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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 Application for Approval of Terms for an Operating Agreement ~ Project No. 1598915

We enclose for filing in the above proceeding FEI's Reply to the City of Surrey's Submissions, dated June 14, 2018.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

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

FortisBC Energy Inc.'s

Reply to City of Surrey Submissions

June 14 , 2018

TABLE OF CONTENTS

PART ONE: INTRODUCTION

1. The Parties agree that the outstanding issues are the Operating Fee, the definition of Relocation Costs, and the allocation of Relocation Costs. FortisBC Energy Inc.'s (FEI) May 31, 2018 Final Submission anticipated and addressed most of Surrey's arguments on the disputed matters. FEI's Reply Submission focusses on specific areas where further comment is necessary. It should be read in tandem with FEI's Final Submission, and silence should not be interpreted as agreement.

2. Surrey's Final Argument avoids, to a large degree, addressing the commercial reasonableness of each proposed financial term in the context of an overall Operating Agreement for this municipality. Surrey's primary rationale for its proposed Operating Fee is simply to point to the formula used by a subset of BC municipalities. In the case of the definition of Relocation Costs, and the allocation of those Relocation Costs, Surrey relies primarily on a jurisdictional argument. FEI submits that the Commission's role under section 32 of the UCA is to ensure that FEI's operations within this particular municipality are subject to terms that are, as a package, commercially reasonable and fair to FEI/FEI customers and Surrey. Fulfilling that mandate requires the Commission to address, head on, the more fundamental questions left unaddressed by Surrey's Final Argument.

3. Surrey's arguments in relation to the Operating Fee beg a number of fundamental questions, including:

(a) whether Surrey's plea for consistency among municipalities, taken to its logical conclusion, would actually suggest eliminating Operating Fees altogether, since the municipalities representing a majority of FEI's revenue, infrastructure and customers receive no Operating Fee;

(b) whether it makes commercial sense, and is fair to FEI's customers, to default to an Operating Fee methodology of unknown origin just because it has been used in the past for much smaller municipalities;

(c) whether it would be commercially reasonable to require FEI's customers to pay millions of dollars in Operating Fees annually when, in the absence of an Operating Agreement, FEI customers would only pay a small fraction of that amount in permit fees (that are disputed in any event), operating costs and dispute resolution;

(d) whether an Operating Fee justified based on Surrey's internal costs would have the flavour of another tax, rather than a fee, given that Surrey's individual permit fees would not recover all of Surrey's internal costs either;

(e) whether Surrey's argument that FEI's presence is a hardship requiring compensation is reasonable when, for instance:

- FEI is fulfilling the public interest and necessity by making natural gas service an option for all residents of Surrey; and
- FEI's public interest approval and presence in the municipality predated Surrey's ownership of the streets by decades.

4. The more fundamental questions begged by Surrey's arguments regarding the relocation of FEI's natural gas infrastructure include:

(a) whether it would be fair in the context of the broader agreement for Surrey to negate the legal and code compliance (grandfathering) of FEI's existing infrastructure by requiring relocation, and then require FEI customers to pay to restore compliance;

(b) whether the City would be left with any incentive to refrain from making costly and inefficient relocation requests if it had the contractual right to require a relocation and didn't pay the cost;

(c) whether the Commission would be fulfilling its statutory role under section 32 by accepting the default allocation methodology in the *Pipeline Crossing Regulation,*

without regard to the implications of that default allocation on the commercial reasonableness of the overall agreement; and

(d) whether it is reasonable to begin collecting an Operating Fee after 60 years of FEI operating without one if Surrey will not agree to a definition and allocation of Relocation Costs that, in the context of this agreement, fairly balances the interests of both parties.

5. The answers to all of these fundamental questions collectively favour FEI's proposed Operating Terms. The Commission's mandate as a rate regulator speaks to ensuring that FEI and its customers are well-served by any Operating Agreement, while being fair to the City. FEI's proposed Operating Terms achieve a mutually beneficial outcome. The City's proposals, by contrast, would produce a commercially unreasonable result that would be unfair to FEI/FEI customers.

6. The Commission is required by the UCA to consider the merits of the proposals in the particular context of this case. Surrey's jurisdictional arguments are similarly not an impediment to a fair result. The Commission can, and should, condition its approval of an Operating Fee and other terms favouring the City on the City's acceptance of reasonable provisions regarding Relocation Costs.

PART TWO: OPERATING FEE

A. INTRODUCTION

7. The City characterizes its arguments on the Operating Fee as "qualitative" and "quantitative".[1] The qualitative considerations are, in essence, all directed to Surrey being treated the same as the subset of municipalities that receive operating fees currently. Surrey says that "adopting the same 3.0 percent of FEI's gross revenues operating fee structure substantially supports transparency, public interest and consistency among FEI ratepayers, most of whom are also municipal taxpayers."[2] The "quantitative" argument, on which Surrey is now placing more weight than it had originally, positions the Operating Fee as compensation for harm done to the City by virtue of FEI's presence in the municipality. In this Part, FEI responds by making the following points:

- First, a fair outcome, rather than the dogmatic application of the Operating Fee methodology used for a subset of municipalities, should be the priority.
- Second, justifying an Operating Fee as compensation for Surrey's internal costs is both conceptually and factually flawed.
- Third, FEI's proposed Operating Fee is a reasonable amount to pay for FEI's use of public places.
- Fourth, Surrey's arguments against the use of delivery margin are without merit.

B. SURREY'S "QUALITATIVE" JUSTIFICATIONS AVOID THE TOUGH QUESTIONS

8. All four of these "qualitative facts" are focussed on the Operating Fees paid to other Inland and Vancouver Island municipalities. A fair outcome, rather than the dogmatic application of the Operating Fee methodology used for a subset of municipalities, should be the priority.

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[1] Surrey Final Argument, paras. 39 and 49.

[2] Surrey Final Argument, para. 40.

(a) Surrey is Silent on the Absence of Operating Fees in the Lower Mainland

9. Surrey's first and second "qualitative facts" are that other municipalities collecting operating fees all have those fees calculated based on 3% of gross revenues.[3] FEI has already addressed in its May 31 Final Submission how Surrey's appeal to consistency among municipalities is selective. Municipal operating agreements already differ in many respects, including whether an Operating Fee is collected at all. Surrey has made no attempt in its Argument to reconcile its demand for consistency with the fact that the municipalities representing the bulk of FEI's business - and that are more similar to Surrey - have never received an Operating Fee. In fact, there is no mention whatsoever in Surrey's Final Argument of the other Lower Mainland municipalities.

10. The 1977 Inquiry Report suggests that the consistent application of one methodology in the Inland Natural Gas service area likely resulted from individual municipalities negotiating "most favoured nation" clauses. That is, the original franchise agreements had obligated Inland Natural Gas to increase the franchise fee if Inland later agreed to pay a higher franchise fee to another municipality.[4] It is understandable that the methodology, and the municipalities' desire for continuity in revenue, would inform renewal negotiations even when the contracts were converted from franchise agreements to operating agreements. That rationale for using the 3% of gross revenues methodology as the starting point in negotiations is absent in circumstances where the *status quo* is no Operating Fee at all.

