

BRITISH COLUMBIA UTILITIES COMMISSION
IN THE MATTER OF THE UTILITIES COMMISSION ACT
R.S.B.C. 1996, CHAPTER 473

And

SSL - Sustainable Services Ltd.
SSL Geothermal Systems Status as a
Public Utility under the *Utilities Commission Act*

VANCOUVER, B.C.
March 9th, 2018

ORAL ARGUMENT

BEFORE:

D. Morton,

Chair

B. Magnan,

Commissioner

VOLUME 2

APPEARANCES

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VANCOUVER, B.C.
March 9th, 2018

(PROCEEDINGS RESUMED AT 9:58 A.M.)

CHAIRPERSON: Please be seated. Thank you.

Good morning, ladies and gentlemen. My name is Dave Morton, and with me is Commissioner Bernie Magnan.

Welcome to this morning's oral argument phase in SSL's geothermal energy system status as a public utility proceeding, which is proceeding under the *Utilities Commission Act*. This proceeding was established on June 17th, 2016 and we've held a workshop and a procedural conference on January 18th. Since then there has been a round of Commission Information Requests, Panel Information Requests, final and reply arguments, and that brings us today to the oral argument phase.

As indicated in the Commission's letter dated January 8th, 2018, the Panel requests that as part of the oral arguments, the parties discuss in particular what effect, if any, the concepts discussed in a document entitled "Launching and Maintaining a Local Government Corporation: A Guide for Local Officials", which is a 2006 document. And it's posted as Exhibit A2-2 on the proceeding website, and we'd like to hear your submissions on how that document

1 affects the issues that we're looking at in this
2 proceeding.

3 I ask you to please don't repeat
4 unnecessarily the submissions that you've put forward
5 in November. The Panel has read those submissions,
6 read them in November and refreshed our memory on them
7 recently, and it is not the purpose of this meeting
8 today for you to re-submit those arguments again.

9 And if you do, I will -- please don't be
10 surprised that I will ask you to move on and try and
11 focus your remarks on the document that we've asked
12 you to.

13 I'd like to introduce some individuals
14 sitting up at the front here who play an important
15 role in the proceeding. Laurel Ross and Ashita Anand
16 Sanghera are lead staff for this proceeding, and
17 they're sitting with Christine Behnert, who is the
18 director of MRS and compliance.

19 Commission counsel for the proceeding is
20 Paul Miller, from Boughton Law Corporation, and Mr.
21 Hal Bemister is the Hearing Officer.

22 After appearances, the order of arguments
23 will be SSL first, followed by the City of Langford,
24 and then FortisBC. And then we'll go back up the list
25 and we'll have SSL and the City of Langford will be
26 provided with the right of reply. During your oral

1 argument the Panel may ask you questions and if you
2 are able to answer them, we would appreciate that. If
3 in fact we do ask.

4 **Proceeding Time: 10:01 a.m. T2**

5 And we would also ask -- we would like to
6 try to be wrapped up at noon today. Now, I'm not
7 trying to rush you. If that's not possible, that's
8 not possible, but I think given the scope of the
9 arguments, we should be able to wrap up at the latest
10 by noon.

11 So I'm now going to ask Mr. Miller to call
12 for appearances. And when you enter your appearance,
13 please state and spell your name for the record, and
14 identify the party that you represent.

15 Mr. Miller.

16 MR. MILLER: Thank you, Mr. Chair. The first in the
17 order of appearances is Sustainable Services Ltd.

18 MS. PARKES: Good morning. Lisa Parkes, P-A-R-K-E-S.
19 I am counsel for SSL.

20 THE CHAIRPERSON: Thank you, Ms. Parkes.

21 MR. MILLER: Next is the City of Langford.

22 MR. ALEXANDER: Good morning, Mr. Chairman, Panel.
23 Alexander, initials L.J. I am counsel for the City of
24 Langford. And the last name is A-L-E-X-A-N-D-E-R.

25 THE CHAIRPERSON: Thank you, sir.

26 MR. MILLER: The next is actually two parties: FortisBC

1 Energy Inc. and FortisBC Alternative Energy.
2 MR. BOTH: Good morning, Mr. Chairman, Commissioner
3 Magnann, Dave Both, B-O-T-H. Just a small
4 correction. I'm counsel for FortisBC Energy Inc. We
5 do not believe FortisBC Alternative Energy Services
6 are attending today.
7 THE CHAIRPERSON: So you are not representing FAES, is
8 that correct?
9 MR. BOTH: That's correct. Just FEI today.
10 THE CHAIRPERSON: Thank you, sir.
11 MR. BOTH: Thank you.
12 MR. MILLER: That concludes the order of appearances,
13 Mr. Chair.
14 THE CHAIRPERSON: Thank you, Mr. Miller.
15 Ms. Parkes, are you ready to go?
16 MS. PARKES: Yes.
17 THE CHAIRPERSON: Thank you.
18 **ARGUMENT BY MS. PARKES:**
19 MS. PARKES: As requested, I'll not to be repetitive of
20 our written submissions. I think my submissions will
21 be fairly brief, but there are a few points that we
22 wanted to emphasize and perhaps expand on a little
23 from our written submissions.
24 THE CHAIRPERSON: Sure.
25 MS. PARKES: I wanted to start by addressing the issue
26 of how this entire hearing process came to be. I

1 think it's relevant to the points that will be
2 discussed by both SSL and the City today in terms of
3 public policy and the need for the Commission to
4 regulate SSL and the City as a public utility or not.

5 The BCUC Order of June 9th, 2016
6 establishing this hearing process has as its recital A
7 -- and this is a quote from the recital:

8 "On December 16th, 2015, the British Columbia
9 Utilities Commission received a complaint
10 from a resident of the City of Langford's
11 Westhills area regarding energy services in
12 the subdivision served by SSL, Sustainable
13 Services Limited Geothermal system."

14 While the statement is strictly factual in that the
15 person making the complaint was a Westhills resident,
16 the wording of the recital implies that the complaint
17 came from a customer of SSL's Energy Services.

18 **Proceeding Time 10:04 a.m. T3**

19 In fact this is not the case. I believe on
20 the day that the complaint came in, BCUC staff had an
21 e-mail exchange with the person through which it
22 became clear that although they were a Westhills
23 resident, they were a resident in an area of Westhills
24 which is not served by the geothermal system and were
25 not an SSL Energy customer.

26 In fact as far as SSL is aware, and we've

1 made this assertion a number of times to staff and
2 through the submissions, and have not been told
3 otherwise, BCUC has never received a complaint from an
4 SSL Energy customer regarding its rates, service
5 levels, or any other aspect of its affairs in the
6 eight years it's been operating.

7 I'll leave this point now, but just ask
8 that the Panel keep it in mind as we move through the
9 other portions of the argument relating to public
10 policy and need for further regulation.

11 THE CHAIRPERSON: Ms. Parkes, is it possible that the
12 complainant could have been in the process of moving
13 into the area served by SSL, or considering moving
14 there?

15 MS. PARKES: I don't believe they have moved into the
16 area that is served by the SSL Energy system, but I
17 think, Mr. Chair, you're correct that in their
18 complaint they indicated they were considering
19 purchasing a home in that area.

20 THE CHAIRPERSON: Right.

21 MS. PARKES: And were, I guess, concerned about the
22 rates.

23 THE CHAIRPERSON: Right.

24 MS. PARKES: Our answer to that is simply, they're not a
25 customer, and so in the same way I presume the
26 Commission, if someone was moving from Alberta or

1 Ontario and said he would like you to look into
2 Hydro's rates because we're thinking of moving to B.C.
3 and don't like them, I expect the Commission probably
4 would not take that complaint particularly seriously.

5 And I think the Commission's process in
6 terms of how they deal with complaints, referring them
7 to the utility to deal with in most cases, obviously
8 wasn't followed here because there was no issue to
9 deal with, with the complainant, and I think that
10 highlights the unusual nature of this complaint
11 leading to this proceeding.

12 THE CHAIRPERSON: Okay, thank you.

13 MS. PARKES: Getting into the definition of "public
14 utility" -- we're all familiar with it, we're all
15 familiar with the municipal exception to the
16 definition of "public utility". So I don't want to
17 spend a lot of time getting into that specifically.

18 I think everyone, all of the parties that
19 are here today, agree that in the absence on the
20 municipal service exception, or some other exception
21 that might apply, a provider of geothermal energy
22 service would be a public utility under the
23 definition, and would be subject to regulation by the
24 Commission.

25 Having said that, the municipal exception
26 does exist, the municipal service exception, and SSL's

1 position obviously is that the municipal service being
2 provided by the City of Langford through SSL falls
3 under that exception and therefore doesn't fall within
4 the definition of "public utility".

5 I'm not going to get into Section 8(2) of
6 the Community Charter in any great detail, as I
7 believe Mr. Alexander will be addressing that further.
8 And again, we don't want to be repetitive. But that
9 section of the Community Charter permits a
10 municipality to provide a municipal service either
11 directly or through a third party. The City of
12 Langford set up the multi-utility bylaw under that
13 section, and in order to provide the municipal service
14 of an energy service, and then entered an agreement
15 with SSL to be that service provider.

16 Everything from the setup on through has
17 shown that that -- the SSL energy service is a
18 municipal service. And in the absence of anything in
19 the municipal service exception saying that a
20 municipal service as set up under the Community
21 Charter does not fall under that exception, it's our
22 submission that in fact it does.

23 And again, reading that, the definition,
24 which I won't go into in great detail, I think
25 everyone agrees that there is nothing in that
26 definition that says a municipal service provided

1 definition of public utility." And I recall at the
2 procedural conference asking my friend a number of
3 times what is the actual conflict that is being said
4 to exist here that then is resolved in favour of the
5 *Utilities Commission Act*? And I, at the time, did not
6 understand what the conflict being alleged was, and I
7 haven't again seen anything since that time that has
8 been pointed to as "this Act says this, this Act says
9 this, they're in conflict, therefore the *Utilities*
10 *Commission Act* prevails."

11 The next point I wanted to speak about is
12 ownership of SSL or the municipal service
13 infrastructure lands. All those kinds of things.
14 They have been -- although it hasn't come out a lot in
15 the documents in front of this Panel, it has certainly
16 been a focus for Commission staff in terms of the
17 questions they've asked SSL throughout this
18 proceeding. Both before the hearing and during the
19 hearing process we've been asked a number of times to
20 explain ownership of infrastructure, rights of way. A
21 number of things related to ownership of the system.

22 However, there is nothing in any of the
23 legislation that we're looking at on this issue that
24 we're here about today, that talks about ownership.
25 It's not mentioned. And in fact, in the Staff
26 submissions, rightfully so I think, the issue of

1 ownership was not raised. I think there is nothing in
2 the Community Charter or the *Utilities Commission Act*
3 that says that ownership is determinative of whether
4 something is a municipal service being provided within
5 the boundaries of a municipality. And our suggestion
6 is that for the Commission to consider ownership in
7 this matter would be an erroneous application of the
8 law.

