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June 28, 2018
File No.: 240148.00841/14797

By Email

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 FEI's Further Reply Submission, pursuant to the established regulatory timetable.

The one decision cited can be accessed at the following link:

https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1864/2013bcsc1864.pdf

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Matthew Ghikas
Personal Law Corporation

MG/gd

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

FortisBC Energy Inc.'s

Further Reply to Surrey

June 28 , 2018

TABLE OF CONTENTS

PART ONE: **INTRODUCTION**

1. This Further Reply focusses on aspects of Surrey's June 14 Reply Argument, since the interveners representing FortisBC Energy Inc.'s (FEI or the Company) customers are generally supportive of FEI's position. FEI's Further Reply avoids repeating FEI's May 31, 2018 Final Submission and June 14, 2018 Reply Submission and should be read in tandem with them. FEI's silence should not be interpreted as agreement.

2. Two related themes pervade Surrey's Reply Argument. First, Surrey seeks to distinguish between commercially reasonable and balanced Operating Terms, which FEI is seeking, and the public interest.[1] Second, it portrays FEI's proposals in this proceeding, including FEI's observation that the Commission can issue conditional orders, as the continuation of a long-standing pattern of taking advantage of the City and subverting the public interest.[2]

3. Throughout this proceeding, FEI has been clear that it is seeking terms that are, as a package, balanced and fair to both FEI/FEI customers and the City. The distinction that Surrey is trying to draw between commercially reasonable and balanced Operating Terms and the public interest is a false one (see Part Two below). The Commission's mandate, regardless of how it is framed in legal terms, speaks to ensuring that FEI and its customers are well-served by any Operating Agreement, while also being fair to the City. FEI's proposed Operating Terms achieve a commercially reasonable and mutually beneficial outcome, consistent with both the public interest and just and reasonable rates.

4. It is within the Commission's power, and quite appropriate, to prevent the one-sided scenario where Surrey insists on retaining the favourable default allocation in the *Pipeline Crossing Regulation*, while also demanding a multi-million dollar annual Operating Fee to be collected from FEI's customers (see Part Two below). Allowing the City to have its proverbial

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[1] See, for instance, Surrey's Reply to Final Argument of FortisBC Energy Inc. (Surrey's Reply Argument), paras. 7, 15 and 17.

[2] See, for instance, Surrey Reply Argument, paras. 18-22 and 56.

cake and eat it too at the expense of FEI's customers would make for an uncomfortable fit, to say the least, with the public interest or just and reasonable rates (see Parts Three and Four below).

5. The subheadings in this document reference, in parentheses, the corresponding paragraphs of Surrey's Reply Argument.

PART TWO: **THE APPLICABLE LAW**

A. INTRODUCTION

6. Surrey takes issue with FEI's characterization of the legal test under section 32 and 33. The City is also critical of FEI negotiating on behalf of its customers, as well as FEI's observation that the Commission can condition an Operating Fee on Surrey agreeing to a reasonable treatment of Relocation Costs. FEI makes three reply points in this Part:

- First, the articulation of the legal test is not determinative of the outcome of this proceeding. An Operating Agreement that incorporates commercially reasonable and balanced terms also serves the public interest and supports just and reasonable rates.

- Second, Surrey's interpretation of sections 32 and 33 as only empowering the Commission to prevent a municipality from "substantially obstruct[ing] FEI carrying out its business"[3] implies an unwarranted level of Commission deference to municipal demands.

- Third, the Commission has the power to condition an Operating Fee on Surrey agreeing to a particular Relocation Cost allocation, and it would be reasonable to use this approach to achieve a fair and balanced result.

B. A BALANCED AGREEMENT SERVES JUST AND REASONABLE RATES AND THE PUBLIC INTEREST (PARAS 5-17)

7. As FEI elaborates below, the objective of achieving a commercially reasonable outcome flows from the requirement for just and reasonable rates. Regardless, an Operating Agreement that incorporates commercially reasonable and balanced terms also serves the public interest.

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[3] Surrey Reply Argument, para. 9.

(a) Cost Implications for Customers Must Be Justifiable

8. In making its case for a public interest test, Surrey emphasizes that the public interest is an important element of the legislative framework governing public utilities. This is true. However, it is equally true that:

(a) other sections of the UCA explicitly invoke a public interest test, whereas sections 32 and 33 do not;

(b) once a public utility has a public interest approval in the form of a CPCN (or a franchise, as was sometimes the case in the past), public utilities and municipalities are left to negotiate mutually acceptable operating terms in the first instance; the Commission only becomes involved at all under sections 32 and 33 when there is a disagreement;

(c) an equally fundamental aspect of the legislative framework is that utilities must charge just and reasonable rates, and such rates can only reflect prudently incurred costs;

(d) operating terms, whether negotiated or determined under section 32 or 33, have cost implications, and the Commission's mandate to set just and reasonable rates will cause it to review the associated costs from the perspective of whether or not they are prudent;

(e) the knowledge that the cost implications must be reasonable should cause FEI, and by extension the Commission, to ask at this juncture whether utility customers would receive good value in return for satisfying Surrey's financial demands, i.e. whether the agreement would be commercially reasonable.

