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November 27, 2019

E-FILED

British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, B.C. V6Z 2N3

Attention: Patrick Wruck, Commission Secretary

Dear Mr. Wruck:

City of Coquitlam

**Application to the British Columbia Utilities Commission (BCUC) for
Reconsideration and Variance of BCUC Order No. G-80-19 (Application)
BCUC Project No. 1599008**

On behalf of the City of Coquitlam, we enclose the City's Reply Argument on Reconsideration for the above-referenced proceeding.

Yours very truly,

LAWSON LUNDELL LLP

Ian Webb

cc. Stephanie James, City of Coquitlam
Regulatory Affairs, FortisBC Energy Inc.
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BRITISH COLUMBIA UTILITIES COMMISSION

City of Coquitlam

**Application for Reconsideration and Variance of
British Columbia Utilities Commission Order No. G-80-19**

BCUC Project No. 1599008

City of Coquitlam

Reply Argument on Reconsideration

November 27, 2019

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1. Introduction

1. This Reply Argument on Reconsideration of the City of Coquitlam (the "**City**") replies to the Final Arguments of FortisBC Energy Inc. ("**FEI**") and the two other parties that submitted final arguments in this Reconsideration Hearing: the Commercial Energy Consumers Association of British Columbia ("**CEC**") and the British Columbia Hydro and Power Authority ("**BC Hydro**"). The term "**the Interveners**" is used in this Reply Argument on Reconsideration to refer to FEI, the CEC and BC Hydro collectively.
2. The Final Arguments submitted by the Interveners indicate misunderstanding generally of the matters that are at issue in this Reconsideration Hearing.
3. The matters that are at issue are limited to the City's request that the BCUC rescind paragraphs 1 and 2 of Order No. G-80-19 in their entirety on the grounds that those paragraphs are based on errors of law.
4. For greater certainty, the following matters are not subject to reconsideration nor otherwise at issue in this Reconsideration Hearing:
 - the BCUC's Order C-11-15 dated October 16, 2015;
 - consideration of replacing paragraphs 1 or 2 of Order G-80-19 with any new determinations or orders;
 - paragraph 3 of Order G-80-19;
 - the following BCUC's determinations in the Order G-80-19 Decision:
 - the terms of the existing operating agreement between FEI and the City dated January 7, 1957 ("**1957 Operating Agreement**") do not permit FEI to leave its 20-inch nominal pipe size ("**NPS 20**") pipes in Como Lake Avenue once decommissioned, do not apply to the removal of the decommissioned NPS 20

pipes, and do not specify a method or formulae for allocating the costs of removing all, or portions of the decommissioned NPS 20 pipes;¹ and

- the NPS 20 pipes will remain FEI's property and responsibility after they are decommissioned, and FEI is required to remove the decommissioned NPS 20 pipes from Como Lake Avenue at the City's request.²

5. To the extent an Intervener is requesting in its Final Argument that the BCUC reconsider and vary further determinations made in the Order G-80-19 Decision, which FEI in particular seems to be requesting, such request ought to have been made by the Intervener as a separate application for reconsideration in accordance with the BCUC's Rules of Practice and Procedure, including identification of the alleged error(s) and nature of the error(s), materiality of the impact, new evidence, etc. None of the Interveners in their submissions on process in June 2019 requested the BCUC to add further alleged errors for consideration within the scope of this Reconsideration Hearing.³ Pursuant to the BCUC's Rule 26.02, any request by an Intervener for reconsideration and variance of additional determinations in the Order G-80-19 Decision is well out of time.
6. The Reconsideration Application is brought on the grounds that the BCUC erred in law by determining that,
 - (i) the BCUC has jurisdiction to authorize FEI and did pursuant to the Order C-11-15 Decision authorize FEI, within the meaning of the term "authorization" as used in section 121 of the *Utilities Commission Act* ("**UCA**"), to abandon in place FEI's decommissioned NPS 20 pipes located in Como Lake Avenue, and
 - (ii) section 32 of the *UCA* provides the BCUC with jurisdiction to specify a term requiring the City to pay half of FEI's cost to remove all, or a portion of, the

¹ Order G-80-19 Decision, s. 2.4.2.

