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FortisBC Energy Inc. and City of Surrey

Applications for Approval of Terms for an Operating Agreement

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Decision
and Order G-18-19

January 29, 2019

Before:
R. I. Mason, Panel Chair
W. M. Everett, QC, Commissioner
B. A. Magnan, Commissioner

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Executive summary

On May 17, 2017, the City of Surrey (City) applied to the British Columbia Utilities Commission (BCUC) for an order pursuant to subsection 32(2) of the *Utilities Commission Act* (UCA) specifying the terms under which FortisBC Energy Inc. (FEI) may install, operate and maintain its distribution equipment in public places within Surrey's boundary limits (City Application).

On May 18, 2017, FEI applied to the BCUC pursuant to section 32 or alternatively section 33 of the UCA, for approval of new operating terms with the City (FEI Application).

FEI and the City have reached agreement on most of the terms of the New Operating Agreement (Agreed Terms), but have failed to reach agreement in respect of four terms set out in FEI's and the City's respective Applications (Disputed Terms). The Disputed Terms relate to an operating fee, the definition of relocation costs, the allocation of relocation costs, and statutory rights of way.

After reviewing the evidence and submissions received, the Panel makes the following key findings and recommendations:

- The Panel finds the legal test to be applied by the BCUC in exercising its jurisdiction under section32 of the UCA is to safeguard the public interest. Whenever the Panel makes a finding, specification or determination under section 32 of the UCA in this Decision, it has done so because it is satisfied that the finding, specification or determination safeguards the public interest;
- The Panel specifies that the Agreed Terms shall be included in the New Operating Agreement;
- In respect of the Disputed Terms, the Panel specifies terms in the New Operating Agreement as set out below in this Executive summary and in section 8 of this Decision; and
- The Panel directs the Parties to submit to this Panel, for final approval within 90 days of the date of the order in this proceeding a revised version of the New Operating Agreement containing the Agreed Terms and terms specified by the Panel according to the directives provided in this Decision.

Operating Fee

Both FEI and the City have proposed terms in the New Operating Agreement for an operating fee (Operating Fee) to be collected from ratepayers. However, the two Parties differ on the level and method of calculating the Operating Fee.

The City submits that the Operating Fee should be calculated as 3 percent of the gross revenues (excluding taxes) received by FEI for provision and distribution of all gas consumed within the boundaries of Surrey, other than gas consumed by customers from whom the BCUC has not allowed FEI to collect the Operating Fee. This amount would not include any amount received by FEI for gas supplied or sold for resale.

The City submits it should receive an Operating Fee of 3 percent of the gross revenues primarily on the basis that it is consistent with the operating fees received by the 74 other municipalities with which FEI has an operating agreement and no municipality in B.C. receives an operating fee from FEI other than 3 percent of gross revenues. Therefore, the City considers its proposal substantially supports transparency, public interest and consistency among FEI ratepayers, most of whom are also municipal taxpayers. The City also notes that, as a condition of receiving the Operating Fee at 3 percent of FEI's gross revenues, it will waive any approval, license,

inspection or permits fees, charges and security deposit requirements in respect of FEI's work and occupancy of public places in Surrey.

FEI argues that the Agreed Terms of the proposed New Operating Agreement place a higher burden, risk and cost on FEI and its ratepayers than is associated with other operating agreements, and therefore the operating fee of 3 percent is not appropriate in the agreement with the City. FEI also notes that no Lower Mainland Municipalities who have entered into operating agreements with FEI receive an Operating Fee. However, FEI states that it believes there is a role for an Operating Fee, provided the amount is fair. It is on this basis that FEI proposes the inclusion of an Operating Fee calculated as 0.7 percent of the delivery revenue (excluding taxes) received by FEI from its customers for the distribution of gas consumed within the City boundaries, but excluding compressed natural gas distributed from fueling stations and the delivery of liquefied natural gas.

The Panel determines that an Operating Fee shall be included as a term in the New Operating Agreement. The Panel specifies that the Operating Fee in the New Operating Agreement will be calculated as 0.7 percent of FEI's delivery margin for customers located within City boundaries, and that the New Operating Agreement will include as a term the version of section 12.1 of the proposed New Operating agreement provided in FEI's Application.

The Panel determines that, pursuant to section 121 of the UCA, any City by-laws purporting to charge Additional Fees to FEI are of no force and effect where they are superseded by or impair an order of the BCUC in a term specified in the new Operating Agreement or where they impair the "authorization" granted to FEI by the 1955 CPCN. Further, the Panel orders the City not to charge FEI Additional Fees while the New Operating Agreement is in force.

Definition of Relocation Costs

Relocation Costs arise when one of the Parties to the proposed New Operating Agreement undertakes an activity that requires the relocation of facilities of the other party. Both Parties agree that this occurs typically but not exclusively when the City requests that FEI relocate its facilities.

The Parties disagree on the definition of Relocation Costs to be included in the proposed New Operating Agreement. FEI submits that Relocation Costs paid by the party requesting relocation should include the cost of compliance with applicable laws and sound engineering practices. The City submits that Relocation Costs should specifically exclude the value or incremental costs of any upgrading and/or betterment of facilities, whether or not they are required by applicable codes and standards.

The Panel specifies that the definition of Relocation Costs in the New Operating Agreement shall include the costs associated with upgrades and betterments required to comply with applicable laws and to comply with sound engineering practices.

The Panel is satisfied that the facility improvements made to meet the applicable laws prevailing at the time of a relocation are due solely to the relocation itself. Since the facility improvements are due solely to the relocation request, it follows that the cost associated with these improvements are caused by the Requesting Party, and therefore should be borne by the Requesting Party. It is not appropriate that FEI's ratepayers should pay the cost of relocations requested by the City, since these relocations are not required for FEI to provide service to its

ratepayers. Similarly, it is not appropriate that the City's taxpayers should pay for relocations of City facilities requested by FEI; such relocations should be paid for by FEI or its ratepayers.

The Panel acknowledges the City's concern that the phrase "sound engineering practices" is somewhat imprecise. However, this phrase is commonly used in other similar agreements, and the City has agreed to its use in section 4.1(a) of the proposed New Operating Agreement, suggesting that it is sufficiently meaningful to the City. Thus, the Panel considers that the phrase "sound engineering practices" is sufficiently precise and meaningful to be used in the definition of Relocation Costs. If there is a dispute as to what constitutes "sound engineering practices," the Panel notes any such dispute can be referred for resolution pursuant to the agreed-to Dispute Resolution provisions in the New Operating Agreement.

The Panel notes that neither party's definition for Relocation Costs addresses the concept of lowest-cost alternatives. The Panel encourages the Parties to incorporate the concept of lowest-cost alternatives in the final version of the New Operating Agreement.

Allocation of Relocation Costs

The Parties do not agree on the provisions specifying the portion of FEI's Relocation Costs that Surrey will reimburse where the relocation is necessitated by the City's actions.

In its version of the proposed New Operating Agreement, FEI proposes that the Municipality should reimburse FEI for Relocation Costs at 100 percent of the costs when the affected Company Facilities are Gas Mains and 50 percent of the Relocation Costs when the affected Company Facilities are High-Pressure Pipelines.

The City submits that FEI's proposal is in conflict with the Pipeline Crossing Regulation (PCR) and proposes that the allocation of Relocation Costs should be calculated in accordance with subsection 3(3) or 3(4) of the PCR, as applicable, whether the affected Company Facilities are High-Pressure Pipelines or Gas Mains.

The Panel finds that, in relation to High-Pressure Pipelines, the BCUC has the jurisdiction to specify the use of the default relocation cost allocation as set out in the PCR and no other relocation cost allocation unless the Parties agree to such a variance, which they do not. Therefore, the Panel specifies that the New Operating Agreement shall include a Relocation Cost allocation method for High-Pressure Pipelines in accordance with sections 3(2) to 3(5) of the PCR.

The Panel finds that, in this instance, the guiding principle for evaluating costs incurred by FEI, and hence FEI's ratepayers, should be cost causation. Relocations of FEI Gas Mains due solely to requests from the City should not be paid for by FEI's ratepayers, since the relocations are not required for the provision of service. Therefore, since the allocation of costs for relocating Gas Mains is not covered by the PCR, the Panel specifies as a term of the New Operating Agreement that the cost of Gas Main relocations requested by the City shall be allocated 100 percent to the City.

Statutory Rights of Way

Based on the concurrence between the Parties that the BCUC does not have jurisdiction to compel FEI to extinguish its Statutory Rights of Way property interests upon request by the City, the Panel specifies that FEI's section 9 (of FEI's proposed New Operating Agreement) shall be incorporated into the New Operating Agreement.

1.0 Background and context

1.1 Approvals sought

On May 17, 2017, the City of Surrey (City) applied to the British Columbia Utilities Commission (BCUC) for an order pursuant to subsection 32(2) of the *Utilities Commission Act* (UCA) specifying the terms under which FortisBC Energy Inc. (FEI) may install, operate and maintain its distribution equipment in public places within Surrey's boundary limits (City Application).

On May 18, 2017, FEI applied to the BCUC pursuant to section 32 or alternatively section 33 of the UCA, for approval of new operating terms with the City (FEI Application).

1.2 Background

On December 13, 1955, the Public Utilities Commission issued a Certificate of Public Convenience and Necessity (CPCN or 1955 CPCN) which granted the British Columbia Electric Company (BCEC) the right to operate a natural gas distribution system in the District of Surrey pursuant to section 12 of the *Public Utilities Act*.

On June 13, 1957, the Corporation of the District of Surrey (District of Surrey) and BCEC entered into an operating agreement under which BCEC was permitted to install, operate and maintain its distribution equipment in public places within District of Surrey's boundary limits (1957 Agreement).

In 1964, BCEC was amalgamated into the British Columbia Hydro and Power Authority (BC Hydro), a Crown corporation. The Lower Mainland natural gas assets of BC Hydro were privatized in 1988 and the natural gas assets transferred to 74280 B.C. Ltd. Subsequently, 74280 B.C. Ltd. became Terasen Gas Inc. On March 1, 2011, Terasen Gas Inc. was renamed FortisBC Energy Inc.

In 1993, the District of Surrey became the City of Surrey.

The City and FEI (together the Parties) have been engaged in negotiations since 2013 to reach terms for a new operating agreement (New Operating Agreement) to replace the 1957 Agreement.

On November 8, 2016, the Parties entered into an interim agreement (Interim Agreement) that provided for, among other things, the termination of the 1957 Agreement and its replacement by negotiation of terms for a New Operating Agreement, or failing agreement, the Parties would apply by May 31, 2017 to the BCUC seeking to have it specify any terms that remained unresolved between the Parties.

FEI and the City have reached agreement on most of the terms of the New Operating Agreement (Agreed Terms), but have failed to reach agreement in respect of four terms set out in FEI's and the City's respective Applications (Disputed Terms). The Disputed Terms relate to an operating fee, the definition of relocation costs, the allocation of relocations costs, and statutory rights of way.

FEI and the City filed their proposed New Operating Agreements as Appendix A and Appendix B respectively to their respective Applications, which include all settled operating terms for the New Operating Agreement and their respective proposals for the Disputed Terms.

1.3 Regulatory process

By Order G-98-17, the Panel directed that FEI's and the City's Applications would be reviewed in a single proceeding given that both Applications are seeking the BCUC's specification of the terms of the New Operating Agreement. The Order established a regulatory timetable which included intervener registration, one round of information requests and an opportunity for participants to provide comments on further process.

The following participants registered as interveners in the proceeding:

- Richard Landale (Landale);
- Commercial Energy Consumers Association of British Columbia (the CEC);
- British Columbia Old Age Pensioners Organization *et. al.* (BCOAPO); and
- Randolph Robinson (Robinson).

The BCUC also received fifteen letters of comment from members of the public in this proceeding.

The BCUC reviewed submissions on further process in this proceeding, from FEI, the City, Landale, the CEC, and BCOAPO, and on November 2, 2017 issued Order G-163-17, together with a revised regulatory timetable which provided an opportunity for participants to file evidence and a second round of information requests.

By Order G-201-17 dated December 29, 2017, the BCUC issued a regulatory timetable to extend the timeline for the second round of information requests. By Order G-66-18 dated March 22, 2018, the BCUC issued a further regulatory timetable including a Panel information request to FEI and the City and an opportunity for participants for provide comments on further process. The BCUC reviewed the submissions on further process and issued Order G-92-18 on May 14, 2018 together with a revised regulatory timetable which included final arguments and reply arguments.

The evidentiary record for the proceeding was closed on June 28, 2018.

By Order G-191-18 dated October 5, 2018, the BCUC reopened the evidentiary record and issued a regulatory timetable which included Panel information requests to FEI and the City of Surrey on use and occupancy of public place by a public utility, responses to Panel information requests and further process to be determined.

The BCUC reviewed the responses to the information requests and issued Order G-202-18 on October 22, 2018 together with a regulatory timetable which included final and reply arguments on the new evidence.

2.0 Jurisdiction

This proceeding raises several issues regarding the BCUC's jurisdiction to specify terms of the New Operating Agreement under section 32 of the UCA. The Panel will address the jurisdiction issues in this section of the decision, and in particular, will consider:

a) whether the BCUC has jurisdiction under section 32 of UCA to specify the Disputed Terms in the New Operating Agreement regarding FEI's use of the City's public space, and in particular the Disputed Term regarding the Operating Fee (the jurisdiction regarding other Disputed Terms of the

proposed New Operating Agreement will be considered in other sections of this decision) (section 2.2);

b) whether the BCUC's jurisdiction is limited to specifying the terms of use only in respect of the Disputed Terms under the New Operating Agreement or whether it also includes specifying its approval of the Agreed Terms and the entire New Operating Agreement (section 2.3); and

c) the test to be applied by the BCUC in exercising its jurisdiction to specify the terms of use under section 32 of the UCA (section 2.4).

2.1 Applicable legislation

For ease of reference the legislation referred to in this section is set out below.

Sections 32 and 33 of the UCA provide:

> 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.
>
> 3 (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.

Sections 2(1), 2(2) and 2(3), in part, of the *Gas Utility Act* (GUA) provide:

> 2 (1) a gas utility that on April 14, 1954 was carrying on business as a gas utility in a municipality or rural area is authorized and empowered, subject to the Utilities Commission Act, to carry on its business as a gas utility in the municipality or rural area.
>
> (2) A gas utility to which a certificate of public convenience and necessity is granted after April 14, 1954 under the Utilities Commission Act or the legislation that preceded it is

authorized and empowered, subject to the Utilities Commission Act, to carry on its business as a gas utility in the municipality or rural area mentioned in the certificate.

(3) Without limiting subsection (1) or (2), a gas utility authorized under either of those subsections may do one or all of the following:

(a) produce, generate, store, mix, transmit, distribute, deliver, furnish, sell and take delivery of gas;

(b) construct, develop, renew, alter, repair, maintain, operate and use property for any of those purposes;

(c) place, construct, renew, alter, repair, maintain, operate and use its pipes and other equipment and appliances for mixing, transmitting, distributing, delivering, furnishing and taking delivery of gas on, along, across, over or under any public street, lane, square, park, public place, bridge, viaduct, subway or watercourse

(i) in a municipality, on the conditions that the gas utility and the municipality agree to. [emphasis added]

Sections 45(1), (7), (8) and (9) of the UCA provide:

45 (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require**.**

2.2 BCUC jurisdiction to specify the Disputed Terms

In this section the Panel addresses whether the BCUC has jurisdiction under the UCA to specify the Disputed Terms in the proposed New Operating Agreement regarding FEI's use of the City's public space, and in particular the Disputed Term regarding the Operating Fee.

2.2.1 Evidence

The Parties have, for the past few years, been negotiating the terms of a New Operating Agreement to replace the 1957 Agreement and have reached agreement on many key terms, but have been unable to reach agreement on the Disputed Terms, which they have both referred to the BCUC for resolution.[1]

Sections 32 and 33 of the UCA

FEI's Application is brought pursuant to section 32 or, alternatively, section 33 of the UCA. FEI states section 32 applies in these circumstances as "Section 32 of the Act, in general terms, provides for a mechanism whereby the Commission can resolve disagreements between a public utility and a municipality regarding the use of municipal spaces…."[2]

The City's Application is also brought pursuant to section 32 of the UCA. In Its Application, the City states that "If the gas utility and the municipality are not able to reach agreement on the terms and conditions of the gas utility's access to public places in the municipality for such purposes the parties or either of them may seek relief from the Commission pursuant to section 32 of the UCA." and "Failing such agreement the Commission may, by order, specify the manner and terms of FEI's use of the public places in Surrey for such purposes."[3]

Section 45 of the UCA

FEI and the City also address whether section 45(8) of the UCA applies in the circumstances of this proceeding to the BCUC's jurisdiction to specify the Disputed Terms of the proposed New Operating Agreement.

In response to an information request (IR), FEI confirms that it is not seeking approval of the Operating Terms under section 45 of the UCA. FEI states the New Operating Agreement is not a municipal franchise, concession or privilege agreement under the UCA that would require BCUC approval under section 45(8) of the UCA. A franchise, concession or privilege confers rights to operate within a municipality. However, in this case, FEI states that section 32 applies because it already has a CPCN and the right to operate within the City, pursuant to the 1955 CPCN. FEI's proposed New Operating Agreement, like the 1957 Agreement with the City, is an operating agreement establishing how the parties will interact with one another.[4]

The City also confirms it is not seeking BCUC approval under section 45 of the UCA because "FEI has CPCNs for the construction and operation of its equipment and facilities to [sic] for the supply of natural gas to the public in Surrey," and "In the present applications, Surrey is not granting FEI a franchise or concession within the meaning of section 45 of the UCA."[5]

In support of the BCUC's jurisdiction to specify the Disputed Terms of the New Operating Agreement and more particularly, of the Operating Fee, the City and FEI also make reference to a previous BCUC letter, and previous orders and decisions, as set out below, in which the BCUC has approved terms of an operating agreement and operating fees pursuant to section 32 of the UCA.

[1] Exhibit B2-1, City Application, p. 1.
[2] Exhibit B1-1, FEI Application, Section 1, p. 1.
[3] Exhibit B2-1, City Application, Section 2, pp.3–4.
[4] Exhibit B1-6, FEI response to BCUC IR 8.2.
[5] Exhibit B2-8, City response to BCUC IR 8.2.

The City references BCUC letter L-4-02[6] which states, in part, that:

> The Commission also noted that where an individual agreement has expired, the Commission expects that FEI and the municipality would make every effort to negotiate an operating agreement, and only if the two parties are not able to agree to a new agreement would the Commission anticipate an application pursuant to section 32 of the UCA to have the Commission determine the terms of such an agreement. The Commission noted that it would review the circumstances in each municipality and determine the appropriate terms and conditions on an individual basis.[7]

The City also references BCUC Order G-17-06, which specified terms under section 32 of the UCA regarding FEI's (then Terasen) use of public places in the District of Chetwynd.[8] With respect to operating fees, the decision states:

> In the Commission's view, a franchise fee or operating fee arrangement that does not allow Terasen to recover its cost of service would represent an unjust or unreasonable rate under Sections 59 and 60 of the Act. The Commission notes that the Operating Fee under the expired agreement was 3 percent. The District of Chetwynd has proposed additional fees related to Terasen operations in the area. The Commission has not previously approved operating agreements that contain operating fees greater than 3 percent and is not persuaded to do so in this instance. Accordingly, the Commission approves an operating fee of 3 percent in the new Operating Agreement. [9]

Further, in support of its position that the BCUC has jurisdiction to specify the method of calculating the operating fee, the City states that the BCUC has approved operating fees in at least 74 operating agreements between FEI and municipalities in the province, and that the BCUC has exercised its jurisdiction under subsection 32(2) of the UCA to direct that a municipality's operating fee shall be 3.0 percent of FEI's gross revenues in circumstances where FEI and the municipality could not agree on the operating fee.[10]

FEI, in response to an IR requesting it to discuss what its next steps would be in the event that the BCUC does not approve the New Operating Agreement, states, in part, that it:

> Believes it is appropriate for the Commission to approve another form of operating agreement pursuant to section 32 of the UCA that (a) accepts the terms agreed upon by the parties, and (b) imposes other terms and conditions on the disputed items. The Commission exercised this power in the Coldstream application and the Commission's Order G-113-12, and its accompanying decision dated August 29, 2012.[11]

2.2.2 Parties' submissions

FEI and the City both submit and agree that s. 45(8) of the UCA does not apply in the circumstances of this proceeding.

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[6] BCUC Letter L-4-02, BC Gas Utility Ltd Application to Approve the Terms of a Proposed Operating Agreement between BC Gas Utility Ltd and Interior Municipalities
[7] Exhibit B2-8, City response to BCUC IR 8.2.
[8] Ibid.
[9] BCUC Order G-17-06, Appendix A, p. 9.
[10] City Final Argument, pp. 16–17, paras. 34–35.
[11] Exhibit B1-6, FEI response to BCUC IR 1.2.

While FEI brought its Application pursuant to section 32 and, alternatively, section 33 of the UCA, neither it, nor any other participant made any submissions that section 33 has any application in this proceeding.

FEI

FEI submits where, as is the case in this proceeding, it has the right to operate in the City under the 1955 CPCN, section 32 of the UCA provides the mechanism whereby the BCUC has jurisdiction to resolve disagreements between a public utility and a municipality regarding the manner and terms of use of municipal public space.[12]

FEI further submits that both it and the City agree that section 32 of the UCA applies to the orders being sought in this proceeding, which includes specifying the amount of the Operating Fee under the proposed New Operating Agreement.[13]

The City

The City submits the BCUC has jurisdiction under section 32 of the UCA to specify the manner and terms of use for a public utility to use municipal public spaces.[14]

The CEC

The CEC submits that the plain meaning of section 32 of the UCA provides the Commission with jurisdiction to establish the terms under which a natural gas utility operates in a municipality when the Parties cannot come to an agreement.[15]

BCOAPO

BCOAPO submits that section 32 of the UCA is the best legal fit as its wording is more general than section 33 of the UCA and that it is therefore, the option best suited for the BCUC to exercise its jurisdiction in this proceeding.[16]

2.2.3 Panel discussion

The Panel finds that the Parties have met the criteria for bringing their Applications pursuant to section 32 of the UCA and that the BCUC has and may exercise its jurisdiction under that section to specify the manner and terms of FEI's use of the City's public space in respect of the Disputed Terms in the proposed New Operating Agreement, including specifying an Operating Fee.

Section 32 provides, in essence, that the BCUC may, by order, allow the use of municipal public space by a public utility and specify the manner and terms of such use, provided:

a) the public utility has a right to enter a municipality to place its distribution equipment, and

b) the public utility cannot come to agreement with the municipality on the use of the public space or on the manner and terms of such use.

[12] FEI Final Argument, pp. 1, 8.
[13] Ibid., pp. 38.
[14] City Final Argument, p. 16, para. 32.
[15] CEC Final Argument, p. 5, para 26.
[16] BCOAPO Final Argument, p. 4.

The legislative scheme surrounding the application of section 32, in the Panel's view, provides in general terms that:

a) A gas utility which has been granted a CPCN after 1954 under the UCA is authorized and empowered, subject to the UCA , to carry on the business of a gas utility in the municipality mentioned in the CPCN, pursuant to sections 2(1) and 2(2) the GUA,

b) A gas utility may conduct all the operations set out in s. 2(3) of the GUA in a municipality on the conditions that the gas utility and the municipality agree to. [Underlining added]

c) In the event the gas utility and the municipality are not able to agree on the conditions of the public utility's use of municipal public spaces to conduct all the operations set out in section 2(3) of the GUA, the public utility or the municipality may seek relief from the BCUC pursuant to section 32 of the UCA to specify the manner and terms of such use.

