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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-28-10**

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Terasen Gas Inc.
for a Certificate of Public Convenience and Necessity
for the Tilbury Property Purchase

BEFORE: A.J. Pullman, Panel Chair/Commissioner
M.R. Harle, Commissioner February 23, 2010

O R D E R

WHEREAS:

- A. On October 28 2009, Terasen Gas Inc. (Terasen Gas) applied (the Application) to the British Columbia Utilities Commission (the Commission), pursuant to section 45 of the *Utilities Commission Act* (the Act), for a Certificate of Public Convenience and Necessity (CPCN) for the purchase (the Tilbury Property Purchase) of a parcel of land known as the Northwest Hardwoods Site located at 6939, 7150 Tilbury Road, and 7505 Hopcott Road in the Tilbury Industrial Area of Delta, BC (the Property) adjacent to the Tilbury LNG Facility; and
- B. Terasen Gas considers that the Tilbury Property Purchase is necessary to control development of the Property in such a manner that will not jeopardize Terasen Gas' ability to continue to comply with Canadian Standards Association standard CSA Z276, the mandatory standard governing the operation of the Tilbury LNG Facility; and
- C. Terasen Gas has entered into a Contract of Purchase and Sale (the Contract) dated September 4, 2009 amended by the Modification and Ratification Agreement dated October 23, 2009 to acquire the Property, conditional upon (among other things) obtaining Commission approval within 120 days of October 23, 2009; and
- D. The Commission was advised via a confidential letter dated January 5, 2010 that the Contract was further amended such that (amongst other things) the date for obtaining Commission approval was extended to March 11, 2010; and
- E. Terasen Gas states that a duty to consult with First Nations does not arise with respect to the sale of the Property, which represents the transfer of previously developed, fee simple land as between private parties; and

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- F. Terasen Gas states that upon the closing of the purchase transaction it will (a) pursue opportunities to subdivide the Property and sell the portion of the Property south of Tilbury Road that is not required for the purposes of compliance with CSA Z276 and (b) pursue appropriate opportunities outlined in the Application to generate revenue from the remaining Property while remaining compliant with CSA Z276, with the intention that any proceeds from these steps will be used to offset the cost of service impact associated with acquiring the Property; and
- G. The Commission determined that the Application would be reviewed by a Written Public Hearing; and
- H. The Commission Panel has considered the Application and the evidence and submissions filed in the Written Public Hearing and has determined that the Tilbury Property Purchase is in the public interest and that a CPCN should be granted to Terasen Gas for the Tilbury Property Purchase subject to the conditions set out in this Order and the Reasons for Decision attached as Appendix A.

NOW THEREFORE pursuant to sections 45 and 46 of the Act, the Commission orders as follows:

- 1. A Certificate of Public Convenience and Necessity is granted to Terasen Gas for the Tilbury Property Purchase subject to the conditions set out in paragraphs 2-7 of this Order.
- 2. Terasen Gas agrees to allocate the total cost of the Property between:
 - (a) that which is not required to comply with CSA Z276 (the land south of Tilbury Road) and that which is required to comply with CSA Z276 as follows:

The residual value of the land south of Tilbury Road will be determined at its current gross valuation less the sum of:

 - (i) the estimated cost of subdivision and sale,
 - (ii) estimated property taxes for the period from the Contract closing date until January 1, 2012, and
 - (iii) estimated short term interest expense from the Contract closing date until January 1, 2012; and
 - (b) the balance of the Property (all that lying north of Tilbury Road) will be valued at the sum of all the costs of the transaction less the residual value of the land south of Tilbury Road established above.
- 3. Terasen Gas agrees that at the Contract closing date, the value of the balance of the Property shall be captured in a non-rate base deferral account, with the balance attracting AFUDC [Allowance for Funds Used During Construction] until being added to rate base in the appropriate land account on January 1, 2012.

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4. Terasen Gas agrees to defer only the property taxes related to that part of the Property that lies north of Tilbury Road and to recover them in rates over a three-year amortization period.
5. Terasen Gas agrees to allocate those incremental revenue requirement items which can be reasonably identified as necessary to bring that part of the Property that lies north of Tilbury Road into its required condition to be capitalized to the appropriate land account and to expense any other costs that fail to meet this criterion.
6. Terasen Gas agrees to report to the Commission, by January 1, 2012, potential opportunities that might generate any revenue from the land north of Tilbury Road outside the heat flux zone, while remaining compliant with CSA Z276 and the costs Terasen Gas anticipates would be required to realize any such potential opportunities.
7. Terasen Gas is to file a written confirmation of its acceptance of the above conditions within 10 working days of the date of this Order, failing which the Application for a CPCN is refused.

DATED at the City of Vancouver, in the Province of British Columbia, this 23rd day of February 2010.

BY ORDER

Original signed by:

A.J. Pullman
Panel Chair/Commissioner

Attachment

Terasen Gas Inc.
Certificate of Public Convenience and Necessity Application
for the Tilbury Property Purchase

REASONS FOR DECISION

1.0 INTRODUCTION

On October 28, 2009 Terasen Gas Inc. (Terasen Gas) filed an application (the Application) with the British Columbia Utilities Commission (BCUC or the Commission) pursuant to section 45 of the *Utilities Commission Act* (the Act) for a Certificate of Public Convenience and Necessity (CPCN) for the purposes of purchasing the property known as the Northwest Hardwoods Site (the Property) located adjacent to Terasen Gas' Tilbury LNG Facility (the Tilbury Property Purchase).