² Order G-80-19 Decision, s. 2.4.1.

³ Refer to the intervener submissions on process at Exhibits C1-2 (FEI), C2-2 (BC Hydro) and C4-2 (CEC).

permanently decommissioned NPS 20 pipes when removal is requested by the City.

7. The City's Final Argument on Reconsideration as submitted on October 16, 2019 fully addresses all of the issues arising from the Reconsideration Application. The City's Final Argument on Reconsideration reviews the pertinent provisions of the *Gas Utility Act* ("**GUA**") and the *UCA* in their grammatical and ordinary sense harmoniously with the statutory scheme established by both of the two statutes. The pertinent provisions of the *GUA* establish and prescribe the authority of FEI as a gas utility, including its authority to place, operate and maintain its pipes in municipal public places. The pertinent provisions of the *GUA* and the *UCA* operate together and must be read as a whole.
8. The Final Arguments of the Interveners suggest that the express grants of jurisdiction and powers to the BCUC must be drastically broadened as a "necessary implication" of certain objectives of the *UCA*. However, the Final Arguments of the Interveners avoid the grammatical and ordinary sense of the statutory provisions at issue, and in particular do not have due regard to the provisions of the *GUA*. The meaning of the pertinent provisions of the *GUA* and *UCA* is plain, and there is no basis to imply that the legislature intended to confer different powers as proposed by FEI in particular.
9. Moreover, the arguments of the Interveners about the BCUC's core mandate and principles of public utility rates are simply not applicable to the issues in this Reconsideration Hearing. The Final Arguments of the Interveners fail to recognise that the dispute between FEI and the City is ultimately about property rights. The extent of FEI's rights to occupy City property is prescribed by the *GUA* and the 1957 Operating Agreement. The 1957 Operating Agreement sets out the terms and conditions of FEI's use of the City's public places for specified purposes,⁴ and the BCUC has determined that the 1957 Operating Agreement does not provide rights to FEI in relation to pipeline

⁴ Order G-80-19 Decision, s. 1.0, page 3.

abandonment.⁵ The Intervener Final Arguments do not have due regard to those BCUC determinations nor to the provisions of the *GUA* that are fundamental to the statutory scheme at issue.

10. Neither a CPCN granted to FEI by the BCUC pursuant to section 46(3) of the *UCA* nor a CPCN FEI is deemed to have received pursuant to section 45(2) of the *UCA* confers property rights on FEI. Rather, section 2(3)(c)(i) of the *GUA* and the 1957 Operating Agreement provide FEI certain property rights to occupy lands owned and controlled by the City for the purposes specified therein.
11. There is no basis in law for FEI's position that it has the right to keep its decommissioned NPS 20 pipes in Como Lake Avenue. The BCUC has determined in the Order G-80-19 Decision that FEI does not have that right and must remove its decommissioned NPS 20 pipes if requested by the City. Those BCUC determinations are not subject to reconsideration in this Reconsideration Hearing.
12. As discussed in section 2.1 of the City's Final Argument on Reconsideration, the BCUC's characterisation of the "approval" at page 24 of the Order C-11-15 Decision as an "authorization" within the meaning of section 121(2) of the *UCA* constitutes an error of law. The effect of this erroneous characterisation is to create the perception of a conflict of laws that might need to be resolved by section 121(1) of the *UCA*. The City reiterates its submission that a conflict of laws does not exist and section 121(1) does not apply.⁶
13. The following sections 2 to 4 provide the City's reply to specific arguments on an intervener-by-intervener basis.

⁵ Order G-80-19 Decision, s. 2.4.2.

⁶ City's Final Argument on Reconsideration, section 2.1.4.

2. Reply to FEI's Final Argument

2.1. Reply to Part Two of FEI's Final Argument

14. In Part Two, Section B, of FEI's Final Argument it argues that the City has overstated the financial impacts to the City of paragraphs 1 and 2 of Order G-80-19. The City replies that the BCUC's Rule 26.04 requires that an application for reconsideration describe the impact of the impugned decision and how it is material. The Rule's requirement to show a material impact is to assist the BCUC in determining as a threshold matter whether to establish a reconsideration hearing to further consider the alleged errors, and new evidence, etc. If the impugned decision was based on errors but does not have a material impact, undertaking a reconsideration hearing would be academic and, in most cases, not a prudent use of resources. In this case, the BCUC has already found that the Reconsideration Application sufficiently demonstrates a material impact to convene this Reconsideration Hearing. That the actual impact to the City of paragraphs 1 and 2 of Order G-80-19 might be uncertain is not relevant to the jurisdictional issues raised by the Reconsideration Application.
15. In Part Two, Sections C and D, of FEI's Final Argument it argues that acceptance of the City's position would have significant implications for utility customers in British Columbia and "beyond this specific case and beyond FEI". The City replies that FEI's argument is highly speculative, has no evidentiary basis, and provides no explanation as to how this case could have implications beyond its specific circumstances and beyond FEI. The Reconsideration Application is specific to the circumstance of FEI, as a gas utility under the *GUA*, proposing to store its permanently decommissioned pipes in Como Lake Avenue where the 1957 Operating Agreement does not permit it to do so. For example, the Reconsideration Application does not have any implications for:
- utilities that are not a gas utility under the *GUA*, such as electric utilities, thermal energy utilities, steam utilities, etc.; and

- a gas utility where its operating agreement provides for storage of the gas utility's decommissioned pipes in lands owned and controlled by the municipality.
16. Notably, BC Hydro's rights to occupy municipal property are pursuant to a completely different statutory scheme that is not at issue in this Reconsideration Hearing: sections 12, 16, 18 to 20 of the *Hydro and Power Authority Act ("HPAA")* prescribe BC Hydro's rights to enter and make use of any lands, roads, etc.; and pursuant to section 32(1) of the *HPAA* BC Hydro is not bound by the *Community Charter* or *Local Government Act*.
17. There is no evidence that granting the relief requested in the Reconsideration Application would have any implications beyond the circumstances of FEI where the 1957 Operating Agreement does not provide for temporary storage of decommissioned pipes in Como Lake Avenue. Moreover, the submissions in Part Two of FEI's Final Argument are not relevant to determining the BCUC's jurisdiction.

2.2. Reply to Part Three of FEI's Final Argument

18. In Part Three of FEI's Final Argument it argues for substantive change to and expansion of the issues under reconsideration in this Reconsideration Hearing. The City replies that the issues within the scope of this Reconsideration Hearing are limited to whether the BCUC has jurisdiction to issue paragraphs 1 and 2 of Order G-80-19. FEI's proposed substantive issues for reconsideration, as stated in Part Three of its Final Argument, seek variance of additional determinations that the BCUC made in the Order G-80-19 Decision. If FEI wishes to request reconsideration and variance of additional BCUC determinations, it ought to have done so as a separate application in accordance with the BCUC's Rules. Pursuant to the BCUC's Rule 26.02, such request by FEI is well out of time.

2.3. Reply to Part Four of FEI's Final Argument

19. In reply to the entirety of Part Four of FEI's Final Argument, the City submits that FEI's arguments do not have due regard to the grammatical and ordinary meaning of the statutory provisions at issue. FEI proposes drastic broadening of the express grants of

BCUC jurisdiction and powers largely by ignoring the plain meaning of the pertinent provisions of the *GUA*, which is reviewed in section 2.1.4 of the City's Final Argument.