9 THE CHAIRPERSON: Ms. Parkes?

10 MS. PARKES: Yes?

11 THE CHAIRPERSON: I wonder if you could address the issue
12 then that the utility -- as I recall, the *Utilities*
13 *Commission Act* describes a public utility as a person
14 that owns or operates. But you're saying that
15 ownership is not an issue?

16 MS. PARKES: I think it is an issue to be determined in
17 the first instance whether something would be a public
18 utility. So if, for example, SSL did not own or
19 operate any of the equipment in providing this
20 municipal service, it couldn't fall under the
21 definition of public utility. The fact that it does
22 own or operate some of the equipment and facilities,
23 means that in the first instance it would fall under
24 the definition of public utility unless the municipal
25 exception applies.

26 When I'm talking about ownership, what I'm

1 talking about is the suggestion that we've heard from
2 Staff, I think we first heard it when Kyle Taylor and
3 myself had a communication, a telephone conference
4 with I believe Ashita and one or two other Commission
5 Staff members before this hearing was established, and
6 the suggestion was made that if the city owned some
7 percentage of SSL, that perhaps they wouldn't be
8 looking into this matter.

9 **Proceeding Time: 10:13 a.m. T5**

10 We asked the question, "How is the
11 ownership of SSL relevant to the determination of
12 whether it's a public utility or not, and it wasn't
13 clear whether the thought was 51 percent, a hundred
14 percent, some lesser percent or a higher percentage,
15 but we've never been pointed to anything in any of the
16 legislation or the public utility definition that says
17 where it's owned by -- some percentage of a company is
18 owned by a municipality and they're providing the
19 service through that company, that then it's not a
20 public utility, where if they don't own any of it,
21 then it is.

22 THE CHAIRPERSON: But in this case, does the
23 municipality own a portion of SSL?

24 MS. PARKES: No, it does not. It owns some
25 infrastructure and some parts of the system, some of
26 the land that the infrastructure is used on. It does

1 not own any part of SSL. But again, SSL's submission
2 is that there is nothing in any of the legislation
3 that says that's how it's determined whether it's a
4 public utility or not. You have the Community Charter
5 saying a municipality can provide the service through
6 a third party. That's what they are doing. And there
7 is nothing in the *Utilities Commission Act* that says,
8 "But it must be partly owned, or 50 percent, or 100
9 percent owned by the municipality in order to qualify
10 under this exception."

11 THE CHAIRPERSON: Thank you.

12 MS. PARKES: On the issue of the paper, the launching
13 and maintain a local government corporation paper, we
14 have read through it. Again, given the point that I
15 was just making, we don't really see what we're being
16 asked to comment on with respect to that paper. With
17 due respect, it seems to be a paper that a local
18 government would look at if they were considering
19 launching a municipal corporation. It gives them
20 advice about when to, how to, whether to, but it
21 doesn't really deal with the issue at hand, which is
22 can a municipality providing a service through a third
23 party fit under the exception in the public utility
24 definition.

25 I think the paper actually recognizes that
26 a municipality may provide a service through a

1 corporation that it owns, or partly owns, or creates
2 and sells shares in, or it may provide service through
3 -- I think one of the things mentioned in the paper is
4 partnering with a third party.

5 So I think the paper acknowledges it can be
6 done this way. I think, getting back again, the
7 Community Charter says it can be done that way. The
8 exception doesn't say it can't, and so the paper -- we
9 just don't see that it's really germane to this issue.

10 And then again, I don't want to spend too
11 much time on something that I did cover in my written
12 submissions, but we do see as really relevant to this
13 proceeding is this Commission's decision in the
14 December 1st, 2016 Spirit Bay matter. That obviously
15 was a different issue. They were applying for an
16 exemption, and as a alternative argument suggesting
17 that a First Nation could be seen to be akin to a
18 municipality and perhaps trying to fit under that
19 exception.

20 But we think there was some really valuable
21 things in that decision in terms of public policy
22 arguments and things that, in that case, were found by
23 the Commission to be not supportive of granting an
24 exemption to Spirit Bay. We think the exact opposite
25 is true in the case of SSL where there is regulation,
26 there are failsafes in place. There aren't natural

1 monopoly characteristics, and all of the things that,
2 in that decision, went against Spirit Bay, we think,
3 if looked at this case support the Commission
4 recognizing that SSL is currently regulated and does
5 not need to be regulated by the Commission.

6 Just a couple of points from that case that
7 I think are valuable. In the decision the Commission
8 cited it's 2012 AES Inquiry Report which stated that
9 regulation is required when natural monopoly
10 characteristics are present and there is a need to
11 regulate to protect the public interest. The
12 Commission then went on, or the Panel in that case
13 went on to consider that report and in the Spirit Bay
14 decision said:

15 "We agree with this public interest
16 consideration and find it to be an
17 appropriate public interest test. Therefore
18 if monopoly characteristics are not present
19 or somehow mitigated, for example, by an
20 alternative regulatory body an exemption
21 from regulation under the *UCA* may be
22 warranted."

23 **Proceeding Time 10:18 a.m. T6**

24 We think this logic can certainly be
25 applied to the City of Langford/SSL situation. The
26 reason for the municipal service exemption, or

1 exception to the "public utility" definition, is that
2 where a municipality is regulating the provision of a
3 service within its own boundaries, it is unnecessary
4 and I think in fact undesirable to have the Commission
5 also regulating the system, the service.

6 In the case of the City of Langford and
7 SSL, the SSL Energy rates are capped at BC Hydro rates
8 unless Langford City Council approves a higher rate.
9 So the residents are protected by the city from
10 anything higher than BC Hydro's rates. Again, this
11 was an issue in the *Spirit Bay* case, where Spirit Bay
12 tried to compare itself, and bring itself in line,
13 with Templeton LP, which was approved on the basis
14 that they were going to resell electricity to its
15 lessees using a rate-setting mechanism, whereby the
16 selling price will not exceed the price which BC Hydro
17 would have charged if the lessee were a customer of BC
18 Hydro.

19 So again, Spirit Bay didn't have that
20 provision; SSL does have a similar requirement in
21 place that the city is the holder of.

22 The Commission said of that rate cap, "The
23 rate cap mitigates concerns about monopoly abuse
24 thereby providing justification for granting an
25 exemption to Templeton LP," in looking back at that
26 case in the *Spirit Bay* decision.

1 Looking at the agreement between the city
2 and SSL, the agreement sets performance standards for
3 SSL, including response times to customer inquiries,
4 requirements for an office location, requirements for
5 a 24-hour emergency response number, and that SSL
6 employees carry and provide information --
7 identification when out doing their work.

8 Also the *Spirit Bay* decision talked about
9 the fact that there was no independent regulator in
10 that case to whom complaints could be brought. And
11 again, complaints can be, and the few that have been
12 made, I think, over the years, have been brought to
13 the city where a customer has a concern about SSL.

14 The city is, of course, responsible to the
15 electorate, and if the electorate doesn't like what
16 they're doing, whether with SSL or anything else,
17 they're obviously -- will be held accountable for
18 that. And again, that gets back to the exact reason
19 for the municipal exception.

20 And I suggest one of the most telling
21 things is that under Section 37(3) of the agreement
22 between SSL and the city, in the event that the
23 agreement was terminated, the city agrees to keep
24 regulating SSL until it applies for and obtains
25 authorization to operate from the appropriate
26 regulatory authority. Clearly a recognition that the

1 service does need a regulator, that it has a regulator
2 in the city, and that should the city cease to be the
3 regulator that it would need another one, being most
4 likely this Commission. And that the city would stand
5 in the Commission's place until that process was
6 complete.

7 All the things I just listed are the
8 support for why the Commission -- regulation by the
9 Commission is not necessary. However, there's also
10 the issue I mentioned earlier of the undesirability of
11 having the Commission regulate this municipal service.
12 The area served by this municipal service is very
13 small, currently about 600 homes that have the
14 residential energy service. The geothermal system is
15 approaching its capacity. It's not been determined
16 whether the system will be redesigned or increased in
17 scope to continue to bring new homes on line, and in
18 fact the homes currently being developed in Westhills
19 are not on the SSL system for geothermal energy.

20 So it's a very small customer base across
21 which any costs are going to be passed.

22 Any state of double regulation by BCUC and
23 the City of Langford would undoubtedly add costs to
24 the SSL operating system. There's simply no way
25 around that. And that would result in increased costs
26 to the utility, and in turn increase costs to the

1 customer, the ratepayer.

2 **Proceeding Time 10:22 a.m. T7**

3 Also, if the thought were that SSL would
4 transfer from municipal regulation to Commission
5 regulation, that would require the city to make
6 changes to its bylaw and to let SSL out of the
7 agreement. And any such change would obviously also
8 result in rather large costs, in transferring from a
9 municipally regulated system to a Commission regulated
10 system, which again I think would be passed on to the
11 customer.

12 I think -- yeah, just in summary based on
13 kind of our submissions, our written submissions and
14 some of the things I've said today, the purpose of the
15 municipal exception to the public utility definition
16 is to avoid double regulation. It's a recognition
17 that where a municipality responsible to its citizens
18 is regulating a utility, it is unnecessary for the
19 Commission to also do so.

20 There is no question that the service being
21 provided is a municipal service being provided by the
22 City of Langford through SSL. Again, there have been
23 no complaints to BCUC from an energy customer in the
24 eight years it's been operating, suggesting that the
25 City of Langford's regulation of its municipal service
26 is successful.

1 And to find that SSL is a public utility on
2 the basis of an ownership argument or a conflict
3 between statutes argument, as we suggest, to make a
4 finding based on legislative provisions that simply
5 don't exist -- and we suggest that the better option
6 is to find that this -- the city providing the service
7 through SSL does fit within the municipal exception,
8 and that it is not a public utility.

9 Those are my submissions.

10 THE CHAIRPERSON: Thank you. Thank you very much.

11 Mr. Alexander?

12 **SUBMISSIONS BY MR. ALEXANDER:**

13 MR. ALEXANDER: Thank you, Mr. Chairman.

14 This matter obviously raises the
15 interpretation or application of a very narrow point
16 regarding a definition of statute. But it comes to
17 you, in my submission, with a backdrop and a context
18 that can't be ignored.

19 The backdrop is that beside the *UCA*, your
20 statute, your home statute, is also the Community
21 Charter, my client's home statute, if you will. And
22 you're going to be asked to interpret both of those
23 statutes in deciding what is really meant by the
24 critical 20 words. That's what we're debating here
25 today, 20 words in exception (c) to the definition of
26 "public utility". And we've spent a year and a half

1 and exchanged lots of information, lots of paper, and
2 lots of legal submissions, and lots of lawyers
3 weighing in on 20 words.

4 But I am urging you not to just look at
5 those 20 words, but to look at what your job as the
6 Commission is, that you can take from what your
7 statute says in whole, and read your statute in whole,
8 and the jurisdiction that the legislature has given to
9 municipal governments, local governments, with respect
10 to their ability to provide services to their own
11 geographical areas.

12 All the parties in front of you agree that
13 the interpretation job you have today is done within
14 the policy framework that underpins utilities
15 regulation in North America. That's right out of
16 FEI's submission. The policy framework that underpins
17 utility regulation in North America.

