b) the actual costs of another more cost-effective code-compliant alternative	The costs are caused solely by the requesting party, and the owner would not have incurred them but for the request	Requesting party pays Relocation Costs, per appropriate apportionment
3. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; and • Identical replacement CANNOT be made under prevailing laws and sound engineering practices (asset or technology obsolete, etc. and alternatives are required to meet Laws and sound engineering practices)	Relocation Costs include the actual costs for what needs to be installed in conformity with prevailing Laws and sound engineering practice, since identical replacement is not possible	The costs are caused solely by the requesting party, and the owner would not have incurred them but for the request	Requesting party pays Relocation Costs, per appropriate apportionment
4. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; and • a more cost-effective (less expensive) and longer-term alternative, such as polyethylene (PE) pipe can be used under prevailing laws and sound engineering practices (no capacity increase)	Relocation Costs include the actual costs of the most cost-effective code-compliant alternative	The costs are caused solely by the requesting party, and the owner would not have incurred them but for the request	Requesting party pays Relocation Costs, per appropriate apportionment

[107] Order G-113-12, Appendix A, Issue 9, p.8: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/118398/1/document.do.

[108] Exhibit B1-9, Surrey-FEI IR 1.3.4.1.

Scenario	Outcome	Rationale	Responsibility for Payment
5. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; • a more cost-effective (less expensive) and longer-term alternative, such as polyethylene (PE) pipe can be used under prevailing laws and sound engineering practices (no capacity increase); and • the **owner** takes the opportunity to increase the capacity or otherwise further improve the facilities	Relocation Costs include the actual costs of the most cost-effective code-compliant alternative but do not include the incremental costs, if any for the increase in capacity or further improvement(s)	The replacement costs are caused solely by the requesting party, and the owner would not have incurred them but for the request; additional costs would be excluded	Requesting party pays Relocation Costs, per appropriate apportionment; Owner pays for improvements

139. Section 10.1 of FEI's Proposed Operating Terms contemplates coordination, including planning meetings. Under FEI's proposal as elaborated on in the table above, the identification of assets in an asset management plan as being slated for replacement shifts cost responsibility to the asset owner. FEI proposes to share its planned capital improvements with the City of Surrey on an annual basis. The information sharing would include approximately a 5 year outlook, updated annually, so that the City of Surrey's infrastructure plans and FEI's can be coordinated, where possible, to reduce disruption to the City and its residents and businesses. A similar approach is already in place with other municipalities within BC where it has created improved communication and cooperation between the parties.[109] FEI listed the projects identified in its current 5 year capital plan in Exhibit B1-15, Surrey-FEI IR 2.6.2.

Dispute Resolution Mechanism is Available

140. The Parties have also agreed on a dispute resolution process, which is Section 17 of FEI's Proposed Terms. If the Parties' respective engineers and other professionals cannot agree on code requirements or sound engineering practice in a particular circumstance or in respect of particular situations, either party may refer the matter to dispute resolution.[110]

[109] Exhibit B1-15, Surrey-FEI IR 2.6.1.

[110] Exhibit B1-14, CEC-FEI IR 2.13.5.

Surrey's Own Bylaws Reflect Similar Approach to FEI's Proposal

141. Surrey's bylaws take a similar approach to FEI's proposal when a third party requests changes to the municipal stormwater drainage system or sanitary sewerage system. Surrey's bylaws require the requesting party to pay the full cost of the work. Surrey is also authorized to require the requestor to upgrade the system (i.e., betterment) at the requestor's own expense - which goes beyond FEI's proposal. Surrey explained in its Rebuttal Evidence that, in practice, Surrey pays for costs of improvements that it initiates, no different from FEI's proposal:[111]

> There are also times that in order to service the applicant and the neighbouring lands or beyond, the diameter of the service extension may need to be upsized as the base size normally required to solely service the applicant is insufficient to service neighbouring lands or beyond. The Bylaw states that:
>
> > 22. Where the City determines that a storm drain and/or ditch of greater capacity should be installed than is required to provide service to the parcels (including their upstream catchments) for which an application for an extension has been made, such excess capacity shall be provided. The City shall pay the costs of providing such excess capacity in accordance with the current Council policy, but only if:
> >
> > (a) the proposed extension does not create an excessive burden for the City; and
> >
> > (b) the required funds are available.
>
> For greater certainty, the City pays the cost of this upsizing. The City directly reimburses the applicant for the cost for the upsizing or enters into a Development Cost Charge Front-Ending Agreement with the applicant which establishes how and when the applicant will be reimbursed by the City for the upsizing costs.
>
> ……
>
> These extension/upsizing approaches are also established for sanitary sewer infrastructure through the Surrey Sanitary Sewer Regulation and Charges Bylaw,

[111] Exhibit B2-12, Surrey's Rebuttal Evidence, p.2.

2008, No. 16611 and for water infrastructure through the Surrey Waterworks Regulation and Charges By-law, 2007, No. 16337.

142. The fact that Surrey, in practice, employs a similar approach to FEI's proposal is additional evidence that FEI's proposal is both reasonable and workable in practice. This point is only underscored by the fact that, despite what Surrey says it does in practice, it nonetheless retains the right to require a third party to fund facilities beyond those required by law.

Cost Causation is a Well-Established Legal and Regulatory Principle

143. The principle of cost causation (a "but for" test) is consistent with common tort and contractual principles. Cost causation is also a well-established approach for allocating costs in the regulatory realm in the context of setting rates.

Community Charter Invokes a Similar Test

144. The *Community Charter*,[112] with respect to remedial work under Division 12 of Part 3, invokes the concept of "standards specified by bylaw" to determine the work required. This is similar to what FEI is proposing as the distinction between costs incurred due to Surrey's request and betterment.

D. FEI'S PROPOSED "RELOCATION COSTS" ALLOCATION IS COMMERCIALLY REASONABLE

145. FEI has proposed a fair allocation of "Relocation Costs" - the costs that a Party incurs to perform the work to relocate facilities in compliance with "applicable Laws and sound engineering practices". As discussed below, the proposal is reciprocal, based on cost causation, and is more favourable to Surrey than under the 1957 Agreement as well as other municipal operating agreements.

[112] SBC 2003, c. 26.

(a) FEI's Proposal is Reciprocal

146. Under FEI's proposal, FEI will reimburse the City for all Relocation Costs when it asks to relocate Municipal Facilities.[113] The City will reimburse FEI for Relocation Costs associated with Municipal Projects as follows:

- 100% of the Relocation Costs when the affected Company Facilities are Gas Mains;
- Only 50% of the Relocation Costs when the affected Company Facilities are High Pressure Pipelines.[114]

(b) FEI's Proposal is Based on Cost Causation

147. FEI has proposed to bear all costs when it relocates Municipal Facilities because it acknowledges that FEI's request is what is causing the costs to be incurred. Similarly, the City is causing the relocation costs by requesting the relocation of FEI's facilities for a Municipal Project, i.e. there would be no costs, *but for* Surrey's request. An allocation of less than 100% in such cases is only justifiable in the context of an overall framework that continues to be fair to FEI customers.[115] FEI elaborated:

> Many of FEI's assets have service lives that extend for decades. As such, if Surrey requests changes that require a replacement before FEI would otherwise have to replace the assets, Surrey is causing FEI and its customers to incur costs that would not otherwise have been incurred. Therefore, FEI is of the view that 100 percent of the costs would generally be the appropriate starting point when a municipality asks FEI to move its facilities because FEI would not otherwise have incurred the costs. That is the allocation that is applicable in the Interior and Vancouver Island operating agreements for all types of relocations. FEI is, for similar reasons, agreeing to pay for all of the costs for changes it requests to Municipal Facilities.

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[113] Exhibit B-1, FEI Application, Appendix A, FEI's Proposed Operating Terms, Section 8.1.

[114] Exhibit B-1, FEI Application, Appendix A, FEI's Proposed Operating Terms, Section 8.2.

[115] Exhibit B1-4, BCOAPO-FEI IR 1.1.1; Exhibit B1-5, CEC-FEI IR 1.3.1; Exhibit B1-5, CEC-FEI IR 1.9.2.

> The change to 50/50 for High Pressure Pipelines in FEI's proposal is a concession made by FEI as part of an overall package. [116]

148. FEI's concession regarding High Pressure Pipelines is a meaningful one. As indicated above, FEI has been incurring higher annual costs for High Pressure Pipeline relocations than for Gas Main relocations. High Pressure Pipeline relocation costs have averaged approximately $500 thousand annually for the past six years.[117]

149. Surrey appears to argue that FEI is causing its own Relocation Costs simply by virtue of having infrastructure present in the municipality. It has sought to calculate a value for the land FEI is using for that infrastructure to justify a higher Operating Fee. There are two answers to these arguments. First, FEI has had the right to own and operate a gas utility in Surrey for more than 60 years by virtue of the UCA and the GUA. The UCA establishes a clear hierarchy of rights in favour of public utilities with a CPCN:

> 121(1) Nothing in or done under the Community Charter or the Local Government Act
>
> > (a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
> >
> > (b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.
>
> (2) In this section, "authorization" means
>
> > (a) a certificate of public convenience and necessity issued under section 46, …

150. Second, Surrey's position is out of step with history. FEI's infrastructure in public places was either installed with the concurrence of the City under the 1957 Agreement or had originally been in rights of way owned by FEI's predecessors that the City later expropriated.[118]

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[116] Exhibit B1-5, CEC-FEI IR 1.3.1.

[117] Exhibit B1-5, CEC-FEI IR 1.3.2.

[118] Exhibit B1-11, FEI Supplemental Evidence, p.5.

Surrey did not obtain ownership of the roads in the municipality until January 1, 2004, decades after FEI had started using the roads. Surrey did not purchase the roads from the Province. Rather, it obtained title by law and "inherited" FEI as an occupier. Surrey took ownership without payment and subject to all subsurface conditions, limitations, third party infrastructure, and all rights and privileges which accrue to those parties.

151. In these circumstances, the proximate cause of the Relocation Costs is the relocation request.

(c) FEI's Proposed Allocation Is Better for Surrey than the 1957 Agreement

152. FEI's proposed allocation of the Relocation Costs is more favourable to the City than the allocation under the 1957 Agreement.

153. Under the 1957 Agreement, the City (defined in the 1957 Agreement as the "Corporation") must generally reimburse FEI for the entire replacement cost, less an amount calculated with reference to book value and the age of the asset. The deduction from book value gets larger as the asset gets older; however, at the same time, the actual replacement costs (pre-deduction) are subject to inflation. The fact that the City is required to pay actual relocation costs, less a deduction based on book value means that the amount the City must pay will still likely grow over time due to inflation on replacement costs. FEI explained that, for FEI's older assets, which had a small initial book value because they were installed decades ago, "the City will pay most of the cost of relocating the assets even after making a substantial deduction from the book value for the age of the assets."[119]

154. The relevant provision of the 1957 Agreement is inserted below:

> 5.(a) If the part of the said works of which the location is changed as provided in paragraph 4 hereof was (1) installed as to both line and elevations in accordance with the approval or instructions on writing of the Municipal Engineer, or (11) was installed as to line in accordance with the approval or instructions in writing of the Municipal Engineer and was laid at a depth of at least eighteen inches under a roadway paved with at least two inches of concrete or asphalt, or (111)

[119] Exhibit B1-13, BCUC-FEI IR 2.15.2.

> was installed as to line in accordance with the approval or instructions in writing of the Municipal Engineer and is being changed because its line is no longer satisfactory to the Corporation [Surrey], the Corporation [Surrey] shall bear and pay to the Company [FEI] the entire cost of the change less an amount equal to two (2) per cent of the installed value on the Company's books of any of the said part of the said works which the Company takes out of service as a result of the change multiplied by the number of years during which it has been in service. Provided, however, that notwithstanding that the said part of the said works was installed, or installed and laid, in one of the manners specified, of at any time the Corporation [Surrey] requires the Company to alter the elevation of any part of the said works to facilitate the laying, construction or operation of either storm or sanitary sewer pipes by not more than one half of the outer diameter of the storm or sanitary sewer pipe concerned, plus one half of the outer diameter of the gas pipe concerned, the Corporation [Surrey] shall bear and pay the Company fifty (50) per cent of the sum arrived at by taking from the cost of the change an amount equal to two (2) per cent of the installed value on the Company's books of any of the said part of the said works which the Company takes out of service as a result of the change multiplied by the number of years during which it has been in service. [Emphasis and parentheticals added.]