20. FEI argues that the express wording of the powers conferred on the BCUC must be broadened as a “necessary implication” of the statutory scheme. Section 2.1.4 of the City's Final Argument clearly sets out how, in their grammatical and ordinary sense, the *GUA* section 2(3)(b) Ancillary Powers and section 2(3)(c)(i) Ancillary Property Rights are all for the purposes of the section 2(3)(a) Gas Activities (as defined therein) and may only be exercised in furtherance of such purposes. The statutory scheme does not confer on FEI rights, without the City's agreement, to construct and operate on City lands an office building or a laydown yard, for example (even if the BCUC granted to FEI a CPCN for same). It does not confer on FEI rights, without the City's agreement, to abandon in City lands permanently decommissioned pipes that will never be used for the purposes of supplying natural gas to the public, and such rights cannot be inferred. The drastic broadening of statutory provisions proposed by FEI is not at all necessary to accomplish the objectives of the *GUA*. The legislature could have used broad and inclusive language in section 2(3) of the *GUA*, like it did for the rights granted to BC Hydro pursuant to the *HPPA* (as noted in paragraph 16, above), but it did not do so. For the *GUA*, the legislature used specific and exhaustive lists of the powers and ancillary property rights conferred on gas utilities. It would not be reasonable to infer that the legislature intended the radical expansion of powers FEI proposes.
21. The pertinent provisions of the *GUA* and the *UCA* operate together and must be read as a whole, as clearly stated in the Court decisions referred to in FEI's Final Argument. FEI's arguments do not have due regard to the provisions of the *GUA* that are fundamental to the statutory scheme.
22. The Court decisions referred to by FEI are otherwise not applicable to the issues in this Reconsideration Hearing. As FEI notes in its paragraph 47, the referenced decisions involve the development of new infrastructure and not a gas utility's plan to store its permanently decommissioned pipes in municipal lands where the gas utility does not

have an operating agreement permitting it to do so. The decisions do not involve a gas utility under the *GUA*.

2.4. Reply to Part Five of FEI's Final Argument

23. In Part Five, Section A (paragraph 49), of FEI's Final Argument it states that the City alleges that the BCUC erred by granting a CPCN for abandonment of non-utility equipment. That is not a correct characterisation of the City's position.

24. For clarity, in paragraph 1 of Order G-80-19 the BCUC made the following determination:

"1. Pursuant to section 121 of the UCA, it is affirmed that FEI is authorized to abandon the decommissioned NPS 20 Pipeline in place."

25. In section 2.4.1 of the Order G-80-19 Decision and in paragraph 1 of Order G-80-19 (above), the BCUC determined (affirmed) that the "approval" at page 24 of the Order C-11-15 Decision of FEI's plans to abandon in place the decommissioned NPS 20 pipes is in law an "authorization" within the meaning of section 121(2)(a) of the *UCA* (that is, a CPCN issued by the BCUC pursuant to section 46 of the *UCA*).⁷

26. Nowhere in Order C-11-15 or the accompanying reasons for decision did the BCUC say that the "approval" at page 24 of that decision is a CPCN issued pursuant to section 46. For greater certainty, the City's position is that the BCUC did not and could not in law issue a CPCN for pipeline abandonment.⁸ FEI states in its second bullet point of its paragraph 49 that "the BCUC has not purported to issue a "CPCN... for abandonment". If that FEI submission is correct, there would appear to be agreement that paragraph 1 of Order G-80-19 is erroneous, supporting the City's position that it should be rescinded.

27. In paragraph 49 and Part Five, Section C, of FEI's Final Argument it also argues that a deemed CPCN is an applicable "authorization" under section 121 of the *UCA*. That

⁷ As discussed in section 2.1.1 of the City's Final Argument on Reconsideration.

⁸ City's Final Argument on Reconsideration, sections 2.1.2 and 2.1.3.

submission is not correct. Section 121(2)(a) of the *UCA* defines “authorization” as a CPCN issued under section 46 of the *UCA*. That is, a CPCN granted by the BCUC under section 46. A utility may be deemed to have received a CPCN pursuant to section 45(2) of the *UCA*, but such deemed CPCN is not issued by the BCUC under section 46 and is not an “authorization” for the purposes of section 121 of the *UCA*. This distinction is important for understanding the actual scope of section 121 of the *UCA*, which is clearly narrower than argued by the Interveners who fail to recognise the distinction.