18 It's also agreed by all of the parties that
19 this utility service cannot bypass regulatory
20 oversight. That's a second area that everybody
21 agrees. You cannot have a monopolistic utility in
22 this province that escapes regulatory oversight.

23 **Proceeding Time: 10:27 a.m. T8**

24 Here's the disconnect between the parties:
25 FEI and the Commission Staff says that this public
26 policy and these two foundational concepts, regulatory

1 oversight, control of monopolies, cannot be satisfied
2 in any case where a local government is the regulator,
3 unless the local government itself owns and operates,
4 or owns or operates, and that this is not room for the
5 local governments to have alternative methods of
6 service delivery.

7 So if I can satisfy you first that it's the
8 City who is providing this service, the second issue
9 is, is there anything wrong with the fact that the
10 City provides the service by entering into a
11 partnering agreement for the service delivery?
12 Because SSL delivers the service. If you tried to
13 find the service, what is the service? You pick up
14 Langford's multi-utility bylaw. It defines the
15 service. It's clearly a bylaw that is authorized. No
16 one here challenges the validity of that bylaw, and it
17 clearly sets out that it is the City of Langford who
18 has decided whether or not this will be a municipal
19 service.

20 It then authorizes the provision of that
21 service, or the delivery of that service to be direct
22 or through a partner or a contractor. And then you
23 have the agreement where they've entered into --
24 they've called it specifically a partnering agreement,
25 with SSL to deliver the service and to own the
26 service.

1 Analogize it, if you will, to two
2 situations that many people might know about in the
3 province with respect to how our highways are managed,
4 the provincial highways. The Province of British
5 Columbia clearly delivers the highway service in this
6 province, but it does not maintain them or actually
7 deliver that service. There's highway maintenance
8 contracts for every single kilometre of road outside
9 municipalities everywhere. The highways department is
10 out of that business. They don't own graders and dump
11 trucks and asphalt machines. It's all contracted out
12 to these other places. Would anybody say, "Oh,
13 British Columbia doesn't provide a highway service any
14 more"? Of course not. They've just contracted it
15 out.

16 THE CHAIRPERSON: Sir? So can I ask you a couple of
17 questions about what I think you just said.

18 MR. ALEXANDER: Yes.

19 THE CHAIRPERSON: I think that you just said that the
20 city does not own the facility, the geothermal, is
21 that correct?

22 MR. ALEXANDER: Right.

23 THE CHAIRPERSON: Although you didn't say this, would
24 you say that SSL operates the facility? I think you
25 used the word "manage" it or something like that.

26 MR. ALEXANDER: I would say it delivers the service.

1 THE CHAIRPERSON: But you would fall short of saying
2 that it operates the utility?

3 MR. ALEXANDER: In terms of the day-to-day operations,
4 no one disputes that SSL maintains the pipes, makes
5 sure the pumps are running, sends out the bills, deals
6 with all of that. So to that extent, yes, they are
7 operating or delivering the service. But how far back
8 do we have to go before you would say the municipality
9 is doing that? Because the municipality can't do that
10 at all. They could hire employees who do that. Does
11 that put them offside? Oh, the municipality is not
12 doing it, their employees are doing it. Or they could
13 subcontract that out to a management firm who hires
14 the employees. Is that too far?

15 **Proceeding Time: 10:32 a.m. T9**

16 Or they could enter into a partnership
17 agreement with a company like SSL, is that too far?
18 Does the statute speak to that kind of administrative
19 service delivery? Or is there a reason why the
20 exception -- or the exclusion, it says "does not
21 include." So we shouldn't talk about exceptions, we
22 should talk about inclusion or exclusion. So, look
23 very careful at those 20 words.

24 Definition of public utility starts up with
25 "a person who owns or operates", okay? The exception
26 does not repeat those words. The exception says, "A

1 municipality, regional district in respect of services
2 provided by." If the legislature had intended that
3 the exception for municipalities was only if they own
4 and operate, then the words of the statute would say,
5 "But does not include a municipality or regional
6 district who owns or operates the equipment or
7 facilities within its own boundaries."

8 If the object was to limit the language
9 like that, the drafters of legislation would have used
10 the same words, "Who owns or operates equipment or
11 facilities, except municipalities who own or operate
12 equipment or facilities." The legislature didn't say
13 that. There must have been a reason the legislature
14 didn't say that. And I say the reason is, the carve
15 out is for two purposes.

16 First of all, it's a clear public policy
17 recognition that if local government is providing this
18 service, administering it, regulating it, the
19 Utilities Commission doesn't. Right? So there can be
20 no doubt that some form of local government utility is
21 carved out from your jurisdiction. So, that's purpose
22 one of does not include sub (c).

23 Purpose two is, to express that carve out
24 in wider language than "who owns and operates." That
25 is why the legislature chose the wider words, "in
26 respect of services provided." Okay?

1 Now, Ms. Parkes referred to section 8(2) of
2 the Community Charter. That's the section that says
3 that local governments have the authority to provide
4 services directly or through another public authority
5 or person or organization. Those are the words, all
6 right? So, the service provision power given, and
7 jurisdiction given by this same legislature to local
8 governments is direct or indirect. You can provide
9 service direct or indirect. The legislature is taken
10 to know that the statute set it's introducing work
11 together.

12 So, here is another way to look at it. If
13 a service power is that the municipality can provide
14 the service, directly or through another person, you
15 can read your exception (c) like this: "Does not
16 include a municipality or regional district in respect
17 of services provided by the municipality or regional
18 district," and then insert the words "directly or
19 through another public authority, or another person,
20 or organization within its boundaries." Because, I
21 mean, did the legislature have to actually repeat
22 those words when it said "in respect of services
23 provided by?" Or should you -- or should we all be
24 taken to understand that the legislature knew that
25 that service power was a direct or indirect provision?

26 So, I mean, if I can, I've got this written

1 down, so you don't have to write down these words.
2 I'm happy to give this to you, and to my friends. I
3 think it demonstrates the point.

4 So, I've just bolded these words, all
5 right? So the core definition uses the words "who
6 owns or operates." Legislature chooses not to use
7 those words in this exception. They use instead "in
8 respect of services provided by".

9 **Proceeding Time 10:37 a.m. T10**

10 Now, if the Staff argument's correct, the
11 legislature would have done it the way I've set it out
12 halfway down the page. A municipality, regional
13 district, who owns or operates the equipment. Now,
14 they say we're going to repeat it, the same language.
15 It's an elementary concept of statutory interpretation
16 that when a statute uses different words it's because
17 it has a different intent.

18 FEI argues for just a narrow interpretation
19 of the words "provided by" by saying that "provided
20 by" has to mean "provided only directly" and that none
21 of these other methods of service delivery should be
22 countenanced by you. What's the public policy behind
23 that? There is none, in my submission.

24 THE CHAIRPERSON: Do you have the dates of these
25 enactments, and do you have any *Hansard* in support of
26 your argument?

1 MR. ALEXANDER: Do I have the dates of these? Well, this
2 issue I have not found determined anywhere else. But
3 in my submission I do provide you with the argument
4 starting at page 11, paragraph 15, to all sorts of
5 authority for the proposition that statutes that deal
6 with the same subject matter -- and I've quoted at the
7 bottom of page 11, in paragraph 15, "are presumed to
8 be drafted with one another in mind, so as to offer a
9 coherent and consistent treatment of the subject."
10 And I've referenced there the *Cowichan Valley Regional*
11 *District v. Cobble Hill Holdings*, a 2016 Court of
12 Appeal decision.

13 And in that case, it was also dealing with
14 the local government -- the *Local Government Act* and
15 the *Community Charter*, the powers of the regional
16 district, versus the powers of the province under the
17 *Mines Act*. And so that quote is found at paragraph 60
18 on page 14 of that *Cobble Hill v. CVRD* case.

19 And it was an interesting debate there. I
20 was counsel for the Cobble Hill Holdings in that case
21 in the Court of Appeal, the year before last. And the
22 court observed that dealing with the regulation of
23 mines was dealt with in both statutes. Just like the
24 provision of a utility service here is dealt with in
25 both statutes. And the court, in applying this
26 principle of, you've got to presume that the

1 legislature drafted these statutes, these different
2 statutes dealing with the same subject matter, with
3 the intention that they have a coherent consistent,
4 non-conflicting objective.

5 At paragraph 67 of that case, the court
6 said:

7 "The legislature clearly intended to ensure
8 that the province's jurisdiction over the
9 regulation of mines and mining activities is
10 maintained, because of the importance of
11 mining to the provincial economy. CVRD
12 contends that the mines exclusion in the
13 *Local Government Act* definition is limited
14 to only those mines that were historically
15 registered in the Land Title Office."

16 They had a very -- again, very narrow definition,
17 trying to say there's only certain types of mines that
18 were excluded.

19 What the court wrestled with and said in
20 the end is, they applied the broader meaning. They
21 said: "It's clear the legislature intended to exclude
22 some forms of mines and mining activity from the
23 definition of land." You can find exactly -- you
24 should find the same thing here. It's clear the
25 legislature intended to exclude some form of local
26 government utility from your Act. Otherwise, why

1 exclusion (c)? There can be no doubt on that. And I
2 don't think any party argues otherwise. We're simply
3 down to what's happening inside these 20 words with
4 respect to the real meaning of "in respect of services
5 provided by".

6 **Proceeding Time: 10:41 a.m. T11**

7 And we simply say if you look at the
8 express provisions in the Community Charter that
9 allows municipalities to provide this kind of service
10 directly or indirectly – and of course this is all set
11 out in great detail in my written argument – and then
12 you look at the words contained in the partnering
13 agreement provisions, again which specifically allow
14 -- the legislature contemplated when local governments
15 deliver services they have the ability to use
16 partnering agreements. In my submission there is no
17 public policy reason why this Commission should find
18 that what the legislature has permitted there, they
19 really only intended to permit for certain types of
20 service but not others, because that's the effect of
21 finding that this partnering agreement, to provide
22 this service that the City decided to do through their
23 multi-utility bylaw, should nevertheless not be
24 allowed.

25 You have to read the Community Charter as
26 saying you can deliver directly or indirectly any

1 service, oh, except utility services. But it doesn't
2 say that. It says any service you need to. And you
3 have to read the partnering agreement provisions to
4 say you can enter into a partner agreement to deliver
5 service, oh, except for a partnering agreement that
6 involves a utility. But it doesn't say that.

7 The reason it doesn't say that is the
8 public policy that everyone agrees applies to this
9 case which is you cannot escape from regulation. The
10 primary objection is to protect the public interest
11 and natural monopolies cannot bypass regulatory
12 oversight.

13 So I think we all know most of the facts
14 and the backgrounds, but when you stand back and look
15 at all of those facts and see what it is that Langford
16 did here, a rather unique project. They approached an
17 entire development scenario, this, what they call the
18 Westhills Green Master Plan, with land use and
19 transportation and amenities and utilities, and all of
20 these things all being integrated together.

