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November 5, 2018

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, B.C.
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Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Mr. Wruck:

Re: FortisBC Energy Inc. (FEI)

Project No. 1598960

**Application to Exclude Employee Information from 2015 Data Order G-161-15
(the Application)**

**Response to the British Columbia Utilities Commission (BCUC) Panel
Information Request (IR) No. 1**

On May 23, 2018, FEI filed the Application referenced above. In accordance with BCUC Order G-201-18 setting out the Regulatory Timetable for the review of the Application, FEI respectfully submits the attached response to BCUC Panel IR No. 1.

If further information is required, please contact the undersigned.

Sincerely,

FORTISBC ENERGY INC.

Original signed:

Diane Roy

Attachments

cc (email only): Registered Parties

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- 1 • G-75-06
2 • G-49-07

3 Please explain your answer and differentiate between the jurisdiction with
4 respect to “Employee Information” and the jurisdiction with respect to other data.

5
6 **Response:**

7 This response elaborates on the following points:

- 8 • The referenced orders were not made solely on the basis of section 54 of the *Utilities*
9 *Commission Act* (UCA), as appears to be implied by the question. In the original KMI
10 Acquisition Decision, the BCUC also relied on section 44(2) when it came to dealing with
11 data.
- 12 • The data-related orders were addressing customer data and sensitive system-related
13 data, not employee data. The BCUC had jurisdiction to make orders such as G-116-05,
14 G-75-06 and G-49-07 under section 44(2) or section 54 to the extent that these orders
15 applied to customer information and sensitive system-related data.
- 16 • In any event, the BCUC’s power to impose conditions under section 54 is similarly
17 limited to conditions that relate to the BCUC’s core mandate, like customer and system
18 data.

19 The original Kinder Morgan acquisition proceeding went well beyond exploring data restrictions.
20 It addressed more fundamentally whether critical operational functions could be moved to the
21 US upon acquisition by Kinder Morgan. The focus was on impact to customers. There was **no**
22 **discussion** in the evidentiary record or the BCUC’s decision regarding employee data. A
23 search of the evidentiary record reveals no instances of the term “employee” appearing. The
24 same is true for the BCUC’s decision accompanying Order G-116-05 (the KMI Decision).

25 In the KMI Decision, the BCUC explained that it was making the data restriction order to
26 address concerns raised in the proceeding by interveners with respect to **customer** privacy and
27 to protect “**customer** interests”. Specifically, at p. 35 of the KMI Decision the BCUC states:

28 The Council of Canadians, Vancouver Chapter (Exhibit C11-8) raises concerns
29 about corporate practices with respect to the location of customer records and
30 possible impacts on the privacy of customer information if those records were to
31 be kept in the United States.

32 In response to those concerns, the BCUC made the following determination at p. 39:

33 With respect to the privacy concerns raised by the Council of Canadians,
34 Vancouver Chapter, and other concerns about gas procurement and other critical

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1 functions, the Commission Panel concludes that it would be appropriate to attach
2 further conditions to the approval of the Transaction **to protect customer**
3 **interests. The Commission Panel notes that under Section 44(2) of the**
4 **UCA, "...[a] public utility must not remove or permit to be removed from**
5 **British Columbia an account or record [required by the**
6 **commission]...except on conditions specified by the Commission.** Section
7 54(9) of the UCA also permits the Commission to attach conditions and
8 requirements to an approval under Section 54 that it considers necessary and
9 desirable in the public interest. In order to address concerns related to privacy
10 and the general removal of critical functions from the Utilities' service areas, the
11 Commission Panel concludes that it should establish a condition that requires
12 KMI not to change the geographic location of any existing functions or data
13 currently in the Terasen Utilities' service areas, without prior approval of the
14 Commission. [Emphasis added.]

