bcuc
British Columbia
Utilities Commission

Patrick Wruck
Commission Secretary

Commission.Secretary@bcuc.com
bcuc.com

Suite 410, 900 Howe Street
Vancouver, BC Canada V6Z 2N3
P: 604.660.4700
TF: 1.800.663.1385
F: 604.660.1102

July 14, 2017

STARGAS ADDITIONAL DELIVERY COSTS 2016 DRARA
EXHIBIT A-4

Sent via email

Mr. M.A. Blumes
President and Director
Stargas Utilities Ltd.
2475 Dobbin Road, Unit 3
West Kelowna, BC V4T 2G3
stargas@shaw.ca

Re: Stargas Utilities Ltd.
Application to include additional costs in the 2016 Delivery Rate Application Regulatory Account

Dear Mr. Blumes:

On June 21, 2017, the British Columbia Utilities Commission (Commission) invited submissions from the Silver Star Property Owners Association (SSPOA) with respect to the subject application. Specifically, the Commission requested comments on (i) a regulatory review process and regulatory timetable, (ii) whether the requested amounts should be deferred for consideration until Stargas Utilities Ltd.'s (Stargas) next application for a delivery rate, and (iii) any other matters.

The Commission received the enclosed submission from the SSPOA on July 10, 2017. The Commission invites Stargas' reply to this submission, at your earliest convenience.

Sincerely,

Original signed by Katie Berezan:

Patrick Wruck
Commission Secretary

BG/cms
cc: utilities@sspoa.ca

NORTON ROSE FULBRIGHT
Barristers & Solicitors / Patent & Trade-mark Agents

Norton Rose Fulbright Canada LLP
1800 - 510 West Georgia Street
Vancouver, BC V6B 0M3 CANADA

F: +1 604.641.4949
nortonrosefulbright.com

Matthew D. Keen
+1 604.641.4913
matthew.keen@nortonrosefulbright.com

Assistant
+1 604.641.4527
rosalind.endo@nortonrosefulbright.com

July 10, 2017

Our reference: 16-4902

BY EMAIL

British Columbia Utilities Commission
6th Floor – 900 Howe Street
Vancouver, BC V6Z 2V3

Attention: Patrick Wruck, Commission Secretary

Dear Sir:

Stargas Utilities Ltd. (Stargas) Delivery Rate – Project No. 3698893
Silver Star Property Owners Association (SSPOA) Response to Stargas Application to Include Additional Costs in its 2016 Delivery Rate Application Regulatory Account

We are legal counsel to the SSPOA in this matter, and, further to the Commission's letter of June 21, 2017, write on its behalf to respond to Stargas' request to "include additional costs…in the 2016 Delivery Rate Regulatory Account".

The specific questions in the Commission's invitation are:

1. A regulatory review process and regulatory timetable, if any;

2. Whether the requested amounts should be deferred for consideration until the next application for a delivery rate, which Stargas is directed to file by July 31, 2019.1 Stargas would be permitted to accumulate the requested costs in the 2016 Delivery Rate Application Regulatory Account and accrue carrying costs on those amounts based on Stargas' weighted average cost of capital until such time as a determination is made; and

3. Any other matters that will assist the Commission in efficiently reviewing the submission.

Below, the SSPOA addresses the first two questions posed by the Commission, and responds briefly to each of the three challenges to the Commission's delivery rate decision contained within Stargas' filing. The SSPOA then responds to the Commission's third question, noting its general concerns with Stargas' conduct following the delivery rate proceeding, and concludes by suggesting a review process and appropriate procedural steps going forward.

Briefly, Stargas' request is another reconsideration and variance request (R&V) that simply fails to use that label. The Commission's standard two-stage process should therefore apply. That process is common to many regulators, and designed to offer efficient outcomes in situations like this. As explained in more detail below, all three of Stargas' requested changes / fee increases should be summarily rejected at the first stage of review. They stem from a continued misunderstanding of Stargas' *forecast* regulatory model, meaning they should have been dealt with during the main hearing, are therefore inappropriately raised at this late stage.