9. Put another way, FEI would be expected to approach negotiations and this proceeding from the perspective of ensuring that the overall outcome can be justified to the Commission (and its customers). FEI must assess what it is giving up, and what it is receiving in return for any concessions it makes. Similarly, Surrey is answerable to the electorate and its

other stakeholders, and would be expected to negotiate on their behalf. The result, in FEI's submission, is a commercial negotiation. The Commission, stepping into the shoes of the parties under sections 32 and 33 when they reach an impasse, is essentially replicating the balance that would be achieved through successful good faith negotiations.

10. The Commission, in the Chetwynd decision cited by Surrey, thus approached the Operating Agreement from the perspective of whether it was defensible from the perspective of what the utility is receiving in return: "The Commission agrees with Terasen that the provisions of the Operating Agreement provide value to the Company and support approval of the Application, as do the responses to the Information Requests provided as evidence in this hearing. The Commission finds that the 3% fee is not unreasonable for the concessions provided by the municipality." [Emphasis added.]

(b) The Legal Test Is Not Determinative of the Result in this Proceeding (Para 12)

11. As FEI stated in its May 31 Final Submission, "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." The public interest will be context specific, and FEI and Surrey appear to agree that a balanced agreement achieves it. The parties just disagree on what constitutes a balanced agreement.

12. Surrey has listed a number of "competing public interests" that it suggests tips the balance in the City's favour relative to "the public interest in FEI using and occupying public spaces in Surrey to extend FEI's distribution equipment to its customers and supply energy services to them".[4] A variety of interests, including those listed by Surrey, are served by the terms to which the parties have already agreed. The outstanding issues -- the Operating Fee and Relocation Costs - are financial in nature, and unrelated to safety, preserving public access or coordination with municipal and third party infrastructure. Surrey's financial demands are a marked departure from (a) the *status quo*, and (b) what the City would be seeking to collect from FEI in permit fees or for a relocation of a Gas Main. The fact that "The City is a not-for-

[4] Surrey Reply Argument, para. 12.

profit organization"[5] is insufficient justification to require FEI/FEI customers to overpay Surrey for what they are getting in return.

(c) Equating FEI Negotiating for Customer Benefit With "Tak[ing] Commercial Advantage of the City" Is a Stretch (Para 15)

13. Surrey has sought to cast in a pejorative light FEI's submissions that the objective should be a commercially reasonable outcome: "The City cannot explain why FEI now in final argument suggests that FEI's position in its negotiations with the City spanning nearly three years was designed to take commercial advantage of the City, nor does the City understand why FEI believes that it is the BCUC's mandate to help FEI take commercial advantage of the City."[6] Surrey's attempt to equate FEI negotiating on behalf of customers with "tak[ing] commercial advantage of the City", as well as its expressed incredulity, are unpersuasive:

- First, the City is a sophisticated party, and is represented by capable legal counsel. Surrey, like FEI, has advocated for its position. Surrey has secured a number of concessions from FEI, which are reflected in the agreed terms.

- Second, it should be obvious to everyone, including Surrey, that FEI would be trying to protect the interests of the Company, and ultimately its customers, in negotiations with municipalities. Public utility rates can only reflect costs that are prudently incurred, which requires FEI to ensure that it is being judicious in committing funds that will ultimately be recovered in customer rates (in fact, collected directly from customers in the case of an Operating Fee). Agreeing to everything that Surrey demanded would have shortened the negotiations, but it would not have been prudent or fair to FEI's customers. (With respect to Surrey's expression of surprise - one might ask why Surrey had never wondered, over the course of "negotiations…spanning nearly three years", why FEI was not simply agreeing to all of Surrey's demands.)

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[5] Surrey Reply Argument, para. 14.

[6] Surrey Reply Argument, para. 15.

- Third, the parties have reached consensus on all but two financial issues. The agreed terms benefit the City, address the interests listed in paragraph 12 of Surrey's Reply Argument, as well as benefit FEI/FEI customers.

