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British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
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Attention: Marija Tresoglavic,
Acting Commission Secretary

Dear Ms. Tresoglavic:

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 (the **City**) and in accordance with the regulatory timetable established by Order G-289-20, we enclose the City's Reply Argument on Reconsideration of Paragraph 2 of Order G-80-19.

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 of
Paragraph 2 of Order G-80-19**

January 18, 2021

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1. Introduction

1. This reply argument for this final phase of the reconsideration proceeding (“**Reconsideration Final Phase**”) responds to the final arguments submitted by interveners in the proceeding: the Commercial Energy Consumers Association of British Columbia (“**CEC**”), FortisBC Energy Inc. (“**FEI**”), and the British Columbia Hydro and Power Authority (“**BC Hydro**”).
2. The final arguments submitted by FEI and the CEC obfuscate the matter that is at issue in this Reconsideration Final Phase, necessitating the following review of the scope of the Reconsideration Final Phase for complete clarity.

1.1. Scope of this Reconsideration Final Phase

3. In its Reconsideration Application the City of Coquitlam (the “**City**”) requested the BCUC to rescind paragraphs 1 and 2 of Order No. G-80-19 in their entirety.
4. The City submitted that the BCUC had erred in three regards in making Order G-80-19 by:¹
 - (1) finding that the BCUC had jurisdiction to 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;
 - (2) finding that section 32 of the *UCA* provides the BCUC with jurisdiction to specify the manner and terms under which the City may request FEI to remove any portion of the NPS 20 pipes abandoned in place; and
 - (3) deciding, in the absence of evidence and submissions from the parties on the matter, that the costs of removal of any portion of the decommissioned FEI NPS 20 pipes shall be shared equally between FEI and the City.
5. Pursuant to Orders G-114-19 and G-150-19 the BCUC established a proceeding to review the Reconsideration Application. Order G-150-19 directed that the alleged error in

¹ Reconsideration Application, pages 4-5.

respect of the cost allocation methodology component (that is, issue (3) above) be adjourned for later consideration, if necessary.²

6. Pursuant to Order G-75-20 dated April 2, 2020, the BCUC rendered decisions on issues (1) and (2), above. The BCUC affirmed its decision that it has jurisdiction to “authorize” FEI to abandon in place its permanently decommissioned NPS 20 pipes in City lands pursuant to a CPCN and to specify terms in relation to such abandonment and subsequent removal pursuant to section 32 of the *UCA*. The City does not accept those decisions of the BCUC and is appealing those decisions to the British Columbia Court of Appeal. In *Coquitlam (City) v. British Columbia Utilities Commission*, 2020 BCCA 289, the Court of Appeal granted leave to appeal from BCUC Order G-75-20 affirming Order G-80-19. The Court of Appeal will hear the appeal in due course.
7. Pursuant to Order G-150-20, the BCUC determined that it is appropriate to continue with the Reconsideration Application and established further regulatory process to address the remaining issue (that is, issue (3), above) in the proceeding.
8. Paragraph 2 of Order G-80-19, in its entirety, is as follows:

“Pursuant to section 32 of the *UCA*, upon request by the City in circumstances where it interferes with municipal infrastructure, the costs of removal of any portion of the decommissioned NPS 20 Pipeline shall be shared equally between FEI and the City”.
9. Not all of paragraph 2 of Order G-80-19 is under reconsideration in this Reconsideration Final Phase. Pursuant to Order G-75-20 the BCUC already ruled on and denied reconsideration of the first two issues under reconsideration. The BCUC has already affirmed its decision that pursuant to section 32 of the *UCA* the BCUC has jurisdiction to specify terms in relation to abandonment and subsequent removal, leaving only the cost allocation component for reconsideration in this Reconsideration Final Phase.

² By Order G-15-19, the BCUC ordered that “The potential need for new evidence regarding the cost allocation methodology for the removal of the decommissioned NPS 20 Pipeline is adjourned, pending a determination on the BCUC’s jurisdiction under section 32 of the *UCA*, as outlined in the [City’s Reconsideration] Application.”