(d) Surrey Is Better Off Under FEI's Proposal than Other Municipalities

155. FEI's proposed allocation of Relocation Costs will put Surrey in a better position than other municipalities.[120] Under operating agreements with Inland and Vancouver Island municipalities, the municipality must reimburse FEI for 100% of the cost to relocate natural gas facilities.[121]

E. SURREY'S PROPOSED ALLOCATION RESULTS IN AN UNFAIR OUTCOME OVERALL

156. The City is seeking to have the *Pipeline Crossing Regulation* default requirements applied to both High Pressure Pipelines and Gas Mains. This would result in FEI (ultimately gas customers) bearing 100% of the Relocation Costs for most Gas Main and High Pressure Pipeline relocations triggered by the City. FEI submits that this outcome would undermine the commercial reasonableness of the overall Operating Agreement, particularly if the other financial consideration flowing to the City remains unchanged from FEI's Proposed Operating Terms.

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[120] Exhibit B1-13, BCUC-FEI IR 2.15.2.

[121] Exhibit B1-6, BCUC-FEI IR 1.7.1.

(a) Surrey's Proposal Creates "Moral Hazard" for Relocation Requests

157. Requiring FEI/FEI customers to bear the full Relocation Cost removes any financial incentive for the City to avoid making unnecessary or inefficient relocation requests. This gives rise to significant financial exposure to FEI/FEI customers, who already pay close to a million dollars each year to relocate natural gas assets at Surrey's request. FEI explained that avoiding this situation was an important consideration for FEI:[122]

> FEI is concerned that if FEI were to accept an allocation of 100 percent of relocation costs, the City would have no incentive to consider alternatives which may be more or most cost effective on given projects, particularly if the relocation resulted in the shifting of costs over to FEI which the City would otherwise incur. This shifting of costs would mean that all of FEI's customers (in Surrey and throughout the province) would have to bear costs which benefit the City of Surrey. As such, all of FEI's customers would be subsidizing the City's projects and budgets.
>
> Some considerations the City might ignore if there is no financial incentive or risk for the City to consider may be alternative routing and elevations for their utilities to avoid FEI's natural gas lines, providing timely permitting, daytime access to minimize the cost of FEI's work, and overall improved cooperation and task sharing to reduce the overall cost of relocations. If FEI were to accept 100 percent relocation costs for High Pressure Pipelines, this would create a financial incentive for the City to request relocation of FEI facilities even if there were other equally acceptable alternatives that would not require a relocation. As such, the City could make decisions based on benefiting its budget to the detriment of FEI and its ratepayers, and FEI would have no recourse. FEI believes that such an allocation would lead to increased numbers of relocation requests and total relocation costs that will result in increased rates for all of FEI's customers for projects which benefit the City of Surrey and Surrey taxpayers.

158. It would be "very harmful to FEI and its customers if the relocation allocation adopted by the Commission were to allow, for instance the City to insist on a relocation that may cost FEI a significant amount when the City could work around FEI's pipeline at a fraction of the cost."[123] Allocating the Relocation Costs to the City will address this issue.

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[122] Exhibit B1-13, BCUC-FEI IR 2.15.1.

[123] Exhibit B1-11, FEI Supplemental Evidence, p.15.

159. FEI's Proposed Operating Terms include new checks and balances throughout project execution that provide Surrey with additional control over project costs. The details are noted in Sections 8.3 and 8.4 of FEI's Proposed Operating Terms and discussed in Exhibit B1-15, FEI's response to Surrey-FEI IR 2.6.3. The measures include:

- Detailed estimation of cost to establish scope of work and main tasks performed, including overheads and taxes. FEI will provide an estimate for the lowest cost alternative, and Surrey has the opportunity to review and accept that estimate, or request changes to the scope of work on the estimate (such as specifically requesting alternative or extra work). FEI will provide the revised estimate which the City must approve before work can commence.

- Project/Job change management communication process for notification of changes in scope, scheduling, costs, etc.

- Detailed invoicing to allow for assessment of reasonableness of cost.

- Work performed at cost plus disclosed overhead.[124]

160. Moreover, the City has the option to complete the excavation and restoration portion of the projects with their own crews or contractors as a way for Surrey to control the work and/or costs as it sees fit. For most main relocations this can be a large portion of the cost.[125]

(b) Adopting Surrey's Proposal Would Materially Erode the Benefits of an Operating Agreement to FEI and Its Customers

161. The default allocation in the *Pipeline Crossings Regulation,* which the Parties agree does not apply to Gas Mains, does not take into account other financial arrangements between FEI and the City. The Operating Fee and the FEI Permit process contained in Section 13(b) of the proposed Operating Terms will for instance, provide significant additional benefits

[124] See also: Exhibit B1-14, CEC-FEI IR 2.16.1, 2.16.5.

[125] Exhibit B1-15, Surrey-FEI IR 2.6.3.

to the City. FEI's Proposed Operating Terms overall are balanced and fair. Allocating a greater portion of Relocation Costs to FEI than what FEI has proposed would, without adjustments elsewhere, materially erode benefits to FEI/FEI customers under a new Operating Agreement.

(c) Surrey is Overlooking the Rights Provided to Pipeline Owners Under the OGAA

162. Although Surrey portrays its allocation proposal as reflecting the legislation relating to pipeline crossings, Surrey is trying to put itself in a far better position than it would be in under the legislation governing pipeline crossings.

163. Under the OGAA, any third party (including Surrey) must obtain permission from a pipeline owner or the Oil and Gas Commission under section 76 to cross a pipeline. The *Pipeline Crossing Regulation* only becomes relevant when the consent or an OGC approval order has been obtained.

164. Section 76 includes safeguards for the pipeline owner that Surrey is overlooking, both in terms of OGC oversight and cost allocation. Section 76 states:

> 76(1) Subject to subsection (3), a person must not
>
> (a) construct
>
> (i) a highway, road or railway,
>
> (ii) an underground communication or power line, or
>
> (iii) any other prescribed work, or
>
> (b) carry out a prescribed activity
>
> along, over or under a pipeline or within a prescribed distance of a pipeline unless
>
> (c) the pipeline permit holder agrees in writing to the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities,

(d) the commission, by order issued under subsection (2), approves the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities, or

(e) the construction or prescribed activity is carried out in accordance with the regulations.

(2) The commission, on application by a person referred to in subsection (1), may issue an order for the purposes of subsection (1) (d) and in doing so may impose any conditions that the commission considers necessary to protect the pipeline.

(3) The commission must approve

(a) the construction referred to in subsection (1) (a), and

(b) the carrying out of a prescribed activity under subsection (1) (b)

by the government or a municipality, but may impose conditions referred to in subsection (2) in the order issued under that subsection.

(4) The commission, for the purposes of deciding whether to issue an order under subsection (1) or impose conditions under subsection (2), may require a pipeline permit holder to submit information regarding the pipeline permit holder's pipeline.

(5) The commission may order a pipeline permit holder whose pipeline is the subject of an order issued under subsection (2) to do one or both of the following:

(a) with the approval of the Lieutenant Governor in Council, relocate the pipeline to facilitate the construction or prescribed activity approved by the order issued under subsection (2);

(b) take the actions specified in the order that the commission considers necessary to protect the pipeline.

(6) In relation to an order of the commission referred to in subsection (5), the Lieutenant Governor in Council

(a) may order that a person other than the pipeline permit holder must pay the costs, or a portion of the costs, incurred in carrying out the commission's order, or

(b) may approve the payment of any of those costs from the consolidated revenue fund.

(7) If there is an inconsistency between an order or an approval made under subsection (6) and a regulation made under section 99 (1) (m.1), the order or approval prevails to the extent of the inconsistency.

165. Thus, under section 76:

- in the absence of FEI's consent, Surrey would have no right to require a pipeline relocation without an order from the Oil and Gas Commission;
- the Oil and Gas Commission cannot grant blanket approvals, so Surrey would have to undertake the process every time a relocation is desired unless FEI consents;
- the OGC can impose conditions;
- an application for an order for a particular relocation would have to be preceded by an attempt to reach agreement with FEI, including agreement on cost sharing; and
- if there was no agreement and Surrey went to the Oil and Gas Commission for an order, the default provision on costs allocation in the Regulation is still not final; FEI would be entitled to ask Cabinet for a final decision on what was fair in the circumstances.

166. By contrast, Surrey now proposes:

- it would have the right to require a relocation in all cases, without seeking any agreement from FEI on costs or otherwise and without going to the OGC for an order;

- FEI would have to issue the necessary consent (permit) expeditiously; **PLUS**

- FEI would bear all the costs in most circumstances, and would lose its right under the statute to take the issue of a fair allocation of costs to Cabinet.

167. Surrey's proposal is very different from the more balanced approach under the legislation. It is another instance where Surrey is seeking to have its proverbial cake and eat it too. If Surrey wants FEI to agree, as part of this Operating Agreement, to issue permits required by Surrey under the OGAA - a consent that FEI is not required to give under the OGAA - Surrey should expect to have to compromise on allocation or other financial terms as part of achieving fair operating terms overall.

F. THE *PIPELINE CROSSING REGULATION* DOES NOT PREVENT A FAIR OUTCOME

168. Surrey treats the *Pipeline Crossing Regulation* as a trump card, suggesting that the Commission has no jurisdiction to depart from the default allocation. FEI makes two points in response in this section. First, the *Pipeline Crossing Regulation* has no application to Gas Mains in any event. Second, the Commission is not constrained by the *Pipeline Crossing Regulation* from ensuring a commercially reasonable outcome, even when it comes to High Pressure Pipelines.

(a) The *Pipeline Crossing Regulation* Does Not Apply to Gas Mains

169. Surrey is advocating applying the allocation in the *Pipeline Crossing Regulation* to Gas Mains, such that Gas Main Relocation Costs that the City triggers are normally borne entirely by FEI/FEI customers. However, as Surrey concedes, the *Pipeline Crossing Regulation* is inapplicable to gas infrastructure operating at a pressure below that regulated by the Oil and Gas Commission (OGC).[126] There is no good policy reason why Gas Mains require the same allocation as High Pressure Pipelines in the context of a broader public utility operating

[126] Exhibit B2-8-1, BCUC-Surrey IR 1.9.1: "The City of Surrey agrees that the Pipeline Crossing Regulation is not legally binding with respect to piping used to transmit gas at less than 700 kPa to consumers by a gas utility as defined in the Gas Utility Act because, pursuant to section 13 of the Interpretation Act, the term "pipeline" in the Regulation has the same meaning as in the Oil and Gas Activities Act. Therefore, the Pipeline Crossing Regulation is not legally binding for FEI distribution gas main relocation projects within the boundaries of Surrey."

agreement. This is particularly so where dictating conformity would yield an unfair result for the regulated utility and its customers.

(b) Commission is Not Constrained by the *Pipeline Crossing Regulation* From Ensuring a Fair Operating Agreement

170. For the reasons set out below, the Commission is not constrained by the *Pipeline Crossing Regulation* from ensuring a commercially reasonable outcome even when it comes to High Pressure Pipelines.

Commission Can Condition its Approval of Operating Fee on Surrey's Agreement to Any Cost Allocation

171. The Commission does not need to resolve the issue of its jurisdiction to dictate a High Pressure Pipeline cost allocation that differs from the *Pipeline Crossing Regulation*. Even if the Commission were to determine that it is unable to *direct* an allocation for High Pressure Pipelines that differs from the *Pipeline Crossing Regulation,* it has the authority to make its approval on <u>other</u> elements of the Operating Agreement conditional upon Surrey <u>agreeing</u> to a particular allocation of High Pressure Pipeline Relocation Costs. So, for instance:

- The Commission could order that there will be no Operating Fee (or that it will be fixed at a much lower amount than that proposed by FEI) unless the City agrees within 30 days to an allocation formula for High Pressure Pipelines that differs from the default methodology in the *Pipeline Crossing Regulation*.