In the Panel's view, both FEI's and the City's Applications have met the statutory requirements under the GUA and section 32 of the UCA. The evidence establishes that FEI has a right to enter the City to place its distribution equipment and conduct its operations in public spaces by virtue of the 1955 CPCN.

The evidence establishes that while FEI and the City both agree the New Operating Agreement should include a term providing for an Operating Fee, they have not been able to come to an agreement on the level and method of calculating the Operating Fee in the New Operating Agreement.

The evidence also establishes that the BCUC has previously issued orders that have specified disputed terms in a proposed operating agreement, including terms regarding the method of calculating an operating fee a public utility has to pay a municipality.

In the Panel's view, the objective of the legislative scheme in the sections of the GUA referred to above and section 32 of the UCA is to enable a public utility to provide its natural gas services in a municipality. The legislation provides a means by which a public utility or a municipality (in circumstances where the public utility has the right to operate in a municipality's public spaces but cannot reach agreement as to the manner and terms of the use of such public spaces) may turn to the BCUC to have it determine the matter by specifying the manner and terms of such use. The objective is consistent with the public interest in the convenience and necessity of a public utility providing a natural gas service to a municipality. That objective is met by interpreting section 32 as providing the BCUC with jurisdiction, in circumstances where a public utility and municipality cannot agree on the terms of an operating agreement, to end the impasse and specify the manner and terms of the use of such public spaces, including the level and method of calculating an Operating Fee.

The Panel also finds, despite FEI referencing section 33 of the UCA as an alternative to section 32 in support of its Application, that section 33 has no application in the circumstances of this proceeding as neither FEI nor the City relied upon that section or made any submissions as to its applicability.

Finally, the Panel accepts that section 45(8) of the UCA has no application in the circumstances of this proceeding. In their submissions, FEI and the City also agree the section has no application in these circumstances . In particular, section 45(8) does not apply in these circumstances as FEI has the right to operate in the City pursuant to the 1955 CPCN and therefore the proposed New Operating Agreement would not constitute a "privilege, concession or franchise" as required under section 45(8).

2.3 BCUC jurisdiction over entire New Operating Agreement

Is the BCUC jurisdiction under section 32 of the UCA limited to specifying only the Disputed Terms under the New Operating Agreement or does it include approving the Agreed Terms and the entire Operating Agreement?

2.3.1 Evidence

FEI initially confirmed it is seeking BCUC approval of the New Operating Agreement as an overall package, which will represent the BCUC's determination regarding the manner and terms of use upon which FEI should be allowed to use public spaces in the City.[17]

The City, in response to an IR, states that the BCUC can resolve the Applications by focusing on making determinations with respect to only the Disputed Terms in the New Operating Agreement given that both Parties have structured their Applications on that basis, have reached agreement in respect of most of the proposed terms and that the BCUC has in the past resolved disputed terms between FEI and the District of Chetwynd and between FEI and the District of Coldstream by focussing on making decisions on the areas of disagreement.[18]

2.3.2 Parties' submissions

FEI

FEI submits the BCUC's review under section 32 should consider the impact of the contractual terms collectively, so as to ensure that the overall agreement is commercially reasonable. It further submits that the BCUC has the discretion to impose terms that differ from those agreed to by the Parties, but that in approving a new operating agreement, the BCUC should give weight to the fact that the Parties are in agreement on certain terms of the proposed operating agreement and that incorporating those agreed terms into a new operating agreement will contribute to an improved relationship ultimately benefitting the public utility, its customers and the municipality. FEI submits the BCUC took this approach in approving an operating agreement between FEI and Coldstream and between FEI and Chetwynd.[19]

The City

The City submits that through the negotiations on the New Operating Agreement it has reached agreement with FEI on many terms containing significant improvements benefitting both Parties when compared to the 1957 Agreement. It submits the agreed-to terms will improve predictability of outcomes, reduce disputes going forward and will enable the Parties to improve the efficiency of their respective business processes.[20]

The CEC

The CEC submits that the entire proposed New Operating Agreement should be examined holistically.[21]

[17] Exhibit B1-6, BCUC-FEI BCUC IR 8.1.
[18] Exhibit B2-8-1, BCUC-City BCUC IR 8.1.
[19] FEI Final Argument, p. 13, paras. 32–33.
[20] City Final Argument, pp. 12–13, para. 25.
[21] CEC Final Argument, p. 4, para. 23.

In addition, the CEC submits that with respect to the Agreed Terms in the New Operating Agreement, the BCUC should give weight to the Parties' consensus on those terms as they represent a highly important element of the New Operating Agreement and should be preserved to the extent possible.[22]

2.3.3 Panel discussion

The Panel finds that section 32 of the UCA provides the BCUC with jurisdiction, in circumstances where a utility has the right to operate in a municipality but cannot reach agreement on the use of the municipality's public spaces, to not only specify the manner and terms of such use in respect of the disputed terms of a proposed operating agreement, but to also specify its approval as to the manner and terms of such use in respect of the entire proposed new operating agreement.

The Panel also finds that section 32 of the UCA provides the BCUC with jurisdiction, in circumstances where a utility and a municipality cannot come to an agreement on an entire proposed new operating Agreement, but have reached agreement on some terms of the proposed new operating agreement, to specify the manner and terms of use that may differ from those agreed to, but that in doing so the BCUC should give weight to the consensus reached on such terms so that they are preserved to the extent possible.

In the Panel's view, it is important to note that the wording of section 32(1)(b) of the UCA refers to a circumstance where the public utility and a municipality cannot come to "an agreement" on the use of municipal public spaces or on the terms of the use. Parties applying under section 32 will have failed to come to "an agreement" either because they could not reach any agreement at all or because they were unable to reach agreement on some of the terms under a proposed operating agreement. In either case section 32(2) provides the BCUC "may" by order allow the use of the public space and specify the manner and terms of the use. In the Panel's view, the words "an agreement" in section 32(b) together with the word "may" in section 32(2) provide the BCUC with jurisdiction and a wide discretion to allow the use of municipal public space and specify the manner and terms of such use. The wording is broad enough to provide the BCUC with jurisdiction to specify the manner and terms of such use in respect of the terms upon which the Parties were unable to reach agreement and/or in respect of the entire proposed operating agreement.

In addition, the wording of section 32 of the UCA is also broad enough to provide the BCUC with jurisdiction, in circumstances where the Parties cannot come to an agreement on the entire operating agreement, but have reached agreement on some terms of the proposed operating agreement, to specify wording which may differ from the wording agreed to by the Parties. However, the Panel should give weight to specifying the terms the Parties have reached agreement upon as part of a proposed operating agreement. In this regard, the Panel recognizes that FEI and the City have been party to lengthy negotiations, have the background knowledge and expertise and have examined the issues in considerable detail and that specifying the Agreed Terms without change is likely to contribute to an improved relationship, a reduction in disputes going forward and improved efficiencies all to the benefit of FEI, its customers and the City.

2.4 The legal test for the BCUC exercising its jurisdiction under section 32 of the UCA

Section 32 of the UCA does not include any provisions or express guidance as to the legal test the BCUC should apply in determining whether or how to exercise its jurisdiction to specify the manner and terms of use of

[22] Ibid., p. 6, paras. 32–36.

municipal public spaces by a public utility where agreement with the municipality cannot be reached. This section addresses the test to be applied.

2.4.1 Parties' submissions

FEI

FEI submits the test to be applied under section 32 of the UCA is whether the proposed manner and terms of use in the New Operating Agreement are commercially reasonable. It submits such a test makes sense given that section 32 of the UCA contemplates a commercial agreement between a municipality and a public utility. With respect to the public interest, FEI points to the fact that it already has a right in the form of a CPCN to conduct and maintain its operations in a municipality, and the BCUC was required to consider the public interest in the granting of that right under section 45 of the UCA. It further submits the public interest is served by imposing commercially reasonable terms since "it will respect the rights of the public utility, protect gas customers from unjust and unreasonable rates and be fair to the municipality."[23]

In addition, FEI submits the BCUC review under section 32 of the UCA should examine the impact of the Disputed Terms and the New Operating Agreement holistically to ensure that the overall agreement is commercially reasonable.[24]

FEI also submits the BCUC should make its determination under section 32 of the UCA without looking into historical disputes between the Parties, but rather make its determination on a prospective basis with a view to improving the Parties working relationship.[25]

It also submits the BCUC should follow its previous decisions rejecting a standard form of operating agreement between FEI and municipalities and make its decisions under section 32 by considering the circumstances in each municipality and determining the appropriate manner and terms of use on an individual basis.[26]

The City

The City submits FEI has a fundamental misunderstanding of the legislative scheme applicable to conducting its gas utility business in municipal public spaces and that the applicable test for the exercise of the BCUC's jurisdiction under section 32 of the UCA arises out of the BCUC's duty to support the public interest.[27] It submits that position is supported by the decision of the Supreme Court of Canada in *Surrey v. BC Electric Company Limited* which stated that:

> The whole tenor of the Act [i.e. the precursor to the UCA] shows clearly that the safeguarding of the interests of the public, both as to identity of those who should be permitted to operate public utilities and the manner in which they should operate, was the duty of the Commission.[28]

[23] FEI Final Argument, pp. 12–13, paras. 29–31.
[24] Ibid., pp. 13–14.
[25] Ibid., pp. 14–15.
[26] Ibid., pp. 16–17.
[27] City Reply to FEI Final Argument, p. 2., para. 5.
[28] Ibid., p. 4, para. 10.

The City submits the BCUC's duty is to support the public interest, or in the words of the Supreme Court of Canada, to safeguard the interests of the public.[29]

The City further submits the BCUC must decide how to balance the public interest in FEI using and occupying public places in Surrey with all the competing public interests which primarily include:

- the City using those same public places to extend and operate its public interest infrastructure (primarily water mains, sewers and highways),
- third party utilities (e.g., BC Hydro and telecom companies) using those same public places to extend and operate their public interest infrastructure,
- the public's use and enjoyment of those same public places, which include critical infrastructure such as municipal highways and bridges, and other open public places such as plazas and parks,
- TransLink and other transit service providers using those same municipal highways and bridges to provide for the transportation needs of Metro Vancouver residents and businesses, and
- the City's statutory obligations to protect the public's safety and the environment in Surrey.[30]

FEI's Further Reply to the City

FEI, in its Further Reply to the City, submits that once a public utility has a public interest approval in the form of a CPCN, the public utility and the municipality are left to negotiate mutually acceptable terms and the BCUC only becomes involved under section 32 of the UCA when there is a failure to reach agreement. While other sections of the UCA expressly provide for a public interest test, section 32 does not. An equally fundamental aspect of the legislative framework requires that utilities must charge just and reasonable rates, and such rates can only reflect prudently incurred costs, which costs, FEI submits, the BCUC must consider when determining operating agreement terms under section 32 of the UCA.[31]

FEI submits that, put another way, it would be expected to approach negotiations and this proceeding from the perspective of ensuring that the overall outcome can be justified to its customers, as well as to the BCUC. FEI must assess what it is giving up, and what it is receiving in return for any concessions it makes. Similarly, the City is answerable to its electorate and its other stakeholders, and would be expected to negotiate on their behalf. The result, in FEI's submission is a commercial negotiation. The BCUC, stepping into the shoes of the Parties under sections 32 and 33 of the UCA when they reach an impasse, is essentially replicating the balance that would be achieved through successful good faith negotiations.[32]

FEI submits the Parties agree that the legal test is satisfied by a fair and balanced agreement but just disagree on what constitutes a fair and balanced agreement.[33]

[29] Ibid., pp. 2–4, para. 5.
[30] Ibid., pp. 4–5, para. 12.
[31] FEI Further Reply Argument, p. 4. para. 8
[32] Ibid., pp. 4–5, paras. 8
[33] Ibid., p. 23, para. 50, p. 5, para. 11.

The CEC

The CEC does not agree that a commercially reasonable agreement is the appropriate test under section 32 of the UCA, because it fails to consider the gravity of the BCUC's jurisdiction and duty to facilitate the imposition of natural gas service in city streets and other locations as a matter of law and as provided for in the CPCN enabling a utility to provide service in the community.[34]

The CEC submits the appropriate test is the public interest in implementation of the convenience and necessity for the natural gas service and that the only sensible approach is for the entire New Operating Agreement to provide a contract for both Parties to implement the public interest in a natural gas service.[35]

The CEC agrees with FEI that the BCUC must consider the impact on rates and that the entire New Operating Agreement should be examined holistically.[36]

The CEC also agrees with FEI that the BCUC should determine these Applications without wading into historical disputes between FEI and the City because they have different interpretations of past events and the New Operating Agreement should not seek to compensate for any perceived historical imbalances. The CEC, however, does acknowledge that it is important to recognize and account for historical sources of friction to avoid repetition of the same by making very clear determinations as to responsibilities and obligations in a New Operating Agreement.[37]

In its reply to the CEC, the City confirms that it did not submit information about its historical disputes with FEI to seek redress. It states, for the most part, the information was requested by the BCUC to get a better understanding of the nature and magnitude of the issues that need to be addressed in the New Operating Agreement. The City agrees with the CEC that the BCUC should consider the causes of historical disputes as they need to be clearly addressed in the proposed terms of the New Operating Agreement in order to avoid further disputes in the future.[38]

2.4.2 Panel discussion

The Panel finds the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA is to safeguard the public interest. To be clear, whenever the Panel makes a finding, specification or determination under section 32 of the UCA in the remainder of this decision, it has done so because it is satisfied that such finding, specification or determination safeguards the public interest.

The passage from the decision in the Supreme Court of Canada cited above makes it clear that the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA is grounded upon the BCUC's duty to safeguard the public interest. This includes the public interest in the convenience and necessity of the delivery of natural gas services in the community and the public interest in safeguarding the interests of the

[34] CEC Final Argument, p. 4, para. 21
[35] Ibid., paras. 22, 24.
[36] Ibid. ,para. 23
[37] Ibid., p. 5 paras. 28–31.
[38] City Reply to Final Arguments of Interveners, pp. 7–9.

municipalities and their inhabitants to the extent they may be affected by the operations of public utilities. This is also made clear from the following passage from the above cited Supreme Court decision:

> The duty of safeguarding the interests of the municipalities and their inhabitants, to the extent that they may be affected by the operations of public utilities, has by these statutes been transferred from municipal councils to the Public Utilities Commission.[39]

The BCUC, in considering the public interest test under section 32 of the UCA, must decide how to balance the public interest in a public utility's authorization to use and occupy municipal public spaces pursuant to a CPCN or otherwise, with the competing interests of the municipality and its inhabitants in order to achieve a fair and balanced agreement.

FEI submits that balancing these interests is best achieved through successful good faith negotiations by imposing commercially reasonable terms. However, the Panel does not agree that the public interest test is met by imposing commercially reasonable terms. That approach to the test is too narrow and limiting. It fails to consider the gravity and scope of the BCUC's jurisdiction under section 32 of the UCA to facilitate the imposition of a public utility's service in municipal public spaces. Such considerations are not limited to simply determining commercially reasonable terms. It would be impossible to set out the potential public interest matters the BCUC may have to consider that are not purely commercial in nature. However, some clear examples are set out above in the City's submission which may include, but should not be understood as limited to, sharing of public spaces between the public utility, the municipality and others, the public's use and enjoyment of such spaces, transportation needs in the municipality and the protection of public safety and the environment in the municipality.

Submissions were also made that the legal test to be applied under section 32 of the UCA should include specific guidance as to whether the BCUC should:

a) examine the impact of the Disputed Items and the proposed New Operating Agreement holistically;

b) not take into consideration the historical differences between the Parties, but rather, make its determination on a prospective basis with a view to improving the Parties working relationship; and

c) follow its previous decisions by not taking into account standard forms of operating agreements between FEI and municipalities and instead, consider the circumstances in each municipality and determine the manner and terms of use on that basis.

In the Panel's view, the matters referred to above are evidentiary in nature. In applications under section 32 of the UCA, the BCUC may determine whether to consider such evidence in its application of the test of safeguarding the public interest. The broad nature of the test should not be fettered by introducing such potential evidentiary matters as part of the test.

3.0 Operating Fee

Both FEI and the City have proposed terms in the New Operating Agreement for an operating fee (Operating Fee) to be collected from ratepayers. However, the two Parties differ on the level and the method of calculating the Operating Fee.

[39] *Surrey v. BC Electric Company Limited,* [1957] SCR 121

This section of the decision addresses the various issues related to the Operating Fee and how it is to be specified.

3.1 Application

The City proposes that an Operating Fee be included in the New Operating Agreement, calculated as follows:[40]

> 12.1 Fee Calculation
>
> Provided that FortisBC is permitted to collect the Operating Fee from customers within the Boundary Limits and effective commencing from the date established by the BCUC, FortisBC agrees to pay to the Municipality on an annual basis, a fee (the **"Operating Fee"**) of three percent (3%) of the gross revenues (excluding taxes) received by FortisBC for provision and distribution of all gas consumed within the Boundary Limits, other than gas consumed by customers from whom the BCUC has not allowed FortisBC to collect the Operating Fee. Such amount will not include any amount received by FortisBC for gas supplied or sold for resale.

FEI also proposes that an Operating Fee be included in the New Operating Agreement, but proposes a different method of calculation: [41]

> 12.1 Fee Calculation
>
> Provided that FortisBC is permitted to collect the Operating Fee from customers within the Boundary Limits and effective commencing from the date established by the BCUC, FortisBC agrees to pay to the Municipality on an annual basis, a fee (the "**Operating Fee**") of 0.70 % of the delivery revenue (excluding taxes) received by FortisBC from its customers for the distribution of gas consumed within the Boundary Limits (the "**Delivery Revenue**"), but excluding compressed natural gas distributed from fueling stations and the delivery of liquefied natural gas. Delivery Revenue further does not include (i) any gas commodity revenue, or (ii) any delivery revenue from customers from whom the BCUC has not allowed FortisBC to collect the Operating Fee.

3.2 Whether to include an Operating Fee in the New Operating Agreement

Both Parties have proposed terms for an Operating Fee in the New Operating Agreement. The Panel will first consider the threshold issue of whether any Operating Fee shall be included in that agreement.

3.2.1 Parties' submissions

FEI applies for what it considers to be a "commercially reasonable" Operating Fee, which FEI characterizes as a contractual consideration rather than a "municipal entitlement."[42] FEI refers to the "strained working relationship" it has had with the City under the Parties' previous agreements, and suggests that the new terms will improve this situation.[43]

[40] Exhibit B2-1, City Application, Appendix B, pdf p. 50.
[41] Exhibit B1-1, FEI Application, Appendix A, pd. pp. 48–49.
[42] FEI Final Argument, p. 23, para. 54.
[43] Ibid., p. 1. para. 2.

FEI states it has "entertained the prospect of Operating Fees for Surrey as a result of a uniquely challenged relationship with Surrey over many years"[44] and believes that "there is still a role for an Operating Fee, provided the amount is fair."[45] Further, FEI states that absent an Operating Fee based on FEI's proposal, it expects that overall costs will go up for all customers as a result of increasing costs of work in Surrey.[46]

The City requests that the New Operating Agreement include an Operating Fee "for FEI's use of public places to place its facilities within Surrey."[47] It adds that the City's Council supports this request. The City also refers to a history of disputes with FEI, and the need for a New Operating Agreement including an Operating Fee.[48]

The CEC agrees with FEI that an Operating Fee may be reasonable "where it is proportional to work being done and is not unduly onerous to FEI customers, on the condition that it is useful in improving the working relationship with the City."[49]

BCOAPO states that it disagrees with the need for an Operating Fee that does not benefit FEI and its ratepayers. However, BCOAPO notes that the Parties have agreed in principle to such a fee,[50] and submits that an Operating Fee is "reasonable and justified in terms of the operating savings it would create" by removing such additional costs to FEI as permits and cut fees.[51]

3.2.2 Panel determination

The Panel determines that an Operating Fee shall be included as a term in the New Operating Agreement as it finds that such inclusion is in the public interest.

The Panel concludes that the inclusion of an Operating Fee is not a matter of dispute between the Parties, since they have agreed to the inclusion of some form of Operating Fee in their proposed versions of section 12.1 of the New Operating Agreement. While the Panel is not obligated under section 32 of the UCA to accept the terms agreed to by the Parties, the Panel has already found that it will give considerable weight to any consensus reached.

Both Parties have referred to a history of disputes between them under the earlier operating agreement. While the historical disputes relate to many matters, the Panel considers that some level of Operating Fee will improve the relationship between the Parties, and reduce the level of future disputes and the cost of resolving them.

The CEC and BCOAPO both conditionally support an Operating Fee, subject to its level and method of calculation.

For the foregoing reasons, the Panel finds that, in the circumstances of this specific proceeding, the inclusion of an Operating Fee in the New Operating Agreement is in the public interest.

[44] Exhibit B1-6, FEI response to BCUC IR 4.1.
[45] Exhibit B1-4, FEI response to BCOAPO IR 2.1.
[46] Exhibit B1-4, FEI response to BCOAPO IR 8.3.
[47] City Final Argument, p. 17, para. 36.
[48] Ibid., pp. 6–9,paras. 8–20.
[49] CEC Final Argument, p. 8, para. 53.
[50] BCOAPO Final Argument, p. 7.
[51] Ibid., p. 8.

3.3 Operating Fee Precedents

Having determined that an Operating Fee shall be included in the New Operating Agreement, the Panel will address the precedents cited by the Parties regarding its level and method of calculation.