- Fourth, FEI has been clear throughout this proceeding that the overall outcome should be balanced. FEI has repeated this in numerous instances, both in the May 31 Final Submission and in FEI's June 14 Reply Submission. For instance, FEI's Reply Submission speaks to an agreement that "fairly balances the interests of both parties" and "being fair to the City".[7]

14. FEI shares the conviction of its customers who intervened in this proceeding that Surrey is demanding an excessive Operating Fee. The City's demand for an Operating Fee that is out of proportion to the permit fees it would otherwise seek to charge FEI is only compounded by its insistence on adhering to the default cost allocation for High Pressure Pipeline relocations in the *Pipeline Crossing Regulation*. FEI makes no apologies for advocating a more balanced outcome that will be less onerous for its customers.

C. SURREY'S INTERPRETATION OF SECTIONS 32 & 33 REQUIRES UNDUE DEFERENCE TO MUNICIPAL DEMANDS (PARA 9)

15. Surrey has addressed the UCA and the *Gas Utility Act* (GUA) in paragraphs 8 and 9 of the City's Reply Argument. Surrey has interpreted sections 32 and 33 in a manner that would require the Commission to pay a high degree of deference to a municipality's demands. Surrey says in paragraph 9:

> If the City attempted to impose conditions that in effect substantially obstruct FEI carrying out its business as a gas utility, sections 32, 33 and 36 of the UCA in combination with section 121 empower the BCUC to, by order, overrule the City's excessive conditions.[8] [Emphasis added.]

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[7] FEI Reply Submission, paras. 4, 5 and 50. FEI's May 31 Submissions uses phrases such as "fair and balanced" (para. 4, p.23), "workable and fair outcome" (para. 81), and "balanced and fair" (para. 161).

[8] Surrey Reply Argument, para. 9. See also para. 14.

16. Sections 32 and 33 say that the Commission may "specify the manner and terms of use" - neutral language that leaves the Commission with wide discretion as to the appropriate manner and terms of use. There is nothing in sections 32 or 33 to suggest that the Commission must accept Surrey's demands barring evidence that a term would "substantially obstruct FEI carrying out its business as a gas utility". Nor is there a basis to imply that standard from the statutory framework summarized in paragraph 8 of Surrey's Reply Submission.

17. It is difficult to reconcile Surrey's position in this regard with its position (addressed next) that the Commission should be balancing the interests of FEI/FEI customers and other interests. Striking a balance is a challenge when Surrey's thumb is on the scale.

D. A CONDITIONAL ORDER IS A VALID AND REASONABLE APPROACH (PARA 20-23)

18. FEI had observed in its May 31 Final Submission that, if the Commission determines it is precluded by the *Pipeline Crossing Regulation* from ordering a different allocation for High Pressure Pipelines, it has the ability to restore the overall balance in the new agreement by either (a) reducing the Operating Fee or (b) making approval of an Operating Fee conditional upon Surrey agreeing to a different allocation of Relocation Costs from the default allocation in the regulation. Surrey has sought to portray FEI's submission regarding a conditional order as something underhanded - a continuation of a pattern of subverting the public interest, from which the Commission should steer clear.[9] Leaving aside for the moment Surrey's characterization of past disputes (which FEI addresses later), FEI submits that a conditional order is a reasonable option.

19. The Commission routinely makes conditional orders. As just one among many examples: the Commission's approval of Fortis Inc.'s purchase of Terasen Gas was conditional upon the purchaser agreeing to a number of significant obligations. In that case, Fortis Inc. had the right to apply for approval to purchase Terasen Gas. The Commission concluded that customers needed to be protected, and thus imposed a number of conditions. The purchaser had to accept the conditions if it wanted to complete the transaction, but was under no

[9] See, for instance, Surrey Reply Argument, paras. 19-21.

obligation to complete the transaction. Surrey is similarly free to accept or reject conditions. The City is incorrect to characterize a conditional order intended to achieve the purpose of section 32 or 33 (whether that purpose is the public interest and/or just and reasonable rates) as extortionate, simply because the condition requires the party subject to the order to make a choice it would prefer not to make.

20. Surrey's argument is also premised on a distorted view of its "legal rights".[10] First, Surrey has no right to collect an Operating Fee. The City - like the municipalities representing a majority of FEI's customers, assets and revenues - has never even received an Operating Fee.[11] Moreover, the *Pipeline Crossing Regulation* only establishes a default allocation, and expressly contemplates contracting out. Surrey's "legal right", at best, would be a right to default to a particular allocation in the absence of an agreement to the contrary. Just as Surrey would have been free to negotiate a different allocation with FEI in the lead-up to this proceeding, it is also free to agree to another allocation if the Commission were to give it the choice between the default allocation and an Operating Fee.

