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VIA E-MAIL

Patrick Wruck
Commission Secretary
British Columbia Utilities Commission
Sixth Floor, 900 Howe Street,
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Dear Mr. Wruck:

**Re: The Greater Vancouver Sewerage and Drainage District
Application for an Exemption from Part 3 of the *Utilities Commission Act***

Further to the Regulatory Timetable established by the Commission in this proceeding, we enclose FortisBC Energy Inc.'s Final Submissions in this matter.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP



David Both

DB/sh

Encl.

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

The Greater Vancouver Sewerage and Drainage District
Application for an Exemption from Part 3 of the *Utilities Commission*
Act

Final Argument of FortisBC Energy Inc.

August 28, 2018

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1.0 Introduction

1. FortisBC Energy Inc. (**FEI**) provides these submissions in respect of the Greater Vancouver Sewerage and Drainage District's (**GVS&DD**) application for an exemption from regulation as a public utility under Part 3 of the *Utilities Commission Act*, RSBC 1996, c. 473 (the **UCA**). The exemption is sought to allow the GVS&DD to construct (ie. no CPCN approval) a thermal energy centre at the North Shore Wastewater Treatment Plant (the **Lonsdale Project**) and exclusively sell the generated heat energy (ie. no financial/rate oversight) to the Lonsdale Energy Corporation (**LEC**).

2. FEI takes no issue with the Lonsdale Project in principle and generally supports alternative energy projects like it. However, FEI has carefully reviewed the record of this proceeding and submits that the GVS&DD has not discharged its burden of demonstrating that an exemption pursuant to section 88(3) of the UCA is warranted. In reaching this conclusion, FEI observes that the Commission plainly set out in the AES Inquiry that the ongoing regulation of projects like the Lonsdale Project need not be burdensome.¹ In light of the likely "light handed" regulation that the Lonsdale Project would attract, the GVS&DD has provided no evidence or justification for why this exemption is so critical to the Lonsdale Project as opposed to being lightly regulated. In short, the GVS&DD asks for extraordinary relief in this application, to resolve a concern that does not appear to have any significant impact.

3. FEI's concern with the exemption sought arises for five reasons:

- (a) No CPCN application would be filed and therefore the Commission would have no visibility over the project need, alternatives and justification, matters of public consultation as well as the consistency of the Lonsdale Project with the provincial energy objectives;
- (b) The Lonsdale Project is proposed to be jointly "regulated" by distinct entities, with distinct constituencies and distinct public interest mandates that, on their face, demonstrate the potential for conflict and deprive the public of a meaningful complaint resolution process;

¹ Order G-201-12, Inquiry into the Offering of Products and Services in Alternative Energy Solutions and other New Initiatives Report, at section 2.2.

- (c) Unlike other exemptions granted in favour of the GVS&DD, the Lonsdale Project would be entirely beyond the Commission's oversight;
- (d) There is inadequate information from which to assess the costs of the Lonsdale Project; and
- (e) The Commission would be tacitly endorsing the "creep" of the municipal exclusion to the public utility definition to services provided outside a municipality's boundaries.

4. GVS&DD does not dispute that it falls within the UCA's definition of a "public utility",² being a "person ... that owns or operates equipment or facilities ... for the production, generation, storage, transmission, sale, delivery or provision of [an] agent for the production of light, heat, cold or power to or for the public or a corporation for compensation".³

5. The question in this proceeding is whether GVS&DD has demonstrated that it qualifies for an exemption from this definition under s. 88(3) of the UCA. This section provides:

The commission may, on conditions it considers advisable, with the advance approval of the minister responsible for the administration of the *Hydro and Power Authority Act*, exempt a person, equipment or facilities from the application of all or any of the provisions of this Act or may limit or vary the application of this Act.

6. The Commission has held that these exemptions are only appropriate "when such exemption serves the objects and purpose of the UCA and it is in the public interest to do so".⁴

2.0 GVS&DD has Failed to Meet its Burden Under Section 88(3) of the UCA

2.1 An exemption forecloses any public interest oversight of the public convenience and necessity of the Lonsdale Project

7. A key component of Commission oversight of public utilities is the CPCN process. Absent an exemption, the GVS&DD could not construct or operate a project like the Lonsdale Project without first obtaining a CPCN.⁵ To obtain a CPCN, a public utility must justify the need for the project, and establish that its proposed solution to meet that need is appropriate and

² Exhibit B-1 page 6, Application for an Order Pursuant to Section 88(3) of the Utilities Commission Act.

³ *Utilities Commission Act*, RSBC 1996, c. 473, s. 1.

⁴ Order G-41-06 (April 7, 2006) at s. 2.2.