28. In reply to the whole of Part Five of FEI’s Final Argument, the City reiterates that the currently operating NPS 20 Pipeline is permitted to occupy space in Como Lake Avenue pursuant to the *GUA* and the 1957 Operating Agreement, not pursuant to any CPCN granted to FEI by the BCUC or deemed to have been received by FEI. A CPCN does not confer property rights. FEI has to obtain property right pursuant to the *GUA* and an operating agreement, or it can purchase them by agreement in the normal course. Furthermore, this Reconsideration Application has nothing to do with the *Community Charter* contrary to FEI’s suggestion at its paragraph 74. The City’s position is based on the grammatical and ordinary sense of the pertinent provisions of the *GUA* and *UCA* read as a whole.

2.5. Reply to Part Six of FEI’s Final Argument

29. In Part Six, Section D, of FEI’s Final Argument it argues that the City’s reliance on the word “placed” in section 32 of the *UCA* rests on “interpretative gymnastics”.⁹ The City replies that the grammatical and ordinary sense of the word “place” is commonplace: to lay down. Moreover, the BCUC has already determined that FEI’s plan to abandon the decommissioned NPS 20 pipes in Como Lake Avenue is not “placing” infrastructure – at page 6 of the Order G-80-19 Decision, under the heading “Regulatory Legal Framework”, the BCUC made the following determination:

⁹ FEI Final Argument, paragraph 85.

“FEI filed this Application pursuant to the provisions of sections 32 and 33 of the UCA. In addition, in the Final Agreed to Terms and Conditions, the parties agreed that if they were unable to resolve a matter relating to the Final Agreed to Terms and Conditions, the BCUC could make a determination on the matter under sections 32 and 33 of the UCA. Section 33 addresses extensions and instances where distribution equipment is being placed which is not at issue, ...” [underlining added]

30. Thus, the BCUC determined that section 33 of the *UCA* is not applicable to the pipeline abandonment issue because section 33 addresses circumstances where distribution equipment is “being placed which is not at issue” (underlining added). Section 32 also applies in circumstances where the gas utility proposes to place distribution equipment¹⁰ and for this same reason section 32 is not applicable to the pipeline abandonment issue as more fully analysed in section 2.2.2 of the City’s Final Argument on Reconsideration.
31. In reply to the whole of Part Six of FEI’s Final Argument, the City reiterates that the operating NPS 20 Pipeline is permitted to occupy space in Como Lake Avenue pursuant to the 1957 Operating Agreement, not pursuant to any CPCN granted to FEI by the BCUC pursuant to section 46 of the *UCA* or deemed to have been received by FEI pursuant to section 45(2) of the *UCA*. The BCUC has determined that the 1957 Operating Agreement does not permit and is not applicable to FEI’s plan to abandon in place in Como Lake Avenue the decommissioned NPS 20 pipes. The BCUC’s determinations regarding the 1957 Operating Agreement are not subject to reconsideration.

¹⁰ Section 32 applies “if a public utility ... has the right to enter a municipality to place its distribution equipment on, along, across, over or under a [public place], and cannot come to an agreement with the municipality on the use of the [public place].” Please refer to section 2.2 of the City’s Final Argument on Reconsideration.

3. Reply to CEC's Final Argument

3.1. Reply to Part V of CEC's Final Argument

32. The submissions in sections 1 and 2 of this Reply Argument on Reconsideration, above, address the CEC's arguments in favour of a broadening of the express grants to the BCUC of jurisdiction and powers.

33. In paragraph 11 of the CEC's Final Argument it submits that section 121 of the *UCA* confers jurisdiction or powers on the BCUC. The City replies that section 121 of the *UCA* does not confer jurisdiction or powers on the BCUC; it prescribes how certain potential conflicts of laws are resolved in regards to anything in or done under the *Community Charter* or the *Local Government Act*.

34. As discussed in section 2.1.4 of the City's Final Argument on Reconsideration, there is no conflict of laws at issue in this Reconsideration Hearing. The only issue in connection to section 121 of the *UCA* is whether the BCUC had jurisdiction to authorize FEI and did pursuant to the "approval" at page 24 of the Order C-11-15 Decision authorize FEI, within the meaning of the term "authorization" as used in section 121 of the *UCA*, to abandon in place FEI's decommissioned NPS 20 pipes located in Como Lake Avenue. As discussed in section 2.1 of the City's Final Argument on Reconsideration, the City submits that the answer to both questions is "no", and paragraph 1 of Order G-80-19 should be rescinded as based on error of law.

3.2. Reply to Part VI of CEC's Final Argument

35. The submissions in sections 1 and 2 of this Reply Argument on Reconsideration, above, address Part VI of the CEC's Final Argument.

4. Reply to BC Hydro's Final Argument

4.1. Reply to Part 4 of BC Hydro's Final Argument

36. BC Hydro agrees with the City that section 121 of the *UCA* does not, itself, confer jurisdiction or powers on the BCUC; rather, it prescribes how certain potential conflicts of laws are resolved.
37. Beyond that, the City reiterates that the only issue in connection to section 121 is whether the BCUC has jurisdiction to authorize FEI and did pursuant to the "approval" at page 24 of the Order C-11-15 Decision authorize FEI, within the meaning of the term "authorization" as used in section 121 of the *UCA*, to abandon in place FEI's decommissioned NPS 20 pipes located in Como Lake Avenue. As discussed in section 2.1 of the City's Final Argument on Reconsideration, the City submits that the answer to both questions is "no".

4.2. Reply to Part 5 of BC Hydro's Final Argument

38. On pages 7-8 of its Final Argument, BC Hydro makes submissions in connection with section 41 of the *UCA*. As submitted in paragraphs 24-25 of the City's Final Argument on Reconsideration, the "approval" at page 24 of the Order C-11-15 Decision might be, in law, the BCUC's permission for FEI to cease the operation of the NPS 20 Pipeline, as FEI is required to obtain pursuant to section 41 of the *UCA*. If the "approval" at page 24 of the Order C-11-15 Decision is actually the BCUC's permission for the purposes of section 41 of the *UCA*, then it clearly is not a CPCN issued pursuant to section 46, and paragraph 1 of Order G-80-19 is erroneous and should be rescinded.
39. On page 10, lines 22-23 of BC Hydro's Final Argument it states that "In this case, the BCUC explicitly approved FEI's plans to decommission the 23 NPS 20 Pipeline in place pursuant to sections 45 and 46 of the *UCA*." The City replies that that statement is not correct. Nowhere in Order C-11-15 or the accompanying reasons for decision does it say that the "approval" at page 24 of the decision was pursuant to sections 45 and/or 46 of the *UCA*. On this point, the City relies on section 2.1.3 of its Final Argument on

Reconsideration. For the first time some four years later the BCUC, in paragraph 1 of Order G-80-19 and its reasons for decision accompanying Order G-80-19, characterized the earlier “approval” as an “authorization” meaning a CPCN issued pursuant to section 46 of the *UCA*.

40. Otherwise, the submissions in sections 1 and 2 of this Reply Argument on Reconsideration, above, address Part 5 of BC Hydro’s Final Argument.

4.3. Reply to Part 6 of BC Hydro Final Argument

41. The submissions in sections 1 and 2 of this Reply Argument on Reconsideration, above, address Part 6 of BC Hydro’s Final Argument.

5. Conclusion

42. For all of the reasons set out in the City’s Final Argument on Reconsideration and in this Reply Argument on Reconsideration, the City submits that the BCUC should rescind paragraphs 1 and 2 of Order G-80-19 in their entirety.

All of which is respectfully submitted this 27th day of November, 2019.

By: 

Ian D. Webb

Counsel for the City of Coquitlam