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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: Application to Exclude Employee Information from 2015 Data Order G-161-15
Reply to MoveUp on Jurisdiction

We enclose for filing in the above proceeding FortisBC Energy Inc.'s Reply to MoveUp on Jurisdiction, dated December 3, 2018.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Matthew Ghikas
Personal Law Corporation
MTG/gvm

Enc.

BRITISH COLUMBIA UTILITIES COMMISSION

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

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

FortisBC Energy Inc.'s

Reply to MoveUP on Jurisdiction

December 3, 2018

FASKEN MARTINEAU DUMOULIN LLP
Matthew T. Ghikas
David Curtis

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Part One: **INTRODUCTION**

1. The Parties exchanged detailed written submissions on jurisdiction during July and August. Order G-161-18 then set a timetable for further reply by FEI, sur-reply by interveners, and sur-sur reply from FEI. Following MoveUP's sur-reply on October 16, 2018 (which was titled Final Argument), and before FEI had responded, the timetable was suspended to allow for Panel IRs to FEI. Order G-201-18 gave interveners an opportunity to comment on FEI's responses to Panel IRs as well. Accordingly, these submissions provide FEI's reply to:.

(a) MoveUP's Final Argument filing dated October 16, 2018 ("MoveUP's Second Submission") and

(b) MoveUP's comments on FEI's responses to Panel IRs, dated November 16, 2018 (Exhibit C1-5) ("MoveUP's Third Submission").

2. FEI does not have any reply to CEC's submissions as CEC continues to agree with the entirety of FEI's submissions.

3. MoveUP's arguments in its Second and Third Submissions added little to the arguments it had already filed. MoveUP's arguments are without merit. FEI respectfully submits that the BCUC should find that Order G-161-15 is invalid as it relates to Employee Information.

Part Two: **REPLY TO MOVEUP'S SECOND SUBMISSION**

4. The issues raised by MoveUP in its Second Submission, and a summary of FEI's response to each, are as follows:

(a) Issue 1 - MoveUP suggests that FEI has conceded that employee information is subject to section 44(1) of the Utilities Commission Act (the "Act").

FEI has not made the concession suggested by MoveUP. FEI has acknowledged that pension cost information is relevant to the Commission's rate setting

mandate. FEI's submission is that the BCUC cannot make orders regarding how and where additional copies of information that is already accessible to the BCUC are stored for the purpose of regulating employee privacy.

(b) Issue 2 - MoveUP argues that the only limitation on the BCUC's jurisdiction under section 44(2) is that any decision it makes be "lawful" and that the Data Order meets the requirement of being "lawful".

FEI agrees with MoveUP's general statement that tribunal decisions must be lawful. However, MoveUP fails to recognize what a lawful decision requires according to the ATCO decision. When the requirements of ATCO are properly considered, the impugned provisions of the Data Order are demonstrably "unlawful".

(c) Issue 3 - MoveUP clarifies that it does not take the position that FEI has attorned to the Data Order, and now argues instead that FEI previously acknowledged that the BCUC has jurisdiction to make the order at issue.

MoveUP's position about "acknowledgement" is also inconsistent with the jurisprudence cited by FEI in its Reply Submission. The law is that the consent of a party to a tribunal proceeding cannot confer on a tribunal any power to act beyond its jurisdiction.

5. FEI's detailed reply submissions on these three issues are as follows:

A. LIMITING THE STORAGE OF COPIES FOR THE PURPOSE OF REGULATING EMPLOYEE PRIVACY DIFFERS FROM USING PENSION DATA IN RATE SETTING

6. MoveUP argues that FEI had conceded in paragraph 7 of FEI's August 17, 2018 **Reply Submission** that Employee Information is subject to section 44 of the Act. MoveUP is incorrect.

7. The relevant paragraphs from FEI's August 17, 2018 Reply Submission had read:

> 7 There is no question that the Commission's rate setting mandate requires the Commission to have access to information on pension costs. As MoveUP's Submission shows, FEI routinely provides information on pension costs in the context of Annual Reviews. These costs inform FEI's cost of service.
>
> 8. MoveUP is glossing over a critical distinction that FEI is making between:
>
> - the power to make orders for the purpose of ensuring that information required for the regulation of FEI is accessible to the Commission in BC, and
>
> - regulating how and where additional copies of already accessible information are stored for the purpose of regulating employee privacy.