3.3.1 Evidence

FEI states that it has operating agreements with 100 municipalities, of which 74 provide terms for the collection of operating fees.[52] Two municipalities on Vancouver Island and the Lower Mainland municipalities have long-standing operating agreements that do not expire, and do not contain provisions or terms for the collection of operating fees.[53]

In response to Panel IR 1.1, FEI provides updated information in the following table:[54]

Table 1: Municipalities Served by FEI*

Category		Number	Percent of FEI's Customers	Percent of FEI's volume	Percent of FEI's revenues
1	Municipalities currently served by FEI with no operating agreement (and thus no fee)	5	6%	6%	6%
2	Municipalities with operating agreements that provide for an operating fee	74	32%	35%	26%
3	Municipalities with operating agreements that do not provide for an operating fee	26	56%	54%	61%

** Excludes First Nations with Operating Agreements*

The City submits that it should receive an Operating Fee of 3 percent of the gross revenues, primarily on the basis that it is consistent with the operating Fees received by the 74 other municipalities with which FEI has an operating agreement.[55] The City states that basing the Operating Fee on terms consistent with those of the 74 other municipalities is relevant because "the nature of the issues to be addressed in an operating agreement will be largely the same for all municipalities, but certain issues and terms will be more important to some municipalities than others. […] FEI's recent operating agreements with other municipalities, and the Commission's prior comments and determinations on them, also provide benchmarks for a reasonable level of municipal oversight of FEI's work in the city."[56]

The City also acknowledges Commission Letter L-4-02, dated February 4, 2002, where the BCUC rejected FEI's request to establish a standard form agreement between itself and certain municipalities to replace expiring franchises and reasoned as follows:

> The BCUC also noted that where an individual agreement has expired, the Commission expects that FEI and the municipality would make every effort to negotiate an operating agreement, and only if the two parties are not able to agree to a new agreement would the BCUC anticipate an

[52] Based on the most recently-submitted evidence in Table 1 on this page. Due to timing differences, earlier submissions from FEI contained slightly different counts. The Panel will use the most recent count.
[53] Exhibit B1-6, FEI response to BCUC IR 4.1.
[54] Exhibit B1-17, FEI response to Panel IR 1.1.
[55] Exhibit B2-8-1, City response to BCUC IR 5.1.
[56] Exhibit B2-5, City response to CEC IR 1.1.

application pursuant to section 32 of the UCA to have the BCUC determine the terms of such an agreement. The Commission noted that it would review the circumstances in each municipality and determine the appropriate terms and conditions on an individual basis.[57] [emphasis added]

FEI notes that, while the majority of municipalities have an operating agreement with an operating fee, the municipalities with operating agreements that do not provide for an operating fee represent the majority of FEI's business in terms of revenues, customers and volume. FEI currently lists the City in Category 3.[58]

3.3.2 Parties' submissions

The City

The City notes that its proposed language respecting the Operating Fee is identical to that contained in FEI's Standard Operating Agreement.[59] In support of this point, the City notes the following from the record:

- At least 74 other municipalities receive an operating fee from FEI calculated on the basis of 3% of the gross revenues (excluding taxes) received by FEI for provision and distribution of gas consumed in the municipality;
- No municipality in B.C. receives an operating fee from FEI other than 3% of gross revenues;
- FEI and the Commission continue to approve operating agreements with operating fees of 3% of FEI's gross revenues (refer to Orders C-4-17 and C-1-18); and
- The Commission previously rejected a municipality's request for an operating fee other than 3% of gross revenues and directed that the municipality's operating fee shall be 3% of gross revenues (Order G-17-06, dated February 2, 2006 (the Chetwynd Decision)).[60]

Therefore, the City considers that adopting 3 percent of FEI's gross revenues as the Operating Fee structure for the New Operating Agreement substantially supports transparency, public interest and consistency among FEI ratepayers, most of whom are also municipal taxpayers.[61]

In its response to Panel IRs, the City continues to argue that it is in the public's interest to have a consistent operating fee across the Province, and that the City's proposed Operating Fee of 3 percent is "eminently reasonable given that FEI and the BCUC have approved the same fee for many other municipalities."[62] The City points to 26 operating agreements between FEI and municipalities on Vancouver Island and the Sunshine Coast which added an operating fee in 2015 even though these municipalities did not previously receive an operating fee.[63]

[57] Exhibit B2-8-1, City response to BCUC IR 8.2.
[58] Exhibit B1-17, FEI response to Panel IR 1.1, Attachment 1.1.
[59] City Final Argument, para. 37, p. 17.
[60] Ibid., para. 39, pp. 17–18.
[61] Ibid. para. 40, p. 18.
[62] City Final Argument on New Evidence, p. 8.
[63] Ibid., para. 32, p. 10.

FEI

FEI responds that a fair and workable outcome for the proposed Operating Fee in City should take priority over uniformity among municipalities for two reasons:[64]

1) There is considerable diversity among operating agreements today, and the financial terms are markedly different between the Lower Mainland and elsewhere such as operating fees and the allocation of pipeline relocation costs; and
2) The BCUC has already recognized the need to consider differences among municipalities in Letter L-4-02 and Order C-7-03, where it viewed the concept of a standard form agreement as inconsistent with its authority under section 32 of the UCA and confirmed it would review the circumstances in each municipality to determine the appropriate terms and conditions on an individual basis, and in its Coldstream decision, where it also emphasized the need to consider differences among municipalities to determine the appropriate terms and conditions on an individual basis.

FEI notes that the City's demand for consistency with other operating agreements when it comes to the Operating Fee is selective and self-serving in that the City ignores the relatively small size of most of the municipalities and the different historical context behind those agreements. In particular:[65]

- The City's justifications boil down to wanting what some other municipalities have, *i.e.* an operating fee calculated at 3 percent of gross revenues;
- The City only favours consistency when it is advantageous to it. Indeed, the City acknowledges that the BCUC reviews and evaluates operating agreements on an individual case-by-case basis, and that FEI's most recent form of operating agreement is not intended to be a standard form agreement;
- The 3 percent formula is currently being used for much smaller municipalities, thus yielding a relatively small Operating Fee in absolute terms. Two-thirds of the municipalities that received Operating Fees in 2016 received less than $100,000 in 2016. In all cases, the Operating Fee is sufficiently small that the difference between using the 3 percent of gross revenues formula and another formula is relatively modest in absolute terms. Had the City's proposal been in place in 2016, FEI would have collected from customers and remitted to the City $3.4 million.
- Operating Fees are a legacy of Centra Gas' and Inland Natural Gas' Exclusive Franchise Agreements, where the fees had originally been part of the consideration paid by the legacy utilities for exclusivity in the municipalities and use of public places. But even then, the basis for 3 percent of gross revenues was obscure, as stated by the Energy Commission during a 1977 inquiry into franchise fees. Also, there was no apparent quantification of costs to be reimbursed or of values recognized in the determination of the fees. Furthermore, FEI explains the 3 percent Operating Fee in the renewed agreements negotiated with Vancouver Island and Inland municipalities are a negotiated hold-over from the original agreements with Centra Gas and Inland Natural Gas. FEI submits that taking a similar approach for the City leads to a result where there is no Operating Fee at all. The agreements with the Lower Mainland municipalities that were originally served by BC Electric were different. None of those agreements is an exclusive franchise agreement. None contemplates the collection of an Operating Fee. FEI stresses that there was a budgetary rationale to continue with the same fee as part of renewed operating agreements with Vancouver Island and Inland municipalities; the same logic cannot be applied to the City as it has never received an Operating Fee in the 60 years natural gas was extended to the area and was never granted an exclusive franchise.

[64] FEI Final Argument, pp. 15–17, paras. 38-41.
[65] Ibid., pp. 37–44, paras. 78-90.

FEI submits that the approval of any Operating Fee for the City, let alone one calculated as 3 percent of gross revenues, will represent a marked departure from prior approvals.

In reply to the City's arguments, FEI submits that the proposed New Operating Agreement contains Agreed Terms which make the agreement significantly different to other operating agreements FEI has with other municipalities. FEI quotes the following examples where FEI must:

- Provide detailed plans and documentation of its proposed works;
- Pay certain permit fees (which FEI would not otherwise have had to pay at all);
- Provide detailed estimates for relocation work and potentially stop work if the scope of work changes and an updated estimate needs to be provided; and
- Remove abandoned pipeline at its own cost if requested by the City.[66]

FEI argues that these Agreed Terms of the proposed New Operating Agreement place a higher burden, risk and cost on FEI and its ratepayers than is associated with other operating agreements, and therefore why the operating fee of 3 percent is not appropriate in the agreement with the City.[67]

The CEC

The CEC states it does not believe that a 'standard operating agreement' would be appropriate to apply across the province without due consideration for the differences in the municipalities… The CEC recommends that the Commission provide a significant weighting to evaluating operating agreements and fees on their own merits"[68] and that "the Commission give the City's submissions with regard to other municipalities little to no weight. If the Commission were to consider consistency with other municipal agreements it would be one-sided to ignore the larger Lower Mainland agreements that contain no Operating Fee."[69]

In response to the CEC, the City states "there is no precedent for the criteria suggested by the CEC for the circumstances in which an operating fee is reasonable. None of the [74] other municipalities with the 3% of gross revenues operating fee were required to provide such evidence or meet such criteria, including the 26 Association of Vancouver Island Coastal Communities (AVICC) municipalities that began receiving the operating fee in 2015 with FEI's agreement and the approval of the BCUC."[70]

BCOAPO

BCOAPO states that:

> …the majority of FEI's customers reside in municipalities where they are not required to pay an operating fee 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

[66] FEI Reply Argument, pp. 5-6, para. 11
[67] Ibid, p. 6.
[68] CEC Final Argument, p. 14.
[69] Ibid., p. 10.
[70] City Reply to Intervener Arguments and FEI Reply Argument, p. 10.

> context of the number and relative sizes of municipalities that do not charge an Operating Fee, its persuasiveness is greatly diminished…[71]

In response to BCOAPO, the City states that to its knowledge "there is no precedent for requiring benefit to the utility and its ratepayers. The evidence demonstrates that the operating fee is intended to offset some of the costs the City incurs as a result of FEI's use of municipal public places which is otherwise at no cost to FEI and its ratepayers."[72]

3.3.3 Panel discussion

The Panel finds that the precedents cited by the parties do not provide a useful basis for setting the Operating Fee in the New Operating Agreement. Therefore, the Panel will consider the applications made by FEI and the City on their own merits.

The City has stated throughout the proceeding that "the 3% of gross revenues Operating Fee it is proposing is the same as the operating fee that FEI collects and remits to 75 other municipalities in the province, and is therefore a standard in FEI's operating agreements in BC."[73] Yet, the Panel observes that the City demonstrated awareness of situations where the BCUC deviated from standard operating terms when citing Letter L-4-02 and acknowledging that "the Commission reviews and evaluates operating agreements on an individual case-by-case basis, and that FEI's most recent form of operating agreement […] is not intended to be a standard form agreement."[74] Moreover, the Panel agrees with FEI that the case of the smaller municipalities that collect operating fees based on 3 percent of FEI's gross revenues is markedly different from the City's case, in particular relative to size, as measured by number of customers, sales volumes and revenues. The Panel also notes that the operating fees in those other agreements are a legacy from Centra Gas' and Inland Natural Gas (FEI's predecessors), where the basis for the 3 percent is unclear.

On this last point, the Panel notes that the operating agreements between FEI (or its predecessors) and these 75 municipalities were previously exclusive franchise agreements, whereby the fee was originally part of the consideration paid by the utility for exclusivity in the municipalities.[75] Those agreements have included not only the right to operate in the municipality but also compensation for use of public spaces.[76] The Panel notes that in these cases, it is not possible to distinguish what portion of the operating fee may have been paid for the right to operate versus compensation for use of public spaces.

The Panel also observes other notable differences between the circumstances of the City and the instances where the BCUC has accepted an operating fee of 3 percent of FEI's gross revenue.

First, where operating fees of 3 percent of gross revenues have been accepted by the BCUC, the agreements have had the mutual consent of the parties involved. The Panel concludes that this acceptance was made on the basis that both parties to those operating agreements had agreed the 3 percent represented a fair exchange of

[71] BCOAPO Final Argument, pp. 7–8.
[72] City Reply to Intervener Arguments, Section 3.2, p. 8.
[73] Exhibit B2-1, City Application, Section 4(i), p. 8.
[74] Exhibit B2-8-1, response to BCUC IR 1.3.1.
[75] FEI Final Argument, para. 86, p. 40.
[76] Ibid., para. 87, p. 40.

value in the context of the overall agreement, rather than because the BCUC believes that 3 percent of gross revenue will always represent a fair exchange of value in every municipality. The Panel considers that having these agreements in place also simplifies the business relationship between FEI and these smaller municipalities.

Second, FEI's agreements with an operating fee of 3 percent of gross revenues contain different terms from the proposed agreement with the City. For instance, in the agreements which have a 3 percent operating fee, the municipalities concerned have agreed to pay FEI for the entire cost of relocations requested by the municipality. FEI has estimated that its annual cost for relocations requested by the City will be $900,000, which is a significant burden on FEI's ratepayers.[77] Since the City has not agreed in the New Operating Agreement to pay the entire cost of such relocations of FEI's facilities, the Panel cannot conclude that the 3 percent operating fee as a stand-alone term is reasonable merely because it was included in these other agreements.

Third, for small municipalities, the costs to the municipality of negotiating customized operating agreements would place an excessive burden on taxpayers or ratepayers and would outweigh the benefits of having an operating agreement tailored for each small municipality. A smaller population means a larger per-capita cost of regulation, other things being equal, and therefore, there is likely an incentive for parties to keep this cost down. While each municipality deserves an evaluation on its own merits, having a standard operating fee agreed by both parties results in more efficient regulation and more efficient government for small municipalities. In contrast, the City has already established that it is willing to enter into negotiations with FEI for a customized operating agreement.

Finally, the unique circumstances of the City, in terms of geographic size, number of residents and population growth, as well as the uniquely challenged relationship between FEI and the City for many years must be considered when setting the Operating Fee. The Panel notes that the City is one of the largest and fastest growing municipalities of the Lower Mainland. The Panel agrees with FEI that one must be careful to take into consideration the results of applying the 3 percent of gross revenues formula to calculate an operating fee for small municipalities versus for the City, as doing so yields vastly different results in terms of revenues collected by the small municipalities versus the City. As noted by FEI, two-thirds of the small municipalities collected less than $100,000 in 2016 and applying the 3 percent formula to the City would result in the collection of $3.4 million.

Based on the foregoing reasons, the Panel finds that the circumstances of the City differ from those of the 74 smaller municipalities, and that they do not provide a compelling precedent for specifying a 3 percent operating fee.

In addition to the 74 municipalities which have an operating fee of 3 percent, there are other municipalities in BC with no operating fee at all (No Fee Municipalities). Many of the No Fee Municipalities are in the Lower Mainland, and are more similar in size to the City than they are to the 74 municipalities with the 3 percent operating fee. Also, the majority of FEI customers live in No Fee Municipalities. However, while the No Fee Municipalities may be more similar in size to the City than they are to the municipalities with the 3 percent operating fee, their circumstances are still different to those of the City. The Panel acknowledges that these larger municipalities differ considerably from the City in size and density of population, the length of High-

[77] Exhibit B1-5, FEI response to CEC IR 1.

Pressure Pipelines, and the frequency and complexity of pipeline relocations. For these reasons, the Panel finds that the operating agreements with no operating fee do not provide a compelling precedent in this case.

Furthermore, past BCUC letters and orders support the idea of setting operating agreement terms on an individual basis, and giving consideration to the unique circumstance in each municipality. To this end, the Panel continues to affirm the BCUC's determination in Letter L-4-02 that it should review the circumstances in each municipality on an individual basis in determining the appropriate terms and conditions of an operating agreement and an operating fee.

The Panel will therefore analyze the Operating Fee issue raised in this proceeding having regard to the specific circumstances relevant to the City. The Panel notes that this approach is in line with section 75 of the UCA, which states that "the Commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions."

3.4 Setting the Operating Fee

The Panel has established that an Operating Fee shall be included as a term in the New Operating Agreement, and that the precedents cited by the Parties do not provide a compelling basis for setting an Operating Fee. The Panel will now address how the Operating Fee shall be set.

The Panel considers that there are three matters to address: the basis for the Operating Fee, the level at which the Operating Fee shall be set, and the formula for calculating the Operating Fee over the term of the New Operating Agreement.

3.4.1 Evidence

FEI

FEI states in its Application that a "principled approach provides a reasonable basis for an Operating Fee that is fair to both the City and FEI's customers who ultimately pay the cost.[78] To this end, FEI submits that cost causation principles have informed FEI's proposal[79] and that Operating Fees may make sense for Surrey, provided the fees are proportional to the nature of the work being done, and not unduly onerous to FEI customers.[80]

FEI states that it "estimated an appropriate Operating Fee based on activity levels experienced in Surrey by extrapolating various permit fees that would be avoided, accounting for probable operating efficiencies, and factoring in a notional amount to recognize avoidance of legal fees and potential litigation." It expects some operating efficiencies, cost reductions, or other avoided costs (together the Avoided Costs) to include:[81]

- Elimination of permit fees currently being charged to FEI's construction and flagging contractors, and avoidance of future permit fees,
- Operational efficiencies and resource time currently being expended to obtain permits,

[78] Exhibit B1-1, FEI Application, Section 3.3.3.1, p. 16.
[79] Exhibit B1-4, FEI response to BCOAPO IR 3.11.
[80] Exhibit B1-1, FEI Application, Section 3.3.1, p. 14.
[81] Exhibit B1-13, FEI response to BCUC IR 16.2.1.

- Improvements to scheduling with improved processing times from the City,
- Avoidance of dispute and litigation costs, and
- Avoidance of other potential fees and charges which the City might otherwise seek to charge in the future.

FEI states it does, however, "expect to incur additional labour costs to provide the City with the more detailed invoices as set out in Section 8.4 (b) of FEI's Proposed Operating Terms."[82]

FEI provides the following summary table, which breaks down the three cost components of its proposed Operating Fee, based on 2016 estimates.[83]

Table 2 – FEI 2016 Estimates for Operating Fee Components

Component	2016Estimate
Permit and Cut Fees	$350,000
Operating Efficiencies	$150,000
Avoidance of Potential Litigation	$100,000
Total:	**$600,000**

1) Permit and Cut Fees:

FEI states that inclusion of Permit and Cut Fees in the calculation "was meant to serve as a proxy for the volume of construction activity within the City, as a way to recognize the City's work in managing the relationship with FEI" and is not intended to trigger a revisitation of FEI's proposal of 0.7 percent of delivery margin in the event that in the future, City Permit and Cut Fees were increased materially."[84] This cost component is calculated based on fees in effect in Surrey as at January 2017 using 2016 FEI construction activities as a multiplier, despite FEI's view that such fees are not applicable to FEI and the fact that the City has never charged these fees to FEI. These fees would be chargeable to a non-utility:"[85]

Table 3: Permit and Cut Fees Calculation

Road Use Permit Calculation	New Services (1,151) + New Mains (91) + Abandonments (461) X $60 per Permit	$102,180
Traffic Obstruction Permit Calculation	305 road repairs X $170 per Permit =	$51,850
Pavement Cut Fees and Degradation Permit Calculation	305 bell holes X $345	$164,700
Pavement Cut Fees and Degradation Permit Calculations	500 metres of pavement cut X $80 per square metres of pavement cuts	$40,000
TOTAL		**$350,000**

[82] Ibid.
[83] Exhibit B1-1, FEI Application, Section 3.3.3.1, pp. 15–16.
[84] Exhibit B1-4, FEI response to BCOAPO IR 3.4.
[85] Exhibit B1-1, FEI Application, Section 3.3.3.1, p. 15.

FEI states that in its proposed New Operating Agreement, and as demonstrated above, the "future savings for fees that the City of Surrey is prepared to waive based on the City of Surrey Bylaw revision in 2016, would amount to approximately $350 thousand."

FEI also provides a rough estimate of the permit fees paid by FEI in recent years. FEI notes that "to date in 2017 FEI has not complied with the new Bylaw revision requirement and has only paid for traffic obstruction permits, which is what FEI has historically paid."[86]

Table 4: Traffic Obstruction Permit Fees Paid to Surrey by FEI

2008 to 2012	2013	2014	2015	2016	2017
Not available	Contractor only	Contractor and FEI	Contractor and FEI	Contractor and FEI	FEI and Contractor
N/A	$10,944	$36,911	$37,818	$47,175	$63,541

[87]

FEI observes that FEI and its contractors have never paid more than approximately $40 thousand per year in permit fees until 2017, when permit fees increased to $63,541. This amount is roughly one-tenth of the amount that would have resulted from applying FEI's proposed Operating Fee formula.[88]

2) Operating Efficiencies:

FEI confirms that the $150,000 in operating efficiencies are 'savings' to FEI rather than costs the City would otherwise incur.[89] FEI highlights that "Operating efficiencies are estimated savings, which FEI hopes will materialize should the Commission approve FEI's Proposed Operating Terms."[90]

3) Avoidance of Potential Litigation:

The estimated $100,000 for avoidance of litigation based on the proposed New Operating Agreement does not reflect actual costs previously incurred.[91] Further, FEI characterizes these as FEI Avoided Costs and states that it is not a cost to Surrey.[92]

The above three cost components provide the basis for FEI's proposal for an Operating Fee calculated as a percentage of delivery margin.[93] FEI takes the total of the three cost components ($600,000) and divides it by the FEI delivery margin for 2016 ($82.5 million), arriving at 0.7 percent of delivery margin. FEI explains that the $82.5 million in delivery margin consists of "Normalized 2016 Delivery revenue for [Residential] and Commercial Rate Schedules and actual Delivery revenues for all other Rate Schedules, all before Delivery rate riders."[94]

[86] Exhibit B1-6, FEI response to BCUC IR 5.5.
[87] FEI Final Argument, p. 29, para. 63.
[88] Ibid.
[89] Exhibit B1-5, FEI response to CEC IR 5.2, 5.2.1.
[90] Exhibit B1-13, FEI response to BCUC IR 16.2.
[91] Exhibit B1-4, FEI response to BCOAPO IR 3.6.
[92] Exhibit B1-5, FEI response to CEC IR 5.3.
[93] The evidence contains references to delivery margin, delivery revenues and utility margin, all of which are synonyms. For clarity, the Panel will refer to delivery margin.
[94] Exhibit B1-1, FEI Application, Section 3.3.3.1, p. 16.

FEI states that its proposed Operating Fee of 0.7 percent of delivery margin is a way to "address the Commission's directive in 2003 to seek a method in future agreements to convert the fee to a charge on Delivery Margin, in order to stabilize costs to utility customers by excluding commodity costs from the fee."[95]

Indeed, in Order C-7-03,[96] the Commission stated that it "considers that the inclusion of the gas commodity cost in the calculation of fees for Sales Service customers has led to considerable volatility in recent years" and therefore "directs Terasen to seek a method in future agreements to convert the fee to a charge on Utility Margin, so as to stabilize the costs to utility customers." FEI states that the opportunities that have arisen since that order have not been conducive to adopting a different methodology until now.[97]

FEI states that it "expects natural gas prices to remain volatile but not to the extent of what was experienced during the late 1990s and early 2000s. Price volatility continues in the natural gas marketplace despite the abundance of shale gas... This is because supply and demand balances can change quickly in response to various market factors... As recently as winter 2013/14, market gas prices spiked due to the winter polar vortex… FEI expects the potential for this level of price volatility to continue in the future."[98]

FEI further states that "Surrey's proposal is based on a percentage of Gross Revenues, which includes commodity costs. Commodity price volatility and future commodity price increases… can result in a significant increase to a customer's total bill. When an Operating Fee is based on Gross Revenue, the Operating Fee to Surrey will increase when commodity prices increase and the impact of rising commodity prices will be exacerbated on customers' bills; this increase has no relationship to FEI's activity levels within a municipality. The Commission recognized the challenges associated with including commodity costs in the formula when it directed FEI to explore a new method of calculating an Operating Fee based on utility (delivery) margin."[99]

FEI explains that the Delivery Margin tends to be more stable than the Gross Revenue which fluctuates more significantly because of the volatility of commodity prices as shown in the graph on the left below. FEI also provides the graph (Figure 2) below showing the annual change and volatility in the Operating Fee based on gross revenue and delivery margin from 2009 to 2017. [100]

[95] Ibid., Section 3.3.3.3, p. 20.
[96] Application by FEI (then Terasen Gas) for Approval of Operating Agreement and Addendum with the Corporation of the District of Salmon Arm.
[97] Exhibit B1-1, FEI Application, Section 3.3.3.3, p. 18.
[98] Exhibit B1-9, FEI response to City IR 2.15.5.
[99] Exhibit B1-13, FEI response to BCUC IR 17.2.
[100] Exhibit B1-15, FEI response to City IR 5.1.