15 This excerpt from the KMI Decision demonstrates two things.

16 First, the BCUC also relied on section 44(2) of the UCA in making the data restriction order in
17 2005.

18 Second, the order was made for the stated purpose of protecting **customers**, not employees.
19 The fact that the order was tied to protecting customer data and customer interests is a key
20 distinguishing feature from the 2015 Data Order that included Employee Information as well. As
21 FEI has stated in its submissions on jurisdiction in this proceeding, FEI agrees that the
22 regulation of customer information is necessarily incidental to the BCUC's statutory role. The
23 BCUC has jurisdiction over the terms and conditions of utility service, which it exercises when
24 setting just and reasonable rates under section sections 59-61 of the UCA. Customer
25 Information is collected as a result of the customer taking service under FEI's BCUC-approved
26 Tariff, so there was some nexus between Order G-116-05 as it relates to customers and
27 determining the public interest in allowing the KMI transaction to proceed, subject to the
28 customer data restriction conditions. A similar nexus exists between sensitive information
29 related to system operations and the BCUC's core mandate. That nexus is absent when
30 considering whether copies of employee information still retained on servers in BC can be sent
31 to a pension actuary in the US.

32 In so far as the BCUC's jurisdiction over Employee Data is concerned, nothing turns on whether
33 the original KMI Decision data orders (or the 2006 and 2007 orders) were made citing section
34 44(2) or section 54 or both. The power to impose conditions under section 54, although broadly
35 worded, is still limited to imposing conditions that flow from the BCUC's core mandate. The
36 Supreme Court of Canada in *Atco Gas* considered a similarly broadly worded power to impose
37 conditions on a sale (the equivalent of section 52) and construed it in a manner consistent with
38 the regulator's "main function of fixing just and reasonable rates ("rate setting") and in protecting
39 the integrity and dependability of the supply system":

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1 7 The interpretation of the Alberta Energy and Utilities Board Act, R.S.A. 2000, c.
2 A-17 (“AEUBA”), the Public Utilities Board Act, R.S.A. 2000, c. P-45 (“PUBA”),
3 and the Gas Utilities Act, R.S.A. 2000, c. G-5 (“GUA”) (see Appendix for the
4 relevant provisions of these three statutes), can lead to only one conclusion: the
5 Board does not have the prerogative to decide on the distribution of the net gain
6 from the sale of assets of a utility. The Board’s seemingly broad powers to make
7 any order and to impose any additional conditions that are necessary in the
8 public interest has to be interpreted within the entire context of the statutes which
9 are meant to balance the need to protect consumers as well as the property
10 rights retained by owners, as recognized in a free market economy. The limits of
11 the powers of the Board are grounded in its main function of fixing just and
12 reasonable rates (“rate setting”) and in protecting the integrity and dependability
13 of the supply system. (ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities
14 Board), 2006 SCC 4) [Emphasis added.]

15 The subsequent BCUC orders G-75-06 and G-49-07 reflected the original purpose and
16 jurisdiction of Order G-116-05. As was the case with the original Kinder Morgan proceeding,
17 there was no suggestion in the record that employee data was being addressed in these two
18 proceedings. The same is true for the BCUC’s decisions accompanying Orders G-75-06 and G-
19 49-07.

20 Accordingly, FEI believes that the BCUC had jurisdiction to make orders such as G-116-05, G-
21 75-06 and G-49-07 under section 44(2) to the extent that these orders applied to customer
22 information and other sensitive system information. FEI notes, however, that the scope and
23 effect of the 2005, 2006 and 2007 orders has no practical implication at this point. As discussed
24 in FEI’s response to BCUC Panel IR 1.1.1.1, the BCUC ordered in Order G-161-15 (citing
25 section 44 only) that the above-noted orders were revoked and no longer in effect to the extent
26 that they relate to data storage.