Stargas' Request is a R&V Request and Should be Treated That Way

Even though Stargas does not use the language of "reconsideration", Stargas seeks the Commission to reverse parts of its recent decision based on information known or otherwise available during the hearing process, which is exactly what a reconsideration is. Stargas states that its requests, if granted, will mitigate some of the impacts to Stargas from the apparently unanticipated consequences of filing its rate case. In Stargas' words, its request is one of "equitable" relief, that would provide "fair and reasonable accommodation" given that its "stakeholders" would not "have agreed to underwrite the quantum of denied costs" in the Commission's Decision. Indeed, the effect of Stargas' requests would be to reverse multiple rulings from the Commission's delivery rate decision: specifically, adding (i) the costs of dealing with Commission decisions, and (ii) amounts inexplicably omitted from the forecasts that were litigated during the hearing, to the regulatory costs already approved by the Commission

The Commission should therefore make use of its standard reconsideration process to address Stargas' request. SSPOA, and all Stargas customers, are entitled to the same procedural protections as other utility customers.

The Commission's reconsideration process is well established. It notably consists of a two stage process where, if the Commission is satisfied "*prima facie*" that there is a legitimate issue to be considered in its earlier decision, a more substantive review will ensue. The general structure is shared by the Alberta Utilities Commission ("AUC"),[1] the National Energy Board,[2] and the Ontario Energy Board,[3] to only name a few regulators. The *prima facie* step exists precisely for situations like this, so abusive review requests can be quickly identified and efficiently rejected. The need for such process is recognized by the authors of a leading administrative law textbook, who highlight that a tribunal's reconsideration powers must be diligently exercised through reconsideration rules and limitations to prevent abuse of a review process, particularly by parties with "deep pockets" who can use the first hearing as a "trial run".[4] This concern is especially relevant where the party seeking review can recover its costs from the other side, as Stargas is keen to do.

Accordingly, to create efficiency and manage the costs of Stargas' applications, the SSPOA recommends that the Commission rigorously apply its existing "*prima facie*" first stage test, especially by rejecting outright review attempts where Stargas had the opportunity to deal with the issue during the main hearing but chose not to, or, as in Stargas' other reconsideration request, has inadequately articulated the legal basis for its claim.

Stargas' Requests Fail the *Prima Facie* Test

Fundamentally, Stargas continues to misunderstand the regulatory compact and forecast ratemaking, which is the cause of its multiple application re-filings in its initial hearing, and the cause of what has now become multiple review applications relating to that decision. As part of the regulatory compact, Stargas is provided a return on equity (ROE) that reflects the risks inherent in its business. Those risks include, among others, the regulatory risks associated with forecast ratemaking, and potential shortfalls due to under-collection of their actual costs. As this Commission explained in the *Hemlock* decision, "as costs are forecast, there is no guarantee the utility will earn a fair and reasonable return; rather, it is afforded the opportunity to do so."[5]

The common thread between Stargas' repeated re-filings and review applications is their attempt to shift this forecast risk onto ratepayers and insulate it from the very risk it undertakes as a regulated utility. This behaviour must be stopped now to avoid the significant waste associated with Stargas' repeated "top up" filings. The SSPOA addresses specific issues in Stargas' request in detail below.

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[1] Alberta Utilities Commission Rule 016: Review of Commission Decisions, 2016, s.6(1).
[2] National Energy Board Rules of Practice and Procedure, 1995 (SOR/95-208), s.45(1)(a).
[3] Ontario Energy Board Rules of Practice and Procedure, 2016, s.43.01.
[4] Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure before Administrative Tribunals,* (Thomson Reuters, 2017), Chapter 27A.1.
[5] *Hemlock,* p. 3-4.

(a) Should the parameters of the 2016 regulatory account change from those delineated in Order G-59-17?

For background, during the recent hearing process Stargas suggested that a regulatory account for hearing costs be created and subject to a "true up" process.[6] The Commission denied Stargas' request, and ruled that hearing cost estimates should be provided and adjudicated during the recent hearing.[7] Stargas repeated its request in Final Argument, and again in Reply Argument:

> Stargas proposes upon receipt of its final costs to file with the Commission a summary with details of its Application costs for review and approval for inclusion in rates and would propose to bear its own costs in such review process.[8]

The Commission's delivery rate decision denied the request again. The Commission directed Stargas to create the 2016 Regulatory Account with a scope limited to *solely* recovering the precise litigated and approved regulatory costs, plus Commission and PACA costs.[9]

Stargas' request now repeats its earlier efforts, for a third time. Stargas proposes that the Commission undertake a "true-up", exactly as proposed in Stargas' Reply Argument, only apparently without additional public process. That would reverse part of the Commission's delivery rate decision.