21. Although the City presents the *Pipeline Crossing Regulation* default allocation as epitomizing the public interest, the fact that the allocation is only a default allocation contradicts the notion that other allocations are somehow unreasonable. The ability to contract out shows that allowing flexibility is the intent of the Regulation, and that any variety of agreed allocations would be equally defensible.

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[10] Surrey Reply Argument, para. 22.

[11] This is discussed in FEI's May 31 Final Submission, para. 57.

PART THREE: **OPERATING FEE**

A. THE OPERATING FEE IS CONTRACTUAL CONSIDERATION (PARA 25)

22. Surrey states that contractual consideration "is an inapt characterisation" of an Operating Fee. Instead, Surrey says "The operating fee can be viewed as a rent for FEI's use and occupancy of public places."[12] The rent analogy, which reflects Surrey's gravitation towards the "qualitative" (restitutionary) approach it had initially rejected, is inapt given FEI's statutory right to own and operate facilities in the municipality. While FEI disagrees with the rent analogy, it should also be noted that rent is a form of contractual consideration (under a lease). An operating agreement is, as the name suggests, an agreement. The correct legal characterization of promises and funds exchanged under a contract is consideration.

B. SURREY WOULD STILL OVER-COLLECT, EVEN ACCOUNTING FOR ONLY SOME OF FEI'S TAXES (PARA 26-31)

23. FEI made the point in its May 31 Final Submission that the Company already pays taxes, for which Surrey's newly-embraced compensation focus does not account.[13] Surrey emphasizes in paragraphs 26 to 31 that some of FEI's taxes go to other authorities, or for police and fire. This fact does not diminish FEI's point. FEI's point was that, even assuming an Operating Fee should be viewed as restitutionary (which it is should not), an Operating Fee of the magnitude sought by the City would significantly over-collect the costs estimated by Aplin Martin when viewed in tandem with taxes paid by FEI to the municipality. This remains the case.[14]

C. THE CITY'S ABILITY TO COLLECT INDIVIDUAL PERMIT FEES IS IN DOUBT (PARA 34)

24. FEI observed in its May 31 Final Submission that an Operating Fee of 0.7% of delivery margin may be generous, given the doubt surrounding the City's ability to charge for

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[12] Surrey Reply Argument, para. 25.

[13] May 31 Final Submission, para. 96.

[14] The $5,136,635 sum of (a) FEI's 2017 1% taxes on utility infrastructure of $1,176,000 (see Surrey Reply Argument, para. 27) and (b) the $3,960,635 Operating Fee that Surrey's proposal would have yielded in 2017 (see May 31 Final Submission, para. 73), exceeds the Aplin Martin estimate of ~$3.3 million by a wide margin, even before accounting for the other general taxes paid by FEI and retained by the City.

individual permits. Surrey argues that permit fees are permissible notwithstanding section 121 of the UCA: "FEI cites section 121 of the UCA, but municipal permit fees in no way supersede or impair a power conferred on the BCUC or an authorization granted to FEI."[15]

25. FEI maintains that the question of the effect of section 121 need not be resolved in this case. Nevertheless, Surrey's substantive argument side-steps the crux of the legal issue. The problem is that the fees are charged for the purposes of acquiring a permit. A permit is municipal approval to undertake activity that, by definition, would not be permitted in the eyes of the municipality but for the issuance of the permit. The City would be requiring a payment when denying the permit and precluding the activity is not an option, since FEI is already authorized to own and operate a natural gas system under a CPCN.

26. In any event, Surrey appears to concede that the Commission would have the power under section 121 to determine that individual permits and the fee should not be required,[16] although the City caveats that statement with a requirement that the bylaws must be an excessive burden. In the Coldstream case cited by Surrey as an instance of an excessively burdensome requirement, the example used by the Commission in that case of the adverse impact of the offending provision was that it would have enabled Coldstream to require a plumbing permit and charge the associated fee.[17]

27. Ultimately, the Commission does not need to address section 121 in this proceeding. The issue of whether Surrey could charge permit fees in the absence of Operating Terms is only relevant to the question of whether FEI's proposed Operating Fee is already generous to Surrey. The ability to charge individual permit fees, if that ability exists in law,

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[15] Surrey Reply Argument, para. 34.

[16] Surrey Reply Argument, para. 35.

[17] In the Coldstream decision, the Commission stated: "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: [BCUC quotes section 121]." (Coldstream Decision, pp. 21 and 22 - Tab 9 of Surrey's May 31 Final Argument, PDF p.165).

would never justify an Operating Fee that is over $3 million greater[18] than FEI's proposed Operating Fee.