Figure 1 – Operating Fee using Gross Revenue vs. Delivery Margin

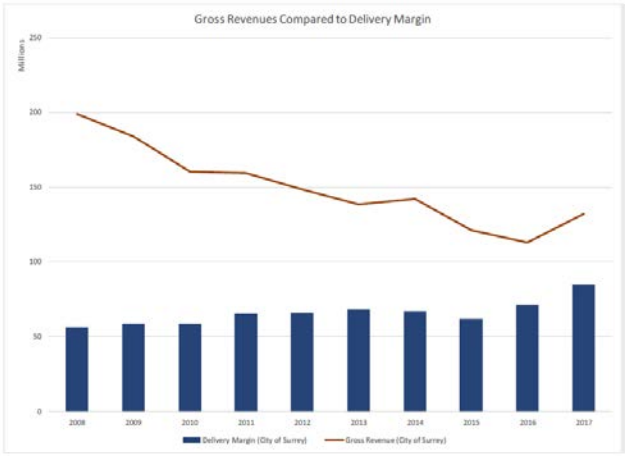
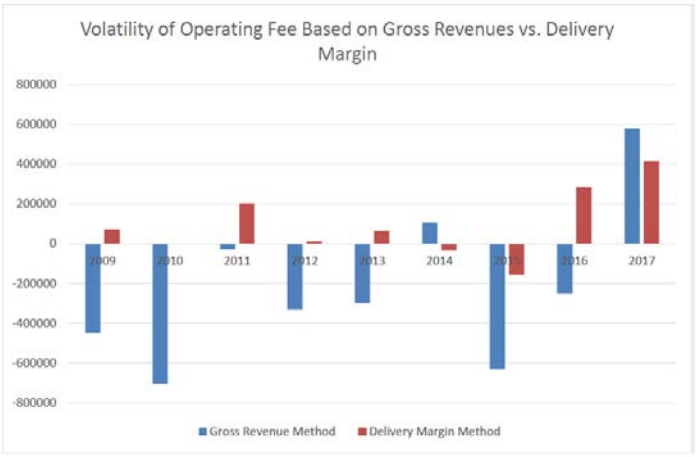


Figure 2 – Volatility of Operating Fee based on Gross Revenue vs. Delivery Margin



FEI describes the benefits and risks of utilizing delivery margin versus gross revenue in the Operating Fee calculation as follows:[101]

[101] Exhibit B1-6, FEI response to BCUC IR 5.4; Exhibit B1-13, FEI response to BCUC IR 17.2.

	% Delivery Margin	% Gross Revenue
Benefits	• Closer relationship with costs and activity levels in the municipality • Increased stability and predictability for customers and municipality as delivery margin is largely based on the fixed costs of operation and is typically adjusted annually • Reduced volatility as the Operating Fee will not be influenced by commodity market supply issues and commodity costs.	
Risks	• FEI is unaware of any risks of using delivery margin	• Does not support the cost causation principle because it is impacted by costs other than those related to the gas delivery system • The amount it yields in the case of Surrey is out of proportion to the amount of work the City must do in addressing FEI's operations in the City and would result in the following outcomes: 1) contributing to FEI's competitive challenges; 2) disproportionately increasing costs for FEI's customers in Surrey; and 3) negatively impacting affordability generally." • Treats Sales and Transport customers differently as Sales customers would be assessed the Operating fee based on the entirety of their bill (delivery and commodity) whereas Transport customers would only be assessed the Operating Fee on the delivery portion of their bill.

FEI confirms that no municipalities in BC have an operating fee of 0.7 percent of delivery margin, and that this is a new methodology FEI developed "to make the Operating Fee more closely match the circumstances of Surrey." Further, FEI confirms that the BCUC has not previously considered the methodology FEI proposes to apply for the City's operating fee.[102]

The City

In its Application, the City requests that "the terms for FEI's use of public places within Surrey's boundary limits include an Operating Fee of 3 percent of the gross revenues (excluding taxes) received by FEI for provision and distribution of all gas consumed within the boundaries of Surrey, other than gas consumed by customers from whom the Commission has not allowed FEI to collect the Operating Fee."[103]

The City believes the 3 percent of gross revenues Operating Fee it is proposing is the same as the operating fee that FEI collects and remits to 74 other municipalities in the province, and is therefore a standard in FEI's

[102] Exhibit B1-9, FEI response to City IR 2.6.
[103] Exhibit B2-1, City Application, Section 4(i), p. 8.

operating agreements in BC.[104] In the City's view, this also makes it the "fairest approach to an operating fee." [105] The City states it understands that the BCUC has never approved an operating fee calculated on any other basis.[106] The City states its requested terms are "consistent with provincial standards and therefore are reasonable."[107]

Further, the City states that "while the operating fee clearly is used by the municipality to offset the municipality's costs, to date the operating fee amount has not been determined on the basis of the individual municipality's actual costs due to FEI."[108] The City also states that "[t]o the extent that the Commission might now consider the specific circumstances and costs of the municipality as relevant to the operating fee amount, the City relies on the facts that (i) Surrey hosts more FEI pipes within its boundaries than any other municipality in the province, including 114 kms of high pressure transmission pipes, and (ii) Surrey incurs more costs as a result of FEI's use of public places within the city's boundaries than all other municipalities in the province combined." However, the City provides limited information to accompany the specific circumstances and costs it refers to.[109]

When asked what the approximate operating fee value would be in respect of the services provided by the City to FEI under a cost causation principle, the City estimated costs incurred as a result of FEI's use and occupation in highways and other public places in Surrey are in the range of $4 million per year based on the Aplin Martin report and the City's estimates of operational costs and indirect costs.[110] The City submits that the Aplin Martin report is a quantitative analysis in support of the City's requested Operating Fee, which quantifies annual direct cost to be roughly $3.3 million (not including work performed outside of City highway/right of way boundaries, City operating costs, City costs to acquire highway/road right of way occupied by FEI infrastructure, direct or indirect City costs resulting from FEI presence such as traffic disruption, park and public amenity disruption etc.). The City estimates operating costs at $300,000 to $500,000 / year. Therefore, annual direct costs are more likely to be over $4 million.[111]

The City submits that on the basis of the 2016 and 2017 gross revenue figures provided by FEI, the $4 million per year figure equates to an operating fee of about 3.55 percent of the 2016 gross revenue or 3.05 percent on the 2017 gross revenue. This suggests 3 percent of gross revenue is reasonable[112] as the 3 percent yields roughly $3.4 million (based on 2016 estimates).[113]

The City states that if cost causation were to be used for calculating an Operating Fee, "FEI would be required to compensate Surrey for the costs identified by the Aplin Martin report, including by complying with and paying the required fees, charges and security deposits pursuant to applicable Surrey by-laws to cover the related costs incurred by Surrey. FEI would also pay all of its costs to relocate its facilities when requested by Surrey, and all of Surrey's costs to relocate Surrey facilities when requested by FEI, again on the basis that these costs are caused

[104] Ibid.
[105] Exhibit B2-14, City response to BCUC IR 14.1.
[106] Exhibit B2-4, City response to BCOAPO IR 1.1.
[107] Exhibit B2-1, City Application, Section 5, p. 12.
[108] Exhibit B2-14, City response to BCUC IR 16.2.
[109] Ibid., City response to BCUC IR 16.4.1
[110] Ibid., City response to BCUC IR 16.6
[111] Exhibit B2-16, City response to Panel IR 1.2.
[112] Ibid.
[113] Exhibit B1-6, FEI response to BCUC IR 5.3.

by and would not be incurred but for FEI's use and occupancy of Surrey highways and other public places. If FEI was responsible for all of its own costs and for Surrey's costs as discussed above, Surrey would agree that the 3% of gross revenue operating fee would not be needed."[114]

The City describes the following benefits and sees no risks of using gross revenue versus delivery margin:[115]

	% Delivery Margin	% Gross Revenue
Benefits		• Operating Fee calculated on the same basis as the operating fees FEI remits to 74 other municipalities in the province with BCUC approval • FEI has existing systems and procedures for calculating and remitting an operating fee calculated on the basis of gross revenue • Continuing to utilize the existing gross revenue approach avoids the added costs and complexity (for example, for changes to financial systems and business processes) associated with FEI using a new approach. • Avoids other municipalities potentially requesting FEI to change the basis for their operating fee from gross revenue to delivery margin if they perceive a benefit from such a change.
Risks	• FEI has never utilized delivery margin as the basis for calculating an operating fee.	• The City sees no risks of using gross revenue

The City states that "if the operating fee was to be expressed as a percentage of delivery margin, based on the 2016 delivery margin of $71.2 million and 2017 delivery margin of $85.0 million, the $4 million per year equates to an operating fee of about 5.6% or 4.7% on delivery margin, respectively. This is what BCUC should use if calculating operating fee on delivery margin with understanding that this is a unique approach."[116]

Regarding the volatility of commodity costs, the City comments on the BCUC directive in Order C-7-03 which FEI relies on, in part, in support of its proposal of delivery margin on the following basis:

> Surrey is aware that in 2003, in the context of exceptionally volatile natural gas prices, the Commission identified a concern that FEI (then Terasen Gas) applying a 3% charge to gross customer bills including gas commodity charges had led to volatility for natural gas customers in recent years. Pursuant to Order No. C-7-03 the Commission directed FEI to seek a method to convert the charge FEI was applying on customer bills to one based on utility margin "so as to stabilize the costs to utility customers". Surrey understands that FEI did not change its method, and the exceptionally volatility in natural gas prices experienced around 2000 was an anomaly and is not expected to recur.

[114] Exhibit B2-4, City response to BCOAPO IR 1.2.
[115] Exhibit B2-8, City response to BCUC IR 2.3.
[116] Exhibit B2-16, City response to Panel IR 1.2.

3.4.2 Parties' submissions

FEI

FEI submits that the City offers a superficial rationale for its proposed Operating Fee, largely disconnected from commercial considerations relevant in the City's context. The City essentially argues that it should receive an Operating Fee of 3 percent of gross revenues because other Inland and Vancouver Island municipalities receive an Operating Fee calculated using that formula. Yet, at the same time, the City also prefers to be treated differently from Inland and Vancouver Island municipalities when it comes to reimbursement of relocation costs and operating protocols. The superficiality of the City's justification for an Operating Fee based on 3 percent of gross revenues is underscored by the fact that the Lower Mainland municipalities representing the bulk of FEI's customers, sales and infrastructure have never received an Operating Fee.[117]

Furthermore, in reference to the 3 percent of gross revenue itself, FEI states that:

> …the legacy 3 percent fee included in past operating agreements is of uncertain origin and is a historical amount that appears to have been designed to yield certain revenues for the municipalities rather than being based on principle. While there was a rationale (or a defensible principle) for not decreasing the existing fees when the agreements with those other municipalities were renewed, FEI believes that in dealing with a municipality with the size and sophistication of Surrey that has never received Operating Fees, it is appropriate to ensure that the operating terms are set on a principled basis.[118]

FEI also adds:

> While the operating agreements are not "rates" *per se*, the costs that flow from those agreements ultimately are recovered from customers through rates. The Commission must have regard to ensuring that the terms on which a public utility operates in municipalities can be justified in the context of "just and reasonable" utility rates.[119]

In FEI's view, justifying the inclusion of an Operating Fee in the New Operating Agreement requires the Commission to ask: "What are FEI customers getting in return for starting to pay now an Operating Fee after 60 years of FEI operating and performing the same type of work without one?". FEI submits that the City's commitments to new operating protocols, including the waiving of its rights to require individual permits and collect permit fees, have value to FEI/FEI customers, such that FEI has offered to pay an Operating Fee calculated as 0.7 percent of delivery margin. This formula would have yielded a fee of about $600 thousand in 2016, which is about $250 thousand more than the permitting fees that the City would have sought to charge FEI based on FEI's activity levels. FEI submits that this additional amount recognizes efficiencies and a notional amount for avoided disputes.[120]

FEI submits that, in contrast, the City's proposed calculation method would have yielded an Operating Fee ranging between $3 million and $6 million over the 2008 to 2016 period. FEI submits that this range

[117] FEI Final Argument, p. 4, para. 9.
[118] Exhibit B1-6, FEI response to BCUC IR 4.4.
[119] FEI Final Argument, p. 12, para. 30.
[120] FEI Final Argument, para. 7, p. 3.

is between 10 to 17 times more than the sum of the permit fees that the City would otherwise seek to charge based on FEI's activities, the value of efficiencies and dispute avoidance.[121]

FEI does not agree that switching to delivery margin would incur added complexities because:[122]

1. Given that the City has never received an Operating Fee, implementing one with the City under either an operating fee based on delivery margin or one based on gross revenues will necessitate communication and billing changes.
2. The City assumes that technology has not changed since the 2006 proceedings, and that it would pose an obstacle. However, there is no evidence of that.
3. The City is, in effect, arguing that complexity and the need for communication are worse for FEI/FEI customers than charging FEI customers approximately $2.5 million more per year in Operating Fees, which FEI considers a poor trade-off.

Further, FEI disagrees with the City that the gross revenues and delivery margins have been roughly equivalent year to year. FEI submits (Figure 2) that "demonstrates that an Operating Fee based on delivery revenues would be less volatile than one based on gross revenues. The delivery margin approach mitigates the risk of increased commodity price volatility over the 20 year term of the agreement."[123]

FEI submits that the Operating Fee should be as a percentage of delivery margin instead of gross revenues because delivery margin provides benefits such as "(i) a closer relationship between the Operating Fee and FEI's facilities and operations in the municipality; (ii) increased fee stability and predictability for customers and the municipality; and (iii) consistent treatment of FEI's Sales and Transport customers."[124]

The City

The City submits that adopting the same 3 percent of gross revenue operating fee structure as that of 75 other municipalities in the province supports transparency, public interest and consistency among FEI ratepayers.[125]

The City also submits that, in addition to these key qualitative considerations, it submitted quantitative analysis demonstrating that the City's requested Operating Fee is reasonable on the basis of the City's costs due to FEI's use and occupation of highways and other public places in the City. As identified in the Aplin Martin report, the annual direct cost to the City resulting from FEI's infrastructure is estimated to be $3.3 million, which figure is not inclusive of all costs. Adding to this the City's operating costs and other difficult to quantify costs, the City submits that if the Operating Fee was designed to recover the City's actual direct and indirect costs as a result of FEI's use and occupation of public places in the City, the Operating Fee value would be more than $4 million per year.[126]

The City argues that FEI's proposed Operating Fee structure is not designed to compensate the City for FEI's use of public places within the municipality to construct and operate its utility business, either on the basis of the

[121] Ibid., para. 8, pp. 3–4.
[122] FEI Reply to City Final Argument, p. 21., para. 45.
[123] FEI Reply to City Final Argument, pp. 21–22., para. 46.
[124] FEI Final Argument, p. 49., para. 99.
[125] City Final Argument, p. 18, para. 40.
[126] Ibid., pp. 19–21,paras. 42–47.

costs incurred by the City or on the basis of a standard fee. The City is of the view that FEI's proposed calculation method is novel, and inconsistent with the purpose of the operating fee as stated in FEI's Tariff, FEI's Application or Order C-7-03 and with the cost causation approach suggested by the BCUC and BCOAPO IRs in this proceeding.[127]

In its response to Panel IRs, the City argues that the purpose of the Operating Fee is to compensate the City for FEI's use and occupancy of public places in the City. It submits that this compensation is permitted under the law, and "expected when one party is using the lands of another." [128] The City argues that such compensation is reasonable, since the City incurs substantial costs as a result of FEI's use of public lands, FEI is able to take advantage of lands the City purchases for other purposes, and the Operating Fee reallocates some of the City's costs to FEI's ratepayers on a "user pay model." [129]

Citing BCUC Order C-9-06[130] through C-16-06, the City states that:

> …the BCUC previously decided not to change the basis for FEI's operating fees from gross revenue to delivery revenue. Specifically, in a proceeding in 2006… the BCUC sought submissions on whether the public interest is better served through operating fees on delivery revenue versus gross revenue. At that time the municipalities and FEI (then Terasen) raised significant concerns about added complexity, costs, and communication requirements if the basis for the fee was changed to delivery revenue.[131]

The City submits that "there is no justification for incurring the added complexity, costs, and communication requirements to switch to delivery revenue [margin] as the basis for the operating fee" and further that "in recent years FEI's gross revenues and delivery revenues have had roughly equivalent year-to-year volatility demonstrating that there is no material benefit to incurring the added complexity, costs, and communication requirements to switch to delivery revenue as the basis for the operating fee." [132] In conclusion, the City states that it remains of the position that gross revenues should be used for the Operating Fee and that there are added costs and risks with no benefit of switching to delivery margin.[133]

The CEC

The CEC agrees with FEI that an Operating Fee may be reasonable where it is "proportional to work being done."[134] The CEC submits that the City has not identified any new costs as a result of the New Operating Agreement[135] and that there is no reason for the City to receive a significant windfall gain at the expense of FEI ratepayers as a result of the new Operating Agreement without evidence of specific cost changes or significant existing cost unfairness. The CEC does not find either of these situations to be evident on the record.[136]

[127] Ibid., pp. 25–26, paras. 59-60.
[128] City Final Argument on New Evidence, p. 7, para. 28.
[129] Ibid., p. 8, para. 29.
[130] BCUC Order C-9-06.
[131] City Final Argument, pp. 27-28, para 65.
[132] Ibid., p. 28, para. 66-67.
[133] Ibid., p. 29, para 69.
[134] CEC Final Argument p. 8, para 53.
[135] Ibid., pp. 8–9, para 54.
[136] Ibid., p. 9, para. 55.

The CEC finds that the Operating Fee of $600,000 proposed by FEI is largely unfounded, excessive, and inappropriate, but more sensible than the City proposal. The City's proposal would have a material impact on customers. The CEC submits that BCUC should avoid decisions that will result in such significant increase in ratepayer costs for little added benefit.[137]

The CEC does not support a fee based on gross revenues because "FEI's costs do not vary with gas prices but do vary with assets or pipe in the ground."[138] In addition, The CEC does not find the City's list of benefits of using gross revenue to be persuasive. It submits it "does not agree that consistency with a variety of significantly smaller municipalities should be a key consideration. The CEC acknowledges the agreement between the two parties is a significant one and should reflect the existing and unique circumstances of the parties, instead of those developed from a selection of other municipality agreements."[139] It further states that "Gross revenues would include revenue from commodity charges which experiences volatility in the commodity market and is unrelated to FEI's operations in the City. Increases in commodity costs would result in a windfall gain for the City and exacerbate any increases in the total customer bill. The CEC finds no justifiable rationale for developing a rate that varies with gross revenues."[140]

With regard to basing the Operating Fee calculation on delivery margin, the CEC states that charge "bears some relationship to the size of the infrastructure deployed in the City, but submits that the relationship may be weak. The CEC notes that the 0.7% proposed by FEI was backwards calculated from the savings, rather than being calculated and justified as a cost related to the delivery margin… the CEC submits that it is doubtful that there is a strong direct correlation for such items with either the gross revenues of the company or the delivery margin and might more likely be considered as fixed or semi-variable costs."[141]

Ultimately, the CEC recommends that the BCUC approve no more than $600,000 as the appropriate Operating Fee based on 2016 figures and should preferably approve a fee of significantly less and that the BCUC approve an Operating Fee of no more than 0.7 percent of the delivery margin with wording as proposed by FEI and should preferably approve a fee of significantly less.[142]

BCOAPO

BCOAPO states a "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% [of Gross Revenue] fee that is received by those [74] municipalities was set."[143]

In terms of the calculation, BCOAPO submits that "FEI's evidence that its 0.7% Delivery Margin proposal would have resulted in Surrey getting about $600K in 2016, or about $250K more than the permit/cut fees waived."[144] It further states that the BCUC "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

[137] Ibid., p. 15, paras. 105-107.
[138] Ibid., p. 9, para. 61.
[139] Ibid., p. 10, para. 63.
[140] Ibid., p. 10, para. 66.
[141] Ibid., p. 72, para. 72, p. 11, para. 78.
[142] Ibid., paras. 108–109.
[143] BCOAPO Final Argument, p. 7.
[144] Ibid., p. 9.

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."[145]

BCOAPO suggests that the proposed Operating Fee should be calculated on delivery margin instead of gross revenues because "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."[146]

3.4.3 Panel determination

The Panel specifies that the Operating Fee in the New Operating Agreement will be calculated as 0.7 percent of FEI's delivery margin for customers located within City boundaries, and that the New Operating Agreement will include as a term the version of section 12.1 provided in FEI's Application, as it finds that this is in the public interest.

In reaching this conclusion, the Panel considered the basis on which the Operating Fee will be set, the appropriate level at which to set the Operating Fee initially, and how the Operating Fee will be calculated during the life of the New Operating Agreement. Each of these three matters is addressed below.

Basis for setting the operating fee

The Panel finds that the appropriate basis to use when setting the Operating Fee is cost causation, being the costs avoided by FEI's ratepayers as a result of the New Operating Agreement.

If the Parties had agreed to a specific Operating Fee as part of the overall agreement, the Panel might view the Operating Fee as part of a fair exchange of value between the Parties. Since the Parties have not reached such an agreement, then before being able to determine the appropriate level for and method of calculating the Operating Fee, the Panel must first consider the appropriate basis it will use to do so.

Cost causation is a principle widely used in regulation, such as in rate design cases where it is used to allocate costs fairly between customer classes, and is generally considered to be a sound basis for "just and reasonable rates." Applying this principle, if costs can be reasonably attributed to providing service to customers, then it is just that those costs are recovered from those customers in rates.

Any Operating Fee FEI pays the City under the New Operating Agreement will in the first instance be a cost to FEI. Whether FEI can recover the Operating Fee from its Surrey ratepayers depends on whether the cost can be reasonably attributed to providing service to those ratepayers; that is, whether the New Operating Agreement provides value for ratepayers. Thus, the Panel finds that cost causation is an appropriate basis to use when setting the Operating Fee.

However, both Parties have submitted arguments as to why their respective proposals for an Operating Fee are consistent with the principle of cost causation. Therefore, the Panel will consider the Parties' competing cost causation methods.

[145] Ibid.
[146] Ibid.

FEI submits that it followed cost causation principles to inform its proposed Operating Fee, as FEI is basing the Operating Fee on various permit fees that would be avoided by FEI ratepayers under the New Operating Agreement, and accounting for probable efficiencies and avoidance of costs related to potential litigation.[147] In 2016, FEI calculated that the Avoided Costs totalled $600,000.

The City also submits that the cost causation principle may also be applied from the City's perspective, yielding a different result. The City argues that it incurs costs as a result of FEI's presence in the City, and these costs are therefore caused by FEI and should be reimbursed to the City.

The City estimates that it incurs annual costs in the range of $4 million as a result of FEI's use and occupation of highways and other public places, based on the Aplin Martin report and the City's estimates of operational costs and indirect costs.[148] In light of the $3.4 million that the City's proposed Operating Fee would generate, the City submits that its proposal is reasonable.

However, the Panel finds that there is a clear distinction between these two views of cost causation. FEI views cost causation to mean the Operating Fee should compensate the City for offsetting reductions in costs to ratepayers as a result of the New Operating Agreement, whereas the City views that the Operating Fee should compensate the City for FEI's use of public places in Surrey.