The option presented in the Commission's request for comment would now have the account collect additional, untested amounts, add carrying costs, and then test and adjudicate those amounts at a later time, as Stargas initially proposed in January. The purpose of the account would morph from amortizing known and litigated costs into a standard regulatory cost deferral account, comparable to those used by some large utilities.

The SSPOA considers the Commission's approach in the delivery rate decision to have been appropriate. The ability of a regulatory account to achieve just and reasonable rates in respect of regulatory costs depends upon those costs being adequately tested. A standard regulatory cost deferral account approach is therefore inappropriate in Stargas' circumstances, given (i) Stargas' history of disallowances, (ii) its executives' clear statements about a lack of record keeping and regulatory sophistication, and (iii) the limited resources of the SSPOA given Stargas' small customer base.

It is difficult and time-intensive for customers to look back on regulatory costs incurred several years earlier and show why, in context, they may have been excessive, duplicative, or otherwise inefficient. Approving a deferral account approach here, *in practice*, weakens the onus on Stargas to justify the reasonableness of the regulatory cost component of its rates, and therefore does not provide sufficient incentive for Stargas to be efficient. This is recognized in the Commission's Regulatory Account Filing Checklist, which holds that benefit matching should generally capture forecast, as opposed to actual, costs. In addition, serious issues were identified with Stargas' practices in the only recent contested hearing it has encountered. Until Stargas shows otherwise, the same should be expected of future hearings, which further harms customers' ability to test costs incurred.

The SSPOA therefore does not support the deferral approach suggested by the Commission's letter, but would be pleased to elaborate further in any second stage review process that considers varying the nature of the 2016 Delivery Rate Regulatory Account.

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[6] Ex. B-1-2, p .2.
[7] Ex. A-9.
[8] Stargas Final Argument, para. 34; Stargas Reply Argument, para. 86.
[9] Order G-59-17, p.18-19. The SSPOA PACA amount was not precisely known, although the Commission was aware that it would not exceed $10,000.

(b) Should Stargas be permitted to revise and increase the regulatory amounts approved for collection in the regulatory account by Order G-59-17?

In its decision on Stargas' rate case, the Commission ruled that the full $16,500 submitted by Stargas as counsel costs should enter revenue requirement, but did find that 25% of Stargas' associated claimed executive management expenses should not because Stargas "submitted material not directly relevant to the proceeding, and repeatedly changed and corrected its submissions".[10]

Stargas now seeks to change that finding by increasing its counsel costs by 60% to $26,000. Stargas' basis for requesting approval of the initial $16,500 estimate was that the proceeding was "complex". Stargas' basis for requesting approval of its new 60% increase is *also*, once again, that the proceeding was "complex". No new information is offered to justify why the new quantum is reasonable relative to the tasks accomplished, the overall hearing cost, the overall revenue requirement or, most importantly, why Stargas did not deal with this total counsel cost amount during the hearing given these costs should have been capable of being forecast at the time of the original proceeding. Like the first R&V request, this was an item that could have been dealt with during the hearing and should not properly be the subject of a reconsideration request now.

Stargas' request must be underpinned by one of the following reasons: (i) Stargas revisiting a strategic choice concerning the quantum of counsel costs that it presented to the Commission, after reviewing the Commission decision - i.e., Stargas thinks it can "get more", if only it asks, (ii) Stargas' confusion as to what its counsel estimates actually said, (iii) mistaken, incomplete, truncated, or inaccurate counsel estimates provided to Stargas, or (iv) counsel incurring $10,000 more than budgeted solely on Stargas' reply argument after reviewing SSPOA submissions (despite having notice through SSPOA IRs and other avenues that the SSPOA had retained counsel and was fully engaged). The last option cannot be true, as counsel's reply submission specifically defended the original $16,500 estimate. Surely at that point counsel and Stargas would have been aware that the amount defended was inaccurate. The three earlier options likewise provide no justification to recover incremental amounts. Stargas should either be held to its choice during the hearing to limit its counsel cost request to $16,500, or bear the consequences of any associated error on it or counsel's part (particularly if Stargas refuses to admit error now).