27

28

29 1.1.1 If FEI believes that the BCUC did not have jurisdiction under section 54
30 to issue the above named orders with respect to the location of servers
31 and data, does FEI believe that these decisions should also be
32 reconsidered? Please explain your answer.
33

34 **Response:**

35 As FEI discussed in its response to BCUC Panel IR 1.1.1, the BCUC had also cited section
36 44(2) in the original KMI Decision. The BCUC had jurisdiction to make orders such as G-116-
37 05, G-75-06 and G-49-07 under section 44(2) because they applied to customer and other



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1 sensitive information. The same would have been true had the BCUC relied on section 54 for
2 this purpose.

3 In any case, these earlier orders do not need to be reconsidered as part of this Application.
4 Effective the date of Order G-161-15, the restriction imposed under Orders G-116-05, G- 75-06,
5 and G-49-07, that the location of data and servers providing service to FEI be restricted to
6 Canada, was removed and is no longer in effect. The 2015 Data Order stated:

7 NOW THEREFORE pursuant to section 44 of the Utilities Commission Act, for
8 the reasons set out in the decision that is issued concurrently with this order, the
9 Commission approves FortisBC Energy Inc.'s application as set out in Recital D
10 of this order subject to FortisBC Energy Inc. continuing to be owned and
11 controlled by a Canadian company located in Canada. FortisBC Energy Inc. is to
12 comply with all determinations and directives set out in the decision.

13 The recital referenced by the BCUC provided in part:

14 D. The approval sought by FEI is as follows:

15 (a) Effective the date of this order, the restriction imposed under Orders G-
16 116-05, G-75-06, and G-49-07, that the location of data and servers
17 providing service to FEI be restricted to Canada, is removed and no
18 longer in effect.

19 Accordingly, even if these orders had previously been made absent jurisdiction, they have since
20 been removed and are no longer in effect, which negates the need to reconsider them in the
21 present circumstances.

22
23
24

25 1.1.1.1 If the BCUC were to reconsider the above named orders with
26 respect to their conditions restricting the location of servers
27 and data, please explain on what basis FEI would consider
28 applying for such reconsideration, and what regulatory process
29 FEI believes would be most appropriate.

30
31 **Response:**

32 Please refer to the responses to BCUC IRs 1.1.1 and 1.1.1.1. FEI does not believe that these
33 orders need to be reconsidered at this time.

34

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1 **2.0 Reference: FEI Application to Exclude Employee Information from 2015 Data**
2 **Order G-161-15 (Application), Exhibit B-1, Section 1.1, p. 1, Section**
3 **4, p. 5; FEU 2015 Remove Data Location Restriction Application,**
4 **Order G-161-15**
5 **BCUC Jurisdiction**

6 FEI's Application on page 1 states:

7 Commission Order G-161-15 (2015 Data Order) established restrictions on FEI's
8 ability to send data – defined as “Customer Information”, “Sensitive Information”
9 and “Employee Information” – outside of Canada. In particular, the 2015 Data
10 Order required that “Employee Information” be encrypted or de-identified before
11 being stored outside of Canada, and that encryption keys must be kept in
12 Canada. In this Application, FEI is respectfully requesting:

- 13 • an order pursuant to section 99 of the *Utilities Commission Act* (UCA) that
14 the portion of Order G-161-15 applicable to “Employee Information” be
15 rescinded; or alternatively,
- 16 • an order pursuant to section 88(2), exempting from Order G-161-15 all
17 “Employee Information” or, at minimum, particular employee data
18 (Pension Data) held by FEI's pension actuaries, Willis Towers Watson
19 (WTW or Towers).

20
21 Further, page 5 of the Application states:

22 ...the Commission had relied upon section 44 of the UCA to issue the 2015 Data
23 Order, nothing that it was the only potential basis for finding jurisdiction. Section
24 44 does refer to the location of “accounts and records”, but the section must be
25 interpreted with regard to the purpose of the legislation and intention of the
26 Legislature. The purpose and intent of section 44 is to ensure that records are
27 available to allow the Commission to regulate the utility, not about protecting
28 privacy or dictating how and where electronic copies must be stored. The 2015
29 Data Order was beyond the Commission's jurisdiction as it related to Employee
30 Information.