By Order G-138-09 dated November 26, 2009, the Commission determined that the Application would proceed by way of a Written Public Hearing and established a Regulatory Timetable (Exhibit A-2).

Interventions were filed by the Commercial Energy Consumers Association of BC (CEC) and by the British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO). Two rounds of Information Requests were issued and responded to. Terasen Gas filed its Argument on January 22, 2010; the Intervenor filed their Arguments on January 29, 2010 and Terasen Gas filed its Reply on February 5, 2010.

Terasen Gas requests that certain appendices of the Application be kept confidential, pursuant to the Commission's Confidential Filings Practice Directive, as the appendices contain:

- market sensitive information that the vendor of the Property has requested remain confidential;
- market sensitive information regarding the potential for Terasen Gas to generate revenues from the use of the Property to offset the cost of service impacts; and
- risk assessments relating to the Tilbury LNG Facility that should remain confidential for security reasons.

(Exhibit B-1, cover letter)

No Intervenor objected to the request for confidentiality. Accordingly, the Commission Panel has treated the appendices as confidential.

2.0 RELIEF SOUGHT

Terasen Gas seeks an order from the Commission in the following terms:

- A Certificate of Public Convenience and Necessity is granted to Terasen Gas for the Tilbury Property Purchase;
- The purchase price and any other capital costs associated with the acquisition of the Property shall be captured in a non-rate base deferral account, with the balance attracting Allowance for Funds Used

During Construction (AFUDC) until being added to rate base in the appropriate land account on January 1, 2012;

- The remaining incremental revenue requirement items except property taxes shall accumulate in the same non-rate base deferral account until the land is added to rate base. The balance of the deferral account shall be subsequently recovered in rates over a three year amortization period;
- The property taxes incurred after the Contract closing date and prior to January 1, 2012 shall accumulate in Terasen Gas' existing Property Tax deferral account and subsequently be recovered in rates over a three year amortization period; and
- Terasen Gas is to report back to the Commission by the later of January 1, 2012 or the date the costs are recorded into rate base regarding:
 - i. the status of Terasen Gas' initiative to subdivide the Property and sell the portion of the Property south of Tilbury Road that is not required for the purposes of maintaining compliance with CSA Z276; and
 - ii. potential opportunities to otherwise generate any revenue from the Property while remaining compliant with CSA Z276, and the costs Terasen Gas anticipates would be required to realize any such potential opportunities.

(Exhibit B-1, Appendix 1)

3.0 THE PROPERTY TO BE ACQUIRED

Terasen Gas states that the Property is currently owned by Weyerhaeuser Company Limited (Weyerhaeuser) and consists of 22.8 acres of freehold land immediately adjacent to and to the south and west of Terasen Gas' Tilbury LNG Facility. The Property comprises two parcels – the main parcel of 17.69 acres next to the LNG facility and a parcel of 5.13 acres to the south of Tilbury Road.

The 5.13 acre portion of the Property south of Tilbury Road will not be required or used for utility purposes (Exhibit B-1, p. 31)

The Property has been the site of a hardwood mill since 1974. The mill has recently been shut down and Weyerhaeuser now wishes sell the Property. Terasen Gas and Weyerhaeuser have entered into a Contract of Purchase and Sale dated September 4, 2009 (the Contract) which has been amended by various Modification and Ratification Agreements, and which is conditional upon Commission approval being received by March 11, 2010.

Under the terms of the Contract, Weyerhaeuser accepts responsibility for providing environmental remediation to the site and obtaining a Certificate of Compliance (CoC) from the Ministry of the Environment confirming environmental remediation to applicable standards prior to Terasen Gas acquiring the Property. The receipt of the environmental CoC is subject to ongoing site remediation, and determines the date that the Contract will close. Terasen Gas notes that the timelines are beyond its control, and has assumed that the milestone for receipt of the CoC is June 30, 2010 although the Contract allows up to 2 years beyond August 25, 2009 (Exhibit B-1, Confidential Appendix 2).

4.0 SAFETY STANDARDS

Terasen Gas addresses safety standards and says that when it constructed the LNG Facility in 1971 there was no Canadian standard covering LNG facilities in Canada with the result that it designed and constructed the facility in accordance with the requirements of the first edition of the US National Fire Protection Association (NFPA) LNG Standard. In 1972, the Canadian Standards Authority (CSA) adopted the NFPA standard as the first edition of CSA Z276 to govern the design, construction and operation of LNG facilities in Canada.

The CSA Z276 requirements have become more detailed and more prescriptive over the years. While the early editions of the standard included minimal siting requirements for an LNG facility, the 1981 edition introduced more rigorous requirements to limit risks within the LNG Facility and beyond the LNG Facility property line due to vapour dispersion and radiant heat resulting from the ignition of an LNG spill. Specifically, CSA Z276 requires the flammable mixture of natural gas from the vapour dispersion of an LNG spill to be limited to the LNG Facility property line, together with a series of radiant heat setback zones to surround a LNG facility. The size of the setback zones is determined in accordance with CSA Z276 based on the dimensions of the impoundment which surrounds the LNG tank. These setback zones are required to ensure that facilities such as public gathering places and public buildings, in existence at the time of facility siting, are located at a specified distance from the LNG facility to manage potential impact should a fire result within the impoundment area.

Terasen Gas states that as standards such as CSA Z276 evolve, LNG facilities may no longer meet all of the prescriptive requirements in the revised standards. To ensure such facilities remain safe and fit for continuing service, CSA Z276 includes a retroactivity clause which states in part:

“The requirements of this Standard are applicable to the operations, maintenance, and upgrading of existing installations; however, unless otherwise specified, it is not intended that existing installations be required to conform retroactively to the requirements of this Standard with regard to design and construction.