The Commission should therefore reject the request summarily. It constitutes wasteful duplication and an abuse of the sort described above. The SSPOA would be pleased to provide further submissions during any second stage of this in substance review request. Doing so beyond the foregoing speculation would require commenting on the content of the invoices that the Commission withheld from the SSPOA when it provided Stargas' filing.

(c) Should Stargas be permitted to transfer 2017 regulatory costs to the 2016 Delivery Rate Application Regulatory Account to reflect the accounting, administrative and executive time associated with processing the Commission's Order?

Stargas argues that it would be equitable to transfer 2017 regulatory costs to the 2016 rate application regulatory account to reflect costs associated with processing the Commission's Order, since such costs would not otherwise be allowed for in the determination of rates. Stargas estimates that the accounting time required to prepare a spreadsheet will cost $276.96, the administrative time incurred in posting will cost $245, and its executive time to oversee will cost $421. In total Stargas is asking that an additional $1,000 in accounting, administrative and executive costs be allowed within the Delivery Rate Regulatory Account.

While the costs Stargas estimates are necessary to comply with the Commission's Order are not insignificant, it would be inappropriate at this stage to, in effect, increase the total revenue requirement amount for 2017. The annual forecast regulatory component approved by the Commission should be taken to have been an "all in" amount (i.e., contemplated and included the costs associated with implementing its order). Recognizing "incremental amounts" which crystalize after an order is issued risks double counting.

[10] *Ibid,* p. 15.

Even if double counting is not present, the risk of "uncompensated" work is part of the risk/reward nature of the regulatory model that has always applied to Stargas, as discussed above. To the extent that Stargas did not build review and implementation costs into the regulatory cost forecast component of its revenue requirement, these costs are part of the risk that justifies Stargas' ROE. Likewise, any unanticipated regulatory costs, and any unanticipated regulatory savings, are to the account of Stargas' shareholder. Stargas clearly does not expect to have to apply to the Commission to change the rate to refund any regulatory savings in 2018, nor should it.[11]

If Stargas wants to recover its time exactly as billed, and not on a forecast basis, then it is taking essentially no risk; the ROE that it receives should be significantly reduced as a result. This again reflects the SSPOA's concern with a utility that appears to be operating to maximize fees billed by an affiliate entity, as opposed to prudently seeking to grow the corporation and *reduce* the fees that it pays to its service providers by finding efficiencies.

Further, Stargas had ample opportunity to include these costs in its forecast and simply did not, despite repeated updates and refilings. No new duplicative process should be started now simply to cater to Stargas. Again, Stargas' customers deserve the equal protection of the Commission's standard procedures, which means rejecting these sorts of requests.

(d) Should Stargas be permitted to transfer 2017 regulatory costs to the 2016 Delivery Rate Application Regulatory Account, to include the executive time and counsel costs of seeking to review the Commission's Order on the basis of retroactive ratemaking?

Stargas also seeks to transfer 2017 regulatory costs arising from executive and counsel time it has incurred in its reconsideration and variance application to the 2016 rate application regulatory account. Stargas argues that since these costs all but surmount the cost of the refund it seeks to have overturned, these costs must be included for this attempt to have been worthwhile. In particular, Stargas is seeking about $5,500, with $1,500 representing legal costs and the remainder representing executive time spent on preparing its request for reconsideration and responding to the SSPOA's submission.

To reiterate, in exchange for the risk of under forecasting, Stargas gets an appropriate ROE and the benefit of the prospect of over forecasting. It is entitled to no further compensation for review costs that are reflected in the overall regulatory cost forecast approved by the Commission as part of Stargas' revenue requirement.

Stargas fails to note the irony of the "pyrrhic victory" that it refers to: while Stargas is concerned that its costs will largely eat into any amount it recovers in its R&V, Stargas essentially asks the Commission to place customers in the same boat, where a successful defence of Stargas' R&V will nevertheless increase revenue requirement by the same amount as if customers had lost. This fact, in and of itself, is not relevant to the relief sought.

Further, it is premature to decide these costs pending the Commission's decision on the merits of the reconsideration (upon which Stargas is wrong). As discussed in more detail in the following section, the result of the Commission's decision is relevant to whether Stargas should be entitled to any costs. Further, even if Stargas is successful, this issue should have been dealt with during the main hearing, as the Commission raised it in IRs and the SSPOA raised it in argument. Proceeding by way of review is a duplicative cost that should be to Stargas' account, not ratepayers.

[11] To avoid any confusion, note that this is different from a changing benchmark ROE, at issue in the (other) ongoing Stargas reconsideration request, where the SSPOA's position is that the approved benchmark premium methodology entails an obligation upon Stargas to make application to reflect any benchmark changes.

General Concerns

(e) Stargas' Request Should be Public

The SSPOA appreciates the Commission's invitation to comment on Stargas' request, as it extends procedural fairness to many customers directly affected by the Commission's decision. As an additional matter, Stargas' most recent request should be made publicly available on the Commission's website,[12] even though experience suggests it is unlikely that any other party will participate. Other Stargas customers are directly affected too, and the Commission's adjudication of the regulatory issues raised by Stargas should be visible to all Stargas' customers, present and future, and may also have application to other BC utilities and their customers. Presenting Stargas' requests and the Commission's responses on the public record, with full and detailed reasons, therefore serves the public interest.

(f) The Commission Should Follow AUC Practices Concerning Review Costs

The SSPOA is concerned by Stargas' numerous attempts to collaterally attack or reverse aspects of the Commission's recent decision.[13] The approach is particularly inefficient and expensive, with the SSPOA's constituents bearing the costs, both in terms of costs incurred by SSPOA to resist Stargas' conduct in the various regulatory proceedings, and as Stargas customers who pay Stargas' regulatory costs (including its counsel) through rates. As the Commission has recognized, Stargas should not be permitted to pass inefficient costs on to customers.

It is perverse for Stargas to challenge decisions favourable to customers, after ample preparation with the assistance of counsel, and then seek to both increase its compensation for its review efforts, and also pass its review counsel costs on to customers, irrespective of the merits of its attempt. Given Stargas' management (through OKF) is also its shareholder, Stargas has no incentive to avoid creating "make work" regulatory projects that, if paid for by customers, necessarily compensate Stargas' shareholder regardless of whether they are actually successful. Stargas' regulatory tactic of multiple weak appeal attempts therefore amount to a "heads I win / tails you lose" approach that is abusive to captive customers. The Commission's processes should protect them from these efforts.

Stargas' approach means that customers face a "no win" situation. If the Commission's decision is not defended, it is to their detriment because the Commission does not have the benefit of their contending point of view. If customers defend the Commission's decision, they then face the prospect of paying both the costs of their own counsel (PACA awards do not recover full costs and are of limited assistance, as SSPOA members comprise a majority of Stargas' customers), as well as Stargas' counsel and Stargas' regulatory costs (including management who are also shareholders), even if they succeed on the merits. "Pyrrhic victory" indeed.

Stargas must face real risks from a review application to discipline the financial incentive that exists otherwise to impose "no win" situations on customers after every rate case or adverse Commission decision. To address these concerns, the SSPOA recommends the Commission employ the following practices.

First, in these circumstances – a small utility incurring significant regulatory costs that are paid directly as executive/administrative costs to the shareholder and which have a material impacts on rates – the Commission must take steps to avoid abuse of its process. SSPOA submits that the Commission should simply follow the AUC's lead and, in the event of an unsuccessful review, require Stargas' shareholders to bear not only its own costs, but also pay the intervener costs to defend the original decision.

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[12] Options are to either treat it as a new and distinct application, or as a further component of the first Stargas reconsideration proceeding.

[13] Specifically: the commodity rate application filed alongside the delivery rate Reply Argument, its first review request, the request at issue here, and two customer notices subsequent to the Commission's decision, all of which substantively challenge giving effect to aspects of the Commission's Order.