31 Order G-161-15 states:

32 D. The approval sought by FEI is as follows:

- 33 (a) Effective the date of this order, the restriction imposed under Orders
34 G-116-05, G- 75-06, and G-49-07, that the location of data and
35 servers providing service to FEI be restricted to Canada, is removed
36 and no longer in effect.

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- 1 (b) For the purposes of this order:
- 2 • **“Customer Information”** means information of or about the FEI
- 3 residential, commercial, or industrial customers.
- 4 • **“Employee Information”** means information of or about the FEI
- 5 employees.
- 6 • **“Sensitive Information”** includes:
- 7 • financial, commercial, scientific or technical information, the
- 8 disclosure of which could result in undue financial harm or
- 9 prejudice to the FEI; and
- 10 • information that relates to the security of the FEI critical
- 11 infrastructure and operations, the disclosure of which could
- 12 pose a potential threat to the FEI operations or create or
- 13 increase the risk of a debilitating impact on the safe and
- 14 reliable operation of the FEI system.
- 15 • **“Encrypted”** means an encryption methodology using current
- 16 industry standards for secure encryption.
- 17 • **“De-identified”** means a de-identification methodology
- 18 consistent with current industry practice for the purpose of
- 19 protecting personal information.
- 20 • **“Encryption keys”** and **“De-identification keys”** mean any
- 21 information or methodology used to access encrypted or de-
- 22 identified data.
- 23 (c) Effective as the date of this Order, FEI is permitted to store data on
- 24 servers located outside of Canada, provided that data containing
- 25 **Customer Information, Employee Information, or Sensitive**
- 26 **Information**, or any combination thereof, must be either **Encrypted**
- 27 or **De-identified** if such data is to be stored on servers located
- 28 outside of Canada.
- 29 (d) **Encryption keys** and **De-identification keys** for **Encrypted** or **De-**
- 30 **identified** FEI data stored outside of Canada must be stored on
- 31 servers located within FEI’s data centres that are located in Canada.
- 32 2.1 Please confirm that the Application relates to “Employee Information” only, and
- 33 not the “Customer Information” and “Sensitive Information” to which Order G-
- 34 161-15 also applies.
- 35



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1 **Response:**

2 Confirmed. FEI believes that the BCUC had jurisdiction to make the order with respect to
3 “Customer Information” and “Sensitive Information”. There is a nexus between restricting the
4 location of copies of “Customer Information” and “Sensitive Information” and the BCUC’s “main
5 function of fixing just and reasonable rates (“rate setting”) and in protecting the integrity and
6 dependability of the supply system” (quoting from *Atco Gas*, para.7). That nexus is absent
7 when it comes to regulating whether copies of “Employee Information” (where the originals are
8 still available in British Columbia) can be sent to a pension actuary outside of Canada.

9

10

11

12 2.2 Please confirm that in the Application “Employee Information” applies only to
13 recital D (b) through D (d) of Order G-161-15, and not to section D (a) which
14 removes the restrictions on all data that were imposed by Orders G-116-05, G-
15 75-06, and G-49-07. Please explain your answer.

16

17 **Response:**

18 Confirmed. The application does not seek any relief in respect of section D(a), which provides
19 as follows:

20 (a) Effective the date of this order, the restriction imposed under Orders G-116-
21 05, G- 75-06, and G-49-07, that the location of data and servers providing
22 service to FEI be restricted to Canada, is removed and no longer in effect.

23 The relief sought relates to recitals D(b) through D(d). Specifically, FEI seeks an order pursuant
24 to section 99 of the UCA that these portions of Order G-161-15, as applicable to “Employee
25 Information”, be rescinded.