The Panel is persuaded that FEI's view of cost causation is the most applicable in this instance. While the Panel notes that the existing operating agreement has resulted in disputes, it has, nevertheless operated for over six decades and involves an overall exchange of value that had been agreed to by the Parties. As part of that exchange in value, FEI uses and occupies public places in the City for its operations and the City receives municipal taxes and permit-type fees in return. Thus, the Panel is of the view that the status quo was a reasonable exchange of value, and the New Operating Agreement was meant to clarify enforceability and reduce disputes rather than to address any long-standing economic inequities. Therefore, the Panel will look at the incremental changes to the agreement, namely an Operating Fee in exchange for other value to ratepayers in the New Operating Agreement.

The Panel recognizes that the New Operating Agreement contains many revised terms compared to the previous agreement, and that most of the terms in the Agreement cannot be ascribed a specific monetary value. However, FEI has identified costs that it will avoid as a result of the New Operating Agreement, and given the choice between the Parties' views, the Panel finds that FEI's interpretation of cost causation most closely matches the Operating Fee with benefits received by FEI ratepayers.

The Panel is not persuaded by the City's argument that an Operating Fee should be set on the basis that the Operating Fee is solely compensation for FEI's use of the City's public places. The Panel agrees that FEI does use the City's public places, but the New Operating Agreement contains many contractual terms, each of which may provide value to one or both of the Parties, and the Operating Fee is merely one of those terms. The Panel considers that the Operating Fee should be considered in the context of the overall exchange of value, and not merely compensation for one aspect. Therefore, the Panel does not find that the Operating Fee should be set on the basis that it is solely compensation for FEI's use of the City's public places.

[147] Exhibit B1-13, FEI response to BCUC IR 16.2.1.
[148] Exhibit B2-14, City response to BCUC IR 16.6.

Operating fee level

Given our determination that the Operating Fee shall be calculated on the basis of cost causation, the Panel has examined the evidence to establish the costs to ratepayers avoided by the New Operating Agreement. FEI submits that the New Operating Agreement would have saved ratepayers $600,000 in 2016, in the three categories of permit and cut fees, operating efficiencies, and avoidance of potential litigation. The City has not provided evidence of the savings to ratepayers as a result of the New Operating Agreement, as it disagrees that this is the correct basis for setting the Operating Fee.

The Panel is persuaded that FEI's calculation of $600,000 is a reasonable figure for the Avoided Costs in 2016. Considering the cost causation basis that the Panel has established, the Panel finds that $600,000 would have been an appropriate level for the Operating Fee in 2016.

Calculation method

The Panel will address how the Operating Fee will be calculated in each year of the New Operating Agreement.

The Panel previously determined that the Operating Fee will offset FEI's Avoided Costs, which consist of permit and cut fees and related costs. The Panel is of the view that the method of calculating the Operating Fee should match as closely as possible the changes in the Avoided Costs over the term of the New Operating Agreement. However, the Avoided Costs will no longer be incurred once the New Operating Agreement is in place, and thus cannot be measured and used as a basis for calculating the Operating Fee.

Both applicants suggest that the Operating Fee be calculated as a percentage of some other variable. The City proposes to base the Operating Fee on gross revenues, in line with the other 74 operating agreements that FEI has where an operating fee is paid, while FEI proposes to base the Operating Fee on delivery margin.

Changes in gross revenues earned by FEI are correlated to changes in the price of natural gas, and there is no clear correlation between changes in the price of natural gas and FEI's Avoided Costs. Conversely, delivery margin is at least partially related to the costs of FEI's delivery system within the City, and thus may serve as a more reliable proxy for FEI's activity and hence for Avoided Costs.

In addition, as established by FEI, delivery margin is less volatile than gross revenues. The Panel also notes that the use of delivery margin as a basis for calculating an operating fee has been suggested to FEI by the BCUC in the past.[149]

For these reasons, the Panel finds that the delivery margin forms a better basis for the calculation of the Operating fee than the gross revenues.

FEI has calculated that its normalized delivery margin in 2016 was $82.5 million, and that the $600,000 in avoided costs in 2016 would be 0.7 percent of the delivery margin. The Panel accepts that these figures are reasonable, and that 0.7 percent of delivery margin is an appropriate method to calculate the Operating Fee for the duration of the New Operating Agreement.

[149] BCUC Order C-7-03.

3.5 Additional Fees

This proceeding has raised a potential issue regarding the City's jurisdiction to charge additional fees to FEI in respect of FEI's work and occupancy of public places in Surrey. The term Additional Fees is defined in this Decision to refer to all the fees in section 5.1 (a) from the proposed New Operating Agreement, reproduced in section 3.5.2 of this Decision below for convenience.

3.5.1 BCUC jurisdiction regarding Additional Fees

This section of the decision will address the jurisdictional issue of whether the City has the right to charge such Additional Fees to FEI where to do so would supersede or impair a power conferred on the BCUC or an authorization granted to a public utility.

Section 121 of the UCA provides:

121 (1) nothing in or done under the Community Charter or the Local Government Act

(a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or

(b) relieves a person of an obligation imposed under this Act or the Gas Utility Act.

(2) In this section, "authorization" means

(a) a certificate of public convenience and necessity issued under section 46

Sections 8(10) and 10 of the *Community Charter* provide:

8 (10) Powers provided to municipalities under this section

(a) are subject to any specific conditions and restrictions established under this or another Act, and

(b) must be exercised in accordance with this Act unless otherwise provided.

10 (1) A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.

(2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

3.5.2 Evidence

An Agreed Term in both Parties' proposed versions of the New Operating Agreement defines and addresses additional fees:

5.1 General Rule

Except for taxes payable by FortisBC, including the taxes payable pursuant to section 644 of the Local Government Act, R.S.B.C. 2015, c. 1, as amended, the payment of the costs of all services and utilities consumed in respect of FortisBC's operations, or as specifically provided in this Agreement,

(a) the Municipality will not charge or levy, or be entitled to receive from FortisBC, any approval, license, inspection or permit fee, or charge of any other type, or require a deposit or other form

> of security, that in any manner is related to or associated with FortisBC undertaking Work or operating Company Facilities in any Public Place or in any manner related to or associated with FortisBC exercising the powers and rights granted to it by this Agreement;
>
> (b) the Municipality will not require FortisBC to seek or obtain approvals, permits or licenses of or from the Municipality for FortisBC's occupancy and use of Public Places, including undertaking Work, pursuant to this Agreement; and
>
> (c) FortisBC will not charge or levy, or be entitled to receive from the Municipality, any approval, license, inspection or permit fee, or charge of any other type, or require a deposit or other form of security, that in any manner is related to or associated with the Municipality undertaking work on or operating Municipal Facilities in any Public Place or in any manner related to or associated with the Municipality exercising the powers and rights granted to it by this Agreement.[150]

In its Application, the City states that it agrees to waive any Additional Fees, on condition of receiving from FEI the Operating Fee at 3 percent of gross revenues.[151, 152]

The City confirms that it collects the Additional Fees and takes the position that the 1957 Agreement does not preclude it from collecting such fees in accordance with City bylaws, nor does it exempt FEI from these fees.[153] The City states that "There is no formal agreement between the City of Surrey and FEI related to the collection of Additional Fees… The amounts are set through City by-laws."[154] The City further states that FEI has been responsible for paying Additional Fees since 1988. However, the City does not have records to confirm whether these Additional Fees were charged to and paid by FEI each year since 1988.[155]

The City states that it would forgo collection of $358,730 in estimated Additional Fees in lieu of receiving a 3 percent Operating Fee on gross revenue (based on "1,703 Road Right-of-way Use Permits, 305 Traffic Obstruction Permits and a significant amount of pavement cut fees in Surrey"). It further suggests given that "FEI and/or its contractors only secure 10 - 15% of the permits they ought to in a typical year," the annual collections (which has been increasing from roughly $15,000 to $28,000) is [sic] drastically understated for what the permit fees should have been and that the historical collection numbers are "not representative of the permit fees FEI owes the City for FEI's activities in public places."[156]

FEI states in its Application that, in circumstances where FEI crews are deployed to install gas services (as opposed to FEI's contractors), the City is requiring FEI to pay traffic obstruction fees. In circumstances where FEI has retained contractors to perform work, the City is requiring FEI's contractors to pay permit fees for FEI's gas installation activities. FEI is of the view that it is not required to pay fees or obtain permits under the 1957 Agreement. Nevertheless, practical considerations – such as a desire to maintain a working relationship with the

[150] Exhibit B2-1, City Application, Appendix B, p. 7 ; Exhibit B1-1 FEI Application, Appendix A, p. 7.
[151] Exhibit B2-1, City Application, Section 4(i), p. 8.
[152] Exhibit B2-15, City response to CEC IR 6.1.
[153] Exhibit B2-8, City response to BCUC IR 2.1, BCUC IR 2.1.1.
[154] Ibid., City response to BCUC IR 2.1.2.
[155] Ibid., City response to BCUC IR 2.1.3.
[156] Ibid., City response to BCUC IR 2.4.

Municipality and a need to conduct work without delay – have necessitated that FEI and its contractors pay the fees and accede to the City's permit and approval requirements in order to avoid disputes.[157]

3.5.3 Parties' submissions

FEI

FEI disputes the City's entitlement to collect any Additional Fees from FEI at all and submits that "its position that Surrey cannot levy permit fees from a public utility operating under a CPCN is supported by s. 121 of the UCA and a Commission decision."[158]

FEI submits that since the issuance of the 1955 CPCN, City by-laws governing permit fees, which were passed under the *Local Government Act*, are subordinated to the CPCN pursuant to section 121 of the UCA.[159]

The City

In response to FEI, the City submits that nothing in the UCA prevents the City from charging permit fees to FEI. It notes FEI relies on section 121 of the UCA, but submits that municipal permit fees in no way supersede or impair a power conferred on the BCUC or an authorization granted to FEI...".[160] The City states that:

> …the BCUC, in exercising its powers under sections 32, 33 and 36 of the UCA, has the power to make orders that supersede municipal requirements including By-laws. There is no dispute… that the BCUC can issue orders that supersede and override municipal requirements, including By-laws, if the BCUC considers such municipal requirements are an excessive burden on the gas utility (and not in the public interest)… But certainly that does not mean that FEI is exempt from all municipal permit fees in the province. Municipal requirements including permit fee requirements apply to FEI unless the BCUC, by order, supersedes such requirements in support of the public interest.[161]

In its response to Panel IRs, the City argues that any novel approach to setting the Operating Fee would not be in the public interest as it would "lack transparency and consistency" across the Province,[162] in contrast to FEI's rates which are consistent across the Province.

The CEC

The CEC agrees with FEI that the City "does not have the independent right to charge the utility fees outside of an Operating Agreement, as the natural gas utility operation in the City is a matter of Commission jurisdiction."[163]

[157] Exhibit B1-1, FEI Application, Section 2.2, pp. 5–6.
[158] FEI Final Argument, p. 29, paras. 64-65.
[159] Ibid., p. 30, para. 67.
[160] City Reply to FEI Final Argument, pp. 11-12, para 34.
[161] Ibid., p. 12, para. 35.
[162] City Final Argument on New Evidence, p. 9, para. 30.
[163] CEC Final Argument, p. 7, para. 42.

3.5.4 Panel determination

The Panel determines that any City by-laws purporting to charge Additional Fees to FEI are of no force and effect where they are superseded by or impair an order of the BCUC in a term specified in the new Operating Agreement or where they impair the "authorization" granted to FEI by the 1955 CPCN.

The issue is whether the City can charge FEI the Additional Fees through its by-laws enacted pursuant to the *Community Charter*, notwithstanding that such Additional Fees will be prohibited under the terms in section 5 of the New Operating Agreement, as specified by the above order of the BCUC.

FEI relies on section 121 of the UCA to support its position that City by-laws charging Additional Fees passed pursuant to the Local Government Act may not supersede or impair a power conferred on the Commission or an authorization granted to a public utility.

As previously stated, the City agrees that there is no dispute that the BCUC can issue orders that supersede and override municipal requirements, including by-laws *provided* the BCUC considers such municipal requirements are an excessive burden on the gas utility (and not in the public interest).

In the Panel's view, section 121 of the UCA makes it clear that nothing done by the City under the *Community Charter* or *Local Government Act* can supersede or impair a power conferred on the BCUC or an authorization granted to FEI as a public utility. However, the Panel disagrees with the City's suggestion that section 121 of the UCA is limited in its application to circumstances where the BCUC considers such municipal requirements are an excessive burden on the gas utility and not in the public interest. There is nothing in the clear language of section 121 of the UCA that could support such an interpretation, either expressly or by implication.

In the circumstances of this proceeding, the City's by-laws charging Additional Fees enacted pursuant to the *Local Government Act* will be superseded under s. 121 by the power conferred on the BCUC to make orders under section 32 of the UCA to specify terms of an Operating Fee in the New Operating Agreement. In the Panel's view, such by-laws are of no effect against FEI to the extent they are superseded by the provisions of the New Operating Agreement, specified by Order of the BCUC.

The City also states it will waive its by-laws charging the Additional Fees to FEI provided FEI agrees to pay an Operating Fee under the proposed New Operating Agreement of 3 percent of gross revenue. However, FEI has not agreed. The Operating Fee is now a Disputed Term which both the City and FEI have brought in their respective Applications to the BCUC pursuant to section 32 of the UCA. Since the Panel has decided, in this proceeding, to specify an Operating Fee in the New Operating Agreement that is less than 3 percent of gross margin, the Panel assumes the City would take the position that it is entitled to continue to charge the Additional Fees.

The Panel disagrees. Section 5 of the New Operating Agreement prohibits the City charging Additional Fees, and the New Operating Agreement is being specified by an Order of the BCUC. Any by-laws charging Additional Fees would be superseded by this Order under section 121 of the UCA. **For additional certainty, the Panel orders the City not to charge FEI Additional Fees while the New Operating Agreement is in force**.

4.0 Relocation Cost Definition – Upgrading/Betterment Cost

Relocation Costs arise when one of the Parties to the proposed New Operating Agreement undertakes an activity that requires the relocation of facilities of the other party. Both Parties agree that this occurs typically but not exclusively when the City requests that FEI relocate its facilities.

The Parties disagree on the definition of Relocation Costs to be included in the proposed New Operating Agreement. The Parties' proposed definitions of Relocation Costs are found in their respective versions of section 1 of the proposed New Operating Agreement, which address definitions. Once agreed upon, the definition of Relocation Costs will be common to both Parties as it will apply regardless of which Parties' facilities are being relocated.

For clarity, in this Decision we will refer to the Requesting Party as the party who requests a relocation of facilities, and the Relocating Party as the party of whom a relocation of facilities is requested.

4.1 Application

In its Application, the City proposes that Relocation Costs be defined as follows:

> (s) "Relocation Costs" means the costs of a party to:
>
> (i) realign, raise, lower, by-pass, relocate or protect the party's facilities to accommodate the work of the other party;
>
> (ii) excavate material from around the facilities as needed to complete the work in (i);
>
> (iii) backfill the material referred to in (ii) and restore the surface; and
>
> (iv) flush water mains, shut down customer gas supply and customer relights as needed,
>
> and includes administration and overhead charges at rates consistent with the party's policy, or standard rates, for such charges, which rates must be reasonable, on the costs of labour, equipment and materials in items (i), (ii), (iii) and (iv), above, and applicable taxes, but excludes the value or incremental costs of any upgrading and/or betterment of the party's facilities or the facilities of third parties <u>whether or not such upgrading and/or betterment is required to comply with applicable Laws</u>;[164] [emphasis added]

In contrast, in its Application, FEI proposes that Relocation Costs be defined as follows:

> (s) "Relocation Costs" means the costs of a party to:
>
> (i) realign, raise, lower, by-pass, relocate or protect the party's facilities to accommodate the work of the other party;
>
> (ii) excavate material from around the facilities as needed to complete the work in (i);
>
> (iii) backfill the material referred to in (ii) and restore the surface; and
>
> (iv) flush water mains, shut down customer gas supply and customer relights as needed,
>
> and includes administration and overhead charges at rates consistent with the party's policy, or standard rates, for such charges, which rates must be reasonable, on the costs of labour, equipment and materials in items (i), (ii), (iii) and (iv), above, and applicable taxes, but excludes the

[164] Exhibit B2-1, City Application, Appendix B, pp 3–4.

value or incremental costs of any upgrading and/or betterment of the party's facilities or the facilities of third parties beyond that which is required to comply with applicable Laws or sound engineering practices;[165] [emphasis added]

The difference between the two proposals is that the City's would exclude from Relocation Costs all incremental costs of upgrades or betterments, whereas FEI's would include in Relocation Costs the incremental costs of upgrades or betterments to the extent that they are required to comply with applicable laws or sound engineering practices.

The sections below will address each of the Parties' proposed definitions of Relocation Costs. After considering the BCUC's jurisdiction to specify a definition of relocation costs, the Panel will consider separately the two areas of dispute regarding the relocation cost definition: the inclusion of upgrades and betterments to comply with applicable laws, and to comply with sound engineering practices.

4.2 BCUC jurisdiction to specify a Relocation Cost definition

This section addresses the BCUC's jurisdiction pursuant to section 32 of the UCA to specify terms and conditions of an operating agreement between a public utility and a municipality with respect to the definition of pipeline relocation costs. The matter is contentious because the *Oil and Gas Activities Act* (OGAA) and the associated *Pipeline Crossings Regulation* (PCR) address pipeline relocation costs, and the Parties do not agree on the BCUC's jurisdiction.

4.2.1 Applicable legislation

For ease of reference the legislation referred to in this section is set out below.

***Oil and Gas Activities Act* (OGAA)**

"permit" means a permit issued under section 25 and includes any conditions imposed on a permit;

"permit holder" means

(a) a person who holds a permit, and

(b) a person, if any, who is the holder of a location with respect to that permit;

"pipeline" means, except in section 9, piping through which the following is conveyed:

(a) petroleum or natural gas;

…

and includes installations and facilities associated with the piping, but does not include

(f) piping used to transmit natural gas at less than 700 kPa to consumers by a gas utility as defined in the Gas Utility Act

[165] Exhibit B1-1, FEI Application, p. 21.

The term “pipeline”, as defined above in the OGAA, is used in both the OGAA and the PCR*:*

Section 76 of the OGAA

(1) Subject to subsection (3), a person must not

(a)construct

(i)a highway, road or railway,

(ii)an underground communication or power line, or

(iii)any other prescribed work, or

(b)carry out a prescribed activity

along, over or under a pipeline or within a prescribed distance of a pipeline unless

(c)the pipeline permit holder agrees in writing to the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities,

(d)the commission, by order issued under subsection (2), approves the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities, or

(e)the construction or prescribed activity is carried out in accordance with the regulations.

(2) The commission, on application by a person referred to in subsection (1), may issue an order for the purposes of subsection (1) (d) and in doing so may impose any conditions that the commission considers necessary to protect the pipeline.

(3) The commission must approve

(a)the construction referred to in subsection (1) (a), and

(b)the carrying out of a prescribed activity under subsection (1) (b)

by the government or a municipality, but may impose conditions referred to in subsection (2) in the order issued under that subsection.

(4) The commission, for the purposes of deciding whether to issue an order under subsection (1) or impose conditions under subsection (2), may require a pipeline permit holder to submit information regarding the pipeline permit holder's pipeline.

(5) The commission may order a pipeline permit holder whose pipeline is the subject of an order issued under subsection (2) to do one or both of the following:

(a)with the approval of the Lieutenant Governor in Council, relocate the pipeline to facilitate the construction or prescribed activity approved by the order issued under subsection (2);

(b)take the actions specified in the order that the commission considers necessary to protect the pipeline.

(6) In relation to an order of the commission referred to in subsection (5), the Lieutenant Governor in Council

(a)may order that a person other than the pipeline permit holder must pay the costs, or a portion of the costs, incurred in carrying out the commission's order, or

(b)may approve the payment of any of those costs from the consolidated revenue fund.

(7) If there is an inconsistency between an order or an approval made under subsection (6) and a regulation made under section 99 (1) (m.1), the order or approval prevails to the extent of the inconsistency.

Section 99 of the OGAA

(1)The Lieutenant Governor in Council may make regulations as follows:

(a) prescribing activities for the purposes of the definition of "oil and gas activity" in section 1 (2);

…

(m.1) respecting how costs incurred in relation to

(i) the construction of anything referred to in section 76 (1) (a),

(ii) the carrying out of an activity under section 76 (1) (b), or

(iii) the relocation referred to in section 76 (5) (a) and any actions referred to in section 76 (5) (b)

are to be allocated between the pipeline permit holder and the person doing anything referred to in subparagraphs (i) to (iii) of this paragraph;

…

Pipeline Crossings Regulation

3(1) Subject to subsections (3) to (5), an enabled person is responsible for all costs incurred by the enabled person in carrying out an enabled action.

(2) Subject to subsections (3) to (6), an enabled person is responsible for any costs incurred by a pipeline permit holder as a result of the enabled person's carrying out of an enabled action, including, without limitation, costs

(a) to realign, raise or lower the pipeline,

(b) to excavate material from around the pipeline, and

(c) to add casing or other appurtenances that an official considers necessary for the protection of the pipeline.

(3) Subject to an order issued under section 76 (6) of the Act and to subsections (4) to (6) of this section, a specified enabled person is not responsible for any costs incurred by a pipeline permit holder as a result of the carrying out of an enabled action.

(4) The costs referred to in subsection (3) must be shared equally between the specified enabled person and the pipeline permit holder if

(a) the specified enabled person is a municipality, and

(b) the enabled action is the construction of a new highway within the boundaries of that municipality on either an existing right of way or a newly dedicated right of way.

(5) The costs incurred by a pipeline permit holder as the result of the carrying out of an enabled action must be shared equally between the enabled person and the pipeline permit holder if the enabled action is the construction of a new road for a subdivision within a municipality.

(6) The cost allocation rules set out in subsections (2) to (5) may be varied by agreement between the parties.

4.2.2 Parties' submissions

The City

The City explains that the PCR is the law in British Columbia, since the OGAA grants the Lieutenant Governor in Council (LGIC) the power to make such regulations.[166] The City acknowledges that the PCR does not apply to Gas Mains, being pipelines at a pressure of less than 700 kPa used to convey natural gas to consumers by a gas utility.[167]

The City argues that its proposed definition of Relocation Costs is "entirely consistent with the Pipeline Crossing[s] Regulation", which provides no indication that the costs of upgrades and betterments are to be included. Thus, it considers that its proposed definition "is designed to provide greater certainty to the parties to avoid future disputes."[168] The City adds that having a common definition of relocation costs for Gas Mains and High–Pressure Pipelines will be easier for the parties to administer, and should avoid future disputes.[169]

The City argues that "[the] Pipeline Crossing[s] Regulation states the scope of costs that are the subject of the regulation's cost allocation methodology, and this regulation is the law in British Columbia for the allocation of FEI's costs to relocate a high pressure pipeline…to accommodate a municipality's 'enabled action' under the regulation."[170] Further, the City states that the BCUC does not have the jurisdiction to impose a term that is "contrary to the Pipeline Crossing[s] Regulation and results in a contravention of it, including the scope of costs that are the subject of the regulation's cost allocation methodology."[171]

FEI

FEI replies by stating that the execution of a New Operating Agreement between the Parties "reconciles the UCA and the Pipeline Crossing[s] Regulation." Thus, the default arrangement contemplated by the PCR is varied as part of the New Operating Agreement, which would be entered into on terms specified by the BCUC under the jurisdiction of section 32 of the UCA.[172]

The CEC

The CEC submits that the BCUC does not have the jurisdiction to make an order contrary to the PCR.[173]

[166] City Final Argument, pp. 30–32, paras. 73–76.
[167] Ibid., p. 32, para. 77.
[168] Ibid., p. 41, paras. 103–104.
[169] Ibid., p. 41, para. 101.
[170] Ibid., p. 40, para. 98.
[171] Ibid., para. 99.
[172] FEI Reply Argument, p. 31, para. 68.
[173] CEC Final Argument, p. 19, para. 129.