D. BILL IMPACTS OF CITY'S PROPOSED OPERATING FEE ARE MATERIAL (PARA 39)

28. The City responds to FEI's discussion of bill impacts associated with an Operating Fee by suggesting FEI ought to have accounted for "any offsetting reduction to the municipal taxes those FEI customers would pay as a result of the operating fee."[19] There is no evidence that Surrey would reduce taxes if it were to receive an Operating Fee.

E. INTERNAL INCONSISTENCY IN SURREY'S "USER PAY" RATIONALE (PARA 14)

29. Surrey continues to characterize its Operating Fee as a "user pay model".[20] FEI's Reply Submission, at paragraphs 27 to 29, addresses this argument. FEI adds that the City's "user pay" argument (quoted in the left column below) is inconsistent with its argument that FEI's significant taxes are irrelevant to whether an additional ~$4 million annual Operating Fee[21] is appropriate (quoted in right column below).

Advocates User Pay Operating Fee	**Dismisses Nexus Between Taxes and Use of Services**
"As discussed previously, the operating fee will provide for more of a user pay model and reduce the burden on the City's taxpayers (many of whom are FEI customers)."[22]	"This FEI argument is essentially that FEI pays its municipal taxes and so it should not have to pay any other fees, including an operating fee, to the City. The portion of the taxes and levies paid by FEI and retained by the City does not compensate the City for all of its costs due to FEI's use and occupancy of public places in Surrey, and this is an inapt argument in any event. FEI's argument incorrectly implies a nexus between overall taxes paid by the individual taxpayer, and the services received and/or costs imposed by that taxpayer. For example, school taxes are not based on whether the taxpayer or their family uses the public school system. Levies for fire and police services are not based on whether the taxpayer actually uses these services."[23]

[18] 2017 Operating Fee would have been $3,960,635. See FEI's May 31 Final Submission, para. 73.

[19] Surrey Reply Argument, para. 39.

[20] Surrey Reply Argument, paras. 14, 25 and 36.

[21] 2017 Operating Fee would have been $3,960,635. See FEI's May 31 Final Submission, para. 73.

[22] Surrey Reply Argument, para. 36.

[23] Surrey Reply Argument, para. 32.

30. In other words, Surrey believes that the “user pay” principle should apply to FEI’s Operating Fee, but not to FEI’s taxes.

31. Surrey’s “user fee” rationale is also an ill fit with its preferred formula for calculating an Operating Fee, which varies significantly with commodity prices. Natural gas customers in Surrey are using public places and the delivery system to the same degree, regardless of commodity prices.

PART FOUR: **FEI HAS PROPOSED A FAIR APPROACH TO RELOCATION COSTS**

A. RELOCATION COSTS ARE A SIGNIFICANT ISSUE FOR FEI/FEI CUSTOMERS (PARAS 39-40)

32. In paragraph 39, Surrey quotes the heading from Part 5B of FEI's Final Submission. FEI's heading had indicated that the cost to relocate FEI's facilities have been at "significant cost to FEI/FEI customers". The point that FEI was making in that section (admittedly, the wording of the heading that Surrey has latched on to did not match the content of the section) was that the costs associated with Surrey's requests to relocate natural gas facilities are significant, making Relocation Cost allocation an important issue for FEI/FEI customers.

B. THERE ARE TWO SIDES TO SURREY'S HISTORICAL GRIEVANCES (PARAS 39-40)

33. A recurring theme in Surrey's Reply Argument is that FEI has "taken unfair advantage of the City"[24] in the past. The crux of Surrey's "unfair advantage" argument is this: "FEI has withheld pipeline permits for the City's projects until the City is in the position that it has no option but to accede to FEI's inappropriate demands, including demands that the City pay for 100 percent of FEI's costs to relocate its facilities plus 100 percent of FEI's costs to upgrade and better its facilities."[25] It suggests that FEI's "habit of withholding pipeline permits" is inconsistent with the OGAA.[26] FEI has already explained why addressing historical disputes is unproductive, and how the existence of historic disputes only underscores the benefit of moving forward with new Operating Terms. In any event, Surrey's argument is based on a faulty premise regarding FEI's legal obligations and its own legal rights.

(a) The City's Complaint Regarding Crossing Permits Is a Longstanding Dispute

34. The City's position that pipeline crossing permits must be issued by FEI independent from cost allocation is a long-standing one, and is one that has long been disputed by FEI. Surrey even brought an unsuccessful judicial review application in early 2013,

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[24] Surrey Reply Argument, para. 40.

[25] Surrey Reply Argument, para. 39. See also paras. 40 and 50.

