

June 14, 2018

VIA EMAIL

Patrick Wruck
Commission Secretary
BC Utilities Commission
6th Floor 900 Howe Street
Vancouver, BC V6Z 2N3



Reply to: Leigha Worth
lworth@bcpiac.com
Ph: 604-687-3034

Our File: 7656

Dear Mr. Wruck:

Re: FEI and City of Surrey Applications for Approval of Terms for an Operating Agreement

Please be advised that we continue to represent the British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Disability Alliance BC, Council of Senior Citizens' Organizations of BC, and the Tenant Resource and Advisory Centre: the ratepayer group known in this and other BCUC regulatory processes as BCOAPO et al. and BCOAPO. The constituent groups of BCOAPO represent the interests of low and fixed income British Columbians and, more specifically in this process, the interests of FEI's low and fixed income residential ratepayers both in Surrey and other jurisdictions where there are not currently operating agreements with fees payable from FEI's ratepayers to the municipality in which they live. As such, BCOAPO's member organizations have a direct and material interest in the outcome of this application.

As counsel, we make the following single final argument to address the issues as well as both parties' Final Arguments and evidence in accordance with the timeline set in Commission Order G-92-18.

Introduction

Most people do not think about how their power, whether it is electricity or natural gas, is transported to their homes. All they care about is that it gets there and how much it

costs. However, there are times when transportation and transmission-related issues arise that do engage their interests whether they realize it or not and this is one of those times.

FEI and the City of Surrey have been trying to negotiate a new Operating Agreement for almost five years now. There was a previous Agreement but the two parties could no longer agree on a few pretty material aspects of that Agreement – its effect and its scope as well as whether it remained valid and enforceable. BCOAPO’s position is that a resolution via application to the BCUC was clearly needed because ongoing or recurring litigation regarding the status, scope and terms of the Operating Agreement is a scenario would not be in FEI’s or its ratepayers’ best interests.

On May 18, 2017, FEI and the City of Surrey filed their Applications for a Commission Order resolving the inability of these two parties to come to a new agreement regarding Operating Terms. The effect of this Order would be the approval of a new Operating Agreement between these two parties, pursuant to section 32 of the *Utilities Commission Act* (“UCA”) or, in the alternative, section 33 of the *UCA*.

These Applications ask the Commission to resolve four outstanding issues:

1. The extent to which the City should be responsible for the cost of relocating FEI’s facilities where the relocation is necessitated by the City’s actions;
2. The amount of any annual Operating Fee to be collected from ratepayers in the Municipality and paid to the City;
3. The extent to which the City should be responsible for the cost of improvements or betterments to Company Facilities which would not have been required but for relocation work requested by the City; and
4. The obligation of FEI to release its interest in statutory rights of way to accommodate highway dedications¹.

¹ Exhibit B1-1, FEI Application, pp 1-2.

In the interests of regulatory process efficiency and cost control, in this instance BCOAPO has chosen to limit its specific submissions to a brief comment on the legal framework focussing instead on the issues of greatest concern to FEI's low and fixed income ratepayers: the Operating Fee and Relocation Costs.

Sections 32 and 33 of the UCA

FEI is the beneficiary of an existing operating agreement with the City, one dating from 1957, that allows the utility to operate its system within the limits of the municipality and to construct what it needs to therein as well.

Use of municipal thoroughfares

- 32** (1) This section applies if a public utility
- (a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and
 - (b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.
- (2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use.

Dispensing with municipal consent

- 33** (1) This section applies if a public utility
- (a) cannot agree with a municipality respecting placing its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse in a municipality, and
 - (b) the public utility is otherwise unable, without expenditures that the commission considers unreasonable, to extend its system, line or apparatus from a place where it lawfully does

business to another place where it is authorized to do business.

(2) On application and after a hearing, for the purpose of that extension only and without unduly preventing the use of the street or other place by other persons, the commission may, by order,

(a) allow the use of the street or other place by the public utility, despite any law or contract granting to another person exclusive rights, and

(b) specify the manner and terms of the use.

To be honest, neither section of the *UCA* is a natural fit with these facts. This is not a specific situation where the FEI is seeking to place certain equipment within the city limits or cannot come to an agreement about the terms upon which it might do so. Instead, this is a dispute resolution effort seeking a Commission decision on certain terms an agreement that would be used in those hypothetical (yet inevitable) specific circumstances. However, sometimes the law is about finding creative ways to fit the square fact pattern into the round legislation and there is, in counsel's opinion, no bar to doing so in this circumstance and some significant public benefit to doing so. In BCOAPO's view, section 32 is the best legal fit to the current situation: its wording is more general and the option best suited to the circumstances, particularly because the wording of section 33(1) indicates there is a need to engage in a costing of alternatives to the operation within the City limits or in 33(2) a reference to the consideration being limited to a specific extension "only". This, in our opinion, is clear indication that the Commission should exercise its jurisdiction as conveyed by section 32 of the *UCA*.