4.2.3 Panel discussion

The Panel finds that the BCUC has the jurisdiction to specify terms of the New Operating Agreement that define relocation costs with regards to Gas Mains and to High-Pressure Pipelines.

The OGAA defines pipelines as piping through which natural gas is conveyed, but excludes "piping used to transmit natural gas at less than 700 kPa to consumers by a gas utility as defined in the *Gas Utility Act.*" The Panel will refer to pipelines used to convey natural gas at less than 700 kPa to consumers by a gas utility as Gas Mains, and to other natural gas pipelines as High-Pressure Pipelines.

Section 99(1) of the OGAA permits the LGIC to make regulations. OGAA section 99(1) (a) permits regulations prescribing activities for the purposes of the definition of "oil and gas activity," and OGAA section 99(1) (m.1) permits regulations regarding the allocation of costs in relation to carrying out of prescribed activities referred to in OGAA section 76(1) (b). The LGIC has enacted the PCR pursuant to OGAA section 99(1), and thus the PCR is an enactment of British Columbia which governs the definition and allocation of High-Pressure Pipeline relocation costs incurred by FEI when performed at the request of the City.

The BCUC's jurisdiction to specify terms of a New Operating Agreement under section 32 of the UCA is not unfettered. The UCA does not give the BCUC the express authority to specify terms that are in conflict with the PCR, and no party has suggested that such jurisdiction exists. Therefore, the Panel finds that the BCUC does not have the jurisdiction to specify terms in the proposed New Operating Agreement that are in conflict with the PCR.

Further, the BCUC can specify terms of the New Operating Agreement that are consistent with the PCR and no participant has disputed that. Therefore, the Panel finds that the BCUC has the jurisdiction under section 32 of the UCA to specify terms in the proposed New Operating Agreement to the extent that those terms are not in conflict with the PCR.

Both Parties and the CEC agree that the PCR applies to High-Pressure Pipelines and not to Gas Mains. Because the PCR does not apply to Gas Mains, the Panel finds that it has the jurisdiction under section 32 of the UCA to specify as a term of the New Operating Agreement any definition of relocation costs with respect to Gas Mains.

The City argues that the PCR "states the scope" of Relocation Costs, and that the BCUC does not have the jurisdiction under section 32 of the UCA to specify a different definition of Relocation Costs in the New Operating Agreement, as this would be in contravention of the PCR. The Panel agrees that the BCUC does not have the jurisdiction to specify terms in the New Operating Agreement that are in conflict with the PCR, but disagrees that the PCR "states the scope" of the Relocation Costs in the manner suggested by the City.

Subsection 3(2) of the PCR lists three types of costs associated with the relocation of facilities. However, this is not an exhaustive list of all possible Relocation Costs. Rather, the regulation states that "any costs incurred" are applicable, "including, without limitation" the three types specifically identified. Thus, any costs incurred in relocating a High-Pressure Pipeline, whether or not specifically identified in the PCR, are included within the scope of the PCR, and no definition of relocation costs would be in contravention of the PCR. Therefore, the Panel finds that the BCUC has the jurisdiction under section 32 of the UCA to specify as a term of the New Operating Agreement any definition of relocation costs with respect to High-Pressure Pipelines.

4.3 Cost of upgrades and betterments to comply with applicable laws

With respect to the relocation of facilities, the Parties differ over the degree to which the definition of Relocation Costs should include the value or incremental costs of any upgrading and/or betterment of the party's facilities or the facilities of third parties to comply with applicable laws.

4.3.1 Evidence

The City provides an example of how codes and standards affect the cost of relocating gas pipeline facilities:

> Example #3: The City is making modifications (raising and/or widening) to an existing roadway bridge to which FEI has an existing gas pipeline attached. FEI requires the City to relocate[174] the gas pipeline prior to the bridge modifications works being done and as part of such FEI requires the City to add isolation valves on FEI's gas main on either side of the river crossing because that is identified within CSA Z662 standard for river crossings. The City is of the position that if FEI's existing pipeline does not have isolation valves on either side of the bridge then the City should not have to pay FEI's costs to bring FEI's pipeline into compliance with the standard. Projecting forwards, it is not unreasonable to foresee that as CSA Z662 continually changes, or another standard may come into effect, new standards may be introduced for gas pipelines across rivers in seismically sensitive areas, such as requiring horizontally directional drilling below the river or seismically restraining pipelines to bridge structures. Using the example illustrated above, if any such standard were to come into effect, it would be the City's position that such modifications to FEI's pipelines to meet the new seismic standards, including drilling beneath the river, would be solely the cost of FEI and not Surrey's because of the change in standards as well as the risk management and operational savings that FEI would enjoy.[175]

4.3.2 Parties' submissions

The City

The City argues that the definition should specifically exclude "the value or incremental costs of any upgrading and/or betterment…whether or not such upgrading and/or betterment is required to comply with applicable laws."[176] The City believes that "[it] should not be the City's responsibility to reimburse FEI for its costs to bring its infrastructure up to standards. Compliance with codes and standards is the responsibility of the asset owner."[177]

The City cites the example of standard CSA Z662, which requires, among other things, that isolation valves on FEI's gas mains be added on either side of a river crossing. If the City requires that a gas pipeline crossing a river be relocated, then it argues that FEI should pay for isolation valves to be installed as part of the relocation if they were not present before.[178]

[174] In this example, to conform with the terminology used in this Decision, the Requesting Party is the City and the Relocating Party is FEI.
[175] Exhibit B2-14, City response to BCUC IR 2.13.1.
[176] City Final Argument, p. 41, para. 105.
[177] Ibid., p. 43, para. 112.
[178] City Final Argument, pp. 43–44, paras. 112, 116.

FEI

FEI replies that its costs for upgrades and betterments to comply with applicable laws would not be incurred but for a relocation request, and thus these costs should be borne by the Requesting Party. FEI observes that the assets being relocated are "already compliant with laws and codes and standards," and hence would not need to be upgraded "but for the request to relocate".[179]

FEI argues that its proposal reflects the principle of cost causation.[180] FEI states that it installs its assets in accordance with the code requirements at the time of installation, and that in most cases it is only required to upgrade its facilities when they are "disrupted as a result of relocation or other activities".[181] Thus, relocations requested by another party are the cause of the cost of the facility upgrades, and FEI's customers should not be responsible for the costs that they "would not have incurred but for the relocation request."[182]

The CEC

The CEC submits that it is reasonable for the Requesting Party "to bear the costs of changes caused by its relocation requests."[183] It argues that it is reasonable for the Requesting Party to bear the costs "for system improvements that would not otherwise be undertaken except for the…request for relocation."[184]

BCOAPO

BCOAPO submits 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."[185]

4.3.3 Panel determination

For the reasons that follow, **the Panel specifies that the definition of Relocation Costs in the New Operating Agreement shall include the costs associated with upgrades and betterments required to comply with applicable laws as this is in the public interest.**

The principle of cost causation is a fundamental part of utility regulation in BC. Utilities are entitled to recover costs from ratepayers, so long as those costs are legitimately required to provide service to those ratepayers. That is, if the costs are "caused" by providing service, then they may be recovered, otherwise they may not. The Panel agrees with FEI that the principle of cost causation is applicable in this matter, and that the cause of Relocation Costs must be examined to determine who should pay for them.

The Panel is satisfied that the facility improvements made to meet the applicable laws prevailing at the time of a relocation are due solely to the relocation itself. As FEI argues, the facilities were compliant when they were

[179] FEI Reply Argument, p. 25, para. 55.
[180] FEI Final Argument, p. 60, para. 122.
[181] Ibid., p. 61, para. 126.
[182] Ibid., p. 63, para. 131.
[183] CEC Final Argument, , p. 24, para. 159.
[184] Ibid.
[185] BCOPAO Final Argument, p. 5.

installed and would have remained so but for the relocation. FEI is obligated to improve its facilities to achieve compliance with applicable laws, but this obligation only arises due to the relocation request.

Since the facility improvements are due solely to the relocation request, it follows that the cost associated with these improvements are caused by the Requesting Party, and therefore should be borne by the Requesting Party. It is not appropriate that FEI's ratepayers should pay the cost of relocations requested by the City, since these relocations are not required for FEI to provide service to its ratepayers. Similarly, it is not appropriate that the City's taxpayers should pay for relocations of City facilities requested by FEI; such relocations should be paid for by FEI or its ratepayers.

The City's argument that FEI is responsible for compliance with applicable laws, and that the City should not therefore "reimburse FEI for its costs to bring its infrastructure up to standards" is not compelling. If the City did not request a facility relocation, FEI would not have been obligated to bring its facilities into compliance with the current applicable laws, and therefore would not have incurred the expense of so doing.

The Panel notes that if a Requesting Party were to identify situations where a Relocating Party had been obliged to improve its facilities prior to a relocation, and had not done so, then the Requesting Party would have the ability to challenge the Relocation Cost estimates in this regard using the dispute resolution process agreed by both Parties in the New Operating Agreement.

4.4 Cost of upgrades and betterments to comply with sound engineering practices

A further difference between the two Parties' proposed definitions is that the City's definition would exclude from Relocation Costs all incremental costs of upgrades or betterments, whereas FEI's would include in Relocation Costs the incremental costs of upgrades or betterments to the extent that they are required to comply with sound engineering practices.

4.4.1 Evidence

Section 4.1(a) of the proposed New Operating Agreement, a term agreed to by both Parties, states:

> In its occupancy and use of Public Places, including conduct of Work, FortisBC shall conform to sound engineering practices and comply with all applicable Laws…

In response to an IR, FEI provides its definition of the phrase "sound engineering practices:"

> "Sound Engineering practices" and similar terms/variations are commonly applied in the construction industry and in construction related documents to reflect the exercise of good judgment in the circumstances, generally taking into account such factors as applicable laws (including those noted in the response to BCUC IR 1.6.1), standards and best practices of other natural gas utilities within North America, and site and/or work specific conditions that require more than minimum design standards for a safe installation.
>
> The obligation to carry out all work (whether New Work, Service Line Work, relocation work, etc.) in accordance with sound engineering practices and in compliance with applicable Laws are positive obligations in the Standard Operating Agreement (Keremeos terms) (please refer to the response to BCUC IR 1.2.1, Attachment 2.1, Keremeos column, Sections 5.1 (Row R63) and Section 6.4 (Row R108) and the Proposed Operating Agreement column FEI Proposed Operating Agreement, Section 4.1 (Row R63)). These positive obligations were transferred as a required

inclusion to the calculation of Relocation Costs to ensure the performance obligation and the reimbursement obligation were appropriately linked and aligned.[186]

FEI supplies the text used in the "Keremeos terms" regarding this phrase:

> All work carried out by FortisBC shall be carried out in accordance with sound engineering practices.[187]

4.4.2 Parties' submissions

The City

The City argues that it should not be responsible for the cost of upgrades when relocating facilities associated with FEI "applying its own discretionary standards"[188] and submits that the term "sound engineering practices" would make the definition of Relocation Costs ambiguous and is "too imprecise to be used."[189]

The City adds that, by excluding the term "sound engineering practices" from the definition of relocation costs, there will be "greater certainty to the parties to avoid future disputes."[190]

FEI

FEI argues that the concept of "sound engineering practices" is commonly used in the industry, and reflects the incorporation of "applicable laws…, codes and standards and best practices of other natural gas utilities within North America, and site and/or work specific conditions that require more than minimum design standards for a safe installation."[191]

FEI adds that the term "sound engineering practices" is already incorporated in section 4.1(a) of the proposed New Operating Agreement, a term to which the City has agreed.[192] Thus, FEI argues that the City has already acknowledged that the term has a meaning that is sufficiently clear and understood.

FEI also points out that the Parties have already agreed to a dispute resolution process in section 17 of the New Proposed Agreement.[193] In the event that the Parties cannot agree on the meaning of "sound engineering practices" in a particular circumstance, either party may refer the matter for dispute resolution.

In reply to the City, FEI states that relocation costs would not include FEI's "own discretionary standards", but merely the cost associated with compliance with "applicable Laws or sound engineering practices."[194] FEI argues that the City's concurrence with FEI's proposed explanation of how relocation costs would work provides

[186] Exhibit B1-6, FEI response to BCUC IR 1.6.2.
[187] Exhibit B1-6, FEI response to BCUC IR 1.2.1, Attachment 2.1 row 108, column "Keremeos Agreement – Clean"
[188] City Final Argument, p. 42, para. 107.
[189] City Further to Final and Reply Arguments, p.17, para. 50
[190] City Final Argument, p. 41, para 104
[191] FEI Final Argument, p.64, para 134
[192] FEI Final Argument, pp. 64–65, para. 135.
[193] Ibid., p. 67, para. 140.
[194] FEI Reply Argument, p. 25, para. 54.

sufficient consensus to alleviate the City's concerns. FEI observes that the BCUC, in the Coldstream decision cited by the City, included a requirement that FEI perform work "in accordance with sound engineering practice…to ensure that the appropriate professional judgement is applied by FEI in its engineering within the Municipality."[195]

The CEC

The CEC agrees with FEI that the phrase "sound engineering practices" is sufficiently clear, not uncommon, and used in other agreements.[196] It submits that it would not be prudent "for City engineers to be provided with a significant opportunity to question the required and/or sound engineering practices needed to maintain a natural gas system", but add that either party may avail itself of the dispute resolution process set out in the Proposed Agreement.[197]

4.4.3 Panel determinations

For the reasons that follow, **the Panel specifies that the definition of Relocation Costs in the New Operating Agreement shall include the costs associated with upgrades and betterments required to comply with sound engineering practices as this is in the public interest.**

The improvements to meet "sound engineering practices" are similar in nature to improvements required to comply with applicable laws; neither would occur but for a request to relocate the facilities concerned. The Panel considers, however, that there is a difference between the standard of using "sound engineering practices," determined by FEI and its engineers, and compliance with applicable laws, which are not determined by FEI.

FEI engineers are expected to use their professional judgement when designing and performing relocation work, which may on occasion involve building to a higher standard than specifically provided for in the current codes and standards. This responsibility exists regardless of who is paying for the relocation. The Parties do not disagree on whether FEI should adopt sound engineering practices, merely who should pay for implementing them.

The Panel acknowledges the City's concern that the phrase "sound engineering practices" is somewhat imprecise. However, this phrase is commonly used in other similar agreements, and the City has agreed to its use in section 4.1(a) of the proposed New Operating Agreement, suggesting that it is sufficiently meaningful to the City. Thus, the Panel considers that the phrase "sound engineering practices" is sufficiently precise and meaningful to be used in the definition of Relocation Costs.

The City expresses concern that the phrase "sound engineering practices" may lead to disputes between the Parties, and the Panel acknowledges this possibility. However, disputes between parties to agreements are not uncommon, and the proposed New Operating Agreement contains a dispute resolution process to which both Parties have agreed. The question for the Panel is whether the dispute resolution process provides sufficient

[195] FEI Further Reply Argument to the City, p. 20, para. 44.
[196] CEC Final Argument, p. 25, para. 165.
[197] Ibid. p. 24, paras 161, 164.

protection such that the Requesting Party, typically the City, will not be obligated to pay more than is appropriate for relocation work.

It is a requirement of the proposed New Operating Agreement that the Relocating Party, when presented with a relocation request, provides the Requesting Party with "a detailed description of the required changes". Therefore, the Requesting Party has the opportunity to review the proposed scope of work, and to question its validity. It is then incumbent on the Requesting Party to examine and, if necessary, to challenge such information. Thus, the Panel considers that the Requesting Party has sufficient opportunity to examine and to challenge the scope of work, and to determine whether any "sound engineering practices" adopted are appropriate.

Should the Requesting Party disagree with the Relocating Party's proposed scope of work, and not be able to resolve the disagreement, they may avail themselves of the dispute resolution process. This process applies to "any matter arising in connection with this Agreement", and thus applies to differences regarding scope of work for relocation costs. The Panel considers that this dispute resolution process provides sufficient opportunity for the Requesting Party to resolve disputes regarding relocation costs including those based on "sound engineering practices" in a fair and conclusive manner.

The Panel has already found that improvements required to comply with applicable laws are an integral part of Relocation Costs, and that their costs should be borne by the Requesting Party. Notwithstanding the concerns raised by the City, which are addressed above, the Panel considers that improvements required to meet "sound engineering practices" are also an integral part of Relocation Costs and should be borne by the Requesting Party.

4.5 Lowest cost alternative

Both Parties make references in their evidence and argument to using "lowest cost alternatives" for Relocation Costs. The Panel believes that this suggestion has merit, but notes that neither party's proposed definition for Relocation Costs addresses the concept of lowest-cost alternatives. Therefore, the Panel addresses how this concept might be incorporated in the New Operating Agreement.

4.5.1 Evidence

Based on FEI's rebuttal evidence and response to City IR 1.3.4.1, the City understands that the following are the key terms of FEI's current proposal for a definition of Relocation Costs for the New Operating Agreement:[198]

[198] Exhibit B2-14, City response to BCUC IR 2.13.1.

Table 5: The City's Understanding of FEI's Current Proposal for Relocation Costs

	FEI Proposal	Reference
1.	The requesting party will be responsible for the appropriate apportionment of the lowest cost solution to meet applicable Laws (codes and regulatory standards – not company policies/practices).	FEI Rebuttal Evidence, page 3, lines 14-16
2.	The only case where the Relocation Costs covered by FEI's Proposed Operating Terms would include more than the amount required to meet codes and standards is if the requesting party (Surrey) insists on having FEI install a more expensive alternative or perform additional work for the City's own reasons.	FEI Rebuttal Evidence, page 3, lines 16-19
3.	For Gas Mains: • The amount subject to the allocation formula would be the least costly of the like for like steel or the equivalent capacity replacement PE Gas Main pipe needed to meet codes or regulatory standards. • Excavation, remediation, and other work involved in relocating the Gas Main itself remains the same irrespective of the pipe material chosen. • If FEI were to decide to increase the Gas Main pipe size to address future needs for increased capacity or otherwise improve the facilities, any such related additional or incremental costs above the least costly alternative (likely PE pipe) are paid by FEI.	FEI Rebuttal Evidence, page 3, lines 25-33
4.	For Service Lines: • The amount subject to the allocation formula would be the least costly of the code compliant alternatives to reconnect Service Lines.	FEI Rebuttal Evidence, page 4, lines 3-5
5.	For all relocation requests it is FEI's intention for the definition of Relocation Costs to capture only the cost of the lowest cost alternative necessary to comply with applicable Laws. That is, the Relocation Costs that are subject to the allocation methodology would include the lowest cost alternative for the Gas Main relocation plus the lowest cost alternative for the Service Line connections. FEI would pay for all additional or incremental costs associated with betterments, upgrades, improvements, or any other discretionary costs not required by applicable Laws.	FEI Rebuttal Evidence, page 5, lines 2-8
6.	Relocation Costs do not include costs related to relocation of facilities that are already identified for replacement under the owner's asset management plans.	FEI response to Surrey IR 1.3.4.1, Scenario #1

In response to a City IR, FEI provides a table of typical relocation scenarios and states that it would have no objection to including it in the Operating Terms for additional clarity: [199]

[199] Exhibit B1-9, FEI response to -City IR 1.3.4.1.

Table 6: Typical Relocation Scenarios

Scenario	Outcome	Rationale	Responsibility for Payment
1. **The** facilities that the **other party** has requested be relocated are already identified for replacement under **owner's** asset management plans	Relocation Costs do not include these costs	The decision to replace is merely accelerated by the request	Owner pays
2. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; and • identical replacement CAN be made under prevailing laws and sound engineering practices	Relocation Costs include the lesser of (a) the actual costs for the identical replacement; or (b) the actual costs of another more cost-effective code-compliant alternative	The costs are caused solely by the requesting party, and the owner would not have incurred them but for the request	Requesting party pays Relocation Costs, per appropriate apportionment
3. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; and • Identical replacement CANNOT be made under prevailing laws and sound engineering practices (asset or technology obsolete, etc. and alternatives are required to meet Laws and sound engineering practices)	Relocation Costs include the actual costs for what needs to be installed in conformity with prevailing Laws and sound engineering practice, since identical replacement is not possible	The costs are caused solely by the requesting party, and the owner would not have incurred them but for the request	Requesting party pays Relocation Costs, per appropriate apportionment
4. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; and • a more cost-effective (less expensive) and longer-term alternative, such as polyethylene (PE) pipe can be used under prevailing laws and sound engineering practices (no capacity increase)	Relocation Costs include the actual costs of the most cost-effective code-compliant alternative	The costs are caused solely by the requesting party, and the owner would not have incurred them but for the request	Requesting party pays Relocation Costs, per appropriate apportionment
5. **Party** requests a relocation of an asset that: • is not slated to be replaced under owner's asset management plans; • a more cost-effective (less expensive) and longer-term alternative, such as polyethylene (PE) pipe can be used under prevailing laws and sound engineering practices (no capacity increase); and • the **owner** takes the opportunity to increase the capacity or otherwise further improve the facilities	Relocation Costs include the actual costs of the most cost-effective code-compliant alternative but do not include the incremental costs, if any for the increase in capacity or further improvement(s)	The replacement costs are caused solely by the requesting party, and the owner would not have incurred them but for the request; additional costs would be excluded	Requesting party pays Relocation Costs, per appropriate apportionment; Owner pays for improvements

4.5.2 Parties' submissions

The City

If Table 6 above accurately describes the terms of FEI's current proposal for a definition of Relocation Costs, the City would agree that FEI's proposal is fair in principle, except for one detail.[200] The City continues to argue that Relocation Costs should not include the lowest cost alternative to comply with applicable Laws.[201]

[200] City Final Argument, p. 45, para. 114, row 5.
[201] City Final Argument, pp. 45–46, para. 115.

FEI

FEI replies that it concurs with the City's understanding of FEI's explanation of its proposed terms.[202]

FEI in turn provides five specific scenarios that typically arise, which it proposes to include in the new Operating Agreement.[203] These scenarios state that Relocation Costs should include the lowest cost alternative in a number of cases. For instance, in scenario number two, when an asset can be replaced by an identical asset and still be compliant with prevailing laws and sound engineering practices, the relocation costs should include the lesser of the actual costs of the identical replacement and the actual costs of another more cost-effective code-compliant alternative.

4.5.3 Panel discussion

The Panel notes that neither party's proposed definition for Relocation Costs addresses the concept of lowest-cost alternatives. Given the high degree of concurrence between the Parties in their arguments on this subject, and the possible benefits to ratepayers and Surrey residents of adopting the lowest cost alternative to relocations, the Panel encourages the Parties to incorporate the concept of lowest-cost alternatives in the final version of the New Operating Agreement.

5.0 Relocation Cost Allocation

In the previous section the Panel addressed the Parties' disagreement as to the definition of Relocation Costs, which definition applies equally to both Parties when requesting the relocation of each other's facilities.

The Parties also disagree on the Allocation of Relocation Costs (Allocation). However, this dispute only applies to the situation where the City is the Requesting Party and where FEI is the Relocating Party. There is no dispute in the reverse situation, since the Parties have agreed that FEI will always pay 100 percent of the Relocation Costs when it requests that the City relocate municipal facilities.

5.1 Application

Section 8(2) of the proposed New Operating Agreement addresses relocation of FEI facilities requested by the City. The Parties have proposed a different allocation in this instance.

In its version of section 8(2), FEI proposes to allocate Relocation Costs requested by the City as follows:

> *(c) Despite the cost allocation provisions of the Pipeline Crossings Regulation (B.C. Reg. 147/2012), the Municipality shall reimburse FortisBC for the Relocation Costs in the following amounts:*
>
> *(i) 100% of the Relocation Costs when the affected Company Facilities are Gas Mains;*
>
> *(ii) 50% of the Relocation Costs when the affected Company Facilities are High Pressure Pipelines.*

[202] FEI Reply Argument, pp. 24–25, para. 53.
[203] FEI Final Argument, pp. 66–67, para. 138.

(d) This section 8.2 is an agreement between the Municipality and FortisBC for the purpose of section 3(6) of the Pipeline Crossings Regulation.[204]

In its version of section 8(2), the City proposes to allocate Relocation Costs requested by the City as follows:

(c) The Municipality agrees to pay a contribution to the Relocation Costs incurred by FortisBC to accommodate a Municipal Project and such contribution shall be calculated in accordance with subsection 3(3) or 3(4) of the Pipeline Crossings Regulation (B.C. Reg. 147/2012), as applicable, whether the affected Company Facilities are High Pressure Pipelines or Gas Mains[205]

FEI's proposed Allocation differs between two cases: where the facilities being relocated are Gas Mains, and where they are High-Pressure Pipelines. The City's proposal, through its reference to sections 3(3) or 3(4) of the PCR, differs between two different cases: where the facilities are being moved due to the construction of a new highway (section 3(4)), and where they are being moved for other reasons.

The Panel has already found (section 4.2.3) that the BCUC has a different jurisdiction depending on whether relocations are of High-Pressure Pipelines or Gas Mains. The Panel will address these two cases separately.

5.2 BCUC jurisdiction to specify Relocation Cost Allocation

This section addresses the BCUC's jurisdiction pursuant to section 32 of the UCA to specify terms and conditions of an operating agreement between a public utility and a municipality with respect to the allocation of pipeline relocation costs. The matter is contentious because the OGAA and the associated PCR address pipeline relocation cost allocation, and the Parties do not agree on the jurisdiction of the BCUC.

5.2.1 Parties' submissions

The City

The City argues that "the BCUC does not have jurisdiction to specify the allocation as between FEI and the municipality of costs FEI incurs to relocate its pipelines to accommodate municipal projects if the pipeline is conveying natural gas at 700 kPa or higher. This is because the Pipeline Crossing[s] Regulation (B.C. Reg. 147/2012) prescribes the cost allocation for such pipeline crossings and relocations."[206]

The City submits that the BCUC's powers pursuant to section 32 of the UCA are broad, but that "[n]owhere in the *Utilities Commission Act* is the BCUC given the power to make an order that is contrary to FEI's obligations under section 21 of the *Oil and Gas Activities Act* or the cost allocation methodology of the *Pipeline Crossing Regulation.*"[207]

The City submits that "pursuant to subsection 3(6) of the [Pipeline Crossings] Regulation the cost allocation rules set out in subsections 3(3) and 3(4) may be varied by agreement between the parties."[208] However, the City

[204] FEI Final Argument, Appendix A, p. 14.
[205] City Final Argument, Appendix B, p. 16.
[206] City Final Argument, pp. 29–30, para. 72.
[207] City Final Argument, p. 33, para. 79.
[208] City Further Reply, p.19.

goes on to state that in relation to high-pressure pipelines, it "can, but does not, agree to a different allocation than that prescribed in sections 3(3) and 3(4) of the Pipeline Crossing Regulation."[209]

The City acknowledges that the PCR does not apply to Gas Mains, but argues that "[one] common definition will be easier for the parties to administer and should avoid future disputes."[210]

FEI

FEI agrees with the City that the PCR is not applicable to Gas Mains[211], but argues that the BCUC is "not constrained by the Pipeline Crossing[s] Regulation from ensuring a commercially reasonable outcome even when it comes to High Pressure Pipelines."[212] It submits that the BCUC has the authority to make its approval of other elements of the New Operating Agreement conditional on the City agreeing to a particular cost allocation for High-Pressure Pipeline Relocation Costs.[213] Further, FEI submits that "the Commission's exercise of its power under section 32 satisfies the requirements to depart from the default allocation in the Pipeline Crossing Regulation."[214]

FEI submits that the BCUC has the authority to depart from the default Relocation Cost allocation in the PCR by virtue of section 32 of the UCA.[215] It adds that the BCUC has already done this in the cases of the Vancouver Island Gas Company Ltd. and Victoria Gas Company (1988) Ltd., and the Chetwynd Decision.[216]

FEI argues that "the fact that the allocation [in the *Pipeline Crossings Regulation*] is only a default allocation contradicts the notion that other allocations are somehow unreasonable. The ability to contract out shows that allowing flexibility is the intent of the Regulation, and that any variety of agreed allocations would be equally defensible."[217]

Further, FEI provides the example of Coldstream, where it states that the BCUC approved the allocation of relocation costs to the requesting party over the objections of the municipality of Coldstream.[218] FEI argues that the BCUC's Coldstream Decision should be read to mean that specific contract terms, such as relocation cost allocation, would normally take precedence over more general terms, such as compliance with laws. Thus, FEI argues, the UCA being a Provincial law "allows the Commission to change the allocation when the pipeline owner is a public utility and the issue is the terms of operation in municipalities."

[209] City Further Reply, p.21.
[210] City Final Argument, p. 41, para. 101.
[211] FEI Final Argument, pp. 79–80, para. 169.
[212] Ibid., p. 80, para. 170.
[213] Ibid., p. 80, para 171.
[214] Ibid., p 82, para. 176.
[215] Ibid., p. 82, para. 176.
[216] Ibid., pp. 82–84, para. 177.
[217] FEI Further Reply, p. 9. para. 21.
[218] FEI Final Argument, p. 84, para. 178.

The CEC

The CEC "agrees with the City that the BCUC does not have jurisdiction to make an order that is contrary to the intent of the *Pipeline Crossing Regulation,*"[219] and recommends that the BCUC "accept the Pipeline Crossing Regulation as the appropriate legislation dictating the allocation of costs for high-pressure transmission pipelines."[220]

5.2.2 Panel discussion

The Panel finds that the BCUC has the jurisdiction to specify terms of the New Operating Agreement that apply to the allocation of Gas Main relocation costs. The Panel also finds in this case that, for High-Pressure Pipelines, the BCUC has the jurisdiction to specify the use of the default relocation cost allocation as set out in the PCR and no other relocation cost allocation.

Both Parties and the CEC agree that the PCR applies to High-Pressure Pipelines and not to Gas Mains. Because the PCR does not apply to Gas Mains, the Panel finds that it has the jurisdiction under section 32 of the UCA to specify terms of the New Operating Agreement that apply to the allocation of Gas Main Relocation Costs.

With regards to High-Pressure Pipelines, the BCUC's jurisdiction to specify terms of a New Operating Agreement is not unfettered. The UCA does not give the BCUC the jurisdiction to specify terms that are in conflict with the PCR, and no Party has suggested that such jurisdiction exists. Therefore, the Panel finds that the BCUC does not have the jurisdiction to specify terms in the proposed New Operating Agreement governing the allocation of High-Pressure Pipeline Relocation Costs that are in conflict with the PCR.

That said, the BCUC can specify terms of the New Operating Agreement that are consistent with the PCR, which no participant has disputed. Therefore, the Panel finds that the BCUC has the jurisdiction under section 32 of the UCA to specify terms in the proposed New Operating Agreement governing the allocation of High-Pressure Pipeline Relocation Costs that are consistent with the PCR.

FEI argues that section 3(6) of the PCR demonstrates that the BCUC is not constrained by the PCR in setting out to achieve a "commercially reasonable outcome". The Panel agrees that section 3(6) of the PCR permits the allocation of Relocation Costs for High-Pressure Pipelines to depart from that specified by agreement between the Parties. However, because there is no agreement between the Parties in this case, the Panel finds that section 3(6) of the PCR does not give the BCUC jurisdiction under section 32 of the UCA to specify a cost allocation method other than that specified in the PCR.

Since, for High-Pressure Pipelines, in the absence of agreement between the Parties the BCUC may not specify the use of either party's proposed Relocation Cost allocation, and in any case may not propose an allocation in conflict with the PCR, the Panel finds that the only Relocation Cost allocation it may specify for High-Pressure Pipelines is that set out in the PCR.

[219] CEC Final Argument, p. 19, para. 129.
[220] Ibid., p. 1, para. 4.

5.3 High-Pressure Pipeline cost allocation

The Panel will now consider how the Relocation Costs of High-Pressure Pipelines will be allocated between the Parties, when caused by a request by the City.

5.3.1 Parties' submissions

The City argues that the BCUC does not have the jurisdiction to specify an Allocation in contravention of the PCR, which applies to High-Pressure pipelines in BC,[221] and that FEI's proposed Allocation contravenes the PCR.[222] The City submits that FEI's examples of previous BCUC decisions approving cost allocations inconsistent with the PCR are not relevant.[223]

FEI replies that the City is "overstating" the rights of a municipality under the PCR, and that the Relocation Cost allocation in the PCR "is, at best, a right to a default allocation in the absence of an agreement to a different allocation". FEI submits that other municipalities have "willingly signed an agreement with FEI that provided for a different allocation than the default allocation in the *Pipeline Crossing Regulation*".[224]

In further reply, the City submits that other municipalities who have signed agreements with FEI have not abandoned their rights under the PCR, as evidenced in BCUC Decision G-113-12. [225]

FEI argues that its proposed Allocation, whereby FEI would pay 50 percent of the cost of relocating High-Pressure Pipelines at the City's request, is a meaningful concession to the City, since FEI views that the principle of cost causation would infer that the City should pay 100 percent of High-Pressure Pipeline relocations.[226]

FEI submits that its proposal is more favourable to the City than the arrangements in place under the 1957 Agreement, whereby generally the City reimbursed FEI for the "entire replacement cost, less an amount calculated with reference to book value and the age of the asset."[227] FEI adds that its proposal would put the City in a better position than other municipalities.[228]

The CEC argues that the BCUC should rely on the PCR for the allocation of costs for relocation of High-Pressure Pipelines.[229] It submits this would not be an "overly onerous" cost to FEI ratepayers. The CEC adds that the BCUC should not "undertake to defeat the Pipeline Crossing[s] Regulation through the application of terms that would otherwise force the City to accept an arrangement it does not agree with."[230]

[221] City Final Argument, pp. 29–22, paras. 72–78.
[222] Ibid., p. 40, para. 96.
[223] Ibid., pp. 33–35, paras. 80–81.
[224] FEI Reply Argument, p. 27, para. 59.
[225] City Reply to FEI Reply Argument, pp. 18–19, para. 54.
[226] FEI Final Argument, paras. 147–148.
[227] Ibid., paras. 152–153.
[228] Ibid, para. 155.
[229] CEC Final Argument, p. 19, paras. 132–133.
[230] Ibid., p. 1, para. 131.

BCOAPO argues that FEI's proposal to pay 50 percent of the costs for relocating High-Pressure pipelines "represents a major concession by the Utility: a concession not required by legislation", and that as such it is a "fair and reasoned compromise."[231]

The City acknowledges that PCR section 3(6) permits the Parties to change the relocation cost allocation by mutual agreement. However, the City makes clear that it "does not agree to any such variance for the purposes of an operating agreement with FEI." The City adds that the BCUC does not have the jurisdiction to direct terms inconsistent with the PCR, and that the BCUC should not undertake to "defeat" the PCR. [232]

5.3.2 Panel determination

The PCR sets out a relocation cost allocation in section 3, wherein subsections 3(2) through 3(5) address the allocation of relocation costs incurred by FEI (the pipeline permit holder) between FEI and the City (the enabled person or specified enabled person). The Panel has already found in section 5.2.2 that for High-Pressure Pipelines the BCUC has the jurisdiction to specify a relocation cost allocation as set out in the PCR, and no other allocation. Therefore, **the Panel specifies that the New Operating Agreement shall include a term for Relocation Cost allocation for High-Pressure Pipelines in accordance with sections 3(2) to 3(5) of the PCR, as we find that specifying such a term is in the public interest**.

The Panel acknowledges FEI's argument that the cost allocation set out in the PCR does not conform to the principle of cost causation. However, in this matter, it is not within the Panel's jurisdiction to make determinations based on this principle. The Panel also agrees with the CEC that it should not "undertake to defeat" the PCR by specifying changes to other aspects of the New Operating Agreement.

5.4 Gas Main cost allocation

In this section, the Panel will address how the Relocation Costs of Gas Mains will be allocated between the Parties, when caused by a request by the City.

5.4.1 Evidence

The City provides the following evidence of the Canadian Radio-television and Telecommunications Commission (CRTC)'s sliding scale for allocation of costs to relocate utility facilities, for the BCUC to consider as an alternative method of allocating Relocation Costs to the City: [233]

[231] BCOAPO Final Argument, p. 6.
[232] City Reply to FEI Reply Argument, p. 19, para. 55.
[233] Exhibit B2-11, Attachment 2.

Table 7: Allocation of Costs to Relocate Utility Facilities

Attachment 2 - Allocation of Costs to Relocate Utility Facilities			
Jurisdiction	**City %**	**Utility %**	**Reference**
Canada - Telecom			
CRTC Telecom Municipal Access Agreement			Tab 8 - CRTC Decision, paras. 38-52
For Hamilton and Bell Canada, sliding scale based on # years since telecom equipment was installed			
1-3 Years	100	0	
4 Years	90	10	
5 Years	80	20	
6 Years	70	30	
7 Years	65	35	
8 Years	60	40	
9 Years	55	45	
10 Years	45	55	
11 Years	40	60	
12 Years	35	65	
13 Years	30	70	
14 Years	20	80	
15 Years	10	90	
16 Years	5	95	
17 Years onward	0	100	

5.4.2 Parties' submissions

The City argues that the BCUC should approve the same cost allocations for Gas Mains as for High-Pressure Pipelines, despite the PCR not applying to Gas Mains,[234] on the basis that the PCR is "good public policy" for High-Pressure Pipelines, and that there is no compelling reason why the same reasoning should not apply to Gas Mains. The City adds that "the cost allocation methodology prescribed in the PCR reflects public policy that municipal projects are public interest projects and take some degree of precedence over gas utility infrastructure in municipal lands and on municipal structures." [235]

FEI disagrees, replying that the relocation cost allocation specified in the PCR is part of a "broader scheme under the OGAA that is applicable to high pressure pipelines", and that the City is "cherry picking" aspects of this framework while ignoring aspects that it dislikes. FEI adds that statutory interpretation principles "would not support inferring from the absence of legislation a legislative intent to extend the default [relocation cost] allocation to Gas Mains." [236]

The City responds that it does not believe that the legislature intended the PCR to apply to Gas Mains, rather that the BCUC should give "considerable weight to the legislative scheme in British Columbia respecting FEI's high pressure pipelines."[237]

[234] City Final Argument, pp. 35–36, para. 84.
[235] Ibid., p. 36, paras. 85–86.
[236] FEI Reply, p. 28, paras. 61-63.
[237] City Reply to FEI Reply, pp. 19–20, para. 56.

The City submits that it is preferable to have one cost allocation methodology for all types of pipe.[238] This would reduce the administrative burden of separating project costs, and would improve transparency and verification of costs.

FEI responds that the City is "overstating the challenge" that this would represent, noting that the interfaces between High-Pressure Pipelines and Gas Mains are "relatively limited in number," and that estimating and project management staff routinely make such allocations.[239]

Alternatively, the City proposes that the BCUC could specify a "sliding-scale methodology" for cost allocations as used by the CRTC.[240] Under this arrangement, the City would reimburse FEI for its Relocation Costs according to a percentage determined by the numbers of years since the assets were installed, and which would diminish to zero after a number of years. The City acknowledges that this methodology would be more complex to apply than the PCR approach, and would mean that different methodologies were in use for High-Pressure Pipelines and Gas Mains.[241] The City suggests a seventeen-year sliding scale methodology, if this were to be adopted.[242]

FEI replies that a sliding scale as short as the seventeen years suggested by the City would be punitive to FEI and its ratepayers, since it would relieve the City from "reimbursing FEI for assets that would otherwise remain in service for the benefit of customers." FEI refers to its rebuttal evidence that the remaining economic life of its Gas Mains is 64 years.[243]

FEI argues that applying the PCR High-Pressure Pipeline cost allocation formula to Gas Mains would "undermine the commercial reasonableness of the overall Operating Agreement," since FEI ratepayers would be responsible for 100 percent of the cost of most relocations requested by the City.[244]

The City replies that FEI's position is misleading, and that the PCR does not require FEI to pay 100 percent of relocation costs in all cases. The City cites PCR section 3(4) which allocates costs related to new highways being shared equally.[245]

FEI argues that there is "no good policy reason" why Gas Mains should have the same relocation cost allocation as High-Pressure Pipelines, particularly when this would "yield an unfair result for the regulated utility and its customers."[246]

The CEC agrees with FEI's position that the sliding-scale methodology suggested by the City would be punitive to FEI and its ratepayers.[247] The CEC recommends that the BCUC approve FEI's proposed wording with regards to Gas Main Relocation Cost allocation. The CEC agrees with FEI that the party requesting the relocation should pay

[238] City Final Argument, pp.36–37, para. 8.7
[239] FEI Reply Argument, p. 39, para. 64.
[240] City Final Argument, p. 37, para. 89.
[241] Ibid., pp. 37–38, para. 90.
[242] Ibid., p. 38, para. 92.
[243] FEI Reply Argument, pp. 29–30, para. 66.
[244] FEI Final Argument, p. 73, para. 156.
[245] City Reply Argument, p. 17, p para. 47.
[246] FEI Final Argument, pp. 79–80, para. 169.
[247] CEC Final Argument, p. 21, para. 144.

100 percent of the Relocation Costs, using the principle of cost causation, and that it would be "inappropriate for one party to require relocations and the other party to pay for such relocations."[248]

BCOAPO also agrees that the requesting party should pay for relocations, as "it is the one triggering the costs." That said, BCOAPO submits that FEI should be responsible for relocation costs associated with assets that would have had to be replaced within the next five years, for example due to reaching the end of their service life.[249]

5.4.3 Panel determination

For the reasons that follow, **the Panel specifies as a term of the New Operating Agreement that the cost of Gas Main relocations requested by the City shall be allocated 100 percent to the City, as it finds that the inclusion of such a term is in the public interest**.

The Panel recognizes that the allocation of costs for relocating Gas Mains is not governed by the PCR, and that the BCUC has the jurisdiction to specify different cost allocations for relocating Gas Mains than those set out in the PCR for relocating High-Pressure Pipelines.

The Panel does not agree with the City that having a different cost allocation for Gas Mains to that for High-Pressure Pipelines is an unreasonable administrative burden. The Panel gives considerable weight to FEI's argument that this type of separation is done routinely. The Panel also rejects the City's argument that the two Relocation Cost allocations should be the same on the basis that the OGAA has defined an allocation for the Relocation Costs of High-Pressure Pipelines and hence that must be good public policy. The Panel agrees that the Relocation Cost allocation in the OGAA is but one aspect of the "broader scheme" of that act, and cannot be used selectively to imply an intent of the legislature with regard to Gas Mains.

The City suggests that the Panel consider a "sliding scale" method of allocating Gas Main Relocation Costs, but acknowledges that this would be more complex to apply than other methodologies. The Panel agrees with FEI and the CEC that the City's proposed period of seventeen years from the date of installation would penalize FEI and its ratepayers, given the much longer life of FEI's Gas Mains. Based on the additional complexity involved, and the potential for penalizing FEI and its ratepayers, the Panel considers that the sliding-scale method is not an appropriate basis for the allocation of Gas Main Relocation Costs.

The Panel finds that, in this instance, the guiding principle for evaluating costs incurred by FEI, and hence FEI's ratepayers, should be cost causation. Relocations of FEI Gas Mains due solely to requests from the City should not be paid for by FEI's ratepayers, since the relocations are not required for the provision of service. This position is supported by BCOAPO and the CEC.

6.0 Statutory Rights of Ways

The Parties have agreed that the proposed New Operating Agreement should include a term specifying a process for the situation where the City intends to create or widen a highway on or through lands over which FEI holds a Statutory Right of Way (SROW) interest and the proposed highway will overlap with the SROW area.

[248] CEC Final Argument, p. 21, paras. 142-143.
[249] BCOAPO Final Argument, p. 5.

However, in their respective Applications, the Parties did not agree whether a blanket waiver of SROW interests by FEI was appropriate.

6.1 Application

In section 9 of its proposed New Operating Agreement, the City's proposed wording is:

(a) If the Municipality intends to create or widen a Highway, or requires as a condition of subdivision, rezoning and/or development approval that a Highway be created or widened, on or through lands over which FortisBC holds a statutory right of way and the proposed new or widened Highway crosses or overlaps a portion of FortisBC's statutory right of way area, then, at the request of the Municipality and provided the Highway project is proceeding**,** FortisBC agrees to release its statutory right of way interest in the portion of the statutory right of way area required for the Highway without requiring the Municipality to exercise its rights of expropriation. FortisBC shall use commercially reasonable efforts to execute the necessary plans and other documents provided by the Municipality, including subdivision and/or road dedication plans, within ten (10) days of receipt of such documents from the Municipality, all at no cost to the Municipality and without compensation payable to FortisBC. [emphasis added]

(b) FortisBC further agrees to use commercially reasonable efforts to obtain the necessary consents, releases or discharges from any of its mortgagees or chargeholders holding an interest in the statutory right of way or in the affected statutory right of way area under subsection (a) above, all at no cost to and without compensation payable by the Municipality.

In section 9 of its proposed New Operating Agreement, FEI's proposed wording is:

(a) If the Municipality intends to create or widen a Highway, or requires as a condition of subdivision, rezoning and/or development approval that a Highway be created or widened, on or through lands over which FortisBC holds a statutory right of way and the proposed new or widened Highway crosses or overlaps a portion of FortisBC's statutory right of way area, then, at the request of the Municipality and provided the Highway project is proceeding, FortisBC will consider releasing its statutory right of way interest in the portion of the statutory right of way area required for the Highway without requiring the Municipality to exercise its rights of expropriation. If FortisBC agrees to release its statutory right of way interest, FortisBC shall use commercially reasonable efforts to execute the necessary plans and other documents provided by the Municipality, including subdivision and/or road dedication plans, within ten (10) days of receipt of such documents from the Municipality, all at no cost to the Municipality and without compensation payable to FortisBC. [emphasis added]

(b) If FortisBC agrees to release its statutory right of way interest, FortisBC further agrees to use commercially reasonable efforts to obtain the necessary consents, releases or discharges from any of its mortgagees or chargeholders holding an interest in the statutory right of way or in the affected statutory right of way area under subsection (a) above, all at no cost to and without compensation payable by the Municipality. [emphasis added]

6.2 Evidence

In its Application, the City explains that a blanket waiver of SROW interests "provides a more efficient process than the alternative which may involve litigation to expropriate the SROW, ending up at the same place."[250]

[250] Exhibit B2-1, City Application, p. 12.