- The Commission could also remove from the Operating Terms any obligation on FEI to provide *OGAA* pipeline permits to Surrey unless Surrey agrees to certain terms.

This approach leaves it entirely to Surrey to determine what it values more - an Operating Fee that would have been $600 thousand in 2016 and avoiding the need to go to the OGC every time there is a relocation OR avoiding reimbursing FEI for costs that totalled approximately $500 thousand annually in recent years - but it cannot have its proverbial cake and eat it too.

172. The impact of adopting an allocation akin to the default in the *Pipeline Crossing Regulation* should be factored into the new Operating Agreement by, at a minimum, directionally reducing the Operating Fee from what FEI has proposed or what the Commission would otherwise approve.[127]

173. Moreover, including provisions that allocate costs to FEI and its customers increases the importance of safeguards to protect against unreasonable relocation requests. In order to mitigate this risk, it would be necessary to modify the Operating Agreement so as to (i) eliminate the unfettered right to request relocations; (ii) require relocation requests to be economically efficient, having regard to the costs to the City of avoiding the issue relative to the costs incurred by FEI to relocate gas assets; and (iii) expressly reserve the right for either party to seek a Commission determination as to whether, and if so how, a particular relocation is to be permitted.

174. The following submissions apply in the event that the Commission nevertheless wishes to determine the legal effect of the *Pipeline Crossing Regulation*.

Default Allocation for High Pressure Pipelines is Superseded by Interim Agreement

175. FEI submits that the Parties' Interim Agreement supersedes the allocation provisions of the *Pipeline Crossing Regulation* in any event. The Interim Agreement (quoted below) provides that the Parties attorn to the jurisdiction of the Commission to determine all outstanding operating terms. The allocation of Relocation Costs is one of those terms. An agreement to have a third party resolve disputed matters is an agreement within the meaning of the *Pipeline Crossing Regulation* to depart from the default allocation.

[127] Exhibit B1-4, BCOAPO-FEI IR 1.3.3.

1.2 *BCUC Application* - The parties shall continue to negotiate the Operating Agreement in good faith and failing agreement shall by May 31, 2017, or by such later date as the parties may agree to in writing (the "**Filing Deadline**"), jointly or separately apply to the BCUC pursuant to s.32 and such other applicable provisions of the *Utilities Commission Act* requesting the BCUC specify the terms of FortisBC's use of the Highways and Municipal Properties.

1.3 *Attornment* - The parties hereby agree to attorn to the jurisdiction of the BCUC and to be bound by any lawful order or decision of the BCUC with respect to the terms of FortisBC's use of the Highways and Municipal Properties. The City of Surrey acknowledges parcels having parcel identifiers 018-138-781 and 003-301-974 are "parks" or "public places" for the purposes of the *Utilities Commission Act*.

Commission's Jurisdiction to Set Terms of Use Supersedes Default Allocation

176. FEI submits that, even in the absence of the Interim Agreement, the Commission's exercise of its power under section 32 satisfies the requirements to depart from the default allocation in the *Pipeline Crossing Regulation*. The UCA also confers jurisdiction on the Commission to resolve disputes over "use of the street or other place or on the terms of use" of municipal streets in circumstances where the pipeline owner is also a "public utility". In such cases, section 32 specifies "the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use." The allocation of costs is a "term of use".

177. The Commission has previously ordered that operating agreements allocate relocation costs in a manner that differs from the allocation specified in the predecessor to the *Pipeline Crossing Regulation*. These examples are:

- ***In the Matter of an Application by Vancouver Island Gas Company Ltd. and Victoria Gas Company (1988) Ltd.*** – The Commission approved terms that required the utility to move part of the system affected by a highway closure and for the municipality to pay for the utility's relocation costs, without distinguishing between the type of pipe.[128]

[128] Orders G-98-90 and G-106-90, Decision, pp. 4-6. The Commission's order applied to all infrastructure in the municipality, as per the definition of "Distribution System": "'Distribution System' means fixed equipment and structures including the mains, pipes, valves, fittings, appurtenances, and related facilities used or intended for the purpose of conveying, distributing, mixing, storing and delivering Gas and making it available for use within

The difference between the two positions is that the Company wishes to limit the need for extra depth to locations where public works are scheduled within five years. By contrast, the Municipalities believe they should be able to specify the depth at any location where public works are anticipated, regardless of the timing of those works. In recognition that their proposal will increase the amount of gas system requiring extra depth, they have agreed to limit the specified depth to 90 cm cover. If this cover should prove inadequate to prevent relocation, the Municipalities are prepared to pay for the relocation.

The Municipality witnesses stated that up to 25 percent of extra depth situations would require the depth of cover to exceed 75 cm (T:416-417). These witnesses also stated that in most Municipalities, running lines for the gas mains were available which would place the mains outside the portion of the road allowance likely to be affected by future road reconstruction (T:418-420).

The Commission believes that this testimony is important in that it provides some understanding of the potential costs of the alternative solutions to the relocation cost issue.

2.1.5 Commission Decision on Relocation Costs

Considering that the Municipalities have control of the choice of running line and that only some 25 percent of mains installed under roads requiring future upgrading would need to relocated if installed with 75 cm cover, the Commission believes it would be fair to both parties if the proposed wording for Section 13 contained in Exhibit 40 is adopted with the following changes:

Firstly, that the figure of 90 cm is reduced to 75 cm. Secondly, that a further provision is added so that where the Municipality has specific plans within five years, it may specify the depth of cover without limit as offered by the Company in Exhibit 28. These changes are reflected in Sections 13A and 13B of the Agreement contained in Section 4.2 of this Decision.

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the Municipality, and includes buildings and structures related to such purpose;". The ability under the regulations to contract out of the cost allocation also post-dated this case. https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/111852/1/document.do.

- ***Chetwynd - Commission Order G-17-06*** Terasen Gas Inc. (now FEI) and Chetwynd were unable to reach an agreement on new operating terms, and the matter was referred to the Commission under section 32. The Commission approved operating terms. Section 13 of those terms provides that each of the utility and the municipality could request the other to relocate or make changes to its infrastructure and the requesting party had to pay the other's entire costs to relocate or make those changes).[129]

178. The Commission approved similar provisions allocating all costs to the requesting party over the objections of Coldstream, which argued that it should not be required to give up any rights under the *Oil and Gas Activities Act*.[130] The difference in the case of Coldstream, relative to the Chetwynd and Victoria decisions discussed above, was that the Commission also referenced the fact that any rights the municipality has would be preserved by another section requiring FEI to comply with "all Federal and Provincial laws, regulations and codes." FEI and Surrey disagree on what was intended by the Commission's reference to the latter clause. Surrey cites this caveat as negating the express approval of a different allocation from that set out in the *Pipeline Crossing Regulation*. FEI reads it differently. A specific contractual provision (regarding allocation) would normally take priority over a general one (regarding compliance with laws). Section 32 of the UCA is a "Provincial law". In essence, Provincial law allows the Commission to change the allocation when the pipeline owner is a public utility and the issue is the terms of operation in municipalities.

179. It is noteworthy that Surrey's jurisdictional argument, if accepted, would apply equally to the provisions of the OGC that serve to protect the pipeline owner, i.e., the right of FEI to require Surrey to go to the OGC each time a relocation is required, and FEI's right to go to Cabinet to determine cost allocation. There is no logical distinction between these rights in terms of this Commission's jurisdiction, and yet Surrey seems content to have the Commission impose an Operating Agreement that would have FEI foregoing rights under the OGAA and

[129] Order G-17-06, https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115946/1/document.do. The ability under the regulations to contract out of the cost allocation post-dated this case.

providing permits to the City on an expedited basis each time Surrey wants to perform work near a High Pressure Pipeline.

180. FEI submits that the Commission can exercise its jurisdiction in the present case as it did in past cases, directing the cost allocation proposed by FEI as a requirement of any overall agreement. The approach outlined in paragraph 171 above is nonetheless preferable because it avoids the need to engage in questions of jurisdiction. The parties agree that the Commission can determine, for instance, whether an Operating Fee is appropriate or the amount of any Operating Fee.

PART SIX: SURREY ABANDONED ITS REQUEST FOR BLANKET RELEASE OF SROW

181. The City had originally sought a blanket release of FEI's statutory rights of way for the purpose of road dedications, but abandoned that request during this proceeding on the basis that the commission lacked jurisdiction to make the order.[131] (The Commission has jurisdiction under section 32 of the Act to set terms of use of public spaces, not to order FEI to relinquish its property rights without compensation.) In any event, there are sound policy reasons why it is more appropriate for FEI to consider release requests on a case-by-case basis.

182. Circumstances surrounding road construction or widening can vary. It is important for FEI to consider the potential impacts of the road on natural gas infrastructure. There are a number of considerations that should inform each request to release all or any portion of FEI's SROW rights, such as the relative size of the affected SROW area, continued access, operational and maintenance requirements, future expansion, and most importantly safety and code compliance.[132] None of these facts can be predicted in advance.

183. A blanket release could also result in Surrey requiring a release of SROW based on its own convenience and cost savings (when having regard to alternatives available to Surrey), but require FEI to incur significant cost to protect its assets. Thus, blanket waiver of FEI's SROW rights would not be in the best interests of FEI customers who rely on the natural gas distribution system.[133]

184. FEI has never been asked by another municipality to provide a blanket waiver of its SROW rights. FEI is not aware of any other utilities operating in BC providing a blanket waiver of such rights.[134] Surrey ultimately has the right to obtain an interest in lands over which FEI holds an SROW through the *Expropriation Act.*[135]

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[131] Exhibit B2-8-1, BCUC-Surrey IR 1.10.1.

[132] Exhibit B1-4, BCOAPO-FEI IR 1.7.1.

[133] Exhibit B1-4, BCOAPO-FEI IR 1.7.1.

[134] Exhibit B1-4, BCOAPO-FEI IR 1.7.2.

[135] RSBC 1996 c.125.

PART SEVEN: CONCLUSION AND ORDER SOUGHT

185. A new Operating Agreement only makes sense for FEI and FEI customers if the agreement can improve FEI's ability to operate in Surrey without imposing an unreasonable financial burden on FEI customers over and above the significant annual taxes FEI pays to Surrey.[136]

186. FEI's Proposed Operating Terms will facilitate the timely and cost-effective maintenance and extension of the natural gas infrastructure. They will ensure that the City has access to necessary information about utility work and has an opportunity to provide feedback to FEI. They include financial terms that provide reasonable consideration to the City in light of what FEI/FEI customers will realize in return. The City is significantly better off under FEI's Proposed Operating Terms than the 1957 Agreement. FEI's Proposed Operating Terms, by delivering a commercially reasonable outcome, will provide the basis for a more cooperative relationship between FEI and the City overall.[137] In short, the Commission should approve FEI's Proposed Operating Terms as an overall package.

187. Other Lower Mainland municipalities are taking a keen interest in this proceeding. There is obvious potential for municipalities to increasingly view FEI's customers as a new source of funding for municipal undertakings, despite recognition by the relevant provincial regulator that utility facilities are in the public interest and necessity. This potential only underscores the importance for FEI customers that the Commission's order signals the Commission's intent to enforce commercially reasonable operating terms.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 31, 2018 ***[original signed by Matthew Ghikas]***

Matthew Ghikas
FASKEN MARTINEAU DUMOULIN LLP
Counsel for FortisBC Energy Inc.

[136] Exhibit B1-1, FEI Application, p.7.

[137] Exhibit B1-1, FEI Application, p.3.

BOOK OF AUTHORITIES

INDEX

THE CORPORATION OF THE DISTRICT OF SURREY, THE CORPORATION OF THE TOWNSHIP OF CHILLIWHACK, THE CORPORATION OF THE CITY OF CHILLIWACK ..... APPELLANTS;

1956
*Dec. 10
1957
Jan. 22

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—Jurisdiction of Public Utilities Commission to issue certificate of public convenience and necessity without consent of municipality affected—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 12, 14—The Gas Utilities Act, 1954 (B.C.), c. 13, s. 3—The Municipal Act, R.S.B.C., c. 232, as amended.

The Public Utilities Commission of British Columbia has jurisdiction, under the *Public Utilities Act* and the *Gas Utilities Act*, to grant a certificate of public convenience and necessity for the operation of a public utility within the boundaries of a municipality, without the consent of the municipality affected.

Per Rand, Locke and Nolan JJ.: The words "if required" at the conclusion of the first sentence of s. 14 of the *Public Utilities Act*, must be construed as meaning "if required by law", and there is no provision requiring the municipality's consent in such circumstances.

APPEAL by the three municipalities from a judgment of the Court of Appeal for British Columbia (1), affirming the decision of the Public Utilities Commission of British Columbia to grant the respondent company a certificate of convenience and necessity. Appeal dismissed.

T. G. Norris, Q.C., for the municipalities, appellants.

Hon. J. W. deB. Farris, Q.C., A. Bruce Robertson, Q.C., and *R. Dodd*, for the respondent.

THE CHIEF JUSTICE:—This is an appeal by leave of the Court of Appeal for British Columbia from its decision (1) dismissing an appeal from a certificate of public convenience and necessity, dated December 13, 1955, granted by the Public Utilities Commission of that Province to the respondent, British Columbia Electric Company Limited.

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Nolan JJ.

(1) 19 W.W.R. 49, 4 D.L.R. (2d) 29.

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DISTRICT OF SURREY, *et al.* *v.* B.C. ELECTRIC CO. LTD.

Kerwin C.J.

Although the application by the respondent to the Commission states that it was made under s. 12 of the *Public Utilities Act,* which is R.S.B.C. 1948, c. 277, it is quite apparent from what will be stated shortly and from a perusal of the two clauses of that section that that part of the application with which we are concerned is really under s. 12(*b*).

The respondent, among other things, carries on the business of manufacturing gas and has entered into a contract for the purchase of natural gas, with a view to its distribution. The territory in respect of which the respondent applied was divided into the Greater Vancouver area and the Fraser Valley area. A certificate of public convenience and necessity was granted as to the former on July 29, 1955, but decision was reserved with respect to the Fraser Valley area. Ultimately a certificate was also granted as to that area, subject to certain conditions, and the real dispute is as to the power of the Commission to grant this certificate without the consent of the appellant municipalities.

The only provisions of the *Public Utilities Act* requiring consideration are s. 12 and the first sentence in s. 14, which read as follows:

> 12. Except as hereinafter provided:—
>
> (*a*) No privilege, concession, or franchise hereafter granted to any public utility by any municipality or other public authority shall be valid unless approved by the Commission. The Commission shall not give its approval unless, after a hearing, it determines that the privilege, concession, or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest. The Commission, in giving its approval, shall grant a certificate of public convenience and necessity, and may impose such conditions as to the duration and termination of the privilege, concession, or franchise, or as to construction, equipment, maintenance, rates, or service, as the public convenience and interest reasonably require:
>
> (*b*) No public utility shall hereafter begin the construction or operation of any public utility plant or system, or of any extension thereof, without first obtaining from the Commission a certificate that public convenience and necessity require or will require such construction or operation (in this Act referred to as a "certificate of public convenience and necessity").
>
> 14. Every applicant for a certificate of public convenience and necessity under either of the clauses of section 12 shall, in case the applicant is a corporate body, file with the Commission a certified copy of its memorandum and articles of association, charter, or other document of incorporation, and in all cases shall file with the Commission such evidence

as shall be required by the Commission to show that the applicant has received the consent, franchise, licence, permit, vote, or other authority of the proper municipality or other public authority, if required. . . .

It is clear that the relevant part of respondent's application was not made under clause (*a*) of s. 12, because it had no "privilege, concession, or franchise" from the appellant municipalities. That part of the application being under s. 12(*b*), and the opening words of s. 14 referring to an application for a certificate under either of the clauses of s. 12, it is too clear for argument that the latter part of s. 14 refers only to a "consent, franchise, licence, permit, vote, or other authority" when one of them is required on an application under s. 12(*a*). The matter does not lend itself to extended discussion and it is unnecessary to deal with the judgment of the Court of Appeal for British Columbia in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1). Notwithstanding the various provisions of the *Municipal Act* to which counsel for the appellants drew our attention, the matter is left to the Commission to take into account the interests of all parties concerned, public and private, and this is corroborated by the provisions of the *Gas Utilities Act,* 1954 (B.C.), c. 13.

The appeal should be dismissed with costs.

The judgment of Rand, Locke and Nolan JJ. was delivered by

LOCKE J.:—The respondent company is a public utility within the meaning of that term, as defined in s. 2 of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, and by a letter dated May 15, 1955, applied to the Public Utilities Commission, constituted under that statute, for a certificate of public convenience and necessity for a project for the supply of natural gas for a portion of the lower mainland area of British Columbia, which included the District of Surrey and the Township of Chilliwhack and the City of Chilliwack.

The application to the Commission was opposed by the present appellants. Lengthy public hearings were held, at which a similar application by a competing gas distributing company was also considered.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

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DISTRICT OF SURREY, *et al.* v. B.C. ELECTRIC CO. LTD.

Locke J.

The respondent has for many years sold manufactured gas through various subsidiary companies in a number of municipalities in the greater Vancouver area. The project proposed was for the supply in additional areas in the lower mainland of the Province of natural gas brought by a pipeline company from the Peace River areas of Alberta and British Columbia.

By s. 2 of the *Gas Utilities Act*, 1954 (B.C.), c. 13, a "gas utility" is defined as a corporation which owns or operates in the Province facilities for, *inter alia*, the production, transmission or delivery of gas, a word defined to include natural gas, and the respondent company falls within this definition. By s. 3 of that Act, every such company to which a certificate of public convenience and necessity is thereafter granted under the *Public Utilities Act* shall in the municipality or area mentioned in such certificate be empowered to carry on, subject to the provisions of that Act, its business as a gas utility, including power to transmit, distribute and sell gas and to place its pipes and other equipment and appliances under any public street or lane in a municipality upon such conditions as the gas utility and the municipality may agree upon. If the parties fail to agree upon these terms, the Public Utilities Commission is empowered by s. 40 of the *Public Utilities Act* to settle them.

Section 12 of the *Public Utilities Act* provides for applications to the Commission for a certificate of public convenience and necessity in cases where a franchise has been granted to a public utility by any municipality or other public authority after the coming into force of the Act, and also in cases where no such franchise has been granted, these being dealt with in clauses (*a*) and (*b*) respectively. The respondent had not applied to any of the appellant municipalities for any concession or franchise to supply gas within their boundaries and, while the written application to the Commission merely states that it was being made under the provisions of s. 12 of the Act, it is clear that the application was made under clause (*b*) of that section.

According to s. 14 of the statute, upon an application for such a certificate under either of the clauses of s. 12, the applicant, if a corporate body, shall file a certified copy of its memorandum and articles of association or other docu-

ment of incorporation, and such evidence as shall be required by the Commission to show that the applicant has received the consent or permission of the municipality or other public authority *if required.*

It was the contention of the appellants that their prior consent or permission was a condition precedent to the right of the Commission to grant the certificate applied for and they contend that this construction of the statute is supported by the language of the section. For the company, it is said that the words "if required" should properly be construed as meaning "if required by law" and that, by virtue of the provisions of the *Public Utilities Act* and the *Gas Utilities Act,* no such consent is required.

The contention that the utility cannot carry on its activities in a municipality without its consent is based upon certain provisions of the *Municipal Act,* R.S.B.C. 1948, c. 232, which, standing alone, would indicate that such consent was required. By s. 58 of that statute a municipality is authorized to pass by-laws regulating the operations of a wide variety of businesses and other activities and prohibiting the carrying on of certain of them, other than by leave and licence of the municipality. Thus, by cl. 55 of that section, by-laws may be passed

> For regulating the construction, installation, repair and maintenance of pipes, valves, fittings, appliances, equipment, and works for the supply and use of gas:

and by cl. 109 for licensing and regulating any gas company and authorizing the use of the public highways by such company. Section 328 of the Act, by cl. 29, fixes the payment to be made by gas companies semi-annually for the licences held by them, failure to pay which renders the licence liable to cancellation. The provisions for the licensing and regulation of gas companies by municipalities in British Columbia have been for many years part of the municipal law of the Province: see *Municipal Clauses Act,* R.S.B.C. 1897, c. 144, s. 50(36); *Municipal Act,* R.S.B.C. 1911, c. 170, s. 53(92); *Municipal Act,* R.S.B.C. 1936, c. 199, s. 59(99).

The *Public Utilities Act* was first enacted in 1938 and was designed to place the operations of persons engaged in the production, generation, transmission or sale of gas and electricity and a wide range of other undertakings designed

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Locke J.

to render service to the public, under the control of a commission constituted by the Act. The statute imposes upon every public utility the obligation, *inter alia,* to supply to all persons who apply therefor and are reasonably entitled thereto suitable service without discrimination or delay, to maintain its property and equipment in proper condition to enable it to furnish adequate, safe and reasonable service, to obey all orders of the Commission made pursuant to the Act in respect of its business or service and to refrain from demanding unjust or discriminatory rates for its service. By Part V of the Act the Commission is given general supervision of all public utilities falling within the definition in the Act and is empowered, *inter alia,* to make such regulations or orders regarding equipment, appliances, safety devices and extensions of works as are necessary for the safety, convenience or service of the public. Further wide powers of supervision and control are given over the rates which may be imposed, the manner in which money can be raised by the sale to the public of shares or bonds and over the mortgage, sale or licensing of the utilities' property. No utility to which a certificate of public convenience and necessity has been issued and which has commenced operations may cease operating without the Commission's consent.

The whole tenor of the Act shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and as to the manner in which they should operate, was a duty vested in the Commission. It is quite impossible, in my opinion, to hold that these powers and those which might be asserted by a municipality to regulate the operations of such companies under s. 58, cls. 55 and 109, were intended to co-exist.

It is unnecessary for the determination of this matter to decide whether, apart from the provisions of the *Gas Utilities Act,* the appellant municipalities might insist that a licence under the licensing provisions of the *Municipal Act* was a condition precedent to the granting of a certificate under s. 12(*b*) of the *Public Utilities Act.* The language of s. 3 of the *Gas Utilities Act* is clear and free from ambiguity.

The words "if required" at the conclusion of the first sentence of s. 14 must be construed, in my opinion, as meaning "if required by law". The municipality, of necessity, being a statutory body could only require its licence or consent if authorized by statute to do so and, from the date the *Gas Utilities Act* became the law, no such licence or consent was necessary. The effect of s. 3 of that statute was, in my opinion, to impliedly repeal the licensing provisions of the *Municipal Act* relating to such utilities.

In discharging its important duties under the *Public Utilities Act* the Commission is required to consider the interests not merely of single municipalities but of districts as a whole and areas including many municipalities. The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission, subject, *inter alia,* to the right of municipalities of insuring a supply of gas by municipal enterprise of the nature referred to in the reasons delivered by the Chairman of the Public Utilities Commission. This right the Commission was careful to preserve.

Reliance was placed by the appellants on certain passages from the judgments delivered by the Court of Appeal in *The Veterans' Sightseeing and Transportation Company Limited v. Public Utilities Commission and British Columbia Electric Railway Company, Limited* (1), but I think what was there said does not affect the present matter. The provisions of the *Gas Utilities Act* of 1954 are decisive, in my opinion.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—At the conclusion of the argument I had doubts as to whether the provisions of the *Gas Utilities Act* and the *Public Utilities Act* manifest a clear intention on the part of the Legislature to confer power on the Public Utilities Commission to authorize the respondent to carry on operations in the appellant municipalities without their consents, which consents would otherwise have been necessary under sections of the *Municipal Act* which have not been expressly amended or repealed.

(1) 62 B.C.R. 131, [1946] 2 D.L.R. 188, 59 C.R.T.C. 63.

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Cartwright J.

I cannot say that these doubts have been entirely dispelled but as the other members of this Court and the unanimous Court of Appeal are satisfied that the relevant statutory provisions should be so construed, I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the Corporation of the District of Surrey, appellant: Norris & Cumming, Vancouver.

Solicitor for the Corporation of the Township of Chilliwhack and the Corporation of the City of Chilliwack, appellants: F. Wilson, Chilliwack.

Solicitor for the respondent: A. Bruce Robertson, Vancouver.

PROVINCE OF BRITISH COLUMBIA

BRITISH COLUMBIA ENERGY COMMISSION

REPORT ON THE INQUIRY BY THE BRITISH COLUMBIA ENERGY COMMISSION INTO THE MATTER OF FRANCHISE FEES PAID BY GAS UTILITIES TO MUNICIPALITIES IN THE PROVINCE OF BRITISH COLUMBIA

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APPEARANCES

MUNICIPAL BODIES	WITNESSES	COUNSEL
City of Nelson	L.D. Maglio, Mayor	-
City of Penticton	H.W. Cooper, Administrator S.H. Cornock, Assessor	J.M. Pelrine
- Village of Chetwynd - District of Hudson's Hope - District of Salmon Arm		
City of Kelowna	W.S. Fleming, Administrator	J.G. Wilson
District of Kitimat - Regional District of Central Okanagan - District of Terrace - Village of Vanderhoof - Village of Burns Lake - District of Houston - City of Castlegar - City of Trail - City of Prince Rupert - Village of Fraser Lake - District of Peachland	R.C. Brewer, Engineer	J.G. Wilson
City of Prince George	C.A. Jeffery, Manager	-
Town of Quesnel	J. Panagrot, Mayor E.A. Green, Administrator	-
Union of B.C. Municipalities	C. McKelvey, Executive Director	T.G. Pearce
GAS UTILITIES		
Columbia Natural Gas Limited	P.L. Snider, Engineer	D.S. Morgan
Inland Natural Gas Co. Ltd.	R.E. Kadlec, President R.B. Stokes, Executive Vice-President	P. Butler
Northland Utilities (B.C.) Limited	G. Sommerville, Secretary	-
Pacific Northern Gas Ltd.	R.F. O'Shaughnessy, Vice-President & General Manager J. Hodson, Comptroller	P.M. Steele
CORPORATE INTERVENORS		
Prince George Pulp & Paper Ltd.	R. Affleck, Vice-President of Corporate Services K. McMillan, Chief Energy Engineer	W.A. Esson
Weyerhaeuser Canada Ltd.	B.R. Carpenter, Asst. to the President	-

LIST OF EXHIBITS

	Exhibit Number
Order No. G-24-77, dated June 24, 1977 issued by the British Columbia Energy Commission	1
Brief on behalf of certain municipalities, by J. Galt Wilson	2
Brief outlining Market Value Estimates of Distribution System Rights in the City of Penticton, by S.H. Cornock	3
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REPORT ON THE INQUIRY BY THE BRITISH COLUMBIA ENERGY COMMISSION INTO THE MATTER OF FRANCHISE FEES PAID BY GAS UTILITIES TO MUNICIPALITIES IN THE PROVINCE OF BRITISH COLUMBIA

This report contains findings and conclusions on certain matters which were the subject of an inquiry by the Commission in October, 1977. The inquiry was initiated by the Commission pursuant to s. 98 of the Energy Act to investigate the nature and purpose of franchise fees and to determine whether or not such franchise fees are in the public interest. The matters are an appropriate concern of the Commission, because franchise fees form a part of the cost of service of energy utilities regulated under the Energy Act and, in addition, one of the energy utilities, Inland Natural Gas, was experiencing some difficulty in reaching satisfactory extensions of existing franchise agreements with some of the municipalities it serves in the province. The major difference between the municipalities and Inland was the question of the amount of the franchise fee. The Commission considered that the issues between Inland and these municipalities were of such significance as to warrant a public inquiry.

A hearing was conducted pursuant to Order G-24-77 of June 23, 1977 and was held in the Commission Hearing Room

on October 4, 5 and 6, 1977. Order G-24-77 is attached as Appendix 1. The Commission received written submissions from 32 interested parties, 26 of whom subsequently attended or were represented by Counsel at the inquiry (see Appendix 2).

The Notice of Public Hearing which issued under Order G-24-77 was widely circulated in the province and specifically given to all municipalities and energy utilities. British Columbia Hydro and Power Authority, although not an energy utility within the meaning of the Energy Act, was also provided a copy of the Order and Notice of Hearing but declined to participate in the hearing.

The Notice of Hearing asked interested parties to respond to four questions, as follows:

1. What is the nature and purpose of franchise fees, and are they in the public interest?
2. If such fees are in the public interest, what is the appropriate level and how should that level be determined?
3. If such fees are in the public interest, should they be displayed as a separate item on the face of the bill issued by the gas utility to its customers or continue to be included in the general tariff structure?

4. If such fees are in the public interest, should they be assessed only to those customers residing in municipalities which require the payment of such fees or continue to be assessed against all the customers of the utility through the general tariff structure?

The following summarizes the findings and conclusions of the Commission.

I. WHAT IS THE NATURE AND PURPOSE OF FRANCHISE FEES, AND ARE THEY IN THE PUBLIC INTEREST?

This is plainly the most important of the four questions because it is apparent that a finding that franchise fees are not in the public interest would eliminate the necessity to deal with the issues raised by questions 2, 3 and 4. However, as matters develop, it will be seen that the issue is not quite that simple. In order to deal satisfactorily with the first question, we must first discuss the nature and purpose of the franchise fee.

Franchise fees are paid by the three major privately-owned energy utilities distributing natural gas in British Columbia. Two smaller privately-owned utilities distributing liquid petroleum gas at Squamish and Nanaimo also pay franchise

fees. The fee itself is generally based on a fixed percentage of the gross revenue and is paid annually on the basis of the previous year's sales of gas within a municipal boundary. The percentage is normally 3%, but in certain isolated cases, has been adjusted by agreement between the energy utility and an industrial customer to a lesser amount. The origin of the franchise fee is obscure, although it appears to have come into the province based on practice in the United States. The original purpose for the imposition of a franchise fee seems to have been as compensation in respect of two features: first, a recognition of an exclusive right to operate an energy utility within municipal boundaries, and second the right of a municipality to be reimbursed for certain costs resulting from the existence of the utility in the municipality. While there was some suggestion that the franchise fee was a form of compensation in respect of profits foregone by the municipality, no significant supporting argument was presented.

Certain anomalies appear when the system in the province is examined. Among these is the fact that the gas utilities are unique in their agreements with the municipalities. No other public utility, electric, water or telephone, has a similar form of franchise agreement or pays a franchise fee. B. C. Hydro, which is the largest gas dis-

tributor in the province, has no agreement calling for the payment of a franchise fee.

The reason for the level of the fee is even more obscure than the origin of the franchise agreement. Apart from the prevalence of a "most favoured nations clause" in the existing franchise agreements, there appears to be no clear reason that the fee has been set at 3% of the gross revenue in virtually all of the cases where it applies. There does not appear to have been any quantification of costs to be reimbursed or of values recognized in the determination of the fees. There was no evidence in the inquiry which would support their existing level. Historically, the utilities have been able to include as a part of their utility cost-of-service the full amount of the franchise fees paid to the municipalities. There has, therefore, been little motivation, other than concern for the competitive price advantage of gas, for the utilities to limit the amount of the fee.

Certain of the industrial consumers evinced a concern, shared by the Commission, that the application of a fixed percentage fee to the gross revenue of the utility constitutes an unreasonable basis for the franchise payment. As has been indicated, no evidence was available as to the reason the 3% was originally set. Even assuming there was some

logical basis for it in the first instance and there was some significant relationship between the cost and prospective revenue at that time, the same relationship between costs of service and revenue does not now exist. The municipalities were unable to provide any evidence of actual costs which would be covered by the fee. There are, no doubt, some costs to the municipalities associated with the operation and maintenance of a gas distribution system. It should be noted, however, that direct costs arising out of the laying of mains, extensions or connection services are borne by the utility on a project-by-project basis. Municipal costs associated with utility operations relate to unforeseen direct costs and indirect administrative costs. However, the cost of gas bears no necessary relationship to either the additional costs imposed on a municipality by virtue of the use of its facilities by the utility or to the value of the franchise itself. The rather arbitrary nature of the fee is only exacerbated by the introduction of additional external arbitrary costs, such as the cost of gas. It is well known that the cost of gas has increased very substantially over the past three years beyond the control of the utility or the municipality; the imposition of the 3% on this increased cost of gas has contributed substantially to the revenue flowing to the municipalities from the franchise fee. Certain

municipalities have enjoyed substantial increases in revenue resulting from annexation of outlying areas in which the heavy concentration of industry results in increased franchise fees disproportionate to any costs involved.

The Commission has examined the evidence taken in the inquiry and has concluded that the existence of a franchise fee in selected utilities is discriminatory on two counts. Firstly, the user of gas, as opposed to other forms of energy, suffers a special cost. Secondly, the user of gas in a territory served by a privately-owned utility suffers a cost not incurred by a customer of the provincially-owned gas distribution company. Discrimination might be eliminated by the imposition on other fuel sources of a similar impost and by requiring that all utilities, public or private, pay a franchise fee to the municipalities concerned. This would surely not be in the public interest as it would only represent a new level of charge on energy consumers, obscured from general view by the nature of its imposition.

There is an additional matter which the Commission feels must be given some weight in arriving at conclusions in the present inquiry. The municipalities all spoke of costs associated with the presence of the utility and some with the right to extract the equivalent of rent for the

use of land. None of the municipalities acknowledged any offsetting benefit from the presence of the utility, although benefit there must be, aside from the revenue generated from the franchise fee and the 1% tax levied under Section 333 of the Municipal Act. Northland Utilities Ltd. testified that it had no franchise fee nor indeed agreement and that the municipalities had asked the utility for service. Unquestionably, the presence of the gas utility must add to the economic and social viability of any community. We think this is a large unquantified benefit which offsets a municipality's unquantified costs.

On the broad question of whether or not the assessment of a franchise fee is in the public interest, the Commission has concluded that it is not. Certainly in the present circumstances, the fees discriminate against gas consumers who indirectly pay them and thereby contribute to municipal revenues in a manner other municipal residents do not. Further, they do not reflect any definable cost or value. They are neither fair nor equitable, nor "necessary for the public convenience" and do not "conserve the public interest". We therefore conclude that the Commission must order the elimination of franchise fees.

The elimination of the fee and the revenue generated by it will be disruptive to some municipalities.

While the amount of money collected is not material in many cases, in others the revenue is important in the context of total municipal revenues. As a percentage in municipalities served by gas utilities, the highest ratio of franchise fee to total municipal revenue, in 1976, was 4.4%. Total franchise fees in this same year were just over $1.1 million, while total municipal revenues were just over $155 million (see Appendix 3).

The Commission will, therefore, order that the franchise fee be eliminated as a factor in the franchise agreement. In order to dampen the effect, we will order that the franchise fees payable in 1978 be calculated and paid in the traditional way, but phased out over succeeding years by a successive annual 20% reduction of the 1978 amount. This timetable will allow municipalities to adjust to the declining revenue from this source. Utility tariffs will require adjustment, however small, to reflect the change in the rates to consumers. The Commission will order appropriate changes.

As to the balance of the questions asked in the Notice of Hearing, it is plain that the course of action taken has eliminated the necessity for answers to questions 2, 3 and 4.

Dated at Vancouver this 15th day of February, 1978.

R. J. LUDGATE,
Deputy Chairman

D. B. KILPATRICK,
Commissioner

F. E. WALDEN,
Commissioner

APPENDIX 1

G-24-77

PROVINCE OF BRITISH COLUMBIA

BRITISH COLUMBIA ENERGY COMMISSION

IN THE MATTER OF the Energy Act

and

IN THE MATTER OF an Application by Inland Natural Gas Co. Ltd.