Where existing plants, equipment, buildings, structures, and installations meet the applicable design, fabrication, or construction layout provisions of the edition of this Standard in effect at the time of approval or installation, they may remain in use, provided that they do not constitute a significant risk to life or adjoining property”.

(Exhibit B-1, pp. 11-12) [Emphasis in original]

Terasen Gas believes that the 5.13 acre portion of the Property south of Tilbury Road is not required for the purposes of maintaining compliance with CSA Z276 (Exhibit B-1, p. 31).

5.0 RISK ASSESSMENTS

Terasen Gas states that the most likely cause of failure of its Tilbury LNG Facility is a seismic event, where the most significant consequences relate to vapour dispersion and radiant heat resulting from the ignition of an LNG spill.

Terasen Gas states that it has performed two risk assessments – the first in 1981 and the second in 1999 and that it made numerous safety-related improvements in response to these risk assessments to ensure the continued compliance of the Tilbury LNG Facility with the retroactivity clause.

Following the 1981 risk assessment, extensive ground improvement was made in 1984 around the tank to improve its response to a seismic event, including construction of a reinforced concrete high dike close to the tank within which much of the LNG carrying equipment was relocated.

Following the 1999 risk assessment improvements were made such that the prescribed dispersion limits at the LNG Facility property line were met but the radiant heat setback zones were not met in all cases. However, Terasen Gas states that the 1999 assessment concluded that the radiant heat risk was within the range of risks generally considered acceptable for similar industrial facilities, thus satisfying the retroactivity clause requirement (Exhibit B-1, pp. 13-14).

6.0 THE REASON FOR THE ACQUISITION

Terasen Gas notes that LNG standards have evolved since the original construction of the Tilbury LNG Facility and Terasen Gas has relied on the retroactivity clause in CSA Z276 to demonstrate compliance with the current CSA Z276 standard.

Terasen Gas states that the 1999 risk assessment was based on the adjacent land use at the time. During the period 1974-2008, there were a limited number of people occupying the Property at any one time. The hardwood mill employees were not normally working very close to the plant property line with the result that this use was considered acceptable from a risk perspective, as validated by the second risk assessment which was based on the use of the Property as a hardwood mill (Exhibit B-1, pp.13, 17-19).

Terasen Gas states that any change in land use and, in particular, any significant increase in the number of people occupying the Property, will increase the risk profile of the LNG Facility and could jeopardize Terasen Gas's ability to comply with CSA Z276 without considerable additional cost.

A material increase in risk could invalidate the 1999 risk assessment conclusion and necessitate either a very significant investment by Terasen Gas, or even closure of the LNG Facility. Changes in land use surrounding the LNG Facility, particularly where the occupancy increases, can also increase the consequences of failure due to a seismic event, which, in turn, affects the overall risk profile of the LNG Facility. Terasen Gas points out that Tilbury Island has undergone significant development since the Tilbury LNG Facility was constructed in 1971, and given that the Property is presently zoned for both Heavy Industrial Uses and Light Industrial Uses, the potential for the Property to be used for Light Industrial Uses is of significant concern for Terasen Gas.

Terasen Gas concludes that the most cost effective way to ensure continued acceptable risk levels to persons and adjacent property, and thus facilitate continued compliance with the governing standard, is to purchase the Property and thereby control its use. Since Weyerhaeuser has recently shut down the mill and wishes to sell the Property, the acquisition at this time represents an opportunity to ensure such continued compliance.

In addition Terasen Gas states that, while not the principal motivation for the acquisition, the Property could also provide a potential benefit related to the future potential expansion of the Tilbury LNG Facility, and could possibly be used to add buffer storage tanks to facilitate and support the LNG market for transportation use (Exhibit B-1, pp. 22-23).

7.0 ALTERNATIVES

Terasen Gas states that if it does not purchase the Property and the Property is developed such that the Tilbury Facility is no longer in compliance with CSA Z276, then Terasen Gas will be in a difficult situation and would be required to either replace the existing tank, attempt to mitigate the risk reactively after the Property was sold, or even decommission the LNG Facility. It estimates that replacing the existing tank would cost \$90 million and that, if the LNG facility had to be decommissioned the costs of providing equivalent peaking storage capacity estimated to range from \$9 to \$11 million per year. Terasen Gas does not believe that these alternatives are in the best interest of customers. In its view, the acquisition of the Property is the most cost-effective option available to it (Exhibit B-1, pp. 20-21, 24).

Terasen Gas calculates that the acquisition of the Property has a 25 year net present value in revenue requirement terms of \$24 million and will add approximately \$1 per year to the average gas bill of a residential customer in the Lower Mainland (Exhibit B-1, p. 30).

8.0 MITIGATION PROPOSALS

Terasen Gas points out that the main parcel of 17.69 acres next to the LNG facility contains more area than is presently required for compliance with CSA Z276, while the portion of the Property south of Tilbury Road is such that development on that land should not affect compliance with CSA Z276 in the future.

As a consequence Terasen Gas has examined options to mitigate the cost impact of the acquisition of the Property.