The Relocation Costs

With respect to costs associated with relocation requests, there is specific disagreement regarding how these costs are defined and to whom they are to be allocated.

The evidence is that although either party may request that the other to relocate facilities in order that the first can undertake a project, it is actually invariably Surrey making the request of FEI and it is to Surrey that those relocation costs are then allocated.

To be clear: relocation costs are material. Over the six-year period between 2010 and 2016, Surrey paid relocation costs to FEI of \$5.4M, an average of approximately \$900K per year. Included in that \$5.4M total are \$2.38M of costs relating to the relocation of distribution mains (or approximately \$400K per year) with the remaining \$3M rooted in relocation requests that affected high pressure transmission lines².

As BCOAPO understands it, Surrey's proposal is that FEI be responsible for 100% of the costs of distribution and transmission relocations, even those Surrey requests, while FEI proposes that, subject to some qualifications, the requesting party be financially responsible for 100% of gas main relocation costs with the cost of high pressure pipe relocations being split evenly between the Utility and the City.

Surrey's main concern with FEI's proposal appears to be that FEI will unnecessarily use a relocate request as an opportunity to upgrade its system from a gas main to a high pressure pipe, unfairly shifting some of this cost to the City.

BCOAPO has reviewed the evidence and my clients are firmly of the view that the requesting party is the one triggering the costs, and as such, that party can and should expect to pay most of the costs of the resulting relocations. To say or decide otherwise unfairly shifts the cost burden of Surrey's growth onto the shoulders of all of FEI's ratepayers.

In BCOAPO's submission, when Surrey's request for relocation is the triggering event that forces FEI to undertake an upgrade to bring its asset to the applicable, generally accepted standards required by the request, the city should be responsible for the cost of the upgrade. However, it is BCOAPO's view that when the affected assets would have had to be replaced within the next five years³ due to reaching the end-of-service life or due to known deficiencies, an upgrade was imminent and cannot be said to be

² Exhibit B2-1, page 6, Fig.1

³ BCOAPO has chosen 5 years as that is the period over which FEI makes its capital plan.

arising due to Surrey's request⁴ Therefore, in this latter instance, FEI should be responsible for all the associated upgrade costs.

My client does not believe that the City of Surrey should be responsible for any costs relating to FEI upgrades regarding capacity increases and the like⁵. To allocate these costs otherwise offends, we submit, the principals of fairness.

While BCOAPO recognizes that while FEI's suggestion that Surrey be held responsible for 50% of the Transmission relocation costs relating to high pressure pipes (stemming from the City's requests for relocation) represents a significant cost going forward, it also represents a major concession by the Utility: a concession not required by legislation. This concession would have provided the City with a \$1.5M benefit had it been in effect for the last six years. As such, it is a fair and reasoned compromise and far more gracious than BCOAPO's desire to see all of these associated costs allocated to the requesting party as was done in the past.

The responses provided by FEI to Surrey regarding transparency, information sharing, willingness to provide initial and revised estimates, etc., in Exhibit B1-15 Surrey IR 6.1-6.6, lead BCOAPO to believe that most of the "heavy lifting" to address Surrey's concerns in these respects has been accomplished and we hope approval of an efficient dispute resolution process should allay further concerns.

The Operating Fee

Although FEI serves 75⁶ other municipalities on whose behalf the Utility collects an Operating Fee from ratepayers before subsequently remitting it back to the municipality, FEI does not currently pay an Operating Fee to Surrey⁷. Furthermore, the Operating

⁴ BCOAPO views this as a case in which FEI would have had to upgrade in any case and the Surrey request merely accelerates the timing slightly.

⁵ BCOAPO understands that there is no disagreement on this.

⁶ Originally the figure cited was 70 municipalities, corrected to 75 in a later IR response.

⁷ Exhibit B2-4, BCOAPO IR 1.1.1 and Exhibit B1-13, BCUC IR 2.16.1

Fee for each of those 75 municipalities, the Operating Fee has been set at 3% of FEI's Gross Revenues (i.e., commodity costs plus delivery margin) from within the municipal borders.

While BCOAPO may disagree with the need for an operating fee absent any demonstration that it ultimately is of benefit to the Utility and its ratepayers, the parties have agreed to the concept of an Operating Fee. Unfortunately there is marked disagreement between them on the basis for the calculation of such a fee and on its order of magnitude. FEI is proposing that an Operating Fee be calculated as 0.7% of delivery margin whereas Surrey's position is that it is only fair that their fee should be 3% of Gross Revenues in line with the other 75 municipalities.

BCOAPO does not agree with Surrey's position for a number of reasons.