BEFORE: N.R. Gish, Chairman; R.J. Ludgate, Deputy Chairman; J.D. King, Commissioner; and F.E. Walden, Commissioner — June 23, 1977

O R D E R

WHEREAS Inland Natural Gas Co. Ltd. ("Inland") by application dated May 25, 1977 applied for an Order authorizing it to make use of the highways, etc. of the City of Penticton (the "City") for certain purposes therein specified and in connection with the conduct of its business as a gas utility as defined in the Gas Utilities Act, R.S.B.C. 1960, c.164.

AND WHEREAS the City filed a response to the said application on the ninth day of June, 1977 in which it refrained from opposing same but asked, inter alia, that Inland be authorized and directed to pay to the City a fee for the use by Inland of the highways, etc. of the City in an amount to be determined by the Commission after a hearing under the provisions of the Energy Act, B.C.S. 1973, c.29.

AND WHEREAS the Commission has decided to hold an inquiry into the matter of fees charged gas utilities by

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municipalities in the Province of British Columbia for the right to make use of the highways, etc. of those municipalities and has appointed Tuesday, the fourth day of October, 1977 for the hearing of such matters.

NOW THEREFORE THE COMMISSION HEREBY:

(a) authorizes Inland to make use of the highways (including where used herein the streets, lanes, squares, parks, public places, bridges, viaducts, subways and watercourses) of the City upon those terms and conditions as set forth in the Agreement between the City and Inland dated the tenth day of December, 1976 and that such permission be for a term of twenty-one years calculated from and including September 26, 1976;

(b) authorizes and directs Inland to pay to the City a fee for the use by Inland of the said highways calculated in the manner set forth in Appendix "A" hereto;

the aforesaid Order to remain in full force and effect until otherwise determined by the Commission.

DATED at the City of Vancouver, in the Province of British Columbia, this twenty-fourth day of June, 1977.

BY ORDER

Chairman

APPENDIX "A" TO THE ORDER OF THE
BRITISH COLUMBIA ENERGY COMMISSION
DATED JUNE 24, 1977

Inland shall pay to the City:

(a) On the first day of November in each of the years 1977 to 1997 inclusive, a sum of money equal to three percent of the amount received in each immediately preceeding calendar year by Inland for gas consumed within the boundary limits of the City, other than revenue from gas supplied for resale; provided however, that the said payment due on the first day of November, 1977, shall be subject to a credit in favour of Inland in the amount of $30,644.43; and

(b) On or before the 26th day of December, 1997, a sum of money equal to three percent of the amount received by Inland for gas consumed within the boundary limits of the City of Penticton (Other than revenue from gas supplied for resale) during the period January 1, to September 25, 1997, both dates inclusive.

FRANCHISE HEARING

Record of Written Submissions and Representation

Provided Written Submissions

Municipal Bodies

1. Village of Elkford
2. City of Grand Forks
3. City of Nelson
4. Village of Chetwynd
5. District of Hudson's Hope
6. City of Penticton
7. District of Salmon Arm
8. City of Kelowna
9. Reg. Dist. of Central Okanagan
10. District of Kitimat
11. District of Terrace
12. Village of Vanderhoof
13. Village of Burns Lake
14. District of Houston
15. City of Castlegar
16. City of Trail
17. City of Prince Rupert
18. Village of Fraser Lake
19. District of Peachland
20. City of Cranbrook
21. City of Nanaimo
22. City of Prince George
23. Town of Quesnel
24. Union of B.C. Municipalities
25. Town of Williams Lake

Gas Utilities

26. Columbia Natural Gas Limited
27. Inland Natural Gas Co. Ltd.
28. Northland Utilities (B.C.) Limited
29. Pacific Northern Gas Ltd.
30. Squamish Gas Co. Ltd.

Corporate Intervenors

31. Prince George Pulp & Paper Ltd.
32. Weyerhaeuser Canada Ltd.

RELATIONSHIP OF FRANCHISE FEES TO

(1) TOTAL MUNICIPAL REVENUES

(2) TOTAL GENERAL REVENUES

1976

COMPANY & MUNICIPALITIES	(a) FRANCHISE FEES PAID $	(b) TOTAL MUNICIPAL REVENUES $	(c) % (a) OF (b)	(d) TOTAL GENERAL REVENUES $	(e) % (a) OF (d)
A. INLAND NATURAL GAS CO. LTD.					
Armstrong	4485	531345	0.8441	824352	0.5441
Ashcroft	2231	474049	0.4706	792218	0.2816
Cache Creek	1570	414986	0.3783	695756	0.2257
Castlegar	31049	1816562	1.7092	3460063	0.8974
Chetwynd	4913	397508	1.2374	713596	0.6885
Clinton	965	203802	0.4752	296901	0.3250
Coldstream	13595	764220	1.7789	1718433	0.7911
Enderby	2589	492263	0.5259	649856	0.3984
Grand Forks	9446	1106566	0.8536	1619297	0.5833
Hudson's Hope	2293	344121	0.6663	844745	0.2714
Kamloops	173385	21322093	0.8132	36039638	0.4811
Kelowna	85507	13697041	0.6243	27164656	0.3148
Keremeos	287	174582	0.1644	305455	0.0940
Logan Lake	2048	213714	0.9583	442693	0.4626
Lumby	2702	361670	0.7471	606366	0.4456
MacKenzie	37227	1803797	2.0638	4392197	0.8476
Merritt	13161	1292431	1.0183	1848245	0.7121
Midway	2455	192443	1.2757	375120	0.6545
Nelson	26402	3667295	0.7199	4988668	0.5292
Oliver	3475	465936	0.7458	795181	0.4370
100 Mile House	4434	482362	0.9192	816012	0.5434
Osoyoos	3710	551810	0.6723	975229	0.3804
SUB-TOTAL	427929	50770596		90364677	

RELATIONSHIP OF FRANCHISE FEES TO

(1) TOTAL MUNICIPAL REVENUES

(2) TOTAL GENERAL REVENUES

1976

COMPANY & MUNICIPALITIES	(a) FRANCHISE FEES PAID	(b) TOTAL MUNICIPAL REVENUES	(c) % (a) OF (b)	(d) TOTAL GENERAL REVENUES	(e) % (a) OF (d)
A. INLAND NATURAL GAS CO. LTD.					
Carried Forward	427929	50770596		90364677	
Peachland	1377	515343	0.2672	854031	0.1612
Penticton	33834	7402757	0.4570	10989157	0.3079
Prince George	192027	17636601	1.0888	30959442	0.6203
Princeton	5372	560269	0.9588	1046440	0.5134
Quesnel	64123	2471900	2.5941	5459670	1.1745
Rossland	7018	876810	0.8004	1144113	0.6134
Salmon Arm	14952	2708999	0.5519	4563987	0.3276
Spallumcheen	90	690897	0.0130	1439476	0.0063
Summerland	6084	1617659	0.3761	2606029	0.2335
Trail	18757	3638668	0.5155	7274863	0.2578
Vernon	33751	6016156	0.5610	9845301	0.3428
Warfield	2632	385619	0.6825	564296	0.4664
Williams Lake	25446	2127717	1.1959	3928525	0.6477
TOTAL	833392	97419991	0.8555	171040007	0.4872
B. COLUMBIA NATURAL GAS LIMITED					
Cranbrook	37096	4842666	0.7660	7084916	0.5236
Creston	11378	914115	1.2447	1535761	0.7409
Fernie	14594	1396146	1.0453	1964040	0.7431
Kimberley	37807	2790933	1.3546	4264009	0.8867
Sparwood	61680	1412116	4.3679	3025152	2.0389
Elkford	26232	648914	4.0424	1349681	1.9436
	188787	12004890	1.5726	19223559	0.9821

APPENDIX 3

RELATIONSHIP OF FRANCHISE FEES TO

(1) TOTAL MUNICIPAL REVENUES
(2) TOTAL GENERAL REVENUES

1976

COMPANY & MUNICIPALITIES	(a) FRANCHISE FEES PAID $	(b) TOTAL MUNICIPAL REVENUES $	(c) % (a) OF (b)	(d) TOTAL GENERAL REVENUES $	(e) % (a) OF (d)
C. PACIFIC NORTHERN GAS LTD.					
Burns Lake	1919	597682	0.3211	982944	0.1952
Fort St. James	1988	588967	0.3375	905379	0.2196
Fraser Lake	4931	429884	1.1471	1051343	0.4690
Houston	3050	649637	0.4695	1406445	0.2169
Kitimat	21854	5018518	0.4355	10697965	0.2043
Prince Rupert	18559	6633724	0.2798	10382915	0.1787
Smithers	4785	1271874	0.3762	1983426	0.2412
Telkwa	51	109010	0.0468	155588	0.0328
Terrace	13889	3923735	0.3540	6005754	0.2313
Vanderhoof	2229	618063	0.3606	994690	0.2241
	73255	19841094	0.3692	34566449	0.2119
D. NORTHLAND UTILITIES (B.C.) LTD.					
Dawson Creek	-	3538008	N/A	5162295	N/A
Pouce Coupe	-	141857	N/A	229157	N/A
		3679865	N/A	5391452	N/A
E. PLAINS WESTERN GAS & ELECTRIC CO. LTD.					
Fort St. John	-	3297253	N/A	4381203	N/A
Taylor	-	340473	N/A	1109169	N/A
		3637726	N/A	5490372	N/A

APPENDIX 3

RELATIONSHIP OF FRANCHISE FEES TO

(1) TOTAL MUNICIPAL REVENUES

(2) TOTAL GENERAL REVENUES

1976

COMPANY & MUNICIPALITIES	(a) FRANCHISE FEES PAID $	(b) TOTAL MUNICIPAL REVENUES $	(c) % (a) OF (b)	(d) TOTAL GENERAL REVENUES $	(e) % (a) OF (d)
F. FORT NELSON GAS LTD.					
Fort Nelson	-	875301	N/A	1400834	N/A
G. SQUAMISH GAS CO. LTD.					
Squamish	5574	2654066	0.2100	4963498	0.1123
H. CIGAS PRODUCTS LTD.					
Granisle	Nil	437624	N/A	1427866	N/A
I. ROCKGAS UTILITIES LTD.					
Port Alice	Nil	587654	N/A	1504581	N/A
J. VANCOUVER ISLAND GAS CO. LTD.					
Nanaimo	17910	14164917	0.1264	24009967	0.0746
CONSOLIDATED	1118913 (1)	155303128 (2)	0.7205	269018585 (2)	0.4159

(1) As per advice from utilities.

(2) As per "Municipal Statistics for the Year ended December 31, 1976" issued by: THE MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING, VICTORIA, B.C.

PROVINCE OF BRITISH COLUMBIA

BRITISH COLUMBIA ENERGY COMMISSION

IN THE MATTER OF the Energy Act,

and

IN THE MATTER OF an Inquiry into Franchise Fees paid by Gas Utilities

BEFORE: N. R. Gish, Chairman; R. J. Ludgate, Deputy Chairman; D. B. Kilpatrick, Commissioner; J. D. King, Commissioner; F. E. Walden, Commissioner

February 15, 1978

O R D E R

WHEREAS pursuant to public notice issued under Order G-24-77, the British Columbia Energy Commission has conducted an inquiry into certain questions related to the nature and purpose of franchise fees paid to municipalities by gas utilities; and

WHEREAS the Commission has considered the evidence and arrived at certain findings and conclusions, all as more particularly set forth in a report issued concurrently with this Order,

NOW THEREFORE the Commission hereby orders that:

1. After January 1, 1978, no gas utility shall recover, as part of its cost of service, franchise fees paid pursuant to any franchise agreement with a municipality, save and except as follows:

(a) during the calendar year 1978, a gas utility may recover, as part of its cost of service, any franchise fee paid by it to a municipality, calculated in accordance with a subsisting franchise agreement;

(b) during the calendar years 1979, 1980, 1981 and 1982, a gas utility may recover as part of its cost of service 80%, 60%, 40% and 20% respectively, of any franchise fee paid by it to a municipality in 1978.

2. Every gas utility which, during the years 1979-1982, seeks to recover as part of its cost of service, franchise fees paid to a municipality, shall file with the Commission rate schedules for the relevant year reflecting the reduction in cost of service attributable to the declining allowance for franchise fees.