10. The City is pursuing its appeal of the BCUC's Order G-75-20 findings on jurisdiction. But for the purposes of this Reconsideration Final Phase, the BCUC's previous decisions are accepted with the exception of the matter of cost allocation methodology, which is the remaining matter under reconsideration. For complete clarity, the underlined words below are under reconsideration in this Reconsideration Final Phase, and the non-underlined words are not:

Pursuant to section 32 of the UCA, upon request by the City in circumstances where it interferes with municipal infrastructure, the costs of removal of any portion of the decommissioned NPS 20 Pipeline shall be shared equally between FEI and the City.

11. To the extent an intervener is requesting in its final argument that the BCUC reconsider and vary further findings the BCUC made in its Order G-80-19 Decision or findings it made in the Order G-75-20 Decision, which FEI and CEC seem to be proposing, such request ought to have been made as a separate application for reconsideration in accordance with the BCUC's Rules of Practice and Procedure. FEI and the CEC, in their submissions on process in June 2019, did not request 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 for reconsideration and variance of additional findings is well out of time.
12. Moreover, since Order G-75-20 is the BCUC's final order on the matters of jurisdiction raised in the Reconsideration Application and Order G-75-20 is now under review before the Court of Appeal, it would not be appropriate for the BCUC to vary or supplement the reasons it gave for its findings of jurisdiction.

2. Reply to the CEC Final Argument

13. The submissions in the CEC's final argument consist primarily of unsupported assertions and re-argument of matters that the BCUC decided previously and which are not under

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

reconsideration in this Reconsideration Final Phase. In particular, the CEC's final argument focuses on the 1957 Operating Agreement between the City and FEI, and on inferences the CEC suggests may be drawn from its terms. The City replies that in the underlying proceedings the BCUC heard the submissions of the parties about the applicability, if any, of the 1957 Operating Agreement to abandonment of decommissioned pipes, and the BCUC made its findings on the matter. Section 2.2.2.2 of the CEC's final argument acknowledges pertinent determinations by the BCUC in relation to the 1957 Operating Agreement, but nevertheless argues against those BCUC findings. Those BCUC findings are reviewed in section 2.2.2.2 of the City's Final Argument and are not under reconsideration.

14. Moreover, the CEC's suggested inferences in relation to the lack of an agreement allowing FEI to abandon decommissioned pipes in the City are at odds with the law of real property and also the law of expropriation in Canada.
- When a person's property is on the land of another person without a right to be there, it is an actionable trespass. If FEI's predecessor in 1957 wished to leave the NPS 20 pipes in the City's lands when the equipment is decommissioned, it was the utility company's responsibility to negotiate and obtain such rights. It did not, and as a result FEI does not have such rights under any agreement with the City, as determined by the BCUC.⁴
 - Order G-80-19 as affirmed by Order G-75-20 purports to give property rights to FEI that FEI did not negotiate for and does not have by contract.⁵ Fundamentally the CEC's submissions are wrong with respect to where overall fairness lies in the circumstances. Section 2.2.1.2 of the City's Final Argument demonstrates that the overarching principle is: the City is to be kept economically whole and fully compensated for the taking of its lands as a result of the regulatory expropriation effected by the BCUC's order.

⁴ Order G-75-20 Decision, section 3.0.

⁵ The City's position is that the BCUC does not have jurisdiction to do so, and that is an issue in the appeal.

3. Reply to the FEI Final Argument

3.1. Introduction

15. We first reply to FEI's final argument at a high level and in particular to the three main points articulated at paragraph 2 of FEI's final argument.

FEI submission – Point 1:

The BCUC approved the abandonment, rather than removal, of the existing NPS 20 IP gas line as part of the certificate of public convenience and necessity ("CPCN") for the Lower Mainland Intermediate Pressure System Upgrade Projects (the "LMIPSU Project") because it found that it was in the public interest to do so, citing a variety of cost, environmental and social impacts. The City would thus be the proximate cause of the removal. It is equitable to require the City to share in the cost of work undertaken for the City and at the City's request.

The City replies that the perspective of overall equity articulated above is wrong. It ignores Order G-80-19 in which the BCUC ordered that FEI has to remove the decommissioned NPS 20 pipes upon request by the City in circumstances where it interferes with municipal infrastructure. Accordingly, under the BCUC orders FEI can leave its decommissioned pipes in place but only for so long as the space is not needed by the City at which time FEI must remove them as necessary to accommodate the City's needs. Those terms are not by agreement with the City. Order G-80-19 as affirmed by Order G-75-20 purports to give property rights to FEI that FEI did not negotiate for and does not have by contract.⁶ Section 2.2.1.2 of the City's Final Argument demonstrates that the overarching principle is: the City is to be kept economically whole and fully compensated for the taking of its lands if this pipeline is abandoned in the City's lands pursuant to BCUC Order.

⁶ The City's position is that the BCUC does have jurisdiction to do so, and that is an issue in the appeal.

FEI submission – Point 2:

The cost sharing provides appropriate incentives for the City to act reasonably in making a request to remove the NPS 20 IP gas line. The need for effective incentives in this case is borne out by the City’s actions and the BCUC’s findings that the City’s position on the need to remove the entirety of the gas line was “vague and imprecise”.

The City replies that the only support offered by FEI for this assertion, which is repeated many times in FEI’s final argument, is the City’s request for FEI to remove the entire NPS 20 Pipeline once it is decommissioned. As explained further in paragraphs 20 and 21 of the City’s Final Argument, a financial disincentive is not necessary to avoid what might be perceived as an unnecessary removal request because there can be no such thing as unnecessary removal of the NPS 20 Pipeline given the terms of the BCUC’s orders.

Notably, in paragraph 24 of its final argument FEI seems to be proposing that the BCUC rescind the term of Order G-80-19 that upon request by the City in circumstances where it interferes with municipal infrastructure FEI shall remove segments of NPS 20 pipes. The underlined term, above, is not under reconsideration. Moreover, paragraph 24 of FEI’s final argument starkly demonstrates that FEI’s priority is to offload FEI’s own costs onto the City.

The City also replies that allocating FEI’s costs to the City is not consistent with the overarching principle articulated by the Supreme Court of Canada that the City is to be kept economically whole and fully compensated for the regulatory taking, or expropriation, of its lands if this pipeline is abandoned in the City’s lands pursuant to BCUC order.

FEI submission – Point 3:

The cost sharing between FEI and the City will incent both parties to work collaboratively to take advantage of opportunities to capture efficiencies in areas

such as scheduling and execution of work, resulting in cost savings and benefits to both the City and FEI customers.

The City replies that this assertion in FEI's final argument is the same as Point 2, above. A financial disincentive is neither appropriate in principle nor necessary. A financial disincentive to deter the City using its own lands for public interest infrastructure is not consistent with the overarching principle that the City is to be kept economically whole and fully compensated for the regulatory taking, or expropriation of its lands if this pipeline is abandoned in the City's lands pursuant to BCUC order. It is also not necessary for the reasons explained above.

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

16. In reply to this part of FEI's final argument, the City submits that FEI's submissions ignore the portion of Order G-80-19 in which the BCUC ordered that FEI has to remove the decommissioned NPS 20 pipes upon request by the City in circumstances where it interferes with municipal infrastructure. As explained in paragraphs 20 and 21 of the City's Final Argument, pursuant to that term of the BCUC's order (which is accepted for the purposes of this Reconsideration Final Phase) unnecessary or unreasonable removal is not possible.

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

17. The City submits that FEI's submissions in this part of its final argument are based on a false premise. Contrary to FEI's assertion, FEI does not have every right to abandon the decommissioned NPS 20 pipes in the City's lands. FEI has no agreement with the City allowing FEI to do so. The only right FEI has to leave its decommissioned pipes in City lands, if any, is that provided by the orders of the BCUC that purport to give property rights to FEI because FEI did not negotiate for and does not have such rights by contract.⁷ The City's Final Argument demonstrates that the overarching principle is: the City is to be kept economically whole and fully compensated for the regulatory taking,

⁷ The City's position is that the BCUC does not have jurisdiction to do so, and that is an issue in the appeal.

or expropriation, of its lands if this pipeline is abandoned in the City's lands by order of the BCUC.

18. The evidence the City has submitted as reviewed in the City's Final Argument clearly demonstrates that if the BCUC has the jurisdiction to, by order, authorize FEI to abandon its decommissioned pipe in the City's lands and set terms for subsequent removal, there is to be no balancing of interests or sharing of financial impacts; rather, the City is to be kept economically whole and fully compensated for the regulatory taking, or expropriation, of its lands. It is a misconception of the BCUC's role and mandate and applicable legal principles to suggest that the BCUC should require the City to bear additional costs and pay a portion of FEI's costs that are caused by the presence of FEI's decommissioned equipment in City lands by order of the BCUC.