8. MoveUP has mischaracterized FEI's position by referring only to paragraph 7 and ignoring paragraph 8 as set out above. In paragraph 8 of its Reply Submission, FEI had made a "critical distinction" that MoveUP does not address.

9. Pension cost information is relevant to the BCUC's rate setting mandate. However, there is no nexus between the BCUC's mandate and regulating how and where additional copies of information that is already accessible to the BCUC are stored for the purpose of regulating employee privacy. There is also a difference between the kind of aggregated employee data that the BCUC requires to consider pension costs in a rate hearing, and the type of individual employee information at issue in this proceeding.

B. THE DATA ORDER IS UNLAWFUL AS IT RELATES TO THESE COPIES OF EMPLOYEE INFORMATION

10. The second argument made in MoveUP's Second Submission is that the BCUC can make any order it wishes under section 44 of the UCA so long as it is "lawful". FEI agrees that the BCUC must act lawfully in making orders under section 44. However, in order to do so the BCUC must follow the law as set out in the ATCO decision that FEI discussed at length in its Initial Submission. When the law from ATCO is applied, the impugned provisions of the Data Order are demonstrably "unlawful".

11. MoveUP's argument begins with the statement that the UCA places no express restrictions on the kind of conditions that the BCUC may specify under section 44(2). MoveUP then observes that when carrying out their statutory mandates tribunals make decisions that are either within or outside of their relevant sphere of expertise. MoveUP then argues that the Dunsmuir decision says that the former kind of decision attracts deference by a reviewing court, while the latter kind of decision must be reviewed on the standard of correctness. On the basis of these submissions, MoveUP offers the following summary about the proper application of section 44(2):

> 16. The general, axiomatic requirement that statutory decisions be made in accordance with the law demands that the Commission and other tribunals apply other, or general legal principles. This duty extends throughout the range of Canadian law, up to and including its pinnacle in our constitution and Charter of Rights and Freedoms . . . let alone provincial privacy protection laws.
>
> 18. Accordingly, where the Commission makes a s. 44(2) order related to the extra-provincial retention of s. 44(1) records, it must take care that the end result is lawful.
>
> 19. Commissions, boards and tribunals make decisions all the time that touch on privacy issues, whether or not privacy law is part of their own sphere of special expertise. As we have pointed out, nothing in the Personal Protection Privacy Act reserves its content to the exclusive domain of the Information and Privacy Commissioner. It is part of the general law of the province.
>
> 20. We respectfully submit that the Commission has the jurisdiction to enter into the inquiry – to ask itself whether privacy protection measures should attach to these regulatory records stored beyond the borders of British Columbia. The proper outcome of that inquiry is a separate issue from the question of jurisdiction. That is where the debate properly resides.

12. FEI agrees that section 44(2) includes no express restrictions on the "conditions" referred to in the section. FEI also agrees that a decision made by the BCUC under section 44 must be lawful. However, neither of these facts mean that the BCUC can make any decision it likes under section 44, so long as the decision is consistent with the general law of the province.

13. In order for a tribunal decision to be "lawful" it must be made in accordance with the law established by the Supreme Court of Canada in ATCO. FEI summarized the law from this case in its Initial Submission (paras. 9 to 16). As set out in those paragraphs and in ATCO, ostensibly broad provisions such as section 44 of the Act must be interpreted with regard to the purpose and objects of the section at issue and the legislation as a whole. As FEI has explained in its Initial Submission, when these considerations are properly taken into account, the application of section 44 is much more limited than MoveUP suggests, and cannot sustain the provisions of the Data Order at issue in this proceeding.

14. MoveUP's submission invites the BCUC to commit the same jurisdictional error that the Alberta Energy and Utilities Board (the "Board") made in the *ATCO* case. In the *ATCO* case the Board went beyond its statutory mandate and purpose in imposing unlawful conditions under a broadly worded statutory provision, similar to the one at issue in this case. The subject matter in *ATCO* was the Board's jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest. The Board applied a formula which provided that if the proceeds of sale exceeded the original cost they would be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the rate-paying customers. This condition was found to exceed the Board's statutory rate-setting mandate. If the BCUC sustains its original Data Order and does not grant the jurisdictional relief that FEI is seeking it will commit the very same error that the Board committed in *ATCO*.

15. MoveUP continues to rely heavily on the Dunsmuir decision in support of its position in this proceeding. Dunsmuir, which relates to the standard of review applied by a reviewing court, is inapplicable for the reasons that FEI articulated in paragraphs 28 through 33 of its **Reply Submission**. The principles applied by tribunals in determining their own jurisdiction are different from those applied by courts in reviewing tribunal decisions.