3. All franchise agreements between gas utilities and municipalities heretofore approved by the Commission or its predecessor, are hereby disapproved insofar as they provide for the payment of a franchise fee by a gas utility to a municipality, and, notwithstanding the terms of any franchise agreement or its prior approval, no provision in such a franchise agreement providing for the payment of a franchise fee by a gas utility to a municipality is enforceable by a municipality, save and except as follows:

(a) during the calendar year 1978, a municipality may enforce, in accordance with the terms of a subsisting franchise agreement, payment by a gas utility of the franchise fee provided for in that agreement;

(b) during the calendar years 1979, 1980, 1981 and 1982, a municipality may enforce the payment by a gas utility of 80%, 60%, 40% and 20% respectively of any franchise fee payable to the municipality in 1978.

4. Except as provided in paragraph 3, franchise agreements previously approved by the Commission or its predecessor shall remain in full force and effect.

5. Nothing in this Order shall be deemed to preclude municipalities and gas utilities from entering into or renewing franchise agreements, subject to the approval of the Commission.

DATED at the City of Vancouver, in the Province of British Columbia this 15th day of February, 1978.

BY ORDER

Chairman

CA 780194/5

Court of Appeal

IN THE MATTER OF THE ENERGY ACT, R.S.B.C. 1973, CAP. 29 AND AMENDMENTS

BETWEEN:

THE CITY OF PENTICTON AND THE VILLAGE OF CHETWYND

APPELLANTS

AND:

BRITISH COLUMBIA ENERGY COMMISSION

RESPONDENT

AND BETWEEN:

THE CORPORATION OF THE VILLAGE OF ASHCROFT, VILLAGE OF CACHE CREEK, CITY OF CASTLEGAR, VILLAGE OF CLINTON, THE CORPORATION OF THE CITY OF CRANBROOK, VILLAGE OF ELKFORD, THE CORPORATION OF THE CITY OF ENDERBY, THE CORPORATION OF THE CITY OF FERNIE, THE CORPORATION OF THE VILLAGE OF FORT ST. JAMES, THE CORPORATION OF THE CITY OF GRAND FORKS, ET AL

APPELLANTS

AND:

THE BRITISH COLUMBIA ENERGY COMMISSION

RESPONDENT

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE McFARLANE

CORAM: The Honourable Mr. Justice McFarlane
The Honourable Mr. Justice Craig
The Honourable Mr. Justice Lambert

Counsel for the Appellants The City of Penticton and the Village of Chetwynd: D. G. Sanderson, Esq.

Counsel for the Appellants The Corporation of the Village of Ashcroft, et al: C. D. McQuarrie, Esq., Q.C.
J. G. Wilson, Esq.

Counsel for the Respondent The British Columbia Energy Commission: J. J. Camp, Esq.
P. G. Foy, Esq.

Counsel for Prince George Pulp & Paper Ltd.: R. B. Wallace, Esq.
Counsel for Inland Natural Gas Co. Ltd.: P. W. Butler, Esq.

Vancouver, British Columbia
January 24, 1979

On September 6th, 1978, orders of this Court granted leave to bring these appeals from part of an order of the British Columbia Energy Commission numbered G-8-78 dated February 15th, 1978, under s.117(1) of the Energy Act, S.B.C. 1973, Cap. 29, the appeals are limited to "any question of law or excess of jurisdiction". The appellants are municipal corporations who have entered into franchise agreements with energy utilities supplying natural gas to the public in their respective geographical areas. The earliest in time of these franchise agreements made between the City of Penticton and Inland Natural Gas Co. Ltd. in September 1955 is accepted as typical. It provides for payment by the utility to the City of 3% of the utility's annual gross revenue from sales of natural gas within the city boundaries. In return the utility received an exclusive franchise and the right to use city streets, etc. for a distribution system. The franchise agreements were adopted by municipal by-laws with the assent of municipal electors. They were also approved by the Lieutenant-Governor-in-Council and by the Energy Commission, or its predecessor the Public Utilities Commission of this province.

The respondent is the British Columbia Energy Commission constituted by the Energy Act. Having regard to the judgment of

the Supreme Court of Canada in Northwestern Utilities Ltd. et al v. City of Edmonton (pronounced October 3rd, 1978, and not yet reported), counsel for the Commission restricted their arguments to the question whether the Commission acted in violation of principles of natural justice or otherwise in excess of jurisdiction. They refrained, properly in my opinion, from presenting any submission in support of the merits of the Commission's order.

Counsel for Prince George Pulp & Paper Ltd., an interested party, supported the order of the Commission. Counsel for Inland Natural Gas Co. Ltd., also an interested party, adopted a neutral position on these appeals.

In June 1977 the Commission, acting under the authority of s.98 of the Energy Act, circulated and published public notice of its intention to conduct an inquiry into the matter of franchise fees paid to municipalities by gas utilities. The notice was given specifically to all municipalities and energy utilities in the province. The notice includes:

> The inquiry will be directed to the following questions:
>
> 1. What is the nature and purpose of franchise fees, and are they in the public interest?
>
> 2. If such fees are in the public interest, what is the appropriate level and how should that level be determined?
>
> 3. If such fees are in the public interest, should they be displayed as a separate item on the face of the bill issued by the gas utility to its customers or continue to be included in the general tariff structure?

4. If such fees are in the public interest, should they be assessed only to those customers residing in municipalities which require the payment of such fees or continue to be assessed against all the customers of the utility through the general tariff structure?

The Commission "Report" states that it received written submissions from 32 interested parties, 26 of whom subsequently attended, or were represented by counsel, at the hearing conducted on October 4th, 5th and 6th, 1977. For reasons which will appear I note here that two representatives of the Union of B.C. Municipalities, a body corporate created by Provincial Statute (S.B.C. 1959, Cap. 106) attended on the first day of the hearing and not thereafter.

Immediately before adjournment, on the first day of the hearing, October 4th, 1977, the Chairman announced:

> THE CHAIRMAN: We've considered the matter at hand, what amounts to the motion by the U.B.C.M. that they be allowed until May of 1978 to undertake some detailed work related to the matters set out on page 3 of their brief, particularly in relation to the costs associated with franchise fees, and consider that in the best interests of moving this Inquiry along, that we will not grant that Motion.
>
> I think we have to deal with the Municipalities who have intervened, who have put their best foot forward in respect of the subject matter of the Inquiry, and that of course takes into account the position of the various utilities who are involved.
>
> We've seen enough this morning to know that there's a great, there are differences of opinion as to what those costs are in the individual municipalities, and as to the approaches that will be taken in recovering them, and at this point in time, we can't see that there is any real advantage to be gained by keeping the hearing open to allow the U.B.C.M. to do this work.

> I should say, and the U.B.C.M. of course is aware, must be aware of this, that what we are doing here is making recommendations. We are not, in our own right, going to achieve very much out of this hearing if whatever recommendations we make are not adopted by the government.
>
> I don't think that that therefore forecloses the U.B.C.M. from making whatever position or point it wishes to make to the government, or to this Commission again, in respect of any of these matters. But I don't think it's fair to the parties involved at this stage, that we keep the matter open until May of 1978.

The Report of the Commission dated February 15th, 1978, dealt firstly with question #1 set out in the notice by concluding that the "assessment" of a franchise fee is not in the public interest and that there was in consequence no necessity for answers to questions 2, 3 and 4. The Commission also concluded, however, that it "must order the elimination of franchise fees".

The formal order of the Commission, subject to these appeal: is also dated February 15th, 1978. Its operative provisions are:

> NOW THEREFORE the Commission hereby orders that:
>
> 1. After January 1, 1978, no gas utility shall recover, as part of its cost of service, franchise fees paid pursuant to any franchise agreement with a municipality, save and except as follows:
>
> (a) during the calendar year 1978, a gas utility may recover, as part of its cost of service, any franchise fee paid by it to a municipality, calculated in accordance with a subsisting franchise agreement;
>
> (b) during the calendar years 1979, 1980, 1981 and 1982, a gas utility may recover as part of its cost of service 80%, 60%, 40% and 20% respectively, of any franchise fee paid by it to a municipality in 1978.
>
> 2. Every gas utility which, during the years 1979-1982, seeks to recover as part of its cost of service, franchise fees paid to a municipality, shall file with the Commission rate schedules for the relevant year reflecting the reduction in cost of service attributable to the declining allowance for franchise fees.

3. All franchise agreements between gas utilities and municipalities heretofore approved by the Commission or its predecessor, are hereby disapproved insofar as they provide for the payment of a franchise fee by a gas utility to a municipality, and, notwithstanding the terms of any franchise agreement or its prior approval, no provision in such a franchise agreement providing for the payment of a franchise fee by a gas utility to a municipality is enforceable by a municipality, save and except as follows:

(a) during the calendar year 1978, a municipality may enforce, in accordance with the terms of a subsisting franchise agreement, payment by a gas utility of the franchise fee provided for in that agreement;

(b) during the calendar years 1979, 1980, 1981 and 1982, a municipality may enforce the payment by a gas utility of 80%, 60%, 40% and 20% respectively of any franchise fee payable to the municipality in 1978.

4. Except as provided in paragraph 3, franchise agreements previously approved by the Commission or its predecessor shall remain in full force and effect.

5. Nothing in this Order shall be deemed to preclude municipalities and gas utilities from entering into or renewing franchise agreements, subject to the approval of the Commission.

The attack by the appellant municipalities is directed against the paragraph numbered 3.

The first ground of appeal is that in ordering the phasing out of the franchise fees as it did, the Commission acted in violation of principles of natural justice with the result that there is error in law and excess of jurisdiction. The argument is supported by the submission that the notice given by the Commission does not fairly or reasonably indicate that an order for a cancellation or phasing out of franchise fees would be the subject of consideration or inquiry. It is supported further by the Chairman's remarks which I have quoted indicating

the intention of the Commission to make recommendations to government about which the Union of B.C. Municipalities would not be foreclosed from making representations to government or to the Commission. It was accordingly submitted that the municipalities have not been given fair notice of what the Commission proposed to inquire into or to do in order that they might properly prepare their answers to whatever case might be made for elimination of franchise fees and that this failure is aggravated seriously by the Chairman's remarks, as a result of which it may be inferred properly, that the representatives of the Union of B.C. Municipalities accepted the refusal of their request for a delay and did not attend the inquiry any further.

In reply, counsel for the Commission presented two submissions. The first is based upon s.10 of the Energy Act which reads:

> 10. Where the commission is directed or authorized under this Act to hold a hearing, it shall give reasonable notice of the hearing; but no act or decision of the commission shall be questioned or held invalid on the ground that no notice or insufficient notice has been given to any person.

I cannot agree. The interpretation of the non-obstante clause contended for would, in my opinion, destroy the effect of the mandatory words "shall give reasonable notice of the hearing". I think the intent of the second part of the section is to prevent an act or decision of the Commission being questioned or held invalid merely because no notice or insufficient notice has been given to some particular person or persons. The application of the prov-

ision necessarily implies that in other respects reasonable notice has been given.

Secondly, counsel for the Commission attempted to show that some parties appearing before the Commission were not misled by the notice or the Chairman's remarks. This was done by producing post-hearing written submissions made to the Commission on behalf of seven interested parties or groups, of whom four were suppliers of natural gas. I think these submissions are for the most part equivocal for this purpose and cannot be applied properly here to overcome the force of appellants' arguments which I accept.

The second ground of appeal is that the Commission has not been given the power to make the order set out in paragraph 3. If it had been the intention of the Legislature to authorize the Commission to render contractual obligations unenforceable, I should have expected that intention to be stated expressly or by clear, necessary implication. I think this is especially so having regard to the fact that the franchise agreements were made with the important and formal sanctions and approvals to which I have referred. I do not find any such delegation of power in the statute. In reaching that conclusion I do not overlook the effect of the statute as a whole which is to vest in the Commission important powers and duties for the regulation and control of energy utilities as defined. The particular provision of the statute which approaches such a delegation most closely is s.39(1) which reads:

> 39.(1) Where the commission, after a hearing, finds that, under a contract entered into by an energy utility, a person receives service at rates that are unduly preferential or discriminatory, the commission may declare the contract to be void and unenforceable, either wholly, or to such extent as the commission considers proper, and the contract is thereupon void and unenforceable either wholly or to the extent specified; or the commission may make such other order as it considers advisable in the circumstances.

In my opinion, the franchise agreements to which the appellant municipalities are parties, are not contracts under which persons receive service within the meaning of the sub-section. The contracts referred there are, for present purposes, those under which customers of the utility receive natural gas.

Counsel for the appellants submitted further that there was no evidence before the Commission to support its findings that (1) the franchise fees payable by utilities which supply natural gas are discriminatory, and (2) the presence of a gas utility in a community adds to the economic and social viability of that community. In the view I take of the principal arguments advanced, it is unnecessary and I think inadvisable to discuss the nature or effect of the evidence and representations now before the Commission. I express no opinion whatever on the merits of the Commission's answer to its question - whether franchise fees are in the public interest.

I would allow the appeals and order clause 3 of the Commission order struck out.

Court of Appeal

IN THE MATTER OF THE ENERGY ACT, R.S.B.C. 1973, CAP. 29 AND AMENDMENTS

BETWEEN:

THE CITY OF PENTICTON AND THE VILLAGE OF CHETWYND

APPELLANTS

AND:

BRITISH COLUMBIA ENERGY COMMISSION

RESPONDENT

AND BETWEEN:

THE CORPORATION OF THE VILLAGE OF ASHCROFT, VILLAGE OF CACHE CREEK, CITY OF CASTLEGAR, VILLAGE OF CLINTON, THE CORPORATION OF THE CITY OF CRANBROOK, VILLAGE OF ELKFORD, THE CORPORATION OF THE CITY OF ENDERBY, THE CORPORATION OF THE CITY OF FERNIE, THE CORPORATION OF THE VILLAGE OF FORT ST. JAMES, THE CORPORATION OF THE CITY OF GRAND FORKS, ET AL

APPELLANTS

AND:

THE BRITISH COLUMBIA ENERGY COMMISSION

RESPONDENT

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE LAMBERT

CORAM: The Honourable Mr. Justice McFarlane
The Honourable Mr. Justice Craig
The Honourable Mr. Justice Lambert

Counsel for the Appellants The City of Penticton and the Village of Chetwynd: D. G. Sanderson, Esq.

Counsel for the Appellants The Corporation of the Village of Ashcroft, et al: C. D. McQuarrie, Esq., Q.C.
J. G. Wilson, Esq.

Counsel for the Respondent The British Columbia Energy Commission: J. J. Camp, Esq.
P. G. Foy, Esq.

Counsel for Prince George Pulp & Paper Ltd.: R. B. Wallace, Esq.

Counsel for Inland Natural Gas Co. Ltd.: P. W. Butler, Esq.

Vancouver, British Columbia
January 24, 1979

I would allow the appeals as set out in the reasons of my brother McFarlane in which I concur.

J.A.

CA 780194/5

Court of Appeal

IN THE MATTER OF THE ENERGY ACT, R.S.B.C. 1973, CAP. 29 AND AMENDMENTS

BETWEEN:

THE CITY OF PENTICTON AND THE VILLAGE OF CHETWYND

APPELLANTS

AND:

BRITISH COLUMBIA ENERGY COMMISSION

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AND BETWEEN:

THE CORPORATION OF THE VILLAGE OF ASHCROFT, VILLAGE OF CACHE CREEK, CITY OF CASTLEGAR, VILLAGE OF CLINTON, THE CORPORATION OF THE CITY OF CRANBROOK, VILLAGE OF ELKFORD, THE CORPORATION OF THE CITY OF ENDERBY, THE CORPORATION OF THE CITY OF FERNIE, THE CORPORATION OF THE VILLAGE OF FORT ST. JAMES, THE CORPORATION OF THE CITY OF GRAND FORKS, ET AL

APPELLANTS

AND:

THE BRITISH COLUMBIA ENERGY COMMISSION

RESPONDENT

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CRAIG

Coram: The Honourable Mr. Justice McFarlane
The Honourable Mr. Justice Craig
The Honourable Mr. Justice Lambert

Counsel for the Appellants The City of Penticton and The Village of Chetwynd:	D. G. Sanderson, Esq.
Counsel for the Appellants The Corporation of the Village of Ashcroft, et al:	C. D. McQuarrie, Esq., Q.C. J. G. Wilson, Esq.
Counsel for the Respondent The British Columbia Energy Commission:	J. J. Camp, Esq. P. G. Foy, Esq.
Counsel for Prince George Pulp & Paper Ltd:	R. B. Wallace, Esq.
Counsel for Inland Natural Gas Co. Ltd:	P. W. Butler, Esq.

Vancouver, British Columbia,
January 24, 1979

I agree with McFarlane J.A. that the Commission did not give "reasonable" notice of the hearing in the sense that the Commission did not indicate in the notice that it might make an order in the terms of paragraph 3 of the formal order, and I agree, therefore, that the appeal should be allowed. However, unlike McFarlane J.A., I think that the Energy Act empowers the Commission to make an order in terms of paragraph 3.

Counsel for the various parties referred to a number of sections, or subsections, of the Energy Act including s.30(1), (2), and (3), s.32, s.33, s.39(1), s.45, s.98, s.99, s.101, and s.152(1).

Section 30 is headed "Certificate of Public Convenience and Necessity" and reads in part as follows:

> 30.(1) Except as otherwise provided, no privilege, concession, or franchise hereafter granted to any energy utility by a municipality or other public authority is valid unless approved by the commission.
>
> (2) The commission shall not give its approval under subsection (1) unless it determines that the privilege, concession, or franchise proposed to be granted is necessary for the public convenience and properly conserves the public interest.
>
> (3) The commission, in giving its approval, shall grant a certificate of public convenience and necessity, and may impose such conditions as to the duration and termination of the privilege, concession, or franchise, or as to construction, equipment, maintenance, rates, or service, as the public convenience and interest reasonably require.

* * *

Section 32 deals with applications for certificates of public convenience and necessity and includes the provision that the Commission may, after a hearing, amend a certificate "previously issued."

The other sections read:

> 33. Where, after a hearing, the commission determines that an energy utility holding a franchise, licence, or permit has failed to exercise or make use of, or has not continued to exercise or make use of, the rights and privileges granted the energy utility by the franchise, licence, or permit, the commission may cancel the franchise, licence, or permit, or may suspend for such time as the commission considers advisable the rights, or any of the rights, under the franchise . . . .

* * *

39. (1) Where the commission, after a hearing, finds that, under a contract entered into by an energy utility, a person receives service at rates that are unduly preferential or discriminatory, the commission may declare the contract to be void and unenforceable, either wholly, or to such extent as the commission considers proper, and the contract is thereupon void and unenforceable either wholly or to the extent specified; or the commission may make such other order as it considers advisable in the circumstances.

* * *

45. (1) The commission has general supervision of all energy utilities, and may make such regulations and orders respecting equipment, appliances, safety devices, extension of works or systems, filing of schedules of rates, reporting, and other matters as it considers necessary or advisable for the safety, convenience, or service of the public, or for the proper carrying out of this Act or of any contract, charter, or franchise involving the use of public property or rights.

* * *

98. Of its own motion the commission may, and upon the request of the Lieutenant-Governor in Council the commission shall, inquire into, hear, and determine any matter or thing which under this Act it may inquire into, hear, or determine upon application or complaint, and in that respect the commission has the same powers as are vested in it by this Act in respect of an application or complaint.

* * *

99. Where a power or authority is vested in the commission under this Act, the commission may exercise that power and authority from time to time, or at any time, as occasion requires; and may at any time alter, suspend, or revoke any rule or regulation made by it, and make others.

* * *

> 101. The enumeration in this Act of any specific power or authority given to the commission shall not be construed to exclude or limit a power or authority otherwise conferred on the commission.

* * *

> 152.(1) A certificate, order, approval, rule, regulation, endorsement, or decision, made under any Act in respect of an energy utility by the Public Utilities Commission established under the *Public Utilities Act*, repealed by this Act, that is in force on the date this section comes into force continues in full force and effect until it expires, or is suspended, cancelled, repealed, or amended and shall be deemed to be made by the British Columbia Energy Commission under this Act.

* * *

Counsel for the appellants referred also to certain sections of the Municipal Act, including s.574(1)(b):

> 574.(1) The Council, by by-law adopted with the assent of the electors and the approval of the Lieutenant-Governor in Council, may . . . .
>
> (b) enter into or ratify or adopt agreements granting to any person an exclusive or limited franchise for any term of years not exceeding twenty-one years for the supplying of gas, electrical energy, water, or telephone service to the inhabitants of the municipality.

* * *

Counsel for the appellants concede that the Commission has wide powers but contend that as the legislature has authorized franchise agreements in the Municipal Act and

in the Energy Act between a utility and a municipality the legislature, obviously, did not intend that the Commission should have the power to cancel a franchise agreement which has been duly approved in accordance with the provisions of these Acts otherwise the legislature would have made express provision for this power in the Act. Counsel for the appellants concede that s.30 empowers the Commission to approve a franchise but contend that this approval relates solely to the "right or exclusive right to serve the inhabitants of a given municipality with natural gas." They draw a distinction between the word "franchise" and the phrase "franchise agreement", contending, as I understand their argument, the Commission does not have the right to govern the terms upon which the right to serve the inhabitants of a municipality with natural gas may be exercised.

I think that the word "franchise" and the phrase "franchise agreement" pertain to the same subject and are interchangeable.

Counsel for the appellants contend, also, that:

> . . . the power of the Commission provided by S.32(2) to attach to the exercise of the right or privilege granted by the certificate terms or conditions, including conditions as to the duration of the right or privilege, does not extend to altering the terms and conditions of the franchise agreement.

Alternatively, counsel for the appellants submits that if the Commission approves a franchise agreement - as it did in this particular case - it cannot, subsequently, "withdraw its approval", or, if the Commission is able to reconsider a franchise agreement which it originally approved it may only "disapprove" the agreement, not part of the agreement.

I disagree with these submissions. The Energy Act confers very wide powers on the Commission. For example, its findings of fact, generally speaking, cannot be challenged. Section 30 provides that the Commission must approve a franchise otherwise it is invalid and provides, also, that the Commission must not approve a franchise ". . . unless it determines that the . . . franchise proposed . . . is necessary for the public convenience and properly conserves the public interest." The section further provides that the Commission in giving its approval shall grant a certificate of public convenience and necessity and ". . . may impose such conditions as to the duration and termination of the . . . franchise, or as to . . . rates . . . as the public convenience and the interest reasonably require."

Section 152(1) empowers the Commission to suspend, cancel, repeal, or amend a certificate which had been previously made. Subsequent to approving a franchise agreement, the Commission might conclude that because of a change of circumstances a

question arises whether the franchise agreement, or a term in it "is necessary for the public convenience and properly conserves the public interest." I think that the Commission should have the right to re-examine the question and the power either to confirm the agreement or to make such alteration in the agreement as the Commission considers is necessary for the public convenience and the proper conservation of the public interest. I think, too, that the tenor of the Act and, in particular, s.98 of the Act, gives the Commission the power to do that.

In arguing that the Commission did not have this power because there was not an express provision in the Act authorizing this power, counsel for the appellants referred to s.33 and to s.39(1) pointing out that these sections empower the Commission to suspend or cancel the franchise in certain circumstances and that the legislature, therefore, did not intend to empower the Commission to cancel or suspend the franchise unless s.33 or s.39(1) was applicable. I do not think that either of these sections supports that conclusion. Section 33 provides that the Commission may cancel or suspend the franchise if the utility has failed to exercise or make use of the rights granted by the franchise. Such a failure may involve a consideration of public convenience or whether the public interest is properly conserved but not necessarily.

In these circumstances, the Commission should have an express power to do what s.33 empowers it to do.

Section 39(1) empowers the Commission to declare that a contract entered into by an energy utility is void and unenforceable if a person "receives service at rates that are unduly preferential or discriminatory." I agree with McFarlane J.A. that the contract which is the subject of s.39(1) is not a franchise agreement made between the utility and the municipality.

With the exception of this particular issue, I agree with the judgment of McFarlane J.A. and with his disposition of the appeal.