9.0 PROPERTY NORTH OF TILBURY ROAD OUTSIDE THE HEAT FLUX ZONE

Terasen Gas addresses the suggestion that it might subdivide and sell that part of the Property north of Tilbury Road outside the heat flux zone, and states that it would not be in the best interests of customers to subdivide and sell this portion of the Property. While based on the 1999 risk assessment, the portion of the Property outside the heat flux zone is not currently required for compliance with CSA Z276, the conditions relating to risk assessments of the facility could change, as they have in the past, which could lead to a wider buffer zone required to maintain compliance with CSA Z276. (Terasen Gas Argument, para 45)

Terasen Gas submits that the land north of Tilbury Road is important for emergency response capability and managing public safety and allows for more effective emergency response to a Level 3 Emergency (an urgent situation that threatens the entire plant site and/or industrial and community neighbours) if the development can be controlled. The existing land north of Tilbury Road, which is outside the heat flux zone, is currently identified as a marshalling area, where people will evacuate directly to ensure safety. (Terasen Gas Argument, para 46)

Terasen Gas must manage the Tilbury LNG Facility in a manner which properly addresses the risk of non-compliance with CSA Z276, not only at the present time but in the foreseeable future. To do otherwise would be to unnecessarily and unreasonably risk the ongoing operation of the Tilbury LNG Facility.

Terasen Gas submits that since the property north of Tilbury Road is contiguous to the existing property, it provides a benefit for Terasen Gas in that any uncontrolled development between the road and the LNG Facility would leave Terasen Gas less control and ability to respond to real or perceived threats to public safety and security. (Terasen Gas Argument, para 47)

Terasen Gas states that it plans to evaluate revenue generating opportunities, such as the potential to use the property for third party storage purposes in a manner consistent with the Corporation of Delta zoning requirements.

Terasen Gas states that it has recently obtained a confidential market assessment regarding the potential for renting the Property for third party storage (Exhibit B-1, Confidential Appendix 10). While Terasen Gas has not forecast any incremental revenue associated with the portion of the Property north of Tilbury Road, if it is able to use the land for third party storage or other revenue generating uses, any associated net revenues would be included in the annual cost of service in those years that the revenues are realized (Exhibit B-1, pp. 31-32).

Terasen Gas states that by Order G-65-09 dated June 4, 2009, the Commission approved Terasen Gas' Rate Schedule 16 for Interruptible LNG Sales and Dispensing Service as a pilot program to from 2009 to 2014, and that, while the Property is not required to make the pilot program a success, it believes that an expanded site would enhance the ability to add buffer storage tanks to facilitate and support the LNG market for transportation use should the market develop significantly in the future. The expanded site would provide sufficient space to provide separation of the peaking gas supply service and the transportation fuel service (Exhibit B-1, pp. 23-24).

10. PORTION OF THE PROPERTY SOUTH OF TILBURY ROAD

As noted above, Terasen Gas believes the smaller portion of the Property south of Tilbury Road (a total area of 5.13 acres) is not required for purposes of maintaining compliance with CSA Z276. However, the current owner of the Property has made clear that it is seeking to sell the entire Property and is not willing to consider a sale of the land that does not include this portion or to undertake the costs required to subdivide the Property to allow for this portion of land to be sold separately. Terasen Gas plans to investigate the potential to subdivide off this portion of the Property and, if subdivision is possible, seek a possible sale of this portion. Terasen Gas is proposing that any net proceeds from the sale of this portion would be used to reduce rate base and therefore to reduce the overall rate impact of the Property acquisition, because this portion will not be required or used for utility purposes. The "proposal is being made without prejudice to the Company's rights under the [Supreme Court of Canada decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy Utilities Board)*, 2006 SCC 4 (*ATCO*)] ... in respect of any future dispositions of utility property" (Exhibit B-1, p. 31).

The without prejudice qualification refers to instances other than the disposition of the 5.13 acres. (Terasen Gas Argument, para 43)

Terasen Gas provides a confidential valuation for the portion of the Property south of Tilbury Road (Exhibit B-1, Confidential Appendix 8, p. 11) and states that in order to sell the portion of the property, it would need subdivision approval from the Corporation of Delta and would be required to complete engineering drawings and make itemized improvements based on the official community plan. All improvement costs would be deducted from the selling price of the property. Terasen Gas currently estimates these costs at \$500,000 (Exhibit B-3, CEC 18.2).

11.0 VIEWS OF THE INTERVENORS AND TERASEN GAS'S REPLY

BCOAPO and CEC actively participated in the hearing by filing Information Requests and submitting Arguments. The bulk of their submissions relate to the issue of mitigation.

BCOAPO

BCOAPO acknowledges Terasen Gas' prudence of adhering to safety standards and the important role that the Tilbury LNG facility plays in Terasen Gas' operations to reduce peak supply costs. It both acknowledges and supports Terasen Gas' efforts to minimize the cost of the proposal. (BCOAPO Argument, para 4)

BCOAPO's main concern is with Terasen Gas' conclusion that the proposed land acquisition is the most cost-effective manner in which CSA Z276 compliance can be assured and the alignment of interests and risks between Terasen Gas' ratepayers and shareholders.

Noting that both the area North of Tilbury Road outside the heat flux zone and the area south of Tilbury Road are surplus to compliance with CSA Z276, BCOAPO questions the incentive that Terasen Gas will have to sell property once it is in its rate base. BCOAPO also submits that mitigation of cost should consider the subdivision and sale of the area north of Tilbury Road that is outside of the heat flux zone. (BCOAPO Argument, para 11)

BCOAPO considers the possibility of Terasen Gas' (unregulated) parent company, Terasen Inc., purchasing the land, and selling to Terasen Gas only what is needed for compliance with CSA Z276. In BCOAPO's view, this would be a preferable balance of ratepayer and shareholder risk and benefit. BCOAPO acknowledges, however, that it is beyond the Commission's jurisdiction to order such an arrangement. Nevertheless it comments that such an arrangement, "would alleviate our concerns and would truly maintain and enhance the trust placed in Terasen Gas by its customers" (BCOAPO Argument, para 15).