16. The fact that a court reviewing the Data Order might accord some deference to the BCUC's jurisdictional determination does not mean that the BCUC has unlimited and unfettered discretion to make any decision it likes under section 44. The BCUC must make the

determination that it believes is correct based on the principles outlined in the ATCO decision, not - as MoveUP is implicitly saying - what the BCUC thinks it might be able to get away with on review by the Court of Appeal.

17. In summary, the requirement that the BCUC act lawfully in exercising discretion under section 44 of the UCA requires that the BCUC interpret and apply this section with regard to the purpose and objects of the section at issue, and with the purpose of the Act as whole. As FEI has previously submitted, when the section is properly interpreted in this way, the only reasonable conclusion is that the section of the Data Order dealing with Employee Information was made without jurisdiction.

C. A PARTY CANNOT CONFER JURISDICTION BY CONSENT OR ACKNOWLEDGEMENT

18. The third issue raised by MoveUP in its Second Submission is a clarification of its position on the procedural history of the Data Order. MoveUP confirms that it does not rely on the principle of attornment in relation to the history of the Data Order. Instead, MoveUP says that FEI has consented to the Data Order and acknowledged MoveUP's understanding and interpretation of its scope.

19. The distinction that MoveUP is trying to draw between conferring jurisdiction by "consent" / "acknowledgement" and "attornment" is without a legal difference. The jurisprudence cited by FEI in its Reply Submission establishes the fundamental principle that the consent of a party to a tribunal proceeding cannot confer on a tribunal any power to act beyond its jurisdiction. FEI's submissions on this matter are found at paragraphs 59 to 64 of its **Reply Submission**.

Part Three: **REPLY TO MOVEUP'S THIRD SUBMISSION**

20. MoveUP, in its Third Submission, has clouded the issues by incorrectly characterizing FEI's position, confusing the various orders issued by the BCUC, exaggerating the implications of the order FEI is seeking, and misinterpreting section 44(1) as a default rule that no documents can be located outside of the province. FEI has articulated its position in its **Initial Submissions** and **Reply Submissions**, including explaining the difference between

regulating to ensure that the BCUC has access to information and limiting how and where FEI can store additional copies of employee information that already exists in B.C. for the purpose of regulating employee privacy. Specific responses are provided below.

A. REPLY TO SUBMISSIONS UNDER HEADING "FEI'S DILEMMA"

21. Under the heading "FEI's dilemma" MoveUP argues that FEI cannot reasonably take the position that the BCUC is permitted to regulate customer records, but cannot regulate employee records.

22. MoveUP summarizes its position under this heading as follows:

> Why does this create a dilemma? Because if the hair cannot be split – if FEI's arguments about jurisdiction are correct but there is no basis valid to differentiate between customer and employee records – then all of the privacy-protection provisions of Order G-161-15 are a nullity. In that event there is nothing left of the Order except with respect to sensitive system information. It becomes an all-or-nothing exercise.

23. FEI does not face the "dilemma" suggested by MoveUP. In its **Initial Submission**, to which MoveUP makes no reference, FEI provided detailed submissions on the key distinctions between Customer Information and Employee Information for the purposes of understanding the BCUC's jurisdiction. The relevant sections of FEI's Initial Submission are:

(a) Part Three, Section C, paras. 41 to 61; and

(b) Part Three, Section F, paras. 74 to 79.

24. FEI is not taking a position on the BCUC's jurisdiction regarding Customer Information in this Application.

B. REPLY TO MOVEUP'S COMMENTS ON FEI'S RESPONSE TO BCUC PANEL IR 1.1.1

Reply to "MoveUP's Answer No. 1" (p. 3)

25. BCUC Panel IR 1.1.1 asked FEI to comment on the BCUC's jurisdiction to make orders G-116-05, G-75-06 and G-49-07. FEI provided its comments on these orders in response.

26. MoveUP's comments on FEI's response to BCUC Panel IR 1.1.1 under the heading "MoveUP's Answer No. 1" appear to be comments about Order G-161-15, which is not the order that the BCUC asked about. For example, MoveUP states:

> The Order speaks for itself. It explicitly deals with employee information, including a definition and rules for its safekeeping. FEI put those words into its proposal. Obviously it did this deliberately.