[26] Surrey Reply Argument, para. 56. Note that pipeline crossing permits are required only for High Pressure Pipeline crossings, and not the much more common Gas Mains.

suggesting that the OGC had erred in considering the issue of whether the 1957 Operating Agreement addressed FEI's issuance of pipeline crossing permits as well as cost allocation. Surrey's Petition was dismissed by the Court as an "abuse of process", and "unnecessary, scandalous, frivolous or vexatious" on several grounds, including by virtue of having included FEI as a Respondent simply for the purpose of seeking a declaration preventing FEI from arguing that the 1957 Agreement (with its relocation cost allocation unfavourable to Surrey) was an agreement governing pipeline crossing permits.[27]

35. In these circumstances, there is truth to the adage that there are two sides to every story. The best path forward for the Commission is to avoid wading into past disputes.

(b) FEI is Under No Obligation to Issue Pipeline Crossing Permits

36. The basis for Surrey's argument is set out in footnote 23 of its Reply Argument (p.20), and is that "It is inappropriate for FEI to withhold a pipeline permit for the purpose of demanding the municipality agree to conditions that are not necessary to protect the pipeline (such as cost allocation contrary to the municipality's rights under the *Pipeline Crossing Regulation*)." FEI submits that Surrey is implying a legal obligation on FEI where none exists. Section 76 of the OGAA expressly requires the OGC to issue permits to municipalities, and confines the OGC to imposing conditions "to protect the pipeline".[28] Such requirements are conspicuously absent in relation to the pipeline owner, and the municipality has recourse to the OGC if it cannot come to terms. Section 76(1) only says, in relation to a pipeline owner, that work can proceed if: "the pipeline permit holder [FEI] agrees in writing to the construction or

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[27] 2013 BCSC 1864 (CanLii), see for instance, paras. 13-18, 121, 128-147. https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1864/2013bcsc1864.pdf

[28] The relevant parts of section 76 of the OGAA provide:

> (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.

the carrying out of the prescribed activity [by Surrey], either specifically or by reference to a class of construction projects or activities."

(c) Surrey's "Right" is to Avoid Applying to the OGC if it Can Negotiate Acceptable Terms With FEI

37. Surrey's argument is also premised on an incorrect view of the City's rights.

38. The City's right under section 76 is the right to avoid having to apply to the OGC if it can negotiate mutually acceptable terms with the High Pressure Pipeline owner. With respect to Surrey's "rights under the *Pipeline Crossing Regulation*", the allocation methodology is only a default allocation. Surrey has the right to negotiate a different allocation (and FEI has the right to ask for a different allocation). FEI and Surrey have negotiated different allocations in the past.

39. Surrey emphasizes that "the municipality has a statutory right to approval to do its work".[29] Yet, at the same time, Surrey has no qualms about demanding from FEI/FEI customers an annual Operating Fee of roughly $4 million[30], plus other financial consideration, as a condition of FEI exercising the Company's statutory right to own and operate a natural gas system in the municipality. Surrey is entitled to make those demands, the parties have the right to negotiate mutually acceptable terms, and FEI ultimately has the right to apply to this regulator to set appropriate terms in the absence of agreement. The parallels with the pipeline crossing permit framework are obvious, only with the roles reversed.

C. FEI'S POSITION ON "SOUND ENGINEERING PRACTICES" HAS BEEN CONSISTENT THROUGHOUT (PARAS 41-43)

40. Surrey argues in paragraphs 41 to 45 that FEI has changed its position on the definition of Relocation Costs and that portions of FEI's Final Argument should be ignored. The crux of Surrey's argument appears to be that FEI had, in its Exhibit B1-12 Rebuttal Evidence,

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[29] Surrey Reply Argument, footnote 23.

[30] 2017 Operating Fee would have been $3,960,635. See FEI's May 31 Final Submission, para. 73.

implicitly withdrawn its request to have the definition of Relocation Costs include the phrase "sound engineering practices":

> Given that there is no indication whatsoever in FEI's final argument that FEI means to withdraw its Exhibit B1-12 evidence and take a new position in final argument (that is substantially at odds with FEI's position on the evidentiary record), it is clear that Part 5.C. of FEI's final argument misstates FEI's actual position on the definition of "Relocation Costs".[31]