Surrey has acknowledged that the sole basis for its Operating Fee proposal is that all the other municipalities get 3% of Gross Revenue⁸. That is hardly a strong basis upon which to argue for such a significant change in the financial benefit it receives from FEI's activities within its municipal borders, particularly when taken in the context of its relocation costing suggestions. In addition, Surrey, by its own evidence is "the outlier" in many respects including facilities hosted, growth rate, relocation requests, and costs. It is a very large city growing quickly and as such it is not a given that what other, materially dissimilar municipalities have been granted historically is appropriate for an admitted outlier.

The fact is that the majority of FEI's customers reside in municipalities where they are not required to pay an operating fee⁹ so the decision whether to implement one or not is by no means as simple as Surrey would have us believe. While 75 municipalities sounds like a lot, when taken in the context of the number and relative sizes of

⁸ B2-4, BCOAPO IR 1.1.1

⁹ Exhibit B1-6 BCUC IR 1.4.1

municipalities that do not charge an Operating Fee, its persuasiveness is greatly diminished.

Another reason to exercise caution in applying Surrey's simplistic "us too" reasoning is that there is no evidence on the record for this Application indicating why or how the 3% GR fee that is received by those 75 municipalities was set. BCOAPO's reading of the evidence suggests that originally it was negotiated initially to be a substitute for or to constitute a franchise fee¹⁰ and was later replicated (or retained upon renewal) in different times for far different municipalities than today's Surrey.

BCOAPO submits that the implementation of an Operating Fee – not the one suggested by the City itself – is reasonable and justified in terms of the operational savings it would create on the condition that the approval of such a fee results in Surrey waiving or being ordered to waive permit/cut fees and the like – as they have indicated they would do in exchange for their proposal of an Operating Fee of 3% of Gross Revenues (GR).

Surrey has indicated that in exchange for the 3% fee, it would be willing to waive collection of permit/cut fees from FEI¹¹. This permit waiving would result in operational savings of approximately \$100K in total¹². The estimate of annual permit/cut fees that would otherwise be paid by FEI to Surrey in the evidence is \$358,730¹³.

BCOAPO views the possibility of operational and administrative savings to be desirable by both parties as well as FEI's ratepayers but Surrey's proposal would significantly increase FEI's costs and hence delivery rates. The evidence is that had Surrey's proposal been in effect for the years 2007-2011 inclusive, the annual fee would have been between \$3.3M and \$6.0¹⁴. FEI's evidence is that had Surrey's proposal been in effect for the last 10 years, the Utility's ratepayers would have paid \$50M in fees during a period in which commodity costs were low¹⁵. The savings realized by Surrey waiving permit/cut fees for FEI are estimated to be \$358,730, less than 10% of the Operating

¹⁰ Exhibit B1-13 BCUC IR 2.12.1 and 2.12.4

¹¹ Exhibit B2-14, BCUC IR2.16.2.4.1

¹² Ibid and Exhibit B2-8-1, BCUC IR 1.2.2

¹³ Exhibit B-1, page 15, and Exhibit B2-8-1, BCUC IR 1.2.4

¹⁴ B1-13 BCUC IR 2.14.1

¹⁵ FEI Argument, para 8

Fee proposal offered by Surrey¹⁶; and to make matters worse, in Surrey's case, using a percentage of Gross Revenues to calculate the fee would result in significant volatility year-to-year due to the inclusion of commodity costs.

BCOAPO therefore submits that the Operating Fee be calculated as a percentage of Delivery Margin instead of Gross Revenue. BCOAPO notes that FEI's evidence that its 0.7% Delivery Margin (DM) proposal would have resulted in Surrey getting about \$600K in 2016, or about \$250K more than the permit/cut fees waived.

BCOAPO does not pretend to have the "right answer" to this specific question (i.e. what is the proper Operating Fee if one is indeed called for) but it does feel strongly that, based on the evidence, 0.7% of FEI's DM would be a good starting point with the final figure falling far short of Surrey's ambitious 3.0% of GR.

Conclusion

BCOAPO submits that the Commission should only consider approving an Operating Fee in Surrey's favour should the evidence clearly show that the Utility is, as a result of this new agreement, achieving significant enough operational and administrative savings to justify the additional cost to its ratepayers and that the final figure should be crafted in such a way that it takes into consideration Surrey's unique characteristics as an outlier while not creating undue volatility in rates.

In addition, we strongly support FEI's proposal for the relocation fees while rejecting Surrey's as one that is clearly opportunistic and one-sided.

BCOAPO also urges the Commission to ensure that the dispute resolution process in place is clear, unambiguous and robust to ensure that any future disagreements are dealt with using a mechanism that is equal to the task.

ALL OF WHICH IS REPECTFULLY SUBMITTED.

¹⁶ Exhibit B2-8-1 BCUC IR 1.2.4

Leigha Worth
Executive Director, General Counsel