⁵ UCA, s.45(1).

will be carried out in accordance with the public interest.⁶ The GVS&DD's application is silent with respect to virtually all of the components an applicant would be required to include in a CPCN application that would allow the Commission to assess whether the project itself was justified and in the public interest. FEI observed this gap and sought to achieve CPCN-type evidence through the information request process. The GVS&DD refused to answer those questions on the basis that, should the exemption be granted, it will not need a CPCN.⁷

8. The result of GVS&DD's strategic refusal to provide that evidence is that the record is inadequate to permit the Commission to engage in any meaningful assessment of the Lonsdale Project itself. As the Lonsdale Project is public utility infrastructure, being built with public funds, to serve public needs, FEI submits that an exemption application that does not permit the Commission to consider whether the construction and operation of the project itself is warranted, should not be approved.

2.2 An exemption would result in competing and potentially conflicting "public interests" regulating the Lonsdale Project

9. The thrust of GVS&DD's justification for an exemption is its submission that Commission oversight is unnecessary because the GVS&DD and LEC both have in place governing bodies with public-interest mandates that together, in GVS&DD's submission, provide an effective replacement for the Commission's public-interest mandate:⁸

Regulation is not needed to protect the public from potential monopolistic behaviour on the part of GVS&DD with respect to the provision of heat energy to LEC. Nor is regulation needed to ensure LEC can access quality service at a fair price, or to ensure continued financial wellbeing of GVS&DD. The elected governing bodies of the LEC and GVS&DD will protect the public interest in all of these respects, as they are required to do.

10. As LEC is a municipally owned utility, FEI understands the relationship between the municipality and utility customer (the constituents of the City of North Vancouver). The

⁶ Order G-20-15, 2015 Certificate of Public Convenience and Necessity Application Guidelines (February 20, 2015).

⁷ Exhibit B-4, Response to FortisBC Energy Inc. Information Request No. 1 at 1.

⁸ Exhibit B-1 Application for an Order Pursuant to Section 88(3) of the Utilities Commission Act, at 9, see also GVS&DD Argument at para. 29.

municipal exclusion exists to recognize that that relationship includes many of the ratepayer protecting features and accountability that the Commission provides for non-municipal public utilities. In contrast, and contrary to the GVS&DD's submissions, it is not clear how the GVS&DD "will protect the public interest ... as they are required to do" as the GVS&DD does not appear to have any legislative requirement or other public interest obligation to the residents of the City of North Vancouver. FEI notes that the GVS&DD has defined statutory objects, none of which are aimed at the protection of the ratepayer of the City of North Vancouver.⁹ Similarly, the Board of the GVS&DD is comprised of representatives of 18 separate municipalities, 17 of which are not the City of North Vancouver, and who can reasonably be assumed to not be primarily interested in protecting the public interest of its utility customers.

11. GVS&DD also relies heavily on LEC's status as a municipal subsidiary to justify its exemption from regulation as a public utility under s. 88(3). GVS&DD argues that the Commission need have no concern for LEC's ratepayers, because as customers of a municipal utility (LEC) the Commission's jurisdiction does not extend to them: "The Commission does not have the mandate to regulate LEC or to protect LEC's ratepayers. The City of North Vancouver's Council has that responsibility."¹⁰

12. FEI is not convinced by these submissions and observes that neither the City of North Vancouver nor the GVS&DD are tasked with serving the object and purpose of the UCA. To be clear, FEI knows both the City of North Vancouver (the owner of the LEC) and the GVS&DD to take their respective mandates seriously, and to have a demonstrated history of zealously protecting and advancing their constituents' interests. However, it is the fact that these distinct entities, with distinct public interest mandates (which differ from the Commission's public interest mandate) will be "regulating" the Lonsdale Project, that raises the prospect of risk to the public interest that the Commission must protect.

⁹ An Act to Incorporate the Greater Vancouver Sewerage and Drainage District Act, SBC 1956, c 59.

¹⁰ GVS&DD Argument at para. 31.

13. The relationship between the LEC and GVS&DD is purely contractual.¹¹ One side has bargained with the other to achieve the best outcome for themselves. The Purchase Agreement has a 20 year term and is sophisticated in its operation.¹² Like most sophisticated contracts, the Purchase Agreement includes a “Dispute Resolution” provision that sets out the steps the parties are to take when a dispute arises, and serves as an acknowledgement that both the LEC and GVS&DD anticipate disputes between them as being possible.

14. It would be speculative to imagine what disputes will arise under the Purchase Agreement, but regardless of what they may be, the Purchase Agreement ultimately calls for a lawsuit to be commenced in the British Columbia Supreme Court by one “public interest” body seeking monetary or other relief from the other. This is antithetical to the Commission’s public interest oversight and complaint resolution processes and the GVS&DD has not provided any justification as to how the public is protected (rather than exposed) by this arrangement.