26 The following blackline is provided for additional clarification, with deletions sought in
27 strikethrough:

28 D. The approval sought by FEI is as follows:

29 (a) Effective the date of this order, the restriction imposed under Orders
30 G-116-05, G- 75-06, and G-49-07, that the location of data and
31 servers providing service to FEI be restricted to Canada, is removed
32 and no longer in effect.

33 (b) For the purposes of this order:

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- “**Customer Information**” means information of or about the FEI residential, commercial, or industrial customers.
 - ~~“**Employee Information**” means information of or about the FEI employees.~~
 - “**Sensitive Information**” includes:
 - financial, commercial, scientific or technical information, the disclosure of which could result in undue financial harm or prejudice to the FEI; and
 - information that relates to the security of the FEI critical infrastructure and operations, the disclosure of which could pose a potential threat to the FEI operations or create or increase the risk of a debilitating impact on the safe and reliable operation of the FEI system.
 - “**Encrypted**” means an encryption methodology using current industry standards for secure encryption.
 - “**De-identified**” means a de-identification methodology consistent with current industry practice for the purpose of protecting personal information.
 - “**Encryption keys**” and “**De-identification keys**” mean any information or methodology used to access encrypted or de-identified data.
- (c) Effective as the date of this Order, FEI is permitted to store data on servers located outside of Canada, provided that data containing **Customer Information**, ~~**Employee Information**~~, or **Sensitive Information**, or any combination thereof, must be either **Encrypted** or **De-identified** if such data is to be stored on servers located outside of Canada.
- (d) **Encryption keys** and **De-identification keys** for **Encrypted** or **De-identified** FEI data stored outside of Canada must be stored on servers located within FEI’s data centres that are located in Canada.
- 2.3 Does FEI believe that the BCUC had jurisdiction under any section of the UCA to make Order G- 161-15 recital D (a) rescind the restriction regarding “Employee Information”? Please explain your answer.

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Response:

For the reasons stated above in response to BCUC IR 1.1.1, FEI does not believe that the prior restrictions under orders G-116-05, G-75-06, and G-49-07 had applied to Employee Information. If those orders had in fact purported to apply to Employee Information, then they would have been *ultra vires* and of no force or effect from the outset to that extent.

In the hypothetical scenario where orders G-116-05, G-75-06, and G-49-07 had applied to Employee Information, the BCUC would have had jurisdiction in 2015 to rescind them on the basis that the prior orders were made without proper jurisdiction. The BCUC has the jurisdiction to make determinations regarding the scope of its jurisdiction / powers, and is required to consider each case on its merits (UCA, s. 75 “The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions”). This is the same jurisdiction that FEI is asking that the BCUC exercise in this proceeding.

The question seems to be asking whether the BCUC is stuck in a circular situation where it cannot reconsider any order made without jurisdiction. That circularity does not arise because it must consider each case on its own merits and determine its own jurisdiction. Applying the reasoning implicit in the question would, taken to its logical conclusion, allow an administrative tribunal to expand its powers indefinitely by making orders that exceed its jurisdiction and then assert that it lacks jurisdiction to reconsider them. That would be contrary to principles of administrative law, and would represent an unlawful fettering of its discretion contrary to section 71 of the UCA.

2.4 Does FEI believe that if recital D (a) of Order G-161-15 were to be rescinded with respect to “Employee Information”, the restrictions imposed on “Employee Information” by Orders G-116- 05, G-75-06, and G-49-07 would continue to apply? Please explain your answer.

Response:

As explained in FEI’s response to BCUC Panel IR 1.2.2, item D(a) would not be affected by the order that FEI is seeking. The only references to Employee Information in Order G-161-15 are in D(b) and (d), and FEI’s requested order is limited to striking those references.

As stated in FEI’s response to BCUC Panel IR 1.2.1, FEI does not believe that the prior restrictions under orders G-116-05, G- 75-06, and G-49-07 had applied to Employee Information in any event. That requirement was introduced for the first time in 2015.