41. FEI's position on referencing "sound engineering practices" has remained unchanged since the Application was filed:

- The requested order in FEI's Application has never been amended.
- As Surrey acknowledges, FEI continued to reference "sound engineering practices" in the responses to round 1 IRs.
- The passage that Surrey appears to be referencing from the Rebuttal Evidence was only re-confirming that betterments associated with internal company policy would not be included in the definition of Relocation Costs. Just as "there is no indication whatsoever in FEI's final argument that FEI means to withdraw its Exhibit B1-12 [rebuttal] evidence", there had also been no indication whatsoever in the Rebuttal Evidence that FEI had intended to change its position from the Application and Round 1 IR responses.
- FEI's responses to the second round of IRs, which post-dated the Rebuttal Evidence, made clear that the proposal remained unchanged. For instance, FEI provided confirmation in response to the question: "Please confirm that FEI's proposal would exclude the costs of increasing the size of a pipeline <u>unless there was an applicable legal requirement or sound engineering reason</u>."[32] [Emphasis

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[31] Para. 42

[32] Exhibit B1-14, CEC-FEI IR 2.13.1.

added.] There are several other examples of round 2 IRs discussing "sound engineering practices", including responses in the CEC-FEI IR 2.13 series:

> 13.3 Please provide a list of the types of changes that are normally included in upgrades or betterments as a result of complying with 'sound engineering practices'.
>
> Response:
>
> On relocation requests, 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) will not be charged by FEI to the municipality. 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.
>
> ….
>
> 13.5 Who is the arbiter of what constitutes 'sound engineering practice'? Please explain.
>
> Response:
>
> If the parties' respective engineers and other professionals cannot agree on what constitutes sound engineering practice in a particular circumstance or in respect of particular situations, either party may refer the matter to dispute resolution in accordance with Section 17 of FEI's Proposed Operating Terms.
>
> 13.6 How does FEI normally comply with the types of 'sound engineering practices' being referred to when there are no relocations or other activities requiring disruption to the facilities?

> Please explain and differentiate the types of situations in which FEI would initiate construction in order to comply with 'sound engineering practices' and those in which FEI would not initiate construction in order to do so.
>
> Response:
>
> In most cases, FEI is only required to upgrade its facilities to comply with laws, codes, standards, and sound engineering practices at the time when an existing asset is disrupted as a result of relocations or other activities.

42. FEI submits that the Commission should consider the body of evidence, and draw its own conclusions about whether FEI's Final Submission is consistent with FEI's evidence. FEI submits that the answer is clear.

43. On June 21, 2018, counsel for FEI filed a letter correcting an error in FEI's June 14 Reply Submission, which related to Surrey's submissions that FEI had changed its position regarding "sound engineering practices". Surrey's May 31 Final Argument, at paragraph 114, had summarized in a table the City's interpretation of FEI's proposal regarding the definition of "Relocation Costs", without suggesting that FEI had changed its proposal. In FEI's Reply Submission, counsel had mistakenly indicated[33] that the summary was accurate, when, in fact, Surrey had not referenced "sound engineering practices" in rows 1, 2 and 5 of its table (the table refers to "applicable Laws" and "codes and regulatory standards"). FEI's proposal, which is correctly summarized in paragraph 138 of FEI's May 31 Final Submission, uses the phrase "applicable Laws and sound engineering practices". This language is also used throughout FEI's Reply Submission.

44. The Commission, in the Coldstream decision cited by Surrey, considered it to be important to include a requirement that FEI perform work "in accordance with sound engineering practice". Its explanation: "The Commission agrees that the inclusion of "sound

[33] FEI Reply Submission, para. 53.

engineering practices" is required to ensure that the appropriate professional judgement is applied by FEI in its engineering within the Municipality."[34] The same logic applies in this case.

D. SURREY'S OWN BYLAWS ALLOW CITY TO BENEFIT FROM BETTERMENT (PARAS 44-45)

45. Surrey argues in paragraphs 44 and 45 that FEI's submissions regarding Surrey's bylaws "should be ignored" because "the City and FEI both agree that the costs of upsizing shall be excluded from 'Relocation Costs' rendering everything above about the City's unrelated By-law clearly inapplicable to any issue in this proceeding." FEI and the City do agree that upsizing of pipe that increases capacity relative to the existing pipe being relocated is excluded from Relocation Costs, but the comparison to Surrey's bylaws remains relevant. The bylaws contemplate that when the City receives a request to move its municipal facilities, the City will not pay for anything other than upsizing (even reimbursement for upsizing is at the City's discretion). The requesting party would thus be paying, at a minimum, the cost of keeping the City's assets compliant with Laws and standards. Applying that same framework to circumstances where FEI is the facility owner and the City is the party requesting a relocation would lead to the adoption of FEI's proposal with respect to both the definition of Relocation Costs and 100% reimbursement of Relocation Costs.