15. Similarly, the GVS&DD relies on the fact that its proposal would see it provide thermal energy exclusively to LEC and “not [...] to the public” as a sufficient reason for failing to provide a customer complaint mechanism.¹³ The GVS&DD states that the contractual dispute resolution clause provides the only dispute-resolution mechanism necessary in the circumstances,¹⁴ and suggests in its Argument that LEC customers can take their concerns to LEC or to the City Council of North Vancouver.¹⁵

16. FEI’s submits that this dispute-resolution mechanism in the Purchase Agreement is not a satisfactory proxy for Commission oversight. For example, even if the Commission is satisfied that the Purchase Agreement does provide LEC (as the GVS&DD’s customer) with an adequate dispute-resolution mechanism (litigation), the ratepayers are still not provided with any direct recourse to the GVS&DD. Ratepayers can of course complain to the LEC, but as a contractual counterparty to GVS&DD it may have interests that are misaligned with those of the

¹¹ The Thermal Energy Sale and Purchase Agreement (the “**Purchase Agreement**”), October 5, 2017.

¹² Ibid.

¹³ Exhibit B-3, Response to British Columbia Utilities Commission Information Request No. 4 at pdf p. 20-24.

¹⁴ Exhibit B-3, Response to British Columbia Utilities Commission Information Request No. 4. at pdf p. 20.

¹⁵ GVS&DD Argument at para. 30.

complaining ratepayer, and the LEC would not, in any event, raise that complaint to the GVS&DD unless it considered it to have merit. The Commission complaint oversight process contains no similar barrier to have a customer complaint heard.

17. Finally, neither the LEC nor the City of North Vancouver has jurisdiction over the GVS&DD analogous to the Commission's jurisdiction over a public utility. Even if ratepayer complaints in respect of the GVS&DD were acted on by the LEC, its only recourse is the dispute resolution provision - a lawsuit pitting one "public interest" against another. A decision by the Commission to exempt GVS&DD from regulatory oversight under Part III would, therefore, create a gap in the customer-protection framework, leaving LEC's customers without any effective complaint mechanism or regulatory oversight in respect of energy received from GVS&DD. FEI submits that this would be neither consistent with the object and purposes of the UCA nor in the public interest.

2.3 The GVS&DD's other section 88(3) exemptions continued to permit Commission oversight and public interest protection of its activities

18. In support of its application, GVS&DD cites two previous s. 88(3) exemptions that it received in connection with the Lulu Island wastewater treatment plant and the Burnaby waste-to-energy facility.¹⁶ GVS&DD confirmed that it is the beneficiary of no other exemption.¹⁷ GVS&DD does not explain the relevance of these other exemptions, but FEI has assumed that the GVS&DD wants the Commission to consider the fact that it has been granted previous exemptions to somehow justify the one sought in this application. If that is the case, FEI disagrees. The Lonsdale Project is materially different in that in each of the GVS&DD's other two exemptions, the counterparty to the exempted activity was a regulated public utility, allowing the Commission to maintain oversight over the potential impact the exempted activity could have on the public.

19. In light of the Commission's requirement that a s. 88(3) exemption "serv[e] the objects and purpose of the Act" and be in the public interest, this is a material distinction. The

¹⁶ Exhibit B-1, Application for an Order Pursuant to Section 88(3) of the Utilities Commission Act at 2-3, 9; GVS&DD Argument at 2-3, 9.

¹⁷ Exhibit B-4, Response to FortisBC Energy Inc. Information Request No. 1 at 2.1.

continued jurisdiction of the Commission over the counterparty to each of the GVS&DD's otherwise regulated activities - and the public interest protection that provides - was highlighted in both of the s. 88(3) exemption Orders previously granted to the GVS&DD:

- “In the case of the sale of electricity to Utilities, ratepayer interest is regulated by the filing of an energy supply contract by the Utility;”¹⁸ [emphasis added]
- “the class of cases for exemption to be that where a person who owns or operates equipment, facilities, plant, or systems used for the production and sale of biogas or biomethane to a public utility, where the Commission can review or has reviewed the purchase of biogas or biomethane by a public utility through an energy supply contract under section 71 of the UCA;”¹⁹ [emphasis added]

20. In this case, the purchaser of GVS&DD's hot water is LEC. As the LEC is a municipal utility that is subject to regulation by the City of North Vancouver, the Commission will have no oversight over the public utility activities of the GVS&DD and the Lonsdale Project, unlike the circumstances that supported the GVS&DD's previous exemptions.