21 SSL formed a part of that in two areas.
22 Not just energy that we're talking about here, but
23 also water. If you look at the agreement it deals
24 with another utility, another monopoly, but one that
25 your Commission doesn't regulate, which is water.
26 But water is a municipal service and they provided the

1 municipal service exactly the same way for energy and
2 water. It didn't do it for sewer, a third clear
3 monopolistic service, again not regulated by your
4 municipality [sic] but regulated by local government.
5 And there's a reason, a public policy reason why we
6 don't have a sewer utility commission. Because sewer
7 systems are almost invariably provided by local
8 governments, which means regulatory oversight.

9 So the public policy milieu is consistent.
10 All of these monopolistic services are regulated
11 somewhere.

12 So I say that your function or your role in
13 decision making here is always in part this policy
14 decision. It has a polycentric quality here. Your
15 cases have dealt with that. The Court of Appeal has
16 interpreted your role as being a polycentric and
17 while, yes, you have to make this work in your
18 statute, in my submission you should make it work with
19 the public policy objective in mind.

20 **Proceeding Time: 10:46 a.m. T12**

21 You should be asking yourself, if I have
22 two ways of interpreting my own statute, both are
23 plausible, neither could be found to be wrong at law,
24 which one should I choose? The broad, purposive
25 approach that makes all the statutes work together?
26 Or the very narrow, exclusionary one that the Staff

1 and FEI argue for to say, you really should find the
2 words were meant to be there, except for BCUC
3 regulated utilities in all those provisions in the
4 Community Charter.

5 So, of course this energy system is a
6 monopoly. Just like the water system and the sewer
7 system. But of course it is regulated.

8 Now, you wanted some comments on this local
9 government municipal corpse document. So, that's a
10 2006 I think document, and if you look at the
11 acknowledgements page, you can determine what it is I
12 think. It is a guide prepared by the Ministry in
13 2006. And while it says,

14 "The Ministry is solely responsible for its
15 content, they thank the law firm of Bull
16 Housser and Tupper which provided advice and
17 law related content."

18 In my submission, the law related content in here,
19 which I'll take you to, is the opinion of some people
20 at Bull Housser in 2006. Not really much more than
21 that. It's not a legal decision, it's not a piece of
22 government regulation, it's not even a government
23 policy. It's just one of the many best practices
24 guides, or resource materials that the Ministry
25 provides to local government. And when they do that,
26 they go out to find wise counsel to weigh in on legal

1 issues. I have drafted the same kind of things in
2 other subjects for local governments that the Ministry
3 then publishes. At the end of the day, it's just my
4 opinion.

5 So, that's what the document is. And when
6 that is dealt with on page 5, where it talks about
7 entering into a partnering agreement which is what we
8 in fact have here, right? This is a 2006 document.
9 The Community Charter was enacted in 2004, it was a
10 major change in the way local government regulation
11 happened. The old *Municipal Act* disappeared, we had
12 the *Local Government Act* and then the Community
13 Charter. So, partnering agreements are in the
14 Community Charter, two years old at the time whoever
15 it was writing this.

16 On page 5, entering into a partnering
17 agreement,

18 "A municipality can also arrange a
19 partnering agreement with a person, public
20 authority or private business. Under the
21 agreement the latter agrees to provide a
22 service, an activity or work or facility, on
23 behalf of a municipality."

24 And so we're down to semantics. Is that the same as
25 saying "deliver a service that is provided by the
26 municipality?" Or "Provide on behalf?" Well,

1 employees provide service on behalf of the
2 municipality. Very much semantics. The key is, on
3 behalf of a municipality. Or as facilitated,
4 organized, and put in place by a municipality.

5 And it says that,
6 "Partnering agreements apply to both
7 public/public and public/private
8 partnerships."

9 And describes what that is.

10 In going through the determination as to
11 what should be considered, if you go over to page 27
12 of that document, the legal input, if you will, to
13 this paper has a section called "meet specific
14 regulatory requirements." And it says,

15 "Municipal staff and council may need to
16 obtain advice on the relevant regulatory
17 requirements, particularly where the
18 municipality has limited experience in this
19 type of enterprise. For example, for
20 utilities, the *Utilities Commission Act* must
21 be consulted to determine whether rate
22 regulation will apply."

23 That's what Langford did.

24 **Proceeding Time: 10:50 a.m. T13**

25 So if I can take you to the information
26 that was in the municipalities information package,

1 and that's C1-4, starting at page 126, you'll see
2 September 2008 correspondence from solicitors at the
3 firm of, what was then, Lidstone, Young, Anderson.
4 It's now called Young, Anderson. Mr. Bill Buholzer, a
5 person who has published a great deal of material on
6 local government regulation and management and
7 administration. He's a planner and a lawyer. And he
8 was advising the City of Langford at the time and said
9 this in September of 2008:

10 "Regarding rate regulation, attached is a
11 revised draft of the rates regulation
12 commentary that reflects some of the
13 Westhills discussion paper."

14 And attached there, and I think it's about page 127 in
15 this documentation, he says this:

16 "Energy utilities are subject to rate
17 regulation by B.C. Utilities Commission, but
18 the Commission has no jurisdiction over
19 services provided by the City within its
20 boundaries."

21 And then it says:

22 "In order to qualify as city services
23 outside BCUC jurisdiction, these services
24 must be provided at rates established by the
25 city."

26 And then it goes on with more commentary about what

1 this utility would have to do in terms of setting
2 rates. That it would have to be approved by bylaw,
3 and that the whole arrangement would have to be set up
4 -- and it says with respect to rate changes:

5 "Council would at that time decide whether
6 to continue with the 95 percent rate
7 structure, reduce the maximum rate to
8 provide an acceptable profit margin, require
9 a diversion of excess profits to other
10 utility operations, customer rebates or
11 other options."

12 Exactly the same exercise as you go through when you
13 are looking at rates. What kind of profit are we
14 going to allow them to make? What kind reserves?
15 What kind of investment and infrastructure? All
16 contemplated, all built into the multi-utility bylaw
17 and then all built into the agreement.

18 So the city did exactly what this best
19 practices guide says. If you are going into a
20 partnering agreement with this, consider what you have
21 to do to make sure it is the municipality who is
22 regulating. And there's nothing in any of the
23 documents that say, that any of the other parties here
24 pointed to that show the city is not regulated.

25 THE CHAIRPERSON: Sorry, the city is not regulated?

26 MR. ALEXANDER: No, no, that the city is not in fact

1 regulating.

2 THE CHAIRPERSON: "Regulating".

3 MR. ALEXANDER: I say it clearly shows it is regulating.
4 It has the authority to set the rates. And, you know,
5 with no disrespect to the Commission at all, a local
6 council is much closer to the customers than a
7 provincial regulator.

8 One of the cases that I gave you is called
9 *We Are In British Columbia*. Within it it talks about
10 the case called *Spraytec*. It's a Supreme Court of
11 Canada case about whether municipalities can decide to
12 regulate pesticides or whether that should be with the
13 provincial regulator. And the Supreme Court of Canada
14 came up with this concept of what they call
15 subsidiarity, and said this. And this is in *Weir*
16 which you have at paragraph 35.

17 "The case arises in an era in which matters
18 of governance are often examined through the
19 lens of the principle of subsidiarity. This
20 is the proposition that law making and
21 implementation are often best achieved at a
22 level of government that is not only
23 effective but also closest to the citizens
24 affected and thus most responsive to their
25 needs, to local distinctiveness and to
26 population diversity."

1 of the appendixes -- one of the case summaries is just
2 about exactly this case.

3 So it's Appendix 3, page 41, talks about
4 Green Utility Corporation. The City of Greendev is
5 proposing to sell for development a number of city
6 properties to encourage construction of
7 environmentally friendly energy-efficient buildings.
8 The city develops a hydraulic heating utility. As a
9 municipal utility, the operation is exempt from rate
10 regulation under the *Utilities Commission Act*. The
11 city creates a corporation to oversee the utility, and
12 the corporation partners with an experienced company
13 in the field to provide day-to-day operation.

14 So there's that three levels down, right?
15 This model goes two levels down. It skips the interim
16 step of a city-owned corporation. But otherwise, it's
17 identical. The municipality obtains a grant, loans
18 money. Utilities, rates -- and here's the key
19 passage. "Utility rates and fees remain under the
20 authority of the municipal council and are set by
21 bylaw." Just like this real-world example instead of
22 the case study.

23 So now you simply have to ask yourself the
24 question, what is it about skipping that one interim
25 step, where the partnering agreement is with a
26 municipally-owned corporation instead of directly with

1 the municipality, that defeats the public interest? I
2 say there's nothing.

3 So the last thing I'll say -- I agree
4 totally with what Ms. Parkes said about the
5 paramountcy issues. We're finished with this
6 argument, once we get out of the definition section.
7 Either exemption (c) applies or it doesn't. If it
8 applies, there is no conflict and you don't have to
9 look at Section 10 of the Community Charter, or 121 of
10 the *Utilities Commission Act*, both of which say when
11 there is a conflict the *UCA* prevails.

12 If there is either no conflict or SSL is a
13 public utility. Those are the only two results. You
14 can't decide that SSL is a public utility but they're
15 not subject to rate restrictions because the Community
16 Charter protects them. You have to decide that this
17 is a city service, delivered by SSL, or SSL is a
18 public utility. You don't get into having to resolve
19 a paramountcy conflict.

20 Subject to any questions --

21 THE CHAIRPERSON: Thank you, sir.

22 MR. ALEXANDER: Thank you.

23 MR. MILLER: Mr. Chair, the document Mr. Alexander handed
24 up to you should be marked as Exhibit C1-12.

25 THE CHAIRPERSON: C1-12. Thank you, Mr. Miller.

26 THE HEARING OFFICER: Marked C1-12.

1 (DOCUMENT HEADED "ADDRESSING THE 20 WORDS" MARKED
2 EXHIBIT C1-12)

3 THE CHAIRPERSON: Mr. Both, are you ready to go, or do
4 you need a short break? Or --

5 MR. BOTH: No, sir. I think I'm ready.

6 THE CHAIRPERSON: Okay.

7 MR. BOTH: All right. Hello again.

8 THE CHAIRPERSON: Good morning.

9 **ARGUMENT BY MR. BOTH:**

10 MR. BOTH: I have some good news and some bad news
11 arising out of submissions this morning. My primary
12 submissions are likely going to be cut down from what
13 I intended, though I may have a little more to say in
14 reply than I originally expected. So we will probably
15 net out somewhere in between.

16 I'm definitely mindful of your comments
17 about not repeating my written submissions, and I
18 don't intend to. Obviously I'm going to touch on a
19 few of the themes I addressed there.

20 THE CHAIRPERSON: Yes.

21 MR. BOTH: I encourage and welcome interruption. I find
22 it's always helpful to explore the issues that are top
23 of mind for both of you.

24 **Proceeding Time 11:00 a.m. T15**

25 Before I get into the substantive portion
26 of our submissions, I thought it would be helpful to

1 explain why FEI is involved in this proceeding. It
2 might give a little bit of colour to our overall
3 submissions.

4 As the Commission is obviously aware, FEI
5 is here regularly in respect of its applications. It
6 has regulatory obligations to the Commission, and it's
7 here, I'm sure, far more than anyone wants to be. But
8 it's here because it has those obligations and it has
9 to meet them.

10 However, you're also aware that FEI takes a
11 fairly active role in proceedings that are convened to
12 consider issues of general regulatory policy. Those
13 types of proceedings, things like the AES inquiry, the
14 proceedings that ultimately resulted in the
15 establishment of the TES guidelines, those are generic
16 proceedings that can affect all utilities equally, and
17 FEI finds it important to participate those, and make
18 sure that its views are known and understood.

19 FEI also participates in proceedings like
20 this where issues are raised where, on its face, you
21 might scratch your head and think, "Well, why is FEI
22 here?" And it's because it raises the general issues
23 of regulatory policy that FEI sees over and over again
24 in various proceedings that frankly can impact its
25 business.

26 Any entity that provides utility service

1 for an end use that could supplant the natural gas
2 service that FEI provides is obviously of an interest
3 to FEI. And it's not from a perspective of "let's
4 keep our competitors down" at all. FEI knows that it
5 doesn't have any claim to its customers. Its
6 customers are claimed -- are free to choose who to
7 take energy service from, from whichever providers are
8 available. What FEI is critically concerned about is
9 that anyone else that is playing in that space is
10 subject to the same rules that FEI is.

11 Now, the rules don't equally apply. There
12 is a municipal exclusion that allows for a municipally
13 owned public utility to provide service outside of the
14 jurisdiction of the Commission. And we see that not
15 far from here with the City of Vancouver, Southeast
16 False Creek district energy system. FEI doesn't take
17 any issue with that system, and it exists and operates
18 and serves its customers.

19 In this case, as we've heard a lot about
20 today and in our written submissions, it's a
21 disagreement on a pretty narrow question of law. The
22 question of, as my friend Mr. Alexander says, the
23 meaning of 20 words. And this is the part that can --
24 actually narrows the submissions I have to make today
25 because that's always been our position, and I have
26 always thought that was well accepted, but it wasn't

1 completely clear to me, so I have been able to scratch
2 out a few pages of notes here.

3 Before I get to our view on the
4 interpretation of that, I want to talk a bit about the
5 scope of this proceeding. There has been considerable
6 evidence and legal argument, both written and oral,
7 related to what -- the question whether SSL should be
8 regulated. And in our submission, and we said this in
9 our written submissions, that's irrelevant to this
10 proceeding. The *Utilities Commission Act*, as you
11 know, contains a mechanism by which any party that
12 fits within the definition of a public utility can
13 seek an exemption from the Commission to be exempted
14 back out. And that's of course under Section 88(3) of
15 the *UCA*.

16 Frankly, FEI doesn't take a position in
17 this proceeding on whether SSL should be regulated.
18 We haven't explored the evidence from that
19 perspective. We haven't provided our own evidence, we
20 haven't provided written argument on that. It's just
21 the fact that it's not the point of this proceeding.

22 This scenario is one that was recognized,
23 at least in my reading of the AES inquiry decision,
24 was recognized by the Commission, that the dichotomy,
25 where you either are or you aren't a public utility.
26 There's no policy underpinning that goes into that.

1 You either are or you aren't under the definitions in
2 the Act.

3 And in the AES inquiry report, and that of
4 course was a proceeding that was convened -- a very
5 lengthy proceeding that was convened and a lengthy
6 decision issued, to discuss how alternative energy
7 systems like a district energy system got -- we're
8 talking about today, should be regulated, and
9 ultimately it turned on questions of the need for
10 economic regulation and protection of ratepayers, and
11 talked about potential for things like light-handed
12 regulation where the more rigorous regulatory process
13 wouldn't be appropriate.

14 **Proceeding Time: 11:05 a.m. T16**

15 In my reading, the Commission acknowledged
16 that regulating an entity that fits within the public
17 utility definition might not always make sense. And
18 the Commission seemed to lament that outcome, and
19 actually suggested -- this is at pages 15 and 16 of
20 the inquiry report, suggested that the government may
21 want to reconsider what the definition of public
22 utility is.

23 But the outcome was, on my reading, was
24 that the Commission considered its hands to be tied.
25 It either is a public utility or it isn't, and it
26 encouraged in that proceeding any entity that thought

1 it shouldn't be regulated, that that regulatory
2 oversight wasn't warranted, encouraged those parties
3 to seek an 88(3) exemption. And I think that's where
4 this proceeding should have gone probably two years
5 ago. I think those are the issues that need to be
6 explored in this case. And I appreciate that my
7 friends have provided evidence in argument to that
8 point, but frankly not the proceeding in which to have
9 that discussion. If that's their position that SSL
10 should not be regulated, then let's have that
11 application and explore that evidence.

12 I get to skip some pages here, sir, because
13 we all agree that we aren't talking about whether SSL
14 owns or operates the equipment. They of course say
15 they do in their submissions. Everyone agrees that
16 they own and they operate the Westhills DES.

17 So now we move into the real question,
18 which is the question of statutory interpretation.
19 And at first, I don't think it's critical, but any
20 time I'm disagreed with, I like to correct the record.
21 In Langford's reply submissions, they seem to draw
22 distinction between FEI's view of the world of
23 statutory interpretation and Langford's. And it
24 characterized our view as outdated and strict, narrow,
25 and I am not quite sure where that comes from.
26 Because we all agree that it's *Drieger's* modern

1 principle which states:

2 "The words of an Act are to be read in their
3 entire context, and in their grammatical and
4 ordinary sense, harmoniously with the scheme
5 of the Act, the object of the Act, and the
6 intention of parliament."

7 Everyone agrees that that's the way that we interpret
8 a statute -- or thankfully not we, it's you. But, in
9 this case, the only distinction I can identify is that
10 they rely on the *Bell ExpressVu* case, we rely on the
11 *Rizzo Shoes* case. They are both good law, they are
12 both Supreme Court of Canada decisions. *Bell*
13 *ExpressVu* is a little bit more recent, and it does
14 have the sentence that says,

15 "The principle must be applied to find
16 harmony, coherence and consistency between
17 statutes dealing with the same subject
18 matter."

19 And I take that to be Langford's position that FEI
20 hasn't considered the impact of the Community Charter
21 on the Commission's jurisdiction. And to the
22 contrary, both today and in our written submissions,
23 we took actually quite the opposite view. In
24 paragraph 15 of our original submissions we said, "the
25 only plausible and coherent interpretation of the
26 definition of public utility, taking into account the

1 UCA and Community Charter as a whole, is that the
2 legislature intended the Commission to have the
3 exclusive regulatory jurisdiction over the provision
4 of utility service, except in narrowly defined
5 circumstances."

6 So, we acknowledge that the principles of
7 statutory interpretation that you've heard about today
8 and in the written submissions that the legislature is
9 taken to know its statute book when it's drafting new
10 legislation, that harmonious interpretation is to be
11 preferred over one that results in disharmony. We
12 take no issue with that, and we just believe that our
13 interpretation provides a much cleaner path to that
14 legislative harmony.

15 **Proceeding Time: 11:09 a.m. T17**

16 To illustrate that -- I hope this isn't
17 painful, and this may be where you can interrupt me
18 and tell me to move on, but I was going to take you
19 through the application of *Dredger's Modern Principle*
20 *of Statute Interpretation* just step by step, because
21 it shows you, in our view, how our interpretation
22 supports the view that SSL is public utility and what
23 the Community Charter say really doesn't weigh into
24 that at all. And so I'll go quick.

25 So the first of *Dredger's Modern Principle*
26 is that the words of a statute are to be read in their

1 entire context. They are to be read in their
2 grammatical and ordinary sense, harmoniously with the
3 scheme of the Act, the object of the Act, and the
4 intention of Parliament.

5 If we break those out and we look at the
6 context -- and this one of the most important parts in
7 my view. The context of the 20 words of the municipal
8 exclusion, they arise as part of the definition of
9 "public utility" in the Act. And that definition, I
10 think I characterized it in our written submissions.
11 It's kind of a two-part. It's at first broadly and
12 inclusive and then secondly narrowly backs out some
13 limited exceptions, including the municipal exclusion.

14 We think that context, in the way that the
15 legislature has gone about setting up the definition,
16 is important, and it's an important consideration in
17 determining what the municipal exclusion says.

18 It supports an error on the side of
19 inclusion interpretation in our view. And if the
20 legislature intended to narrowly define who was a
21 public utility, and exclude everyone else, it could
22 have. And instead it said, "Everyone that owns or
23 operates equipment is a public utility, unless you do
24 this." They purposely cast a very broad net and then
25 only allowed very limited examples or very limited
26 circumstances to not be caught by that net.

1 The second part, and I think I keep saying
2 that these are the most important, so I won't do that
3 again. But the words are to be read in their
4 grammatical and ordinary sense. This one has
5 confounded me in this proceeding. The 20 words say
6 that, "The public utility does not include a
7 municipality or a regional district." I can't read
8 that in any way other than to conclude that the only
9 entity that can benefit from the exclusion is a
10 municipality or regional district. Regardless of the
11 layers of agreements and everything else, I'm not
12 quite sure how any entity other than -- how the
13 Commission could issue a ruling saying SSL is not a
14 public utility because it is a municipality or a
15 regional district. We all know it is not, that's not
16 in dispute.

17 I think in my written submissions I said
18 that can be the beginning and the end of this
19 analysis, and I truly believe that. I'm not quite
20 sure how we get over that hurdle and I haven't seen or
21 heard any argument that does it for me.

22 The second part of the explanation may be
23 my friend's answer to it, and I'm not sure. The
24 second part of the definition is "in respect of
25 services provided by the municipality and regional
26 district." I confess, I don't understand my friend's

1 position, because I read that and read the
2 municipality has to be providing the services. It can
3 apply to a municipality or regional district as long
4 as it's the one providing the services, and then the
5 third part, that it's within its own boundaries, which
6 no one takes issue with today.

7 We don't have to engage in a discussion of
8 whether someone is being very narrow, you know,
9 applying a very strict interpretation or being very
10 narrow, those are the words. That's the grammatical
11 and ordinary sense of those words, is that only a
12 municipality or a regional district can benefit from
13 municipal exclusion, and only in respect of services
14 that they provide.

15 **Proceeding Time 11:14 a.m. T18**

16 Lastly, *Driedger* tells us that you read
17 these to be harmonious with the scheme of the *Act*, the
18 object of the *Act*, and the intention of Parliament.

19 We spent some time in our October 13th
20 submissions, the first round of written submissions,
21 that takes the Commission through previous Commission
22 decisions, Commission guidelines, and the *Surrey*
23 decision, and comes to the conclusion, and in the
24 interest of moving quickly through this, that's at
25 paragraphs 13 and 14 of our October 13th submissions,
26 we submit that the scheme and object of the *Act*, to

1 protect the public interest, ensure that rates are
2 fair, just, and reasonable, ensure that service is
3 safe, adequate and secure, and that the *Surrey*
4 decision tells us that the legislature has intended
5 that the Utilities Commission be the entity that has
6 exclusive jurisdiction over public utilities.

7 An interpretation of the municipal
8 exclusion that sees SSL included under the municipal
9 exclusion is disharmonious with the intention of the
10 Act. The Commission would no longer have any
11 oversight of SSL, a private, for-profit company that's
12 partnered with a municipality to provide service.
13 There would be no process by which the Commission
14 could ensure that rates were fair, just and
15 reasonable, and that service was safe, adequate and
16 proper. There would be no means for ratepayers or
17 other citizens to advance complaints to the
18 Commission. And we've heard from our friends that,
19 well, the municipality deals with that.

20 And we stressed in our submissions, and I
21 stress again here, no one takes issue with the
22 integrity or the intention of the municipality here.
23 But the municipality has an interest in the financial
24 success of SSL. They receive a 3 percent fee of the
25 gross payments of -- gross revenues of SSL. And I'll
26 -- I'm going to talk about that in a moment. They

1 have a financial interest in the outcome. And I'm not
2 suggesting, certainly in this particular case, that
3 that means much of anything. But it certainly means
4 something from an interpretive perspective. It means
5 that there isn't the disconnect, it isn't a neutral
6 arbiter of a complaint.

7 The conclusion that the application of the
8 statutory interpretation exercise has to result in SSL
9 not being captured by the municipal exclusion is, I
10 think, reinforced by the sections in the *UCA* and in
11 the Community Charter that talk about resolution of
12 conflicts. And I will certainly agree that if it's
13 not a public utility, there can't be a conflict.
14 Because everything in the *UCA* says a public utility
15 shall -- you know, no one shall connect, or construct
16 a public utility system without a CPCN. Every public
17 utility must file rates, and so on. But the logic is
18 circular. They're saying there's no conflict because
19 we're not a public utility. And that's -- and maybe
20 that's fair, but what we submit is that these sections
21 that -- and Section 121 of the *UCA* expressly says that
22 a municipality's authority is subservient to the
23 Commission's authority under the *UCA*. In Sections --
24 I believe it's 8(10) and Section 10 of the Community
25 Charter, expressly declare the municipality's bylaw
26 are inoperative, if they're inconsistent with another

1 *Act.*
2 That informs the view of what the
3 legislature was thinking when they drafted these *Acts*.
4 If we're talking about the legislature knowing its
5 statute books and having each statute in mind when
6 they wrote these, they clearly intended that when it
7 comes to regulation of public utilities, a
8 municipality's authority is subservient to the
9 Commission's.

10 **Proceeding Time: 11:18 a.m. T19**

11 And the reasons for this are simple, and
12 I've alluded to some of them. There are many
13 obligations on a public utility, as you obviously
14 know, to provide and maintain its property in a
15 condition that allows it to provide adequate, safe,
16 efficient, just and reasonable service. And one
17 interesting piece, and I don't want to dive too much
18 into the scope of the City of Langford's regulatory
19 regime over SSL given our submissions that they are
20 not relevant. But we don't know -- you know, FEI is
21 held to a standard to make sure that it is maintaining
22 a system so that it will always be able to provide
23 service. I don't see any of that in Langford and
24 SSL's organization.

25 Similarly there is no discontinuation
26 without provision; Section 41 of the *UCA*. No public

1 utility can just stop providing service. I don't see
2 any bar to that. Under certain circumstances SSL can
3 terminate the services agreement, and then I'm not
4 quite sure what happens to its customers. I don't
5 suggest that the City of Langford would leave them
6 hanging out there, but we don't actually know what
7 happens, and there isn't statutory guidance telling us
8 what should happen.

9 And then of course the provision of
10 discrimination and rates. A public utility must not
11 make -- and this is Section 59 -- must not make
12 demands or receive unjust, unreasonable, and duly
13 discriminating or unduly preferential rates. And as I
14 understand it, the City of Langford's answer to this
15 is, "Well, we've set them by bylaw and we've set them
16 with reference to BC Hydro's rates."

17 The first thing that comes to mind for me
18 is, how do we know that that's a fair rate for the
19 service that they are receiving. It's entirely
20 possible that SSL and the City of Langford are making
21 out like bandits, or it's entirely possible that they
22 are not recovering enough to make the operation
23 worthwhile. The entire purpose of your rate-setting
24 process is to ensure that it's a fair balance between
25 fair recovery and fair rates.

26

1 So rather than be negative and tell you all
2 the things that I think are wrong, I thought I would
3 tell you the way that we see the City of Langford and
4 SSL world fitting under the *UCA*, and it fits quite
5 cleanly in our submission. And there really isn't
6 much magic to it. It actually doesn't look very
7 different than any other public utility that you see
8 in front of you.

9 First of all, of course, we very strongly
10 believe that SSL is captured by the definition of a
11 public utility and that the municipal exclusion cannot
12 apply.

13 Secondly, we look at the services agreement
14 and a number of other benefits conferred on SSL under
15 their arrangement as a privilege concession or
16 franchise as describe in 45(7) of the *UCA*. We look at
17 Westhills DES and we say this looks exactly like a
18 Stream B thermal energy system contemplated by the TES
19 regulatory guidelines, and as a result, SSL must have
20 CPCN, and must have approved rates.

21 Now, we're mindful that the AES inquiry
22 discusses the merit of a light-handed regulatory
23 approach. Maybe that's appropriate in the
24 circumstances. We don't know, because we haven't had
25 that discussion and that would inevitably come up in
26 either a CPCN application, rates application or a

1 section 80(83) application if one were before you.
2 But it's not -- and I'm sure you know this. It's not
3 this stark, drastic, fall off a cliff, if we're
4 regulated by the Commission, oh my goodness, we are
5 going to be here all the time and the regulatory
6 burden is unbearable. The Commission has rightly
7 acknowledged that it needs to be a practical balance
8 between ensuring the protection that the public
9 requires is achieved without undue burden on the
10 entity providing the service.

11 Our view, this framework, it's a public
12 utility that has a franchise agreement. Looks like a
13 Stream B TES, therefore need a CPCN and approved
14 rates. It's clean. It fits perfectly within the UCA
15 and doesn't at all conflict with the Community
16 Charter, because what the Community Charter says is
17 any bylaw that is passed that is inconsistent with any
18 other act is of no effect. It actually isn't a
19 conflict, it's just they lack, it's outside their
20 jurisdiction, and then the bylaw is no longer legally
21 operative.

22 **Proceeding Time: 11:24 a.m. T20**

23 And I'll point out that it appears that the
24 original intention of the City of Langford was to
25 enter a franchise agreement with an entity and have it
26 be regulated. If we look at the RFP document, and

1 it's appended -- I'm going to call it tab 3.1 in my
2 friend -- of Exhibit C1-4, which is the City of
3 Langford's information package. In his covering
4 letter he identified the attachments, and this one is
5 identified as 3.1. And it's an RFP document, and it
6 says,

7 "It is intended that City Council would
8 franchise the integrated utility for a
9 period of 21 years."

10 And we know that that was not ultimately what they
11 crystalized in their services agreement, but the fact
12 is that the biggest structural change between what
13 they were contemplating in the RFP and what is in the
14 services agreement is the fact that in the services
15 agreement, and that's at tab 5.2 of Exhibit C1-4, and
16 this is section or clause 2 of the services agreement,
17 it just expressly states "This is not an agreement
18 granting an exclusive or limited franchise." So they
19 declare that we're not granting you a franchise.

20 Now, of course, or at the very least, it's
21 our submission, that's not for anyone other than you
22 to say what is and is not a public utility under the
23 UCA, and a municipality cannot just declare that an
24 arrangement they've entered into with a third party is
25 not a privileged concession of franchise.

26 The Commission recently has provided some

1 insight into it's thinking on this, and this arises in
2 the suite of decisions related to the City of
3 Vancouver's attempt to -- I hope I don't characterize
4 it unfairly, but include certain benefits for a public
5 utility within its bylaw making authority. And there
6 was a reasonably protracted series of decisions and
7 reconsiderations and amended filings, where ultimately
8 the Commission said, and this is at page 11 of order
9 G-88-16, where the Commission basically said, it is
10 the suite of benefits that are conferred on the
11 utility that make up the privilege, concession or
12 franchise. The parties don't get to say what the
13 privilege, concession or franchise is. And just as in
14 that case, in this case we say the fact that they
15 declare that they are not entering into a franchise
16 doesn't really mean much other than what they're
17 intention is.

18 In the materials you have, I thought I'd
19 point out a handful of things that make the services
20 agreement and the multi-utility bylaw, and the terms
21 and conditions look a lot like a franchise agreement.
22 The multi-utility bylaw, which is tab 2.1 of C1-4, and
23 it's attached terms and conditions which is schedule F
24 to the bylaw, state that, "Only the service provider,"
25 which is defined to be SSL, "is entitled to provide
26 energy service," which is then defined to be the

1 district energy service in the Westhills area. This
2 looks a lot like something approaching an exclusive
3 entitlement to service district energy in that service
4 area.

5 Articles 35 and 36 of the services
6 agreement grants SSL a license from Langford to use
7 the highways for construction, and obligate Langford
8 to grant statutory rights of way across private
9 property for the same purpose. This looks a lot like
10 the types of benefits that public utilities receive
11 from municipalities so that they can produce or
12 construct their facilities.

13 And then lastly, under the services
14 agreement, which again is tab 5.1, article 26,
15 obligates SSL to pay a total of \$300,000 to Langford
16 on achievement of certain customer connection
17 milestones. And article 28 obligates the payment of 3
18 percent of the gross revenues realized from the
19 Westhills DES. So, the municipality is realizing a
20 revenue stream from this.

21 For those reasons we say the arrangement
22 looks like a franchise. We think it looks like a
23 Stream BTS, just frankly because it is a Stream BTS.
24 It's a thermal energy system that exceeds the capital
25 cost actuals in the TES guidelines. I'm not sure what
26 else it could be.

Proceeding Time 11:29 a.m. T21

1
2 But I think it's important to be mindful of
3 the amount of energy and thoughtful consideration that
4 went into proceedings like the AES inquiry and the TES
5 guidelines. They were held and very well-attended
6 from industry, because these were important issues and
7 a lot of thought went into how these issues should be
8 resolved. And we think it would be a bit of a
9 disservice to that process to walk away from it, to
10 not take the things that were learned and apply them
11 going forward. In this case we don't -- and we don't
12 see any real reason not to. Now maybe those reasons
13 come out in a Section 88(3) application, I don't know.
14 But we set first instance and for the purposes of this
15 proceeding, it's difficult for me to conceive for a
16 reason to do that.

17 Lastly, I'll touch on the local government
18 guide as well, of course. And I say lastly because I
19 have a few pages for notes for reply, but I'm not sure
20 whether I've covered the things off or not. But we
21 took a look at the local government guide, and a few
22 things jumped out at us. First mirroring what my
23 friends have said, it's a general document of policy.
24 It's 10, 12 years old now. And it's not a public
25 utility document. It's not a document about how does
26 a municipality start up a utility service. It covers

1 everything from how do you name your corporation, it
2 covers income tax issues, it is certainly not intended
3 to be, you know, a final authority on any of these
4 things. It is broad, it covers a lot of ground.

5 One thing I will state -- and I'm not
6 saying this because I either agree or disagree with
7 anything it really says, but my friend noted the
8 acknowledgements page, where it indicates that was
9 contributed to by lawyers at Bull, Housser & Tupper.
10 And I think he characterized it as a legal opinion.
11 And I always get nervous about that term. A legal
12 opinion is like the last thing that I ever want to
13 give, because that's hanging myself out there. I give
14 legal advice all the time, but a legal opinion is
15 saying, this is how we think this is going to go.

16 There's a disclaimer on that page that
17 says, "This is not intended to provide legal advice
18 and should not be relied upon as legal advice." So I
19 take that as saying, this is -- not only is this not a
20 legal opinion, this isn't even legal advice. This is
21 some observations about the regulatory world that you
22 may be entering.

23 And then of course it does say that
24 municipal staff and council need to obtain advice on
25 the relevant regulatory requirements. This is the
26 passage that my friend Mr. Alexander read out.

1 And I think his submission was that, well,
2 the City of Langford did this. We went out and looked
3 at the issue. And I think it would be a little cute
4 to suggest that looking at the issue is the same as
5 getting the issue right. And no disrespect to the
6 counsel that were involved in that, but simply I just
7 don't think their conclusions were correct. For the
8 reasons I've stated, I can't see any reason that a
9 municipality can partner with an unrelated for-profit
10 entity for the provision of utility service.

11 And that brings us to the example that is
12 included at Appendix 3, page 41. The Green Utility
13 Corporation, which is characterized as one being
14 exempt from regulation under the *UCA*, and then my
15 friend indicated that this was almost identical to the
16 situation we have before us. And I think it's -- I
17 think that's missing a very key point, and I think his
18 comment was what -- was something along the lines of,
19 "What's the difference?".

20 The difference is, the Green Utility
21 Corporation was a municipally controlled corporation.
22 The municipality went out and they developed a
23 utility. They then -- I'm reading from it now. "The
24 city creates a corporation to oversee the utility."
25 The municipality is the directing mind, the
26 controlling mind, of this -- of the Green Utility

1 Corporation. There is no third-party entity unrelated
2 to the municipality that gets to run the utility in a
3 way that they want to, that may be offensive to the
4 Commission, frankly.

5 **Proceeding Time: 11:18 a.m. T22**

6 And analogies were made to -- well,
7 employees. Are they captured by the definition? No,
8 of course not. The directing mind remains the
9 municipality in this case. The analogy to the
10 highways in the province, the province owns them and
11 runs them and controls them, but they contract out
12 grading and paving and whatever else. The province
13 still controls them. The company that they contract
14 with to plow the highways doesn't get to decide where
15 they build the next highway. They go out there and
16 they plow the highway, and that's it.

17 FEI, of course, contracts out work itself.
18 It contracts out meter readers, it contracts out
19 people to do civil construction on its projects. They
20 don't become a public utility. FEI owns and operates
21 the utility infrastructure and answers to you to run
22 the utility property. But of course they can contract
23 out services and they can hire employees. It doesn't
24 mean that the board of directors of the company has to
25 run the utility. They are the directing mind and the
26 controlling mind in the Green Utility Corporation.

1 The important distinction between that and what SSL
2 is, is that the municipality retain control. And in
3 this case the municipality has a contract and nothing
4 else.

5 If you'll just bear with me for twenty
6 seconds, I'll make sure I've hit all my notes here.

7 THE CHAIRPERSON: Take your time.

8 MR. BOTH: One point of distinction I wanted to make is
9 -- and we made this distinction in our written reply
10 submissions, but my friend referred to everyone
11 agreeing that the policy underpins this decision, and
12 it's with reference -- and forgive me, I don't have
13 the decision open in front of me, but it was the
14 polycentric decision-making role of the Commission,
15 and of course you have that when you are looking at a
16 CPCN application for example. That is a -- that is a
17 decision with many moving parts and many different
18 factors that you are compelled to consider. In this
19 case, this is a pure question of law and a very narrow
20 one: Can SSL, which everyone agrees is not a
21 municipality, be considered a municipality or regional
22 district for the purposes of the municipal exclusion.

23 And in the interest of time, sir, and I'm
24 thinking that I covered most of these comments in my
25 submissions, I think I'll wrap it up there subject, of
26 course, to any questions you have. And I certainly

1 welcome them. But I can't stress enough that I think
2 this is -- we need to forget about all of the
3 questions of "should we" and "is regulation warranted"
4 and just look at the question of how do we interpret
5 those 20 words. And luckily for you we all agree on
6 that, I suppose. But it just seems almost
7 inconceivable to me that a private third-party
8 company, for profit, could fit within that municipal
9 exclusion.

10 THE CHAIRPERSON: Thank you, Mr. Both.

11 MR. BOTH: Thank you.

12 THE CHAIRPERSON: Are you both addressing -- both of
13 you? Do you need a little time before you reply or
14 would you -- are you prepared to --

15 MS. PARKES: I appreciate taking five minutes.

16 THE CHAIRPERSON: Sure. So we'll come back at ten to.

17 **(PROCEEDINGS ADJOURNED AT 11:36 A.M.)**

18 **(PROCEEDINGS RESUMED AT 11:49 A.M.)** **T23/24**

19 THE CHAIRPERSON: Please, be seated.

20 Ms. Parkes and Mr. Alexander, before you
21 get started, I wonder if I could ask you to
22 particularly address a question that the Panel has in
23 your submissions. And Mr. Both, if you would like an
24 opportunity to reply to this specific question, I'll
25 give you that opportunity also.

26 Looking at your -- Mr. Alexander, your

1 argument about municipal services, it seems to me --
2 it's not clear to me what a municipal service is. I
3 don't think you really spent a lot of time on the word
4 "service" itself. And so I wonder if you could point
5 us to if there's any definition of it in the
6 *Municipalities Act* or the *Interpretation Act* or if
7 there's any case law on it.

8 Because a question that arises for me, we
9 talked a little bit about franchise agreements, and
10 let's say a municipality has a franchise agreement,
11 let's say, with FEI, you know, so that FEI can operate
12 in the municipality and provide natural gas service to
13 the citizens of the municipality, and the municipality
14 enters into that agreement, collects a franchise fee
15 for it, is that a service then that the municipality
16 is providing through FEI? And if so, then it would
17 seem that that would make FEI a municipally regulated
18 utility.

19 So if you could address -- both or either
20 of you, if you could address that issue, and Mr. Both,
21 if you chose to reply to that, I'll give you an
22 opportunity. Thanks.

23 Please go ahead, Ms. Parkes.

24 **REPLY BY MS. PARKES:**

25 MS. PARKES: Just a couple of points that we wanted to
26 respond to out of my friend's submissions on behalf of

1 FEI. The first one, I think, is to do with the
2 statutory interpretation aspect of his argument.

3 Certainly, obviously the purpose of the
4 overall *Utilities Commission Act* is for the regulation
5 of utilities among other things. But I think in
6 saying that's the purpose of the Act and therefore --
7 and I'm paraphrasing a bit and I hope I'm not being
8 unfair, but it's SSL should be regulated by the
9 Commission, that's the purpose of this Act. The
10 purpose of this section is to allow for municipal
11 regulation of utilities instead of Commission
12 regulation where appropriate. So I think in looking
13 at the statutory interpretation of the particular
14 section, the purpose is being met by the City of
15 Langford regulation of SSL.

16 We also wanted to mention the example
17 that's been referred to a number of times as a case
18 study to this local government paper, which again I
19 think we've all kind of acknowledged as it's there for
20 a specific purpose, and as I've stated in my initial
21 submissions, I don't think overall the paper is
22 particularly relevant to this issue.

23 Having said that, the case study that's
24 been mentioned, my friend Mr. Alexander spoke about
25 it, and then as did my friend Mr. Both. When Mr. Both
26 spoke about it, however, he stopped at the

1 tens, maybe hundreds of companies within B.C. that
2 should be regulated by the Commission. Examples that
3 jump to mind are VI Power Services I think they're
4 called, that install the hydro lines that provide
5 service. I think my friend Mr. Both mentioned meter
6 reading companies, Ola Meter that reads meters for
7 Fortis. If you get back to the definition of public
8 utility, really all that's required is that the person
9 being defined as a public utility own or operate
10 equipment or facilities for the productions,
11 generations, storage, transmission, sale, delivery of
12 energy for compensation. And I think those companies
13 that I mentioned, as well as many, many other
14 companies could be put into this definition if that
15 was the Commission's desire. However, because they
16 are providing services through companies that are
17 already regulated in most cases by the Commission, or
18 in certain cases by municipalities, the Commission has
19 not, to the best of my knowledge, applied that
20 definition to those kinds of entities.

21 And going even further than for-profit
22 companies, I think if in reading the definition and
23 excepting my friend Mr. Both's position, if only the
24 strict municipality or regional district can be the
25 exempted party, then the municipal corporation created
26 in this case study example or in many examples that

1 exist around B.C., would also be public utilities,
2 because they are not by definition a municipality.

3 And finally, just on the issue of the
4 public policy considerations, I just wanted to be
5 clear, SSL's position is not the law says SSL should
6 be found to be a public utility, but because of the
7 public policy considerations let's not worry about
8 that. SSL's position is that the law and the wording
9 of the statutes in this matter are clear that SSL is
10 not a public utility, and that the public policy
11 considerations support that finding by the commission.

12 THE CHAIRPERSON: Thank you.

13 MS. PARKES: And I believe Mr. Alexander is going to
14 address questions.

15 THE CHAIRPERSON: Go ahead.

16 **REPLY BY MR. ALEXANDER:**

17 MR. ALEXANDER: I'll address the question that you asked,
18 what is the scope of the service power of a local
19 government. If you've got the final argument that was
20 submitted by the municipality on October 13th, 2017,
21 and you go to page 8, the Community Charter provisions
22 that underpin much of our argument are set out there,
23 so it is a convenient place to find sections 7, 8 and
24 9 of the Community Charter, which I think are set out
25 pretty well in whole. Actually, it's 7 through 10 are
26 there.

1 Services include energy services. And I
2 say that for two reasons; first of all the *Utilities*
3 *Commission Act* talks about exempting municipalities
4 providing that very kind of service. So, the
5 legislature must have intended, whatever else is in
6 services, regulated utility services are there,
7 otherwise why would there be an exemption if
8 municipalities simply didn't have that power. So, the
9 narrow answer is, at the very least, what is referred
10 to in the *Utilities Commission Act*? The wider answer
11 comes from a reading of 7, 8 and then 122 of the
12 Community Charter. So 7 sets out the basic municipal
13 purposes, providing for good government, providing for
14 services, laws and other matters for a community
15 benefit. So, that's a service. As long as it is for
16 community benefit, you can provide it. You have, your
17 purpose include services for community benefit.

18 **Proceeding Time 11:59 a.m. T26**

19 And then, under Section 8, the municipality
20 has the capacity, rights, powers and privileges of a
21 natural person. The natural person powers are the
22 same as the included corporate powers. So any -- if a
23 company has the ability to provide a service, the
24 municipality has the ability to provide a service.
25 Because they have all the capacity of a natural
26 person.

1 So if -- the rights are not taken away. It
2 used to be, in the *Municipal Act* before 2004, the
3 natural person powers didn't exist for municipalities.
4 They had to find their power directly under the
5 statute.