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

19. The submissions in this part of FEI's final argument are fully addressed in section 2.2 of the City's Final Argument with one exception, as elaborated below.
20. In paragraph 43 of its final argument FEI asserts, without any basis in evidence nor any reference to applicable regulatory precedent, that any FEI expenditures to remove decommissioned NPS 20 pipes are a cost of providing utility service and are recoverable from FEI customers in rates. FEI has not supported those assertions with evidence or regulatory precedent, and those assertions are not foregone conclusions. Utilities typically record asset retirement obligations and recover forecast asset retirement costs in rates during the operating life of the utility asset. That way, asset retirement costs are recovered from those customers that benefit from the asset while it is used and useful for the utility. If that is the case with the NPS 20 Pipeline, FEI has already recovered asset retirement costs from customers and any recovery of such expenses from either FEI customers or the City again in the future would be double recovery. If that is not the case, it would be appropriate for the BCUC to inquire into why not and consider

disallowing recovery of such expenses if FEI is not able to provide a reasonable explanation.

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

21. This part of FEI's final argument begins by putting forward the position that "the BCUC can legitimately consider the Burnaby Terms of Reference in determining an appropriate cost allocation",⁸ but then the rest of this part of FEI's argument seems to try to walk back that position somewhat. The City submits that FEI's assertions in relation to the circumstances and considerations of FEI and the City of Burnaby in reaching agreement to the Burnaby Terms of Reference are not supported by evidence in this proceeding and have not been tested in this proceeding, and therefore are not reliable.
22. In response to paragraph 48 of FEI's final argument, the criticism is that FEI maintains that it knew cost allocation methodology was at issue in the original proceeding⁹ but FEI chose not to file in that proceeding the Burnaby Terms of Reference that contain cost allocation methodology in respect of the very same NPS 20 Pipeline once decommissioned. FEI asserts that the City was aware of these terms, but that misses the point – the City was not aware that the BCUC intended to order a cost allocation methodology in the original proceeding.
23. The submissions in this part of FEI's final argument are otherwise fully addressed in section 2.2.2.1 of the City's Final Argument.

3.6. Reply to Parts Six and Seven of FEI's Final Argument

24. The submissions in these parts of FEI's final argument are fully addressed in sections 2.1 and 2.2.1.1 of the City's Final Argument.

⁸ The terms FEI agreed to with Burnaby are nearly identical to the City's position in this Reconsideration Final Phase as set forth in section 2.2.1.1 of the City's Final Argument.

⁹ Refer to Part Eight of FEI's final argument.

3.7. Reply to Part Eight of FEI's Final Argument

25. The submissions in this part of FEI's final argument are fully addressed in Exhibits B-3, B-10 and B-11 in this Reconsideration proceeding.

4. Reply to BC Hydro's Final Argument

26. We understand from BC Hydro's final argument that BC Hydro supports the BCUC rescinding the cost allocation methodology component of Order G-80-19, and is of the view that pursuant to the BCUC's orders the BCUC will be the final arbiter of requests for FEI to remove its decommissioned NPS 20 pipes. Given the nature of BC Hydro's submission, the City has no submissions in reply.

5. Conclusions

27. FEI has no right to abandon its decommissioned NPS 20 pipes in the City's lands unless the BCUC orders provide such rights.¹⁰ If so, this is regulatory taking, or expropriation, of the City's land. The principles to be applied in such cases are well established – the City is to be kept economically whole and fully compensated for the taking of its lands as a result of the regulatory expropriation effected by order of the BCUC.
28. In circumstances where section 32 of the *UCA* applies, the BCUC has jurisdiction to, by order, allow the public utility to place its distribution equipment on, along, across, over or under municipal public places in support of the public interest in extending utility service to consumers. This is a regulatory taking, or expropriation, and the same make whole principle applies. The jurisdiction under section 32 of the *UCA* is not for imposing the risks and costs of the utility onto the municipality; it is to support the provision of utility service to consumers while keeping the municipality whole.

¹⁰ The Court of Appeal will decide this matter.

29. For all of the reasons set out in the City's Final Argument and in this Reply Argument, the City submits that the BCUC should rescind the portion of paragraph 2 of Order G-80-19 that is the subject of this Reconsideration Final Phase and replace it as proposed in the City's Final Argument.

All of which is respectfully submitted this 18th day of January, 2021.

By: 

Ian D. Webb
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