2.4 Insufficient detail respecting GVS&DD's cost recovery

21. GVS&DD has not provided detailed information relating to the oversight of its cost recovery. Although GVS&DD provides a breakdown of the items included in the annual cost recovery, it fails to quantify them.²⁰ GVS&DD relies on its statement that it “does not intend to profit beyond cost recovery”;²¹ however, absent regulatory oversight there is no way for LEC or its customers to determine whether GVS&DD's costs (even when stripped of any mark-up or profit) may be unjust or unreasonable and, in any event, they would have no recourse if there is an allegation that they were.

¹⁸ Order G-60-03, Montenay Inc. and the Greater Vancouver Sewerage and Drainage District - Exemption from the Utilities Commission Act, Except Part 2, for the Sale of Electricity from the Seegen Turgogenerator Project at the Greater Vancouver Sewerage and Drainage District's Solid Waste Incinerator in Burnaby (September 18, 2003).

¹⁹ Order G-126-13, Inquiry into an Exemption for Biogas and Biomethane Suppliers (August 20, 2013).

²⁰ Exhibit B-3 Response to British Columbia Utilities Commission Information Request No. 3.3. at pdf p. 19.

²¹ Exhibit B-1, Application for an Order Pursuant to Section 88(3) of the Utilities Commission Act, at 5.

2.5 An exemption would tacitly support a municipally owned utility to provide service outside the municipality's boundary

22. The Lonsdale Project involves supply and return piping to connect the energy centre at the wastewater treatment plant with the LEC's system. This includes approximately 500 m outside the municipal boundary of the City of North Vancouver. This piping will be designed, built, owned, operated and maintained by the LEC.²²

23. FEI observed in its letter of comment that, even were the exemption granted to GVS&DD, by operating outside of the municipal boundary of North Vancouver LEC may no longer be captured by the municipal exclusion to the public utility definition. It would either require regulation itself, or need to seek its own exemption. The LEC responded by indicating that such a position "makes no sense"²³. However, as the Commission recently noted, an entity is either captured by the definition of public utility, or not. Whether regulation "makes sense" is not relevant to that determination:

The Panel also agrees with FEI that whether a public utility should be regulated for public policy reasons is not relevant to whether a person meets the definition of a public utility.²⁴

24. Were the LEC to own and operate the supply and return piping outside of its boundary, it would necessarily be captured by the public utility definition as the municipal exclusion only operates "*in respect of services provided by the municipality or regional district within its own boundaries*".²⁵

25. In its letter of comment²⁶, the LEC supported its view by indicating that it only "serves" customers within the boundaries of the City of North Vancouver. While this may be true, "service" is a defined term under the UCA and is broader than the simple utility/customer relationship that the LEC is referencing:

²² Exhibit B-1, Application for an Order Pursuant to Section 88(3) of the *Utilities Commission Act* at 4.

²³ Order G-104-18, SSL-Sustainable Services Ltd. Status as a Public Utility under the *Utilities Commission Act* at 9.

²⁴ Exhibit C1-2, Letter of Comment of Lonsdale Energy Corporation at 3.

²⁵ Ibid.

²⁶ Exhibit C1-2, Letter of Comment of Lonsdale Energy Corporation at 1.

"service" includes ...

(c)the plant, equipment, apparatus, appliances, property and facilities employed by or in connection with a public utility in providing service or a product or commodity for the purposes in which the public utility is engaged and for the use and accommodation of the public;

26. There can be no question that the supply and return piping to be owned and operated by the LEC is part of its "plant, equipment, apparatus, appliances, property and facilities" employed by it to provide service to its customers. In FEI's submission, no reasonable interpretation of the UCA could accommodate a conclusion other than that the LEC owning and operating public utility equipment beyond its municipal boundary brings it outside of the municipal exclusion to the public utility definition.

3.0 Conclusion

27. FEI's participation in this proceeding and its advocacy against the exemption sought is driven by its concern that the Commission's jurisdiction over public utilities is being tested with increasing regularity in the context of municipally associated projects and corporate structures. FEI accepts that these municipalities are well intentioned; however in many cases their actions represent a "municipal creep" into the sphere of public utility regulation, which is - subject to limited exclusion and exemption - the exclusive jurisdiction of the Commission. As the Commission is aware, FEI has actively participated in each of these past proceedings to guard against further "municipal creep" into the provision of public utility service and advances these submissions to the same end. FEI does not seek to stop the development of the Lonsdale Project, but submits that it should proceed under the type of "light handed" regulation contemplated by the Commission in the AES Inquiry.

28. GVS&DD has failed to meet its burden to qualify for a s. 88(3) exemption. It has not demonstrated that the "objects and purpose of the Act" would be served if an exemption were granted, or that an exemption would be in the public interest. For the reasons described above, FEI submits that GVS&DD's application should not be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of August, 2018.



David Both
Counsel to FortisBC Energy Inc.