6 So, 8(1) is, you can do everything that a
7 person can do. 8(2) then drills down deeper and says
8 a municipality may provide any service that the
9 Council considers necessary or desirable. So again a
10 very wide specific grant of power. Any service that a
11 Council thinks is necessary and desirable.

12 So, the City of Langford decided that it
13 was necessary and desirable to have an energy service.
14 The *Utilities Commission Act* certainly contemplates
15 municipalities having energy services, and exempting
16 them from regulation. And so the city adopted bylaw
17 12-91, and 12-91 starts out saying:

18 "Whereas the Community Charter authorizes
19 the city to provide any service that the
20 Council considers necessary and desirable,
21 and to do this directly or through another
22 person or organization...

23 (b) the city wishes to establish services
24 for the purposes of providing water and
25 energy within the city, on certain terms and
26 conditions, and

1 (c) the city wishes to establish rates, fees
2 and other charges for the water and energy
3 services."

4 Long way of answering, the city can do
5 almost anything it wants, but at least and very
6 clearly energy services. And that is exactly the
7 power they relied on to put the multi-utility bylaw
8 number 12-91 into place. So I say there is no
9 question about the municipality exceeding its
10 jurisdiction or not in deciding to be in the energy
11 service business.

12 THE CHAIRPERSON: Mr. Alexander, and I'm sorry if you're
13 just about to answer this, but where does that leave
14 my question concerning if a city or a municipality has
15 a franchise agreement, let's say with Fortis Gas or
16 FEI --

17 MR. ALEXANDER: Yes.

18 THE CHAIRPERSON: -- is it providing a gas service
19 through that franchise agreement?

20 MR. ALEXANDER: No. No.

21 THE CHAIRPERSON: Could you please explain how that
22 differs, then?

23 MR. ALEXANDER: That's a situation where the City Council
24 says to itself, "We don't want to be in the energy
25 supply business. Let's give a franchise to someone
26 who wants to do that. And maybe we can make some

1 money out of it, but we don't want to be in that
2 business."

3 THE CHAIRPERSON: Isn't that what the City of Langford --

4 MR. ALEXANDER: And if you turn it over --

5 THE CHAIRPERSON: Isn't that what the City of Langford
6 has done with SSL?

7 MR. ALEXANDER: No, because they instead enacted a
8 service bylaw which would not exist with just entering
9 into a franchise agreement. They would simply pass a
10 resolution. "Resolved to enter into a franchise
11 agreement for 21 years with FEI." There would be no
12 bylaw, number one. And number two, they would have no
13 role in regulating it. They would simply grant the
14 franchise and say to FEI, "Deal with your provincial
15 regulator, not up to us. Because we've decided not to
16 be in the service provision business."

17 The difference here is that the city
18 enacted a -- whatever it is, a 25-page bylaw with all
19 the details of how the city is providing the service,
20 how the city regulates, how the city will charge, how
21 the city will collect, how the city will renegotiate
22 rates from time to time, how they will make sure that
23 the service is provided properly, and then they said,
24 "Okay, now we need to be the controlling mind." And
25 they entered into an agreement that gives them the
26 control they thought necessary.

1 So, as Ms. Parkes said, my friend referred
2 to this, well, it's different if the city is the
3 controlling mind, a wholly-owned company. You can't
4 find that anywhere in the statute. But what we do
5 have is control by the city through an agreement,
6 instead of share ownership. There's many ways to
7 control what your service provider is doing. You can
8 own them, and then you don't need an agreement at all.

9 **Proceeding Time: 12:04 p.m. T27**

10 What the city chose to do here is to enter
11 into an agreement that enter into an agreement that
12 was specifically contemplated by their bylaw that will
13 get service delivery through a partner, and they have
14 that control, just effective as owning the shares.
15 Unless you want to drill down into the agreement
16 itself and say, "In your opinion, that's not a very
17 good agreement. They don't have the control that we,
18 as the Utilities Commission might like to have if we
19 were in control." But that's a matter of the quality
20 of the agreement, not the nature of the arrangement.

21 THE CHAIRPERSON: Okay.

22 MR. ALEXANDER: So I say we don't go to look at --like
23 my friend says, it didn't do a very good job at
24 controlling or it took out too much money, or it
25 didn't leave enough money in or whatever. That's a
26 matter of the quality of what the council has done,

1 and you may find that they did a bad job. But that's
2 not for the Commission.

3 THE CHAIRPERSON: Thank you, sir.

4 MR. ALEXANDER: So I'm glad that everyone has conceded
5 that all we're arguing about is the exemption and
6 really, the only difference I hear from what FEI says
7 is that the exemption is only in narrow circumstances
8 and we simply say, yes, narrow circumstances, but not
9 so narrow as to eliminate all the different methods of
10 service delivery. So narrow, but not that narrow, and
11 this arrangement doesn't fall outside the narrow.

12 So how can you say SSL is not a public
13 utility? Because that requires you to say SSL is a
14 municipality. That's a tautology. That's setting up
15 an argument and knocking it down. But it's an
16 argument that we don't make. The city says SSL is not
17 a public utility because it is the city who is
18 providing the service and the city is exempted from
19 the definition of public utility, and SSL is our
20 service delivery partner.

21 And SSL hasn't asked this Commission this
22 question. The city hasn't asked this question to the
23 Commission. It's come up on the Commission's own
24 volition, and I think that's what leads us to the
25 difficulty. In other words, how could you say they're
26 not? Well, that's the way in which you posed the

1 question. That doesn't mean that the answer cannot be
2 Langford is providing the service. By definition,
3 Langford is not a public utility, and we find SSL is
4 their service delivery partner. That's the end of the
5 story.

6 My friend is correct. In that circumstance
7 there will be no process by which the BCUC can ensure
8 rates are fair, reasonable, just, all of that kind of
9 thing, because that's done by the council. And he
10 then criticizes those arrangements, but that is -- I
11 mean it might be a bad arrangement, but if the
12 arrangement is there at law, it's there at law.

13 My friend makes the point that some of the
14 early documents indicate that there was consideration
15 about going by way of franchise. It clearly didn't do
16 that, and the key document is not just the fact that
17 the agreement says, "This is not a franchise," because
18 I agree with my friend. Both parties agreeing what
19 the nature of an animal is, doesn't determine what
20 that animal is. What does determine this is not a
21 franchise, is the fact that the city proceeded by
22 enactment of service bylaw instead of a franchise
23 agreement. Then they entered into a partnering
24 agreement to deliver the service.

25 So if they thought those evil thoughts
26 about franchise agreement, that would have, by

1 definition, brought them here. Like Jimmy Carter
2 says, "I'm sorry for thinking evil thoughts, but I
3 didn't actually go that direction." So I think
4 that's, in my submission, a bit of a red herring.

5 And Ms. Parkes made the point about the
6 controlling mind.

7 **Proceeding Time: 12:09 p.m. T28**

8 So in closing, don't be fooled by a
9 restatement of the position taken by the City or by
10 SSL, that's an incorrect statement of the position,
11 and then a deconstruction of that position. FEI in
12 its final argument says:

13 "The City has maintained throughout this
14 proceeding that its authority under the
15 Community Charter to provide municipal
16 services is sufficient to override the
17 Commission's jurisdiction."

18 That is not our argument. This is not about
19 overriding. The City says it is providing a service,
20 it does not fall within the definition, and there is
21 no aspect of overriding or paramountcy.

22 Subject to any further questions, that's
23 all I have.

24 THE CHAIRPERSON: No, thank you, sir.

25 Mr. Both, did you want to add any remarks
26 to that at this point?

1 **REPLY BY MR. BOTH:**

2 MR. BOTH: Thank you for the opportunity, Mr. Chair.

3 I'll be exceptionally brief.

4 I believe if I captured it correctly, your
5 question was whether -- was essentially what is a
6 municipal service and how is the arrangement with FEI
7 or any other public utility that has a contract with a
8 municipality to provide service within its boundaries,
9 how is that any different than what we have here.

10 THE CHAIRPERSON: That's correct. That's the question.

11 MR. BOTH: To the extent itself, I wanted to point out,
12 and I believe we did this in a footnote in one of our
13 arguments. In the few seconds I had there I couldn't
14 find it, but "service" is a defined term in both the
15 Community Charter and in the *UCA*, and I think that's
16 important because if I understand it correctly, what
17 the City of Langford says is that they have -- that
18 the service they are providing under the municipal
19 exclusion, or that SSL is providing purportedly on
20 Langford's behalf under the municipal exclusion, they
21 are authorized to do it by way of the Community
22 Charter.

23 And I was going to say I take no issue. I
24 don't take much issue -- I don't have much issue with
25 what my friend said about the authorities granted to
26 the municipalities under the Community Charter to

1 provide services as a natural person, and so on. That
2 is all correct, except as in any jurisdictional issue
3 to the extent its constrained by other spheres of
4 jurisdiction. So, yes, the Community Charter says
5 everything it says about the provision of service, but
6 that only butts up against -- they can't -- I'm trying
7 to think back to constitutional law. They can't
8 intrude on other spheres of jurisdiction. That would
9 be *ultra vires* their jurisdiction, not matter what the
10 Community Charter says.

11 So the municipal exclusion says -- it
12 excepts out a municipality or regional district in
13 respect of the service it provides. And I apologize,
14 I'm paraphrasing. Well, that service is the service
15 under the *UCA* which is the use and accommodation
16 provided by a public utility, a produce or commodity
17 provided by public utility, and the plant equipment,
18 apparatus, appliances, property and facilities
19 employed by or in connection with the public utility
20 in providing service or a product or a commodity for
21 the purpose of -- and so on.

22 It's necessarily a case that it's not the
23 service that a municipality is empowered to provide
24 under the Community Charter. And I'm not going to
25 push my luck any further.

26 THE CHAIRPERSON: Okay, thank you, sir.

1 MR. ALEXANDER: And you may want to respond to this, Mr.
2 Both, but you did ask about, well, what about the
3 franchise, why wouldn't the franchise -- and I did
4 find the section in the Community Charter, Section 22,
5 which is a separate power from the service power which
6 says:

7 "A council may, by bylaw, adopted with
8 approval of the electors, enter into an
9 agreement that grants an exclusive or
10 limited franchise for the provision of one
11 or more of the following in accordance with
12 the agreement ..."

13 And it doesn't say "following services", just "the
14 following". And then it's:

15 "A) public transportation;
16 B) water through a water supply system;
17 C) sewage disposal through a sewer system;
18 D) gas, electrical or other energy supply
19 system."

20 So the franchise power is separate from the service
21 power.

22 THE CHAIRPERSON: Yes, okay, thank you, sir. Mr. Both?
23 Okay.

24 Okay, so thank you very much for being
25 mindful of the 12:00. We appreciate that. And thank
26 you for your submissions today. It has been an

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interesting morning, and we will consider these, and we hope to get out decision out as soon as possible, but you've left us with a lot to think about, so I can't promise next week, but we'll get it out as soon as we can.

Thank you.

(PROCEEDINGS ADJOURNED AT 12:14 P.M.)

I HEREBY CERTIFY THAT THE FORGOING
is a true and accurate transcript
of the proceedings herein, to the
best of my skill and ability.



A.B. Lanigan, Court Reporter

March 9th, 2018