Reply to "MoveUP's Answer No. 2" (p. 4)

27. FEI does not agree with MoveUP's comments under this heading. MoveUP's comments under this heading repeat arguments that it has previously made and to which FEI has previously responded in its Initial Submissions and Reply Submissions.

C. REPLY TO COMMENTS ON FEI'S RESPONSE TO BCUC PANEL IRS 1.1.1.1 AND 1.1.1.1.1

28. BCUC Panel IR 1.1.1.1 asked:

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

29. FEI's response was that FEI believes that the BCUC had jurisdiction to make Orders G-116-05, G-75-06 and G-49-07. FEI further commented that these orders do not need to be reconsidered as part of this proceeding because they have been rescinded by the BCUC.

30. In respect of this IR response, MoveUP insists that the BCUC's consideration of Order G-151-15 is "all or nothing", such that if FEI is correct about Employee Information, then

the whole of Order G-161-15 must be rescinded as a nullity. MoveUP goes on to state that if Order G-161-15 is found to be a nullity, then Orders G-116-05, G-75-06 and G-49-07 "could spring back to life and would need to be evaluated through the same lens as Order G-161-15". MoveUP hasn't cited any authority for its "all or nothing" proposition, and the portion of Order G-161-15 relating to Employee Information is readily severable from the rest of the order.

D. REPLY TO COMMENTS ON FEI'S RESPONSE TO BCUC PANEL IRS 1.2.0 SERIES

31. With respect to the 2.0 series of Panel IRs, MoveUP makes two comments. MoveUP's first comment is the following:

> First, in its response to IR 2.3, we now have FEI's agreement with our argument that "the BCUC has the jurisdiction to make determinations regarding the scope of its jurisdiction / powers. . . ." This is right at the heart of our position: the legislature has left it to the Commission to determine what considerations it may take into account when formulating a s. 44(2) condition.

32. MoveUP has confused FEI's position.

33. FEI does not dispute that the BCUC has the jurisdiction to make determinations regarding the scope of its jurisdiction. The BCUC is empowered under the Act to decided what is within its jurisdiction, and what lies outside of it. This does not mean that BCUC can create jurisdiction, or expand its jurisdiction beyond what the legislature intends and what is permitted under common law authority such as the ATCO decision. The BCUC's ability to make determinations regarding the scope of jurisdiction must not be equated with an unfettered and limitless right to impose conditions under the various provisions of the Act. A provision such as section 44(2) of the Act must be applied in accordance with the law from the ATCO decision. That decision prohibits the kind of broad, open-ended conditions that MoveUP suggests the BCUC can impose.

34. MoveUP's second comment is the following:

> Second, regarding its response to IR 2.4, we submit that FortisBC's formulation has stood the matter on its head. In its response to BCUC Panel IR 2.3, the utility said:

> ". . . 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."
>
> This is all wrong. A Commission order under section 44(2) is not restrictive: it is permissive. It provides relief from the default requirement of the Act, which is that all records the Commission requires of a utility be kept exclusively within British Columbia. The Act does not provide for the unconditional removal of any such records from British Columbia:
>
> …
>
> If FortisBC is correct that the earlier orders (G-116-05, G-75-06 and G-49-07) did not refer at all to regulatory records that consisted of employee information, then the default rule continued to govern those records and the impugned Order (G-161-15) provided the utility's earliest authorization to maintain the employee data in the USA.

35. MoveUP is misapplying section 44 of the UCA in arguing that the section establishes a "default" rule that all records of a public utility must be kept in B.C. Section 44(1) only applies to records that are "required by the commission to be kept in British Columbia."

> 44 (1) A public utility must have in British Columbia an office in which it must keep all accounts and records required by the commission to be kept in British Columbia.

36. It is permissive in the sense that the BCUC does not have to require any records be kept in B.C. Had the Legislature intended to establish a default rule, as alleged by MoveUP, then the section would have read as follows:

> 44 (1) A public utility must have in British Columbia an office in which it must keep all accounts and records ~~required by the commission to be kept~~ in British Columbia.

37. FEI repeats its position that the previous Orders G-116-05, G- 75-06, and G-49-07 did not apply to Employee Information. These prior orders were clearly concerned with customer information. The requirement regarding Employee Information was new in 2015.

Part Four: **CONCLUSION**

38. FEI respectfully submits that MoveUP's arguments are without merit. The BCUC should find that Order G-161-15 is invalid as it relates to Employee Information.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

[original signed by Matthew Ghikas]

Dated: December 3, 2018

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

[original signed by David Curtis]

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