11. There is no recognition in Surrey's position that the agreed portions of the Operating Terms reflect concessions made by FEI that impose a greater burden, risk and cost on FEI/FEI customers than is associated with other operating agreements. Under the Surrey Operating Agreement, FEI must for example:

- Provide detailed plans and documentation of its proposed works;

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[3] Surrey Final Argument, para. 39.

[4] 1977 Inquiry Report, p.5: "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."

- Pay certain permit fees (which FEI would not otherwise have had to pay at all);
- Provide detailed estimates for relocation work and potentially stop work if the scope of work changes and an updated estimate needs to be provided; and
- Remove abandoned pipeline at its own cost if requested by Surrey.

FEI customers would face multiple burdens if a 3% Operating Fee is put in place, Surrey's approach to Relocation Costs is accepted, and yet all other terms of FEI's prposed Operating Terms are accepted as negotiated.

(b) Surrey's Reference to Recent Approvals Highlights Inconsistencies in its Arguments

12. Surrey's third "qualitative fact" is the Commission's recent approval of operating agreements for the Village of Montrose and the Village of Salmo that specify an operating fee based on 3% of gross revenues.[5] This variant on Surrey's central theme about wanting the same treatment as other municipalities suffers from the same logical inconsistencies outlined in FEI's May 31 Final Submission. Surrey isn't advocating for the protocols and processes from these two agreements to apply to Surrey. It wants protocols that make more sense in the context of BC's second largest municipality, as well as all of the concessions that FEI has made in other areas of the agreement. The same contextual approach Surrey is applying in advocating for more robust protocols should apply to the Operating Fee formula.

13. These villages had prior agreements with FEI that had specified an operating fee calculated on the basis of 3% of gross revenues. Their agreement to renew avoided any of the process that comes with resolving disputed terms. Avoiding a regulatory process is particularly valuable in the context of villages so small (each of the villages has fewer than 400 customers[6]), since the cost of a protracted negotiations and a regulatory proceeding could dwarf the fee and negate benefits for both parties. Moreover, the choice of methodology used for calculating the operating fee has very little practical impact for small villages - the operating fee will be very

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[5] Surrey Final Argument, para.39.

[6] BCUC-FEI IR 1.4.2.

small in dollar terms regardless. The circumstances of the present case differ significantly. Surrey has never collected an Operating Fee. It now wants to collect one based on a formula that, had it been in place over the past decade, would have yielded Operating Fees totalling in the range of $50 million. There is no agreement on the financial terms. It is well worth spending the time in this proceeding to explore the rationale for a 3% Operating Fee in circumstances where the value of the benefits flowing to FEI customers under an Operating Agreement with Surrey would come nowhere close to that amount.

14. The Commission has made it clear in the past that, in the case where parties are unable to agree, "The Commission would review the circumstances in each municipality and determine the appropriate terms and conditions on an individual basis."[7] It should follow that approach here, recognizing the difference between B.C.'s second largest municipality[8] and a rural village.

(c) Rejecting Chetwynd's Request for an 11% Fee is Not Synonymous With Concluding that 3% is Appropriate for Surrey

15. Surrey's fourth and final "qualitative" factor in support of a 3% Operating Fee is the fact that "BCUC previously rejected a municipality's [Chetwynd's] request [in 2006] 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."[9] Again, the context is missing from Surrey's argument.

16. Chetwynd had an existing franchise agreement dating back to 1980 (originally with Inland Natural Gas). The existing franchise agreement had provided for an franchise fee based on 3% of gross revenues as a term of the 21-year CPCN.[10] The fact that the existing fee was 3% was an important consideration, as is evidenced by the sentence from the Commission's reasons that immediately preceded (and was omitted from) the passage quoted

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[7] Letter No. L-4-02. Included at Tab 8 of Surrey's Final Argument.

[8] Surrey's population is approximately 543,940. BCUC-FEI IR 1.4.3.

[9] Surrey Final Argument, para. 39.

[10] Order No. G-17-06, Decision p.1.

by Surrey in paragraph 34 of its Final Argument: "The Commission notes that the Operating Fee under the expired agreement was 3 percent."

17. After receiving a 3% fee for more than 25 years, Chetwynd was seeking multiple fees that were estimated to sum to approximately 11% of FEI's gross revenues. It also wanted those fees not to be collected from customers in Chetwynd.[11] Terasen had not opposed extending the 3% operating fee. As with other approvals in such circumstances, there was no examination of the original basis for the 3% operating fee. This is not surprising given the lower stakes involved with a municipality of approximately 2,800 people (half are customers) where the value of the resulting fee was modest.[12] Preserving a longstanding methodology as part of a broader solution with a smaller Interior municipality is a fundamentally different circumstance from introducing a significant Operating Fee in BC's second largest municipality for the first time after 60 years without one.

(d) Surrey's Postage Stamping Argument is Conceptually Flawed

18. Surrey has also re-cast its appeal for an Operating Fee of 3% of gross revenues in terms of supporting the move to postage stamp rates.[13] In other words, this argument focusses on the equal treatment of FEI customers themselves, rather than equal treatment of the municipalities. Surrey's professed concern about the treatment of FEI's customers rings hollow given the costs that its proposals would impose on those customers. Leaving that aside, there are also factual and conceptual problems with Surrey's postage stamping argument.

Rate Design Principles Are About Allocating Costs, Not Increasing Them

19. Surrey is, in essence, trying to use rate design principles to justify the collection of a significant Operating Fee where one has never been paid before. It would be a novel application of rate design principles to use them to justify an increase in the <u>total</u> amount recovered from FEI's customers. Rate design principles are concerned with the equitable

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[11] Order No. G-17-06, Decision p.5 and p.7, para (b). Surrey has provided Order No. G-17-06 at Tab 4 of the supporting documents provided with its May 31, 2018 Final Argument.

[12] The fee in 2016 was only $47,438. BCUC-FEI IR 1.4.2.

[13] Surrey Final Argument, para. 40.

allocation of prudently incurred costs among customers. Rate design principles are only applied once a commercial rationale for incurring costs has been provided (i.e., to allocate the proverbial pie, after the prudent size of the pie has been determined).[14] Surrey has not provided a compelling commercial justification for the magnitude of Operating Fee that it seeks to collect from FEI's customers. Or, to continue with the pie metaphor, Surrey has not demonstrated that the size of the pie should increase in the first place.

20. Consistent with these rate setting fundamentals, the Commission has previously determined that operating agreements give rise to different issues from rate design:

> The Commission concludes that a municipal Franchise/Operating Agreement with the public utility that owns and operates the distribution system, and gas rates for customers served by the utility, raise issues that largely need to be resolved separately. To put it another way, the form and terms of a Franchise/Operating Agreement do not impact the Commission's conclusions on the appropriate allocation of gas rates to Terasen Gas customers in Chetwynd.[15]

Surrey's Approach Does Not Result in Uniform Treatment of FEI's Customers

21. While rate design principles cannot be used to justify additional costs, it is worth pointing out the fallacy of Surrey's assumption that the consistent application of its preferred calculation methodology across municipalities would result in all FEI customers being treated the same.

- First, FEI has customers located outside of any municipal boundaries that will never be subject to an operating fee of any kind.

- Second, customers in different municipalities receiving a 3% operating fee would still be affected differently. Surrey's approach would still result in the amount

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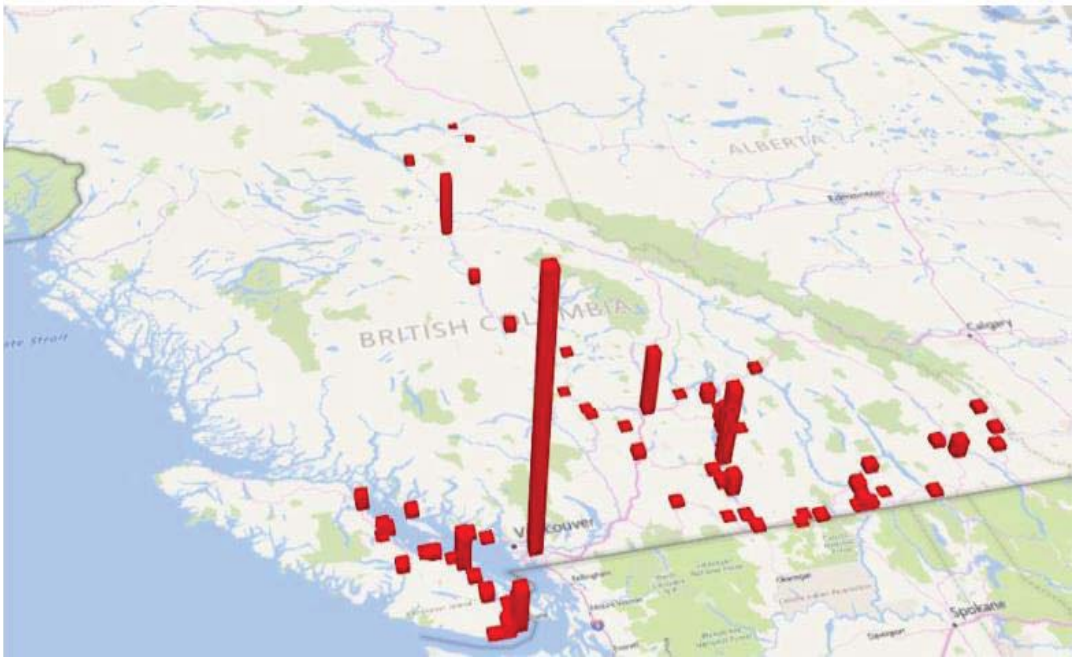
[14] Postage stamp rates are the product of the application of principles such as those articulated in Bonbright, *Principles of Public Utility Regulation*, (1988). It will be noted that the author articulates those principles (p.383) in a chapter devoted to allocating the revenue requirements. Bonbright was careful to make this distinction, stating at the outset of the chapter (p.373), for instance, "Thus, the chapters of Part Three were concerned with rate level determination under the standard of a fair return. Now we turn to discussion of the far more complex problems involved in establishing an appropriate rate structure."

[15] Letter L-36-05 https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115810/1/document.do. Also cited in Order G-17-06, p.7. (Included at Tab 4 of Surrey's Final Argument.)

paid by customers in Surrey being based on the gross revenues applicable to Surrey alone. The amount paid by customers in different municipalities would still differ because gross revenues will differ depending on customer density and composition in each municipality. FEI has shown that the application of the same formula across various municipalities can yield vastly different revenues depending on the circumstances of a given municipality. This is depicted in the following figure, with Surrey being by far the largest bar:[16]



22. In other words, Surrey's version of postage stamping isn't really postage stamping at all. True postage stamping would involve the costs of all municipal operating fees being pooled and treated as O&M in FEI's revenue requirements, and then being recovered from all non-bypass customers. The postage stamping would eliminate Surrey's justification for consistency in the methodology employed across municipalities, since the impact of any fee is spread over all non-bypass customers.

23. Operating fees have always been collected as a separate line item on a utility bill of customers in a municipality, and remitted to the applicable municipality. FEI is not proposing

[16] BCUC-FEI IR 1.4.2.

to change the way in which an operating fee is collected from customers. Indeed, consideration of whether or not the longstanding practice remains the appropriate means of recovering the cost of an operating fee from customers is a rate design issue, distinct from the question of whether the amount of the Operating Fee payable to Surrey (or any other municipality) is appropriate. As the Commission put it in L-36-05 (quoted above), the form and terms of an operating agreement do not impact the Commission's conclusions on the appropriate allocation of gas rates to customers in a municipality.[17]

Consistency is Achieved by Quantifying an Operating Fee with Reference to what FEI/FEI Customers Are Getting in Return

24. The principle underpinning FEI's proposed Operating Fee is to view the Operating Fee as contractual consideration necessary to come to terms with a municipality as contemplated in the *Gas Utility Act* and section 32 of the UCA. The Commission has previously conceived of an operating fee as contractual consideration.[18] Viewed as contractual consideration, an Operating Fee (if any) can and should differ among municipalities, just as the individual permit fees paid to each municipality and FEI's avoided work effort and disputes would differ among municipalities. The reasonableness of an Operating Fee in a particular case would also depend on the other "gives and takes" in the agreement.

(e) Transparency Is the Same Regardless of the Calculation Methodology

25. Surrey argues that "adopting the same 3.0 percent of FEI's gross revenues operating fee structure substantially supports transparency,…".[19] There is no relationship between the choice of Operating Fee calculation methodology and transparency. In the event that the Commission approves an Operating Fee for Surrey, the customer bills will display the amount payable regardless of the calculation methodology.

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[17] Letter L-36-05 https://www.ordersdecisions.bcuc.com/bcuc/orders/en/115810/1/document.do. Also cited in Order G-17-06, p.7. (Included at Tab 4 of Surrey's Final Argument.)

[18] See FEI Final Submission, para. 56.

[19] Surrey Final Argument, para.40.

26. Transparency is achieved, however, by ensuring that an Operating Fee retains the character of contractual consideration, quantified by reference to what FEI/FEI customers are receiving in return from the municipality. Otherwise, the Operating Fee takes on the flavour of an indirect, and more opaque tax on some of its citizens.

C. SURREY'S NEW EMPHASIS ON ITS "QUANTITATIVE RATIONALE" IS MISPLACED

27. Over the course of this proceeding, Surrey's positioning of the Aplin Report has evolved. Surrey started off characterizing the analysis in the Aplin Report as "not central to the City's requested operating fee. It was submitted in response to the Commission's IR."[20] It now says that "the City's quantitative cost analysis verifies that an operating fee of 3.0% of gross revenue is reasonable…".[21] Surrey goes further, characterizing the Operating Fee as "more of a user pay model, which the City believes is more equitable…".[22] It also links its approach to "cost causation".[23] FEI submits that, for the reasons set out in FEI's May 31 Final Submission and augmented below, justifying an Operating Fee as compensation for Surrey's internal costs is both conceptually and factually flawed.

(a) Municipalities Charge Permit Fees, Not Restitution

28. The premise underlying Surrey's presentation of the Aplin Report as a quantitative justification for the Operating Fee is that an Operating Fee is intended to reimburse Surrey for all costs that it incurs in dealing with FEI. That rationale does not withstand scrutiny, as FEI explained starting at paragraph 95 of its May 31 Final Submission. Municipalities, including Surrey, 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. (Their ability to even charge published fees in respect of public utility infrastructure subject to a CPCN is questionable, a point which Surrey appears to implicitly

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[20] See FEI's Final Submission, para. 94.

[21] Surrey Final Argument, para. 49.

[22] Surrey Final Argument, para. 51.

[23] Surrey Final Argument, para. 60

concede in the context of its arguments about the *Pipeline Crossing Regulation*.[24]) A list of Surrey's permit fees are included in FEI's Supplementary Evidence[25], and include for instance:

City Road and Right-of-Way Use Permit	
- General:	$60.00
- Servicing Agreement:	$90.00
- Inspection[1,2]:	$105.00
- Video inspection[1,2]:	$215.00
- Shoring and hoarding:	$365.00
Traffic Obstruction Permit	
- General:[3]	
▪ Arterial/Collector Road	$170.00
▪ Local Road:	
▪ Significant obstruction	$170.00
▪ Minor obstruction	$ 60.00

29. The Commission should view with some skepticism the City's expressed preference for a user pay model as being more equitable. There are many costs in a municipal budget that benefit a subset of citizens, presumably on the basis that the whole of the tax base in the municipality benefits when such matters are addressed. This is no different - FEI's current customers are the current direct beneficiaries in the sense that they are taking service today, but all citizens of Surrey benefit from commercial development facilitated by access to natural gas, as well as having the option of accessing natural gas if desired. Moreover, there is no evidence of Surrey taking any steps to change its own permitting fees, which one might have expected to occur if the City regarded fees to be inequitable when they under-recover costs.

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[24] Surrey cites section 121 of the UCA, stating that the absence of a similar provision referencing the *Oil and Gas Activities Act* indicates the Commission is bound by the Pipeline Crossing regulation: "Section 121 of the Utilities Commission Act clearly states that the BCUC's powers under the Utilities Commission Act supersede anything in or done under the Community Charter or the Local Government Act. Nothing in the Utilities Commission Act provides for the BCUC's orders pursuant to sections 32, 33 and 36 to supersede section 21 of the Oil and Gas Activities Act or the Pipeline Crossing Regulation." See Surrey's Final Argument, para. 70 and footnote 64.

[25] Exhibit B1-11, Supplementary Evidence, PDF p. 88.

(b) Surrey Concedes Elsewhere that Operating Fees Are Not Compensation for Municipality's Costs

30. Although Surrey has cited the Aplin Report as a "quantitative" justification for its proposed Operating Fee methodology, it has conceded in its evidence and Final Argument that operating fees are not intended to be compensatory.

- Surrey pointed this out in its original procedural submission in the context of minimizing the relevance of the Aplin Report: "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."[26]

- Surrey's takes the position in its Final Argument that the purpose of an Operating Fee is as reflected in FEI's Tariff, pointing out that FEI's Tariff "says nothing about 'cost incurred by the municipality'".[27]

(c) Grant of Exclusivity and Right to Use the Streets Originally Distinguished the Recipients of the Fee From the Non-Recipients

31. Surrey argues that "whether or not the municipality grants an exclusive franchise to FEI is a distinction without a difference for the purposes of an operating fee. FEI's use of public places in a municipality has the same impacts on the municipality and its residents whether the use is pursuant to an exclusive franchise or as the incumbent gas utility." Surrey's argument that FEI's use of public places impacts every municipality the same actually proves FEI's point that fees were never intended to be compensation for costs incurred by the municipality in its dealings with the utility. Rather, the fees related to what the utility was getting in return (i.e., it was viewed as consideration, not compensation for the municipality's direct costs and overheads enumerated in the Aplin Report). At the outset, the one factor that differentiated the municipalities that received a fee from those municipalities that did not was what the utility received in return. Fees were only associated with agreements that (a)

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[26] See FEI's Final Submission, para. 94.

[27] Surrey Final Argument, para. 56.

conferred exclusivity upon the utility, and (b) provided a franchise necessary to obtain a CPCN. The Lower Mainland municipalities, Oak Bay, and even the two original non-exclusive agreements entered into by Inland Natural Gas[28] never incorporated a fee. The original franchise agreements that contemplated a franchise fee explicitly linked the franchise fee to the grant of exclusive franchise and conferral of the right to use the streets. There is no reference to compensation anywhere.

(d) Even if Restitution Is an Appropriate Objective, There Are Offsetting Benefits

32. Treating the Operating Fee as compensation, which is implicit in Surrey's new reliance on the Aplin Report, requires first accepting Surrey's argument that the presence of utility infrastructure is a hardship inflicted on municipalities by utilities. Neither Surrey, nor the Aplin Report, consider any benefits to the City and its residents from having access to natural gas.

System is Constructed Because Access to Natural Gas is in the Public Interest

33. As the majority of the Supreme Court of Canada found, "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…".[29] The Commission granted the CPCN based on a finding that it was in the public convenience and necessity for Surrey residents to have access to natural gas.

34. The system only gets extended when there is demand for natural gas.

35. The Energy Commission's 1977 Report addressed the fallacy of looking at utilities as an impediment to municipal operations without accounting for the benefits associated with access to natural gas. It stated:

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[28] Two of the original Inland Natural Gas agreements with municipalities 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. Exhibit B1-13, BCUC-FEI IR 2.12.1.

[29] *District of Surrey v. BC Electric*, at paras. 15, 17. Attached to FEI's Final Submission.

> 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 off-sets a municipality's unquantified costs.[30]

Evidence Demonstrates that Surrey Residents Want Access to Natural Gas

36. There is evidence before the Commission in this case regarding the new demand for access to natural gas service, demonstrating that residents of Surrey see a benefit in being able to access natural gas. There is also evidence that natural gas is integral to commercial and industrial processes that drive economic benefits for the City. FEI also quantified the taxes it pays to Surrey. The relevant passage from FEI's Supplementary Evidence is quoted below:[31]

> It is evident from Figure 1 below which shows FEI's steady increase in new customer attachment rates for all building types and customer classes since 2013 and FEI's upward trending capture rate (most recent data available is for 2014 and 2015) that the availability of natural gas service is important to Surrey's community. Surrey is the single largest municipality that FEI serves with regard to the number of new customer attachments.

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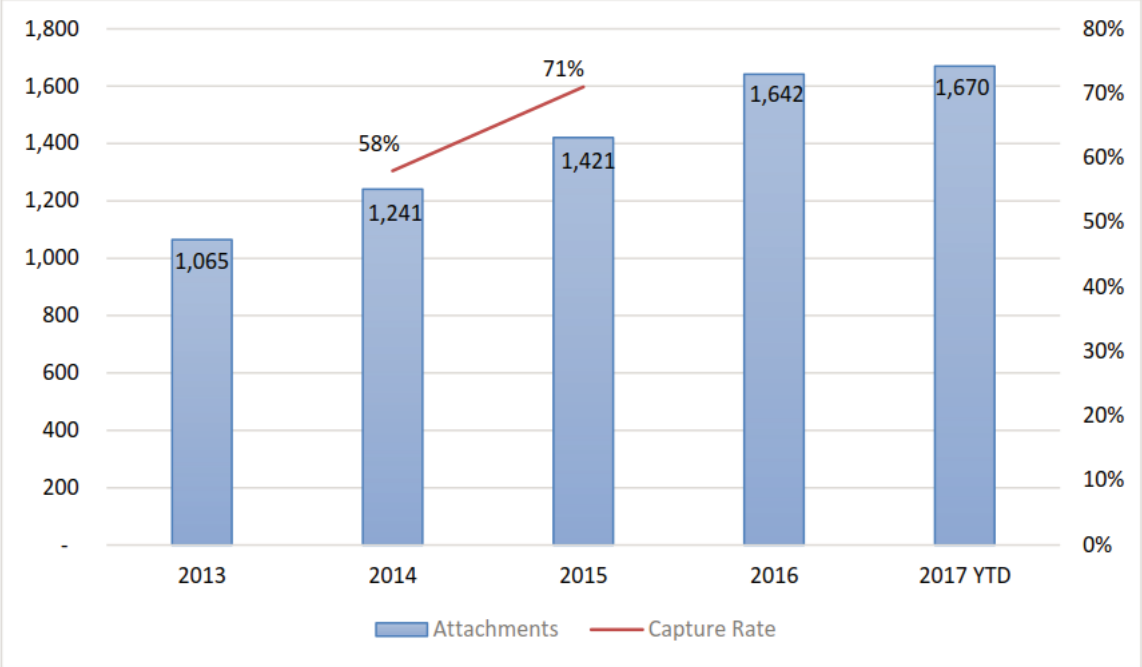
[30] 1977 Inquiry Report, pp.7-8 (Appended to FEI's May 31 Final Submission).

[31] Exhibit B1-11 , FEI Supplementary Evidence, pp. 3-5.

Figure 1: FEI New Customer Attachments and Capture Rate for Surrey



FEI's commercial and industrial customers in Surrey make up 37 percent of the total volume of gas FEI delivers in Surrey, with the balance delivered to residential customers. These commercial and industrial customers rely on gas service for their heating, hot water, or business process needs. FEI serves 220 industrial customers and 8,829 commercial customers in Surrey, for a total of 9,049 commercial and industrial customers (as at August 31, 2017). Table 1 below provides the breakdown.

Table 1: FEI Commercial and Industrial Customer Count in Surrey

Customer Class	# Customers (at Aug 31, 2017)	Total Volume (GJs)	% of Total Volume
Commercial	8,829	3,379,208	22%
Industrial	220	2,274,799	15%
Total:	**9,049**	**5,654,007**	**37%**

FEI expects that these businesses and industries contribute substantially to Surrey's tax revenue base.

FEI is also a Surrey taxpayer. FEI's main operations centre is in Surrey. FEI pays taxes to Surrey for all of its facilities and operations in the Municipality (including offices, buildings, stations, pipe assets, and services). In 2017, FEI paid to the City of Surrey approximately $5.2 million in taxes. Table 2 below provides the

breakdown of taxes paid by FEI to the City as a result of its facilities and operations in Surrey:

Table 2: 2017 Taxes Paid by FEI to Surrey

Tax	Amount
1% of Revenue	$ 1,175,971
General Municipal	861,508
School	2,439,020
Other	703,185
Total:	**$ 5,179,684**

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 highways.

Surrey Residents Are Direct Beneficiaries When Delivery Costs Are Reduced

37. The effect of FEI having access to public places is to reduce delivery rates relative to what they would be if FEI had to operate with Statutory Rights of Way throughout the municipality. The beneficiaries are customers, which include thousands of Surrey residents.

On Surrey's Logic, Surrey "Uniquely Burdened" Provincial Taxpayers by Being Given the Roads for Free

38. Surrey suggests that, while "the City and its residents are uniquely burdened by FEI's activities, FEI and its customers benefit by FEI's facilities occupying highways and other public places without contributing to the City's cost of acquiring such public places."[32] There is a certain degree of irony in Surrey's statement, given that Surrey acquired its rights to municipal roads from the province for free - on Surrey's logic, "uniquely burdening" provincial taxpayers.[33] In any event, Surrey acquires new lands for its own purposes. Utility infrastructure is only placed in that acquired land if there is a demand for services from residents of Surrey.

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[32] Surrey Final Argument, para. 48.

[33] See FEI's May 31 Final Submission, para. 98.

D. A FEE FOR THE USE OF PUBLIC PLACES AND FEI'S QUANTIFICATION ARE ALIGNED

39. Surrey has sought to distinguish between what it says is the purpose of an Operating Fee - "for FEI's use of public places within the municipality to construct and operate its utility business"[34] - and FEI's characterization of the Operating Fee as contractual consideration, quantified based on the value FEI is getting in return for its commitments to Surrey.[35] Surrey appears to argue that FEI's characterization and quantification is somehow inconsistent with the Company's acknowledgement (in the Application and the Tariff) that an Operating Fee is for the use of public places.[36] Surrey suggests - despite its earlier critique of compensatory approach and acknowledgement that the 3% of gross revenues was not derived in that manner - that a payment for the "use of public spaces" necessarily requires FEI to "compensate the city…either on the basis of the costs incurred by the City or on the basis of a standard fee."[37] The answer to this submission is two-fold.

(a) FEI's Tariff Language Does Not Mandate Restitution

40. First, Surrey is providing a very tortured interpretation of FEI's Tariff. The Tariff only says that an Operating Fee is "monies payable…for the use of the streets".[38] This is the language from the old franchise agreements. The Tariff says nothing about how the appropriate "monies payable" should be quantified.

(b) "Use of Public Places" Would Otherwise Be Secured With Permit Fees Alone

41. Second, leaving aside the Tariff, Surrey is making a significant leap in logic in assuming that a payment for the "use of public places" must be quantified in the manner it suggests. In the absence of an Operating Agreement, FEI could secure "use of public places" by paying a lot less than what FEI is proposing as an Operating Fee.

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[34] Surrey Final Argument, para. 57.

[35] Surrey Final Argument, para. 58.

[36] Surrey Final Argument, para. 60.

[37] Surrey Final Argument, para. 59.

[38] The full quote appears in para. 115 of FEI's Final Submission.

42. Let's assume, for the sake of argument, that an Operating Fee is a fee "for the use of public places" as Surrey suggests, and is neither intended to compensate the municipality nor to reflect the benefit FEI is getting from the agreement. How would FEI secure "use the public spaces" in Surrey in the absence of a new Operating Agreement? The answer is either:

(a) FEI would pay Surrey's published permit fees for work it needs to do; or

(b) FEI would dispute its obligation to pay permit fees by virtue of section 121 of the UCA, and would perform the work without paying.

There would be no additional costs to FEI to secure the "use of public spaces" - no payment of overhead costs, operating costs, capital costs or any other costs. As such, Surrey's argument leads to the outcome that the Operating Fee should not exceed the undiscounted permit fees. The value of the permit fees that Surrey would have charged based on the work done in 2016 was significantly less than what FEI is proposing as an Operating Fee, and one-tenth of the Operating Fee that would have been yielded by Surrey's proposal.

43. FEI's approach to calculating the Operating Fee has recognized that, while paying a permit fee each time (or not paying at all) might secure "FEI's use of public places", an *ad hoc* or confrontational approach comes with a downside for its customers. It is worth more to FEI/FEI customers than just the undiscounted value of the permit fees to be able to perform work in an efficient and timely way and to secure a fair outcome regarding Relocation Costs. FEI's proposed Operating Fee is thus justified as contractual consideration, based on what FEI/FEI customers are getting in return.

E. USING DELIVERY MARGIN TO CALCULATE OPERATING FEE IS BENEFICIAL

44. Surrey argues that "There would need to be significant benefit to justify changing the operating fee structure, and none has been shown in this proceeding."[39] It also argues that there are disadvantages to calculating an Operating Fee with reference to delivery

[39] Surrey Final Argument, para. 67.

margin. FEI has, in fact, identified benefits associated with using delivery margin. Surrey's arguments against the use of delivery margin are without merit.

(a) Surrey's Argument About Added Complexity is a Red Herring

45. Surrey points to a proceeding in 2006 as an instance where "the municipalities and FEI (then Terasen) raised significant concerns about added complexity, costs, and communication requirements if the basis for the fee was changed to delivery revenue."[40] There are three responses to this argument.

- First, all of the municipalities in question were already receiving an operating fee calculated based on 3% of gross revenues. The referenced communications and complexity were associated with changing the existing methodology and communicating it to customers. Surrey has never received an Operating Fee. Communication and billing changes will be necessary under either methodology. If that is a legitimate concern (which it isn't), then the only way to address that concern would be to not pay any Operating Fee to Surrey at all.

- Second, Surrey is assuming that technology hasn't changed since 2006, such that it would continue to pose obstacles. There is no evidence that is the case.

- Third, Surrey is, in effect, arguing that complexity and the need for communication are worse for FEI/FEI customers than charging FEI customers approximately $2.5 million more per year in Operating Fees. This would be a poor trade-off, to say the least.

(b) An Operating Fee Based on Gross Margin Would Be More Volatile

46. Surrey states that "in recent years FEI's gross revenues and delivery revenues have had roughly equivalent year to year volatility."[41] On the contrary, FEI submits that the figure in paragraph 109 of FEI's Final Submission demonstrates that an Operating Fee based on

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[40] Surrey Final Argument, para. 65.

[41] Surrey Final Argument, para. 67.

delivery revenues would be less volatile than one based on gross revenues. The delivery margin approach mitigates the risk of increased commodity price volatility over the 20 year term of the agreement.

(c) Other Municipalities Wanting to Use Delivery Margin Too Is Not a "Risk"

47. Surrey also argues that "Changing the basis for the operating fee to delivery revenue for the City of Surrey would also create a risk that other municipalities will request to change the basis for their operating fees to delivery margin if they perceive a benefit from such a change."[42] One might question whether this is a "risk" at all, given the advantages of using delivery margin. In the event a municipality does wish to revisit the methodology, the "risk" seems to be limited to the effort required to discuss a change with a municipality, and the communications with customers.

(d) Surrey's Argument for the Status Quo Precludes Improvements

48. Surrey's approach of treating change as a negative, *per se*, locks the Commission and FEI into a framework in perpetuity. All of the past decisions approving agreements with operating fees based on 3% of gross revenues have been made in circumstances where the methodology represented continuity. Most involved very low stakes, given the size of the municipalities involved. Surrey, as it has reminded us in this proceeding, is different from other municipalities. That difference makes this Application the right time for the approach to evolve for the better.

F. SUMMARY ON OPERATING FEE: THE FOCUS SHOULD BE ON THE MERITS

49. The arguments advanced by Surrey have the character of dogmatic adherence to selective precedents, without reflecting on

- the absence of operating fees in other municipalities, including every Lower Mainland municipality;
- the context in which other municipalities obtained operating fees;

[42] Surrey Final Argument, para. 68.

- the much greater implications for FEI customers in Surrey of levying an Operating Fee based on 3% of gross revenues, relative to FEI's proposal; and

- the fact that an Operating Fee is contractual consideration, not restitution for making available to all Surrey residents and businesses a service that is in the public interest and necessity.

50. The UCA provides that the Commission "must make its decision on the merits and justice of the case, and is not bound to follow its own decisions."[43] That provision applies regardless of whether the Commission is looking at approved agreements with operating fees based on 3% of gross revenues or Lower Mainland agreements with no fees at all. The Commission is free to examine the merits of introducing a new Operating Fee in Surrey based on these circumstances. The evidence supports an Operating Fee of the magnitude proposed by FEI. It is commensurate with what FEI customers are getting in return under FEI's proposed Operating Terms and is fair to Surrey.

[43] UCA, s. 75.

PART THREE: FEI HAS PROPOSED A FAIR APPROACH TO RELOCATION COSTS

A. INTRODUCTION

51. The bulk of Surrey's submissions regarding the definition of Relocation Costs and the allocation of those costs are devoted to jurisdictional arguments. The approach identified in paragraph 144 of FEI's May 31 Final Submission - conditioning approval of an Operating Fee or other terms on Surrey's agreement to fair Relocation Cost provisions - allows the Commission to dispense with those legal arguments. The Commission is free to focus, as it should, on the reasonableness of the parties' respective Relocation Cost proposals in the context of establishing overall Operating Terms governing the use of public places. The submissions below focus on the merits of the terms, and focus on the flaws in Surrey's substantive arguments. They are organized around the following points:

- First, FEI's definition of Relocation Costs is commercially reasonable.
- Second, FEI's proposed allocation of Relocation Costs is more appropriate in the context of the overall Operating Terms.
- Third, if the Commission wishes to address the merits of Surrey's jurisdictional argument at all, then FEI submits that the Commission's role can be reconciled with the *Pipeline Crossing Regulation.*

B. FEI'S DEFINITION OF "RELOCATION COSTS" IS COMMERCIALLY REASONABLE

52. FEI's definition of "Relocation Costs" is commercially reasonable.

(a) Parties Agree, With One Exception, that Implications of FEI's Definition Are Fair

53. Surrey summarized its understanding of FEI's proposal regarding the definition of Relocation Costs in a table in paragraph 114 of Surrey's Final Argument. Surrey indicated that, on the assumption it had understood FEI's proposal correctly, the proposal "is fair in principle, except for one detail". Surrey's summary of FEI's proposal is accurate. FEI expanded on the

implications of the definition of Relocation Costs using particular scenarios in the table included at paragraph 138 of its May 31 Final Submission.

54. This consensus removes one of Surrey's key concerns: the potential for Relocation Costs to be increased by FEI's "own discretionary standards".[44] Under FEI's proposal, Relocation Costs only includes those costs associated with complying with "applicable Laws or sound engineering practices".

(b) An Exclusion for Compliance With Applicable Laws and Sound Engineering Practices is Commercially Reasonable

55. Surrey's argument on the merits of FEI's proposal boils down to this: "Compliance with codes and standards is the responsibility of the asset owner".[45] Surrey is missing the point. Assets in the ground are already compliant with Laws and codes and standards. They are "grandfathered". They would remain "grandfathered", but for the request to relocate.

56. Moreover, Surrey is, in essence, calling its own bylaws commercially unreasonable. Surrey is on the receiving end of third-party requests to relocate municipal utility assets like sewers. Based on Surrey's argument that "compliance with codes and standards is the responsibility of the asset owner", Surrey should always be paying the cost to bring its own sewers and other facilities into compliance with current laws, codes and standards. However, Surrey does not take that approach with its own assets. On the contrary, Surrey's bylaws require the requesting party to pay the entire costs of the relocation, not just the cost to bring it into alignment with current codes and standards. The incongruity is highlighted in the following table:

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[44] Surrey Final Argument, para. 111.

[45] Surrey Final Argument, para. 112.

If this is as unfair as Surrey argues…	Then why does Surrey treat requests to relocate its own infrastructure like this?
"It should not be the City's [i.e. requesting party's] responsibility to reimburse FEI for its costs to bring its infrastructure up to standards. Compliance with codes and standards is the responsibility of the asset owner."[46]	"The cost payable by an applicant shall be the actual cost to extend the storm drain or ditch on a legally designated road allowance, from the most convenient existing storm drain or ditch to a point opposite the farthest boundary of the last parcel of land to be served or to such point as the General Manager, Engineering determines is appropriate. In addition, the actual costs of service connection(s) shall be added to and form part of the costs in providing such extension."[47]
"The crux of the issue is that the City believes it should not be responsible for any costs associated with FEI upgrading or bettering its facilities…".[48]	"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." Surrey says the current policy is to pay for capacity expansions, but the bylaw allows Surrey to take advantage of such betterments.[49]

C. FEI'S PROPOSED ALLOCATION OF "RELOCATION COSTS" IS AN APPROPRIATE PART OF AN OVERALL PACKAGE OF TERMS

57. As indicated above, Surrey defends its position regarding allocation of High Pressure Pipeline Relocation Costs by challenging the Commission's jurisdiction. It seeks to extrapolate the same approach to Gas Mains, which are not covered by the *Pipeline Crossing Regulation*. FEI has addressed Surrey's arguments below, demonstrating that FEI's proposed allocation is more appropriate in the context of the overall Operating Terms.

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[46] Surrey Final Argument, para. 112.

[47] Surrey Rebuttal Evidence, p.1.

[48] Surrey Final Argument, para. 107.

[49] Surrey Rebuttal Evidence, p.2.

(a) Typical Allocation for High Pressure Pipelines and Gas Mains is 100% Municipality

58. FEI has made the point in this proceeding that its proposal regarding allocation of Relocation Costs places Surrey in a better position relative to (a) where it stands today, and (b) other municipalities with which Surrey likes to compare itself (i.e., those municipalities that are collecting operating fees). Surrey appears to concede point (a), but takes issue with point (b). Surrey says, with respect to the obligation of other municipalities:

> That FEI claim is incorrect because it is contrary to the requirements of the *Pipeline Crossing Regulation* and, as discussed above, the BCUC's Order No. G-113-12 Decision confirms that municipalities operating under the FEI Standard Operating Agreement do not abandon their rights under the Pipeline Crossing Regulation given that these agreements require FEI to comply with all federal and provincial laws, regulations and codes.[50]

59. Surrey is overstating the "right" of a municipality under the *Pipeline Crossing Regulation*, and is overstating the effect of a provision that requires FEI to comply with laws. The "right" under the *Pipeline Crossing Regulation* is, at best, a right to a default allocation in the absence of an agreement to a different allocation. Complying with the *Pipeline Crossing Regulation* means, at best, respecting an allocation that is subject to contracting out. Surrey is relying on an instance where a municipality (Coldstream) had objected to a different allocation. Other municipalities have - both before and since - willingly signed an agreement with FEI that provided for a different allocation than the default allocation in the *Pipeline Crossing Regulation*. The execution of an agreement that contemplates a different allocation respects the "rights" and complies with the law.

(b) Policy of *Pipeline Crossing Regulation* is Inapplicable to Gas Mains

60. Surrey argues that the default allocation in the *Pipeline Crossing Regulation* should be applied to Gas Mains too, on the basis that "municipal projects are public interest projects and take some degree of precedence over gas utility infrastructure in municipal lands

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[50] Surrey Final Argument, para. 94.

and on municipal structures."[51] It maintains, for instance: "Surely the public policy reflected in the *Pipeline Crossing Regulation*'s cost allocation methodology is not dependent on the pressure of the natural gas conveyed in the pipeline."[52] There are a number of reasons why Surrey's argument is unpersuasive.

61. First, the default allocation under the *Pipeline Crossing Regulation* is part of a broader scheme under the *Oil and Gas Activities Act* (OGAA) that is applicable to high pressure pipelines. Surrey is "cherry picking" the aspects of that framework that it favours, while ignoring those that it dislikes. For instance, Surrey would presumably oppose a term of the Operating Agreement requiring Surrey to seek FEI's consent or an order of the Commission each time it wished to work near a Gas Main, which is a key element of the framework under the OGAA with respect to High Pressure Pipelines.

62. Second, Surrey's argument fails to recognize that, while the OGAA does not employ a public interest test for pipelines, all pipelines and gas mains owned and operated by public utilities will have a public interest approval granted under the UCA (a CPCN). The UCA establishes its own hierarchy, and places public utility infrastructure at the top. Section 121 precludes municipalities from interfering with a work conducted under a CPCN. Section 121 reflects the policy outlined in the Supreme Court of Canada's decision in *City of Surrey v. BC Electric*, which emphasized that the public interest under consideration when granting a CPCN extends beyond the more parochial interests of individual municipalities. Section 32, 33 and 36 provide mechanisms that would preclude municipalities from vetoing utility activities in public places.

63. Third, statutory interpretation principles would not support inferring from the absence of legislation a legislative intent to extend the default allocation to Gas Mains.

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[51] Surrey Final Argument, para. 86.

[52] Surrey Final Argument, para. 85.

(c) Different Allocations for Gas Mains and High Pressure Pipelines is Workable

64. Surrey maintains that having a different allocation methodology for Gas Mains and High Pressure Pipelines could create practical issues for allocating costs.[53] FEI submits that Surrey is overstating the challenge this would represent. The interfaces between the transmission system and distribution system are relatively limited in number. Estimating and project management routinely require allocation within a specific project, such as when extras are claimed or where contractors are doing different scopes of work that intersect. A similar costing exercise is required to distinguish between Relocation Costs associated with the required work and discretionary upsizing.

(d) A "Moral Hazard" Exists Under Surrey's Proposal

65. FEI's May 31 Final Submission articulated the risk to FEI customers with a framework that contemplates FEI being required to relocate facilities upon Surrey's request, and all costs being paid by FEI/FEI customers. Surrey addressed that point in paragraph 95 of its Final Argument, suggesting that the discipline will come from the risk to Surrey if "utilities are not relocated in a timely manner." Surrey's argument misses the crux of the issue. The Operating Terms reduce the risk of delay by imposing obligations on FEI to process relocation requests in a timely manner. Surrey would have little incentive to avoid inefficient relocation requests.

(e) Surrey's Alternative Proposal for Gas Mains (the CRTC Approach) Would Require Modification for Long-Lived Assets

66. Surrey advocates, as an alternative position, an approach that would reduce the amount recoverable from Surrey on a sliding 17-year scale. In the event that the Commission adopts an approach like this, the sliding scale would have to be much longer than 17 years and decline more slowly. A short sliding scale would be punitive to FEI/FEI customers as it would relieve Surrey from reimbursing FEI for assets that would otherwise remain in service for the benefit of customers. FEI explained in its Rebuttal Evidence:[54]

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[53] Surrey Final Argument, para. 87.

[54] Exhibit B1-12, FEI Rebuttal Evidence, pp. 13-14.

The allocation approach used by the CRTC has a staged allocation based on the number of years the equipment has been installed. The CRTC is clear that the staging starts at 100 percent for a period over which the City can reasonably plan. It is based on an assessment of useful life, with the end of the staging coinciding with "the shortest length of the useful life of Bell Canada's assets that are likely to be affected by relocation initiated by the City over the lifetime of the MAA [agreement]." (Decision, paragraphs 49-50). Applying the CRTC's logic to the present circumstance would result in a significantly different allocation from that which Surrey has attributed to the CRTC. There are two points of difference.

First, the City has a 10-Year Servicing Plan for development within the Municipality. Applying the CRTC's logic to the present circumstances would result in a longer period during which the costs would be allocated 100 percent to the requesting municipality (the period over which the City can reasonably plan).

Second, FEI has described in responses to IRs that its assets have a much longer life. As noted in the response to Surrey-FEI IR 1.3.3, were it not for third party requests to relocate, much of FEI's system would not have to be replaced for a very long time. The most recent depreciation study estimates the financial end of life of distribution mains at 64 years and 65 years for transmission pipelines, but the financial end of life is shorter than the actual useful life of the assets. The financial life is shortened by the fact that there are many relocation requests. FEI explained that the life would be much longer if third parties were not requesting relocations. The CRTC's logic, applied to the long-lived pipeline assets would suggest a much slower decline from 100 percent in terms of the proportion recoverable from the City for FEI's assets.

Also, there is a proviso in the CRTC's allocation that should be noted for the sake of completeness:

> Consistent with Previous Commission determinations, where costs directly attributable to a Municipality-initiated requirement to relocate a Company facility are incurred as a direct result of work undertaken by or on behalf of the Municipality for beautification, aesthetics, or other similar purposes, such costs are to be entirely borne by the Municipality. These costs include, but are not limited to, the depreciation, betterment and salvage costs. (Decision, para. 52)

D. RESPONSE TO SURREY'S JURISDICTIONAL ARGUMENT REGARDING THE *PIPELINE CROSSING REGULATION*

67. FEI has the following additional comments on the merits of Surrey's jurisdictional argument.

68. The UCA contemplates the Commission having the power to direct terms of use. The *Pipeline Crossing Regulation* contemplates only a default arrangement, which can be modified by agreement. When the Commission determines appropriate operating terms in the face of a disagreement, the expectation is that the Commission will order the parties to enter into an agreement on those terms.[55] This expectation is reflected, for instance, in Surrey's proposed draft order, which provides: "FEI and Surrey are to file with the Commission an endorsed Operating Agreement in accordance with the terms approved by this Order." The execution of that agreement, pursuant to the Commission's direction authorized under the UCA, reconciles the UCA and the *Pipeline Crossing Regulation*. In effect, the default allocation is varied as part of the Operating Agreement entered into on terms directed by the Commission.

69. FEI cited, in paragraph 177 of its May 31 Final Submission, past Commission decisions that contemplated a different allocation from the *Pipeline Crossing Regulation*. Surrey seeks to distinguish those decisions. The decisions do support FEI's point:

- Surrey says the Victoria Gas decision addressed "the circumstance of new pipeline construction where the municipality might request that Vigas or Victoria Gas install its new pipeline at a depth beyond that planned by the utility." This is true, but the allocation of costs associated with a subsequent relocation were also addressed in the passage that FEI quoted in paragraph 177.

- Surrey seeks to distinguish the Commission's Chetwynd decision on the basis that "In that Order the BCUC did exercise its jurisdiction pursuant to section 32 of the *Utilities Commission Act* but it did not make any order respecting cost

[55] See Order G-17-06, clause 3: "Terasen and the District of Chetwynd are to file with the Commission an endorsed Operating Agreement in accordance with the terms approved by this Order and Reasons for Decision." (Order is included at Tab 4 of Surrey's Final Argument.)

allocation for pipeline crossings / relocations." FEI submits that the Commission approves an Operating Agreement as a whole, not individual provisions. The approved terms for Chetwynd included a cost allocation that differed from the default allocation in the *Pipeline Crossing Regulation*.

70. At the end of the day, the purpose and intent behind section 32 of the UCA is to allow the Commission to achieve a commercially reasonable outcome where the parties cannot reach one on their own. The Commission's focus should be on ensuring the overall Operating Terms are reasonable, leaving Surrey's jurisdictional arguments only as a consideration in how to structure the Commission's section 32 order to achieve the desired outcome.

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

71. The parties agree that it would be inappropriate to order a blanket release of Statutory Rights of Way. Surrey suggests that FEI's jurisdictional argument is inconsistent with the Company's position regarding the *Pipeline Crossing Regulation*. FEI's submissions are internally consistent. The distinguishing factor is that the allocation of Relocation Costs relates to FEI's use of public places, whereas FEI's Statutory Rights of Way are private interests in land. Section 32 of the UCA is concerned only with the use of public places. There is a distinct process under the *Expropriation Act* to address private interests in land.

PART FIVE:CONCLUSION AND ORDER SOUGHT

72. FEI made the point in its May 31 Final Submission that entering a new Operating Agreement only makes sense for FEI/FEI customers if the agreement can improve FEI's ability to operate in Surrey without imposing an unreasonable financial burden on FEI/FEI customers. FEI's Proposed Operating Terms, by delivering a balanced outcome, will provide the basis for a more cooperative relationship between FEI and the City overall.

73. Surrey's arguments in favour of an Operating Fee calculated based on 3% of gross revenues, which are focussed on consistency with other municipalities that receive operating fees, are superficial, selective and, if anything, appear to justify having no Operating Fee at all. FEI submits that there will be value in an operating fee in many cases. However, that value does not arise from the conceptual ability to place municipalities or FEI customers in all municipalities on to an equal footing. Rather, the value arises from the ability of a fee to serve as part of the contractual consideration necessary to secure workable operating terms that will facilitate efficient and effective operations in a municipality. FEI's proposed Operating Fee is ample to fulfil that role. It will avoid a windfall to Surrey, provided that Relocation Costs are addressed reasonably.

74. Surrey's resort to jurisdictional arguments in the context of both the definition of Relocation Costs and their allocation overlooks the fundamental point that the Operating Terms must be reasonable as a package. The Commission has the ability to adjust other terms of the Operating Agreement to achieve a fair outcome, even if the Commission were to accept Surrey's argument that the law requires the Operating Agreement to incorporate the default allocation in the *Pipeline Crossing Regulation*.

75. Surrey's inability or unwillingness to defend its position on the merits only underscores the propriety of the Commission adopting FEI's proposed Operating Terms.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 14, 2018

[original signed by Matthew Ghikas]

Matthew Ghikas
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