The City states that there is regulatory precedent with respect to a utility giving up SROW interests on an overall basis, citing "the 1956 Agreement between the City of Surrey and British Columbia Electric Company Limited (subsequently assigned to FEI in 1988),"[251] which was terminated in 2013, but required FEI to give up SROW interests.

FEI states that it has never been asked by another municipality to provide a blanket waiver of its SROW interests, is not aware of any other utilities operating in BC providing a blanket waiver of such interests, and further submits that a blanket waiver "would not be in the best interests of our customers who rely on the natural gas distribution system, since such a waiver would not enable FEI to assess the impact of the release of rights."[252]

Also, FEI does not believe that the Commission has the jurisdiction under section 32 of the UCA to order it to waive its SROW interests and give up its statutory protections under the *Expropriation Act*. SROWs are FEI's private interests in land and not public places of the nature addressed in section 32 of the UCA.[253]

6.3 Parties' submissions

The City submits that while "it is much more efficient (in terms of both time and cost) if persons having an interest in the land to be dedicated as highway consent to the dedication instead of the cumbersome and potentially costly expropriation alternative,"[254] it "has accepted that the BCUC does not have jurisdiction to, by order, require FEI to extinguish its private interests in land in all cases whenever requested by the City and without regard to the circumstances of each case."[255]

FEI submits that the City "abandoned that request [for a blanket waiver of SROW interests] during this proceeding on the basis that the commission lacked the jurisdiction to make the order."[256]

The CEC observes that both Parties agree the BCUC does not have jurisdiction to order FEI to relinquish its property rights.[257]

6.4 Panel determination

Based on the agreement between the Parties that the BCUC does not have jurisdiction to compel FEI to extinguish its property rights as requested by the City, **the Panel specifies that FEI's applied-for version of section 9 shall be incorporated into the New Operating Agreement, as it finds this to be in the public interest**.

[251] Exhibit B2-4,City response to BCOAPO IR 1.3.1.
[252] Exhibit B1-4, FEI response to BCOAPO IR 1.7.1.
[253] Exhibit B1-1, FEI Application, p. 22.
[254] City Final Argument, p. 48, para. 121.
[255] Ibid., p. 47, para. 119.
[256] FEI Final Argument, p. 86, para. 181.
[257] CEC Final Argument, p. 25, para. 170

7.0 Entire Agreement

In accordance with section 32 of the UCA, as established in section 2.3 above, **the Panel specifies that the Agreed Terms shall be included in the New Operating Agreement, as such inclusion is in the public interest.**

The Panel found in section 2.3 that the BCUC has the jurisdiction to specify terms in the New Operating Agreement which differ from the Agreed Terms. However, the Panel finds that the Agreed Terms are in the public interest because the two Parties have agreed to them after lengthy negotiation, and because there were no compelling reasons to amend them.

The Panel directs the Parties to submit to this Panel for final approval within 90 days a revised version of the New Operating Agreement containing the Agreed Terms and the terms specified by the Panel according to the directives provided in this Decision. As explained in section 4.5 above, the Panel encourages the Parties to incorporate the concept of lowest-cost alternatives in the final version of the New Operating Agreement.

8.0 Determinations and Findings

This summary is provided for the convenience of readers. In the event of any difference between the Directions in this Summary and those in the body of the decision, the wording in the decision shall prevail.

	DIRECTIVE	PAGE
1	**The Panel determines that an Operating Fee shall be included as a term in the New Operating Agreement as it finds that such inclusion is in the public interest.**	**16**
2	**The Panel specifies that the Operating Fee in the New Operating Agreement will be calculated as 0.7 percent of FEI's delivery margin for customers located within City boundaries, and that the New Operating Agreement will include as a term the version of section 12.1 provided in FEI's Application, as it finds that this is in the public interest.**	**35**
3	**The Panel determines that any City by-laws purporting to charge Additional Fees to FEI are of no force and effect where they are superseded by or impair an order of the BCUC in a term specified in the new Operating Agreement or where they impair the "authorization" granted to FEI by the 1955 CPCN.**	**41**
4	**For additional certainty, the Panel orders the City not to charge FEI Additional Fees while the New Operating Agreement is in force**.	**41**
5	**The Panel specifies that the definition of Relocation Costs in the New Operating Agreement shall include the costs associated with upgrades and betterments required to comply with applicable laws as this is in the public interest.**	**49**
6	**The Panel specifies that the definition of Relocation Costs in the New Operating Agreement shall include the costs associated with upgrades and betterments required to comply with sound engineering practices as this is in the public interest.**	**52**

	DIRECTIVE	PAGE
7	**The Panel specifies that the New Operating Agreement shall include a term for Relocation Cost allocation for High-Pressure Pipelines in accordance with sections 3(2) to 3(5) of the PCR, as it finds that specifying such a term is in the public interest**.	**61**
8	**The Panel specifies as a term of the New Operating Agreement that the cost of Gas Main relocations requested by the City shall be allocated 100 percent to the City, as it finds that the inclusion of such a term is in the public interest**.	**64**
9	**The Panel specifies that FEI's applied-for version of section 9 shall be incorporated into the New Operating Agreement, as it finds this to be in the public interest**.	**66**
10	**The Panel specifies that the Agreed Terms shall be included in the New Operating Agreement, as such inclusion is in the public interest.**	**67**
11	**The Panel directs the Parties to submit to this Panel for final approval within 90 days a revised version of the New Operating Agreement containing the Agreed Terms and the terms specified by the Panel according to the directives provided in this Decision.**	**67**

	FINDING	PAGE
1	The Panel finds that the Parties have met the criteria for bringing their Applications pursuant to section 32 of the UCA and that the BCUC has and may exercise its jurisdiction under that section to specify the manner and terms of FEI's use of the City's public space in respect of the Disputed Terms in the proposed New Operating Agreement, including specifying an Operating Fee.	7
2	The Panel finds that section 32 of the UCA provides the BCUC with jurisdiction, in circumstances where a utility has the right to operate in a municipality but cannot reach agreement on the use of the municipality's public spaces, to not only specify the manner and terms of such use in respect of the disputed terms of a proposed operating agreement, but to also specify its approval as to the manner and terms of such use in respect of the entire proposed new operating agreement.	10
3	The Panel also finds that section 32 of the UCA provides the BCUC with jurisdiction, in circumstances where a utility and a municipality cannot come to an agreement on an entire proposed new operating Agreement, but have reached agreement on some terms of the proposed new operating agreement, to specify the manner and terms of use that may differ from those agreed to, but that in doing so the BCUC should give weight to the consensus reached on such terms so that they are preserved to the extent possible.	10

	FINDING	PAGE
4	The Panel finds the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA is to safeguard the public interest. To be clear, whenever the Panel makes a finding, specification or determination under section 32 of the UCA in the remainder of this decision, it has done so because it is satisfied that such finding, specification or determination safeguards the public interest.	13
5	The Panel finds that the precedents cited by the parties do not provide a useful basis for setting the Operating Fee in the New Operating Agreement.	21
6	The Panel finds that the circumstances of the City differ from those of the 74 smaller municipalities, and that they do not provide a compelling precedent for specifying a 3 percent operating fee.	22
7	The Panel finds that the operating agreements with no operating fee do not provide a compelling precedent in this case.	23
8	The Panel finds that the BCUC has the jurisdiction to specify terms of the New Operating Agreement that define relocation costs with regards to Gas Mains and to High-Pressure Pipelines.	47
9	The Panel finds that the BCUC does not have the jurisdiction to specify terms in the proposed New Operating Agreement that are in conflict with the PCR.	47
10	The Panel finds that the BCUC has the jurisdiction under section 32 of the UCA to specify terms in the proposed New Operating Agreement to the extent that those terms are not in conflict with the PCR.	47
11	The Panel finds that it has the jurisdiction under section 32 of the UCA to specify as a term of the New Operating Agreement any definition of relocation costs with respect to Gas Mains.	47
12	The Panel finds that the BCUC has the jurisdiction under section 32 of the UCA to specify as a term of the New Operating Agreement any definition of relocation costs with respect to High-Pressure Pipelines.	47
13	The Panel finds that the BCUC has the jurisdiction to specify terms of the New Operating Agreement that apply to the allocation of Gas Main relocation costs. The Panel also finds in this case that, for High-Pressure Pipelines, the BCUC has the jurisdiction to specify the use of the default relocation cost allocation as set out in the PCR and no other relocation cost allocation.	59
14	The Panel finds that it has the jurisdiction under section 32 of the UCA to specify terms of the New Operating Agreement that apply to the allocation of Gas Main Relocation Costs.	59

	FINDING	PAGE
15	The Panel finds that the BCUC does not have the jurisdiction to specify terms in the proposed New Operating Agreement governing the allocation of High-Pressure Pipeline Relocation Costs that are in conflict with the PCR.	59
16	The Panel finds that the BCUC has the jurisdiction under section 32 of the UCA to specify terms in the proposed New Operating Agreement governing the allocation of High-Pressure Pipeline Relocation Costs that are consistent with the PCR.	59
17	The Panel finds that section 3(6) of the PCR does not give the BCUC jurisdiction under section 32 of the UCA to specify a cost allocation method other than that specified in the PCR.	59
18	The Panel finds that the only Relocation Cost allocation it may specify for High-Pressure Pipelines is that set out in the PCR.	59

DATED at the City of Vancouver, in the Province of British Columbia, this 29th day of January 2019.

Original signed by:

R. I. Mason
Panel Chair / Commissioner

Original signed by:

W. M. Everett, QC
Commissioner

Original signed by:

B. A. Magnan
Commissioner

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ORDER NUMBER
G-18-19

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

FortisBC Energy Inc. and City of Surrey Applications for
Approval of Terms for an Operating Agreement

BEFORE:
R. I. Mason, Panel Chair/Commissioner
W. M. Everett, QC, Commissioner
B. A. Magnan, Commissioner

on January 29, 2019

ORDER

WHEREAS:

A. On May 17, 2017, the City of Surrey applied to the British Columbia Utilities Commission (BCUC) for an order pursuant to subsection 32(2) of the *Utilities Commission Act* (UCA) specifying the terms under which FortisBC Energy Inc. (FEI) may install, operate and maintain its distribution equipment in public places within Surrey's boundary limits (City of Surrey Application);

B. On May 18, 2017, FEI applied to the BCUC pursuant to section 32 of the UCA, or alternatively section 33 of the UCA, for approval of new operating terms with the City of Surrey (FEI Application). The new operating terms would, among other things, establish new protocols for interaction between the parties, address the allocation of costs when the City of Surrey requires FEI to relocate its facilities, and provide for FEI to collect operating fees on behalf of the City of Surrey from FEI customers in the City of Surrey;

C. On December 13, 1955, the Public Utilities Commission issued a Certificate of Public Convenience and Necessity which authorized the British Columbia Electric Company (BCEC) to operate a natural gas distribution system in the District of Surrey pursuant to section 12 of the *Public Utilities Act*;

D. On June 13, 1957, the Corporation of the District of Surrey (District of Surrey) and BCEC entered into an operating agreement under which BCEC was permitted to install, operate and maintain its distribution equipment in public places within District of Surrey's boundary limits (1957 Agreement);

E. In 1964, BCEC was amalgamated into the British Columbia Hydro and Power Authority (BC Hydro), a Crown corporation. The Lower Mainland natural gas assets of BC Hydro were privatized in 1988 and the natural gas assets transferred to 74280 B.C. Ltd. Subsequently, 74280 B.C. Ltd. became Terasen Gas Inc. and on March 1, 2011, Terasen Gas Inc. was renamed FortisBC Energy Inc.;

F. In 1993, the District of Surrey became the City of Surrey;

G. The two parties have been engaged in negotiations since 2013 for replacement operating terms to reach a new agreement (Operating Agreement) to replace the 1957 Agreement;

H. On November 8, 2016, the parties entered into an interim agreement that provided for the termination of the 1957 Agreement and its replacement by terms to be negotiated, or failing agreement, the parties would seek BCUC approval for terms that were still unresolved by May 31, 2017;

I. FEI and the City of Surrey have settled most of the new operating terms, but the parties disagree over the issues listed in the FEI Application and the City of Surrey Application;

J. FEI and the City of Surrey each filed their proposed Operating Agreements as Appendix A in the FEI Application and Appendix B in the City of Surrey Application, which include all settled operating terms and FEI's and the City of Surrey's respective proposals for the outstanding items;

K. By Order G-98-17 dated June 21, 2017, the BCUC established a regulatory timetable for the proceeding which included information requests on the FEI Application and the City of Surrey Application and an opportunity for participants to provide comments on further process;

L. By Order G-163-17 dated November 2, 2017, the BCUC established a regulatory timetable after reviewing the submissions on further process. The revised timetable included an opportunity for parties to file evidence and a second round of information requests;

M. By Order G-201-17 dated December 29, 2017, the BCUC further amended the timetable to extend the information request no. 2 deadlines;

N. By Order G-66-18 dated March 22, 2018, the BCUC established an amended regulatory timetable which included a Panel information request to the City of Surrey and an opportunity for participants to provide comments on further process;

O. By Order G-92-18 dated May 14, 2018, following submissions on further process by registered participants, the BCUC established an amended regulatory timetable which included written final arguments from all parties and reply arguments from FEI and the City of Surrey. By June 28, 2018, all registered parties provided final and reply arguments and the evidentiary record was closed;

P. By Order G-191-18 dated October 5, 2018, the BCUC reopened the evidentiary record and issued a regulatory timetable which included Panel information requests to FEI and the City of Surrey on use and occupancy of public places by a public utility, FEI and the City of Surrey's responses with further process to be determined;

Q. By Order G-202-18, dated October 22, 2018, the BCUC established a regulatory timetable which included final arguments on the new evidence from all parties and reply arguments from FEI and the City of Surrey; and

R. The BCUC has considered the FEI Application, City of Surrey Application, and the evidence and submissions filed in the proceeding and makes the following determinations.

NOW THEREFORE pursuant to section 32 of the *Utilities Commission Act* and for the reasons outlined in the decision issued concurrently with this order, the BCUC orders as follows:

1. FEI and the City of Surrey are directed to submit to this Panel for approval within 90 days a revised version of the New Operating Agreement containing the Agreed Terms and the terms specified by the Panel according to the directives provided in this Decision.

2. FEI and the City of Surrey are directed to comply with all other directives in the decision accompanying this order.

DATED at the City of Vancouver, in the Province of British Columbia, this 29th day of January 2019.

BY ORDER

Original signed by:

R. I. Mason
Commissioner

Glossary and List of Acronyms

Acronym / Glossary	Description
Agreed Terms	FEI and the City have reached agreement on most of the terms of the New Operating Agreement
AVICC	The Association of Vancouver Island Coastal Communities
BC Hydro	British Columbia Hydro and Power Authority
BCEC	British Columbia Electric Company
BCOAPO	British Columbia Old Age Pensioners Organization et. al.
BCUC	British Columbia Utilities Commission
CEC	Commercial Energy Consumers Association of British Columbia
City	The City of Surrey
City Application	Application for Approval of Terms for an Operating Agreement
CPCN	Certificate of Public Convenience and Necessity
CRTC	The Canadian Radio-television and Telecommunications Commission
Disputed Terms	FEI and the City have failed to reach agreement in respect of four terms set out in FEI's and the City's respective Applications
FEI	FortisBC Energy Inc.
FEI Application	Application for Approval of Terms for an Operating Agreement
GUA	*Gas Utility Act*
Interim Agreement	On November 8, 2016, the Parties entered into an interim agreement
IR	Information Request
Landale	Richard Landale
New Operating Agreement	The City and FEI have been engaged in negotiations since 2013 to reach terms for a new operating agreement to replace the 1957 Agreement
OGAA	*Oil and Gas Activities Act*
Operating Fee	FEI and the City have proposed terms in the New Operating Agreement for an operating fee
PCR	*Pipeline Crossing Regulation*
Robinson	Randolph Robinson
SROW	Statutory Right of Way

Glossary and List of Acronyms

Acronym / Glossary	Description
the Parties	The City and FEI
UCA	*Utilities Commission Act*

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

FortisBC Energy Inc. and City of Surrey
Applications for Approval of Terms for an Operating Agreement

EXHIBIT LIST

Exhibit No.	Description
COMMISSION DOCUMENTS	
A-1	Letter dated June 19, 2017 - Appointing the Panel for the review of FortisBC Energy Inc.'s Application for Approval of Operating Terms between the City of Surrey and FEI
A-2	Letter dated June 21, 2017 – Order G-98-17 Establishing the Regulatory Timetable and Public Notice
A-3	Letter dated August 17, 2017 – Notice to parties of potential conflict of interest
A-4	Letter dated August 18, 2017 – Commission Information Request No. 1 to FEI
A-5	Letter dated August 18, 2017 – Commission Information Request No. 1 to City of Surrey
A-6	Letter dated November 2, 2017 – Order G-163-17 with Reasons for Decision and Regulatory Timetable
A-7	Letter dated December 29, 2017 – Order G-201-17 Amending the Regulatory Timetable
A-8	Letter dated January 26, 2018 – Commission Information Request No. 2 to FEI
A-9	Letter dated January 26, 2018 – Commission Information request No. 2 to City of Surrey
A-10	Letter dated March 22, 2018 – Commission Order G-66-18 with the Regulatory Timetable
A-11	Letter dated March 22, 2018 – Panel Information Request No. 1 to City of Surrey
A-12	Letter dated April 20, 2018 – Request for comments on the proposed regulatory process
A-13	Letter dated May 14, 2018 – Order G-92-18 with reasons for decision and the Regulatory Timetable
A-14	Letter dated October 5, 2018 – BCUC Order G-191-18 with the Regulatory Timetable
A-15	Letter dated October 5, 2018 – Panel Information Request on use and occupancy of public places by a public utility to FEI

A-16	Letter dated October 5, 2018 – Panel Information Request on use and occupancy of public places by a public utility to City of Surrey
A-17	Letter dated October 22, 2018 – Order G-202-18 with the Regulatory Timetable

APPLICANT DOCUMENTS

B1-1	**FORTISBC ENERGY INC. (FEI)** Letter dated May 18, 2017 - Application for Approval of Terms for an Operating Agreement
B1-1-1	Letter August 10, 2017 – FEI Submitting Errata to the Application
B1-2	Letter dated May 29, 2017 – FEI Submitting Proposed Timetable
B1-3	Letter dated August 22, 2017 – FEI Submitting Response to Exhibit A-3
B1-4	Letter dated September 29, 2017 – FEI Submitting Response to BCOAPO IR No. 1
B1-5	Letter dated September 29, 2017 – FEI Submitting Response to CEC IR No. 1
B1-6	Letter dated September 29, 2017 – FEI Submitting Response to BCUC IR No. 1
B1-7	Letter dated September 29, 2017 – FEI Submitting Response to Landale IR No. 1
B1-8	Letter dated September 29, 2017 – FEI Submitting Response to Robinson IR No. 1
B1-9	Letter dated September 29, 2017 – FEI Submitting Response to Surrey IR No. 1
B1-10	Letter Submitted October 13, 2017 – FEI Submissions on Further Process
B1-11	Letter Submitted November 30, 2017 – FEI Submitting Supplementary Evidence
B1-12	Letter dated December 21, 2017 - FEI Submitting Rebuttal Evidence
B1-13	Letter dated March 2, 2018 - FEI Submitting Response to BCUC IR No. 2
B1-14	Letter dated March 2, 2018 - FEI Submitting Response to CEC IR No. 2
B1-15	Letter dated March 2, 2018 - FEI Submitting Response to Surrey IR No. 2
B1-16	Letter dated April 27, 2018 – FEI Submitting Comments on Further Process
B1-17	Letter dated October 18, 2018 – FEI Submitting Responses to Panel IR No. 1
B2-1	**CITY OF SURREY (SURREY)** Letter dated May 18, 2017 - Application for Approval of Terms for an Operating Agreement – Updated with Appendix C
B2-2	Letter dated May 26, 2017 – Surrey Submitting Proposed Timetable
B2-3	Letter dated September 8, 2017 – Surrey Submitting IR No. 1 to FEI

B2-4 Letter dated September 29, 2017 – Surrey Submitting Response to BCOAPO IR No. 1

B2-5 Letter dated September 29, 2017 – Surrey Submitting Response to CEC IR No. 1

B2-6 Letter dated September 29, 2017 – Surrey Submitting Response to Robinson IR No. 1

B2-7 Letter dated September 29, 2017 – Surrey Submitting Response to Landale IR No. 1

B2-7-1 Letter dated September 29, 2017 – Surrey Submitting Additional Response to Landale IR No. 1

B2-8 Removed - Letter dated September 29, 2017 – Surrey Submitting Response to BCUC IR No. 1

B2-8-1 Letter Submitted October 4, 2017 – Surrey Submitting Amended Response to BCUC IR No. 1

B2-8-2 Letter Submitted October 6, 2017 – Surrey Submitting Comments regarding Exhibits B2-8 and B2-8-1

B2-9 Letter Submitted October 13, 2017 – Surrey Submissions on Further Process

B2-10 Letter Submitted October 17, 2017 – Surrey Submitting Comments

B2-11 Letter Submitted November 30, 2017 – Surrey Submitting Evidence

B2-12 Letter dated December 20, 2017 - Surrey Submitting Rebuttal Evidence

B2-13 Letter dated February 2, 2018 - Surrey Submitting IR No. 2 to FEI

B2-14 Letter dated March 2, 2018 - Surrey Submitting Response to BCUC IR No. 2

B2-15 Letter dated March 2, 2018 - Surrey Submitting Response to CEC IR No. 2

B2-16 Letter dated March 29, 2018 – Surrey Submitting Response to Panel IR No. 1

B2-17 Letter dated April 30, 2018 – Surrey Submitting Comments on the Proposed Regulatory Process

B2-18 Letter dated October 18, 2018 – Surrey Submitting Responses to Panel IR No. 2

INTERVENER DOCUMENTS

C1-1 **LANDALE, RICHARD (LANDALE)** Letter dated August 4, 2017 Request to Intervene by Richard Landale

C1-2 Letter dated September 5, 2017 – Landale Submitting IR No. 1 to Surrey

C1-2-1 Letter dated September 8, 2017 – Landale Submitting Additional IR No. 1 to Surrey

C1-3 Letter dated September 5, 2017 – Landale Submitting IR No. 1 to FEI

C1-4 Letter Submitted October 13, 2017 – Landale Submitting Further Process Comments

C1-5 Letter Submitted November 29, 2017 – Landale Submitting Evidence

C1-6 Letter dated December 19, 2017 - Landale Submitting Rebuttal Evidence

C1-7 Letter dated April 27, 2018 – Landale Submitting Comments on Further Process

C2-1 **COMMERCIAL ENERGY CONSUMERS ASSOCIATION OF BRITISH COLUMBIA (CEC)** Letter dated August 10, 2017 Request to Intervene by David Craig and Christopher Weafer

C2-2 Letter dated September 8, 2017 – CEC Submitting IR No. 1 to Surrey

C2-3 Letter dated September 8, 2017 – CEC Submitting IR No. 1 to FEI

C2-4 Letter Submitted October 13, 2017 – CEC Submitting Further Process Comments

C2-5 Letter dated February 2, 2018 - CEC Submitting IR No. 2 to Surrey

C2-6 Letter dated February 2, 2018 - CEC Submitting IR No. 2 to FEI

C3-1 **THE BRITISH COLUMBIA OLD AGE PENSIONERS ORGANIZATION *