E. SURREY HAS INCORRECTLY PARAPHRASED FEI'S DESCRIPTION OF THE *PIPELINE CROSSING REGULATION* DEFAULT ALLOCATION (PARA 47)

46. In paragraph 47, Surrey suggests that FEI has provided "a misleading description of the allocation in the *Pipeline Crossing Regulation*. The regulation does not require FEI to bear 100 percent of its Relocation Costs in all cases…". FEI did not say "in all cases". FEI stated: "This would result in FEI (ultimately gas customers) bearing 100% of the Relocation Costs for <u>most</u> Gas Main and High Pressure Pipeline relocations triggered by the City." [Emphasis added.] FEI agrees with Surrey's description of the default allocation in paragraph 47 of Surrey's Reply Argument. FEI observed that "most" relocations would be borne entirely by FEI customers because the circumstances in which the default allocation is 50%-50% are limited to when the activity triggering the relocation work is the construction of a new highway. The cost of

[34] Coldstream Decision, p. 8 (Tab 9 to Surrey's May 31 Final Argument).

relocations involving existing roads, of which there are many in Surrey, would be allocated 100% to FEI.[35]

F. MORAL HAZARD CAN ARISE EVEN WITH "NOT FOR PROFIT" GOVERNMENT (PARAS 48)

47. Surrey dismisses FEI's submission that a "moral hazard" exists if Surrey can request relocations without bearing any cost, stating: "The risk posited by FEI is not real because the City has the duty to be fiscally responsible and to act in the public's interest."[36] The City is presumably not positing a fiduciary obligation in favour of FEI customers. A duty on the City owed to its constituents to be fiscally responsible would lead to limiting costs payable by the municipality, not minimizing costs for FEI's customers. A relocation request that saves taxpayers money at very significant cost to FEI customers is a legitimate concern. Surrey's request for a multi-million dollar annual Operating Fee is an example of Surrey prioritizing municipal finances over FEI customers.

G. WORK CAN BE COORDINATED TO REDUCE COSTS (PARA 4)

48. Surrey, in paragraph 4, addresses FEI's statement: "The party requesting the relocation can also perform work itself so that it retains control over costs." Surrey has misinterpreted FEI's comment to mean that the City "can relocate the FEI facilities so that the City retains control over all of the work." FEI must perform the physical relocation of natural gas facilities, simply due to the specialized nature of the work. FEI was referring to the fact that the City will already be performing excavation and preparation work in the same location for its own purposes. If the City is going to be paying 100% of the Relocation Costs, then there may be an opportunity to coordinate the work performed by FEI and the City such that, for instance, the City conducts more of the excavation, preparation or site restoration work in that

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[35] Exhibit B1-13, BCUC-FEI IR 2.15.2: "Based on the City's proposal, an example of a gas line relocation that would be 100 percent chargeable to FEI would be when the City upgrades any infrastructure or installs new utilities in an existing roadway which conflicts with FEI's High Pressure Gas Pipeline or Gas Main. Instead of changing the grade or redesigning the City utility to avoid FEI's gas line, the City would request FEI relocate the gas facility at no cost to the City. This would essentially have FEI rate payers subsidizing the City of Surrey projects."

[36] Surrey Reply Argument, para. 48.

location.[37] The Operating Terms are fine as is, without revision. Coordination of work is already addressed in the agreed provisions of the Operating Terms.[38]

H. AGREEMENT FACILITATES SURREY OBTAINING PIPELINE CROSSING PERMITS (PARA 49)

49. Surrey states in paragraph 49 that FEI incorrectly described the agreed process for the City to request pipeline crossing permits from FEI. FEI takes no issue with Surrey's characterization of the agreed process as set out in sections 8.2(b) and 13(b), which appears in the first and second bullets of paragraph 49 of Surrey's Reply Argument. FEI's point was that there is value to Surrey in being able to trigger relocations, as well as in FEI processing pipeline crossing permit requests within 10 days based on a pre-determined cost allocation and limitations on the types of conditions that FEI can impose. Surrey should expect to have to compromise on Relocation Cost allocation, or on other aspects of the Operating Terms, as part of achieving a fair balance overall.

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

[38] For instance, in the proposed Operating Terms FEI has to obtain a permit from the municipality, which triggers the ability of the City to require FEI to coordinate work under 5(d)(ii).

PART FIVE: **CONCLUSION AND ORDER SOUGHT**

50. The formulation of the legal test under sections 32 and 33 will not dictate the appropriate outcome in this proceeding. The parties agree that, however the legal test is formulated, the test is satisfied by a fair and balanced agreement. FEI submits that its proposed Operating Terms strike that fair balance, containing agreed provisions and reasonable financial concessions in favour of Surrey.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 28, 2018

[original signed by Matthew Ghikas]

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