The AUC's rules state:

> When the unsuccessful review applicant is the owner of an electric utility, the owner of a gas utility, or the [Independent System Operator], it shall also bear the costs incurred by local interveners responding to their review application, and these costs shall be borne by the shareholders of the applicant utility or the [Independent System Operator] and may not be included in or form the basis of any forecast used to apply for rate increases.[14]

Second, the Commission should rigorously employ the use of the first stage *prima facie* test. If an issue could have been dealt with during the main hearing, but was simply left to one side by Stargas – whether as a matter of legal argument, or counsel or executive cost estimates – then the Commission should not entertain changing its decision now. Stargas should not get the benefit of a second kick at the can at customers' expense.

Third, the SSPOA recommends that the Commission likewise rigorously enforce the standard utility onus to prove the reasonableness of all review-related costs, even if successful - i.e., Stargas' regulatory/counsel costs should be considered unrecoverable unless Stargas can show otherwise, rather than treated as reasonable unless customers should show otherwise.

Conclusion

In short, the SSPOA's submission is as follows:

- Though not framed in so many words, Stargas' request is an R&V request, and should be treated by the Commission as such. Doing so is both procedurally fair and procedurally efficient.

- Given the small amounts at stake, procedural efficiency demands that the Commission rigorously apply the *prima facie* standard for the first stage of an R&V.

- With respect to the specific issues raised in the Commission's letter:

    - There is no justification for changing the nature of Stargas' regulatory account for forecastable future costs away from what was approved in the recent delivery rate hearing, and towards a structure used by larger and more sophisticated utilities. Stargas is ill-equipped to manage that structure, and in the specific circumstances it would be unfair to the SSPOA and Stargas' customers to delay final adjudication of current delivery rate amounts by years.

    - All of Stargas' requests for increased "top-up" / unforecast cost increases should be rejected at the Commission's preliminary stage of review because they are inconsistent with Stargas' forecast ratemaking model, and should have been dealt with during the earlier hearing. More process now is duplicative and wasteful. Specifically:

        - Stargas' request to be compensated for yet further counsel costs arising from its rates case should be rejected because it vigorously defended a smaller estimate during its rate case, and has provided no justification for raising these new costs at this late stage.

        - Stargas' request to increase rates based on implementing the Commission's rate case order risks double counting because the Commission's order should be seen as an "all-in" approved amount and, in any event, ignores that under the regulatory compact, it is compensated for regulatory risk (e.g., unforeseen costs), through its ROE.

[14] Alberta Utilities Commission Rule 009: Rules on Local Intervener Costs, s. 5.A.3.

- Stargas' request to increase rates to compensate it for costs incurred in challenging the Commission's rate case decision again ignores the regulatory compact and its allowed return, and in any event is premature, since the Commission has not yet rendered a decision on the merits, which is relevant to whether Stargas should recover those costs. In the SSPOA's view, Stargas' (first) R&V is unnecessarily duplicative, because it could have addressed the issue in dispute during the original hearing merely by responding to the SSPOA's argument on that very issue, but did not.

- Because Stargas' shareholders benefit from increased regulatory costs, Stargas must be financially disciplined to avoid wasteful behaviour and abuse of Commission processes. The Commission should therefore require Stargas to pay its own regulatory costs, as well as those of interveners, for any unsuccessful R&V, and to meet its onus to establish prudent costs even if it is successful.

The Commission should therefore take the following steps:

- Treat Stargas' request as an R&V request and publish it on the Commission's website accordingly.

- Seek all parties' comments on whether the first *prima facie* stage of the review has been met for each of the issues discussed above. The SSPOA is content for the within submissions to serve that purpose. Based on these submissions, none of the issues pass the first stage *prima facie* threshold. Stargas' requests should be dismissed. Stargas should bear its costs of this application, as well as interveners.

- In the event that the Commission considers any issues ought to proceed to the second stage of review on their merits, the Commission should seek parties' further and detailed submissions. While the SSPOA denies there are any such issues, it would be pleased to provide submissions if the Commission rules otherwise. Stargas should then have an opportunity to reply.

Please contact the undersigned if you have any questions.

Yours very truly,

Matthew D. Keen

MDK/roe
c. M. Waberski, S. Cook, SSPOA
info@stargas.ca