Alternatively, BCOAPO submits that the Commission Panel should consider approving only the proportion of the Property purchase price required to meet CSA Z276. BCOAPO concludes that there are better arrangements to balance the interests and risks of shareholders and ratepayers, and urges the Commission to find such a balance. (BCOAPO Argument, paras 16-17)

Terasen Gas submits that BCOAPO's view that the land north of Tilbury Road outside the heat flux zone should be subdivided and sold is incorrect and sets out several reasons why retention of the portion of the Property north of Tilbury Road as a contiguous parcel is necessary and prudent, the principal reason being that there indeed may be an expansion of a "buffer zone" that applies to the Tilbury LNG Facility. Terasen Gas submits that although the Tilbury LNG Facility is "grandfathered" from many of the prescriptive requirements of CSA Z276, the heat flux zones required by CSA Z276 are still relevant to the risk assessments required to demonstrate that the Tilbury LNG Facility "does not constitute a significant risk to life or adjoining property" (Terasen Gas Reply, paras 31-33).

In response to the BCOAPO submission that the Commission should consider only approving a portion of the purchase price, Terasen Gas submits that such an option is outside the Commission's jurisdiction and should not be considered. Given that the Vendor is unwilling to consider subdividing and selling only a portion of the Property, in Terasen Gas' submission a condition of the CPCN that allowed only a portion of the costs to be recovered in rates, which it submits are legitimate costs in providing utility service, would effectively require the shareholder to subsidize the purchase of the Property and "would be fundamentally unfair to the shareholder"

and contrary to the regulatory compact as explained by the courts. Terasen Gas relies on *ATCO* to support its submission that a condition on a CPCN which effectively requires the shareholder to subsidize the purchase of the property would be contrary to the regulatory compact and beyond the Commission's jurisdiction. (Terasen Gas Reply, paras 43-45)

Terasen Gas cites two authorities were cited in its submissions: *ATCO* and *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2005 ABCA 122 (*ATCO 2005*).

ATCO involved the sale of property no longer used or useful for the provision of utility services. *ATCO Gas - South (AGS)*, a division of *ATCO Gas and Pipelines Ltd.*, (*ATCO*) an Alberta public utility, applied to the Alberta Energy and Utilities Board (*AEUB*) for an order approving the sale transaction and for an order approving the proposed disposition of the sale proceeds. *ATCO* requested that the *AEUB* approve the sale transaction and the disposition of the sale proceeds to retire the remaining book value of the sold assets, to recover disposition costs, and to recognize the balance of the profits resulting from the sale of the property should be paid to shareholders. According to *AGS* the sale would also not cause any harm to customers (para 8).

The *AEUB* approved the sale transaction on the basis that customers would not be exposed to the risk of financial harm, since that matter could be addressed in a subsequent hearing. In a second decision, the *AEUB* decided that it had the jurisdiction under the *Alberta Energy and Utilities Board Act* to apply a formula which allocated the profits realized when the proceeds of sale exceeded the original costs between shareholders and rate paying customers.

The Alberta Court of Appeal set aside the *AEUB* decision and referred the matter back to the Board to allocate the entire remainder of the proceeds to *ATCO*. The Supreme Court of Canada dismissed the appeal from the Alberta Court of Appeal's decision and allowed a cross appeal by *ATCO* that questioned the *AEUB*'s jurisdiction to allocate any of the proceeds from the sale to the customers.

The majority of the Court concluded that the three statutes applicable to the *AEUB* did not provide it with the power to allocate the proceeds of sale and therefore affect the property interests of the utility (para 78).

In its Reply, Terasen Gas refers to the regulatory compact between a public utility and its customers as discussed in *ATCO* and submits that there is a balance of risk and benefit as between customer and shareholder in this case, since if the Property is sold at some future date, customers benefit by having the cost of the Property removed from rate base. Terasen Gas specifically refers to para 67 of *ATCO* where the following statement appears:

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment. The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: *MacAvoy and Sidak*, at p. 244. In fact, speculation would accrue even more often should the public utility, through its

shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk. (Terasen Gas Reply, para 41)

Terasen Gas also refers to the following paragraphs in 74-80 in *ATCO* to support its submission that a condition on a CPCN that would effectively require the shareholder to subsidize the purchase of the Property would be contrary to the regulatory compact and therefore beyond the Commission's jurisdiction. (Terasen Gas Reply, para 45)

ATCO 2005 involved an appeal from a decision of the AEUB that found ATCO had acted imprudently in managing its gas supplies for the winter of 2000/2001 and ordered ATCO to pay \$4 million to its customers for missed cost savings. In dismissing the appeal, the Alberta Court of Appeal commented on the presumption of prudence of utility management decisions. The Court agreed with the test of prudence articulated by the AEUB in its decision. The Board had described the test as follows:

. . . [T]he utility would be found prudent if it exercises good judgment and makes decisions which are reasonable at the time they are made, based on information that the owner of the utility knew or ought to have known at the time the decision was made. In making a decision, a utility must take into account the best interests of its customers, while still being entitled to a fair return (para 22).

Terasen Gas submits that its interests are aligned with those of its customers in that "it is motivated to pursue cost mitigation in the form of subdivision and sale and revenue generation as it is interested in providing service to customers in a cost-effective manner." It submits that the Court in *ATCO 2005* recognized the alignment of interests. (Terasen Gas Reply, para. 24)

CEC

CEC submits that the proposed purchase of the Property is in the public interest and meets the requirements that would enable the Commission to grant a CPCN under section 45 of the Act. CEC submits that in granting the CPCN, the Commission should exercise its authority to place conditions on the CPCN to protect the public interest, specifically with respect to costs, which may be recovered in rates from ratepayers in the future in regard to the purchase of the Property. (CEC Argument, p. 1)

Specifically the CEC submits that the Commission should make it clear to Terasen Gas that recovery from ratepayers of costs in rates is conditional upon Terasen Gas prudently carrying out mitigation of the costs which might otherwise be charged to rate payers by one of the following:

- development of revenues from the Property, which would reduce the costs related to the purchase;
- sale of a portion of the Property along with development of revenue from the remainder of the Property; and

- placing a covenant on the Property, working with the responsible municipality to obtain by-laws restricting land uses adjacent to the Tilbury LNG Plant, and selling the Property.

(CEC Argument, p. 1)

CEC disagrees with Terasen Gas that acquisition of the Property is the only way for Terasen Gas to have certainty and submits that the evidence suggests that Terasen Gas does not have to acquire the Property to limit development in that Terasen Gas made arrangements with a neighbouring property owner to provide satisfactory certainty with regard to safe and acceptable uses of land adjacent to the Tilbury LNG Plant. Clearly property ownership is not the only way to manage risk. (CEC Argument, p. 4)

CEC considers placing covenants or easements on the property, obtaining by-laws restricting land use next to the LNG facility and negotiations with neighbours to confine land use, and submits that all would be valid options for Terasen Gas to consider when managing the risk of new development. While they may not provide the same level of certainty over a long term that fee simple ownership of property would provide, CEC submits that these options may well provide sufficient certainty to be prudent risk management and may be more cost-effective than fee simple ownership. These options are likely to cost substantially less than the fee simple ownership options. (CEC Argument, pp. 4-6)

CEC submits that Commission should grant Terasen Gas' request for a CPCN for the acquisition of the Property at this time and should place conditions on the CPCN that Terasen Gas should pursue cost mitigation options up to and including placing of restrictive covenants on the Property and seeking zoning by-laws to restrict land use around the Tilbury LNG Plant and then selling off the Property to reduce costs to ratepayers.

CEC submits that the Commission should clarify, as a condition on approval of the CPCN, that the recovery of costs, related to the acquisition of the Property, in future revenue requirement regulatory proceedings would be in jeopardy, if the subsequent cost reduction measures were not prudently and adequately pursued and that the assessment of the appropriateness of recovery of those costs would be assessed over time in those future revenue requirement regulatory proceedings.

The CEC submits that such a conditional approval to the granting of a CPCN to Terasen Gas will provide a strong incentive for Terasen Gas to achieve the appropriate cost effective risk management for the Tilbury LNG Plant risks related to new development. (CEC Argument, p. 8)

Terasen Gas addresses CEC's zoning proposal and submits that, in fact, the evidence demonstrates that zoning will not provide Terasen Gas with long term certainty with respect to density and development on the Property. Terasen Gas submits that the CPCN should not contain a condition that Terasen Gas seek to establish more restrictive zoning on the Property instead of retaining the Property.

On the matter of negotiation, Terasen Gas observes that it would be in the unfavourable position of having to enter into discussions with the owner in circumstances where the owner knows Terasen Gas is facing a potential capital expense of more than \$90 million if the owner's agreement cannot be secured. Any concession will thus reflect the owner's lost opportunity to develop *and* Terasen Gas's significant savings on its investment.

Terasen Gas references paragraph 32 of its Final Argument in which it provides a number of reasons why a restrictive covenant was not a cost-effective alternative and did not provide Terasen Gas with the certainty it required with respect to controlling density and development on the Property and summarizes the reasons as follows:

- a restrictive covenant would diminish the value of the Property for resale;
- a restrictive covenant would not provide certainty for controlling the use of the Property;
- a restrictive covenant would not give flexibility to Terasen Gas for future expansion of the LNG Facility;
- Terasen Gas would have to monitor use of the Property and may require injunctive relief from the courts to enforce the restrictive covenant, which the courts may refuse to give; and
- restrictive covenants are subject to challenge by property owners as being void.

(Terasen Gas Reply, para 5)

12.0 RATEMAKING MATTERS

Terasen Gas proposes the following accounting treatment for the transaction:

- place the cost of the land together with related acquisition costs in a non –rate base deferral account from the Contract closing date until January 1, 2012. Up to that date, the amount deferred would attract AFUDC. On January 1, 2012, Terasen Gas would transfer this amount to its Rate Base;
- credit any proceeds from the sale of surplus property against the original cost of the Property;
- defer property taxes in respect of the period from the Contract closing date to January 1, 2012 in its property tax deferral account and amortize over a three-year period commencing on that date; and
- defer any incremental O&M costs in relation to the Property in respect of the period from the Contract closing date to January 1, 2012 and amortize over a three-year period commencing on that date.

(Exhibit B-1, pp. 29-30)

Terasen Gas proposes that if it is able to use the land for third party storage or other revenue generating uses, any associated net revenues would be included in the annual cost of service in those years that the revenues are realized. (Exhibit B-1, pp. 31-32)

CEC addresses Terasen Gas' proposed accounting and ratemaking proposals and agrees with all items proposed by Terasen Gas, except (i) for the proposal to amortize the incremental O&M costs over a three year period, where CEC submits that they should be amortized over the expected remaining life of the Tilbury LNG Plant of 25 years, and (ii) provided that it is clear in the Commission's decision that the inclusion in rate base is conditional on the prudent and diligent pursuit of the full suite of cost mitigation potentials. (CEC Argument, pp. 8-9)

13.0 FIRST NATIONS

Terasen Gas believes no First Nations consultation is required for the purchase for the following reasons:

1. The purchase of the privately owned fee simple Property does not have the potential to impact any Aboriginal right or title;
2. The Property and the easement area are both privately owned , within an existing industrial area and have been previously used for heavy industry; and
3. There are no known archaeological or heritage sites on the Property.

(Exhibit B-1, p. 28)

Terasen Gas submits that the purchase of the Property does not give rise to a duty for the Crown to consult with First Nations as it is a transfer of previously developed, fee simple land as between private parties (Terasen Gas Argument, para 49). CEC endorses this view (CEC Argument, para 11).

14.0 JURISDICTION

Sections 45 and 46 of the Act are appended as Appendix 1 to this Decision.

No submissions were made on what constitutes public convenience and necessity for the purposes of sections 45 and 46. The Commission has previously concluded *In the Matter of Vancouver Island Energy Corporation (A Wholly –Owned Subsidiary of British Columbia Hydro and Power Authority), Vancouver Island Generation Project, Application for a Certificate of Public Convenience and Necessity*, Decision dated September 8, 2003 (VIGP Decision) that “...the test of what constitutes public convenience and necessity is a flexible test” (VIGP Decision, p. 76).

In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project, Decision (VITR Decision) dated July 7, 2006 the Commission discussed public convenience and necessity and the public interest, in the context of sections 45 and 46 of the Act. It adopted the statement of the Supreme Court of Canada in *Memorial Gardens Assn.(Can.)Ltd. v. Colwood Cemetery Co.* [1958] S.C.R. 353 at para 8 that it would be “...both impractical and undesirable to attempt a precise definition of what constitutes public convenience and necessity.” It also adopted the statement in the VIGP Decision that the test was a flexible test (VITR Decision, pp. 1, 15).

The Commission Panel considers that cost-effectiveness is one of a number of factors that it can consider in deciding whether to issue or refuse a CPCN.

Pursuant to section 46(3.1) of the Act, the Commission Panel is required to consider the following matters in deciding whether to issue a CPCN:

- (a) the government's energy objectives,

- (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
- (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable.

No submissions on these matters were received from Terasen Gas or the Intervenors. The Commission Panel finds that despite the absence of submissions, none of the matters noted above apply to the Application. Under section 46(3) of the Act:

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

Terasen Gas accepts that “the Commission has broad jurisdiction to impose conditions on a CPCN,” but as noted above submits that that a condition on a CPCN that would effectively require the shareholder to subsidize the purchase of the Property would be contrary to the regulatory compact and therefore beyond the Commission’s jurisdiction (Terasen Gas Reply, para 45).

15.0 COMMISSION DETERMINATION

Based on a comparison of the alternatives identified by Terasen Gas, the Commission Panel agrees with Terasen Gas’s submission that the purchase of the Property is the most cost-effective means of facilitating the Tilbury LNG Facility’s ongoing compliance with CSA Z276.

The Commission Panel agrees with Terasen Gas that, in the circumstances described by Terasen Gas, the purchase of the Property does not give rise to a duty for the Crown to consult with First Nations.

The Commission Panel agrees that the acquisition of the Property in fee simple, unlike relying on negotiations with neighbours, zoning or a restrictive covenant, will provide Terasen Gas with the requisite certainty that it seeks. Accordingly, it denies any relief sought by the CEC in this regard.

The Commission Panel also understands that Terasen Gas has no control over the Vendor’s unwillingness to consider a sale of only a portion of the Property and that its options are either to purchase the Property in its entirety from Weyerhaeuser or to do nothing. The main issue in the Commission Panel’s determination whether to grant the requested CPCN becomes the mitigation options proposed by Terasen Gas and the Intervenors for the two portions of land.

With respect to the land south of Tilbury Road the Commission Panel notes Terasen Gas’ submission that this portion of the Property is not required to effect compliance with CSA Z276 and that its development would not affect compliance with CSA Z276 in the future. It agrees with Terasen Gas’s proposal to subdivide this land and sell it. The Commission Panel also accepts the confidential valuation of this land and Terasen Gas’ estimate of the costs of subdivision and sale.

In considering the main issue, the Commission Panel's must determine where the risk of Terasen Gas' proposal to subdivide and sell the land south of Tilbury Road should appropriately lie. Terasen Gas submits that it would conduct a thorough analysis and would only pursue the subdivision and the sale if it continued to be cost-effective to ratepayers. Terasen Gas proposes to allocate the risk entirely to its customers by placing the entire property into rate base and allocating the entire proceeds of sale of the portion of the Property south of Tilbury Road to customers when and if the sale closes (without prejudice to its rights under *ATCO* in other instances). The Commission Panel has considered Terasen Gas's submission that its interests and the interests of its customers are aligned due to Terasen Gas's motivation to pursue cost mitigation in the form of subdivision and sale and its interest in providing service to customers in a cost-effective manner, the Commission Panel observes that Terasen Gas's proposal is to investigate the potential to subdivide off the land south of Tilbury Road and, if subdivision is possible, seek a possible sale. Terasen Gas is proposing that any net proceeds from the sale of this land would be used to reduce rate base and therefore to reduce the overall rate impact of the Property acquisition.

The Commission Panel notes that Terasen Gas' proposal, if not executed by January 1, 2012 will require customers to pay in their rates the costs of property that is not required or used for utility purposes. The Commission Panel agrees with the concerns expressed by BCOAPO that there seems little incentive on Terasen Gas to pursue the sale and that the proposal favours the interests of Terasen Gas' shareholder. The Commission Panel has also considered Terasen Gas' submissions on the presumption of prudence, the nature of the regulatory compact and the alignment of its interests with those of its customers and is not convinced that, in the circumstances of this Application, Terasen Gas' interests are aligned or that the regulatory compact places any form of performance standard on the utility. The Commission Panel considers that this is one of the reasons that section 46(3) of the *Act* gives it the jurisdiction to impose conditions in this instance.

The Commission Panel has considered BCOAPO's submission that the Commission should consider only approving a portion of the purchase price and finds that it has merit as a means of balancing ratepayer and shareholder risk and benefit.

The Commission Panel rejects Terasen Gas' submission that by approving only a portion of the purchase price Terasen Gas's shareholder would be required to pay "legitimate costs of providing utility service." In the Commission Panel's view the evidence is that the land south of Tilbury Road will not be required or used for utility purposes and for this reason any order it makes to exclude it from rate base is within its jurisdiction. The Commission Panel finds that the facts in this proceeding can be distinguished from those in *ATCO*, since:

- i. the property disposed of by AGS had been in rate base for decades prior to its disposal, whereas the land south of Tilbury Road has never been (nor will it ever be) used to provide utility service; and
- ii. the issue was the allocation of the sale proceeds of a utility property, whereas the issue in this proceeding is the treatment for rate making purposes of a property that has not yet been purchased, a portion of which will never be required to provide utility service.

The Commission Panel believes that the suitable balance between ratepayer and shareholder can be struck by including a portion of the purchase price in rate base and by ascribing a residual value to the land not required to provide utility service that will incent Terasen Gas to dispose of the land in a timely fashion and in a way that will minimize the risks to both Terasen Gas and its ratepayers. Accordingly the Commission Panel rejects

Terasen Gas' proposal to subdivide and sell the land south of Tilbury Road and allocate the proceeds to rate base and is not prepared to grant the CPCN as applied-for.

In the case of the land north of Tilbury Road outside the heat flux zone, the Commission Panel accepts Terasen Gas' submission that it would not be in the best interests of its customers to subdivide and sell this parcel. The Commission Panel accepts Terasen Gas' undertaking to seek offsetting revenues from third parties as a suitable mitigant with any actual off-setting revenues being used to reduce the annual revenue requirement.

The Commission Panel is prepared to find that that the Tilbury Property Purchase is in the public interest and will grant a CPCN to Terasen Gas under the following conditions:

- (1) Terasen Gas agrees to allocate the total cost of the Property between that which is not required to comply with CSA Z276 (the land south of Tilbury Road) and that which is required to comply with CSA Z276 as follows:**
 - **the residual value of the land south of Tilbury Road will be determined at its current gross valuation less the sum of: (i) the estimated cost of subdivision and sale, (ii) estimated property taxes for the period from the Contract closing date until January 1, 2012, and (iii) estimated short term interest expense from the Contract closing date until January 1, 2012; and**
 - **the balance of the Property (all that lying north of Tilbury Road) will be valued at the sum of all the costs of the transaction less the residual value of the land south of Tilbury Road established above.**
- (2) Terasen Gas agrees that at the Contract closing date, the value of the balance of the Property shall be captured in a non-rate base deferral account, with the balance attracting AFUDC until being added to rate base in the appropriate land account on January 1, 2012.**
- (3) Terasen Gas agrees to defer only the property taxes related to that part of the Property that lies north of Tilbury Road and to recover them in rates over a three-year amortization period.**
- (4) Terasen Gas agrees to allocate those incremental revenue requirement items which can be reasonably identified as necessary to bring that part of the Property that lies north of Tilbury Road into its required condition to be capitalized to the appropriate land account and to expense any other costs that fail to meet this criterion.**
- (5) Terasen Gas agrees to report to the Commission by January 1, 2012, potential opportunities that might generate any revenue from the land north of Tilbury Road outside the heat flux zone, while remaining compliant with CSA Z276 and the costs Terasen Gas anticipates would be required to realize any such potential opportunities.**

Subject to Terasen Gas agreeing to the above conditions in writing within 10 working days of the Order issued concurrently with this Decision, the Commission Panel grants the CPCN.

UTILITIES COMMISSION ACT EXCERPTS

Certificate of public convenience and necessity

45 (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

(2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it

(a) to operate the plant or system, and

(b) subject to subsection (5), to construct and operate extensions to the plant or system.

(3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

(4) The commission may, by regulation, exclude utility plant or categories of utility plant from the operation of subsection (1).

(5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(6.1) and (6.2) [Repealed 2008-13-8.]

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise,
or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

Procedure on application

- 46** (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.
- (2) The commission has a discretion whether or not to hold any hearing on the application.
- (3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.
- (3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider
- (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
 - (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable.
- (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
- (4) If a public utility desires to exercise a right or privilege under a consent, franchise, licence, permit, vote or other authority that it proposes to obtain but that has not, at the date of the application, been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate.
- (5) On application under subsection (4), the commission may make an order declaring that it will, on application, under rules it specifies, issue the desired certificate, on the terms it designates in the order, after the public utility has obtained the proposed consent, franchise, licence, permit, vote or other authority.
- (6) On evidence satisfactory to the commission that the consent, franchise, licence, permit, vote or other authority has been secured, the commission must issue a certificate under section 45.
- (7) The commission may amend a certificate previously issued, or issue a new certificate, for the purpose of renewing, extending or consolidating a certificate previously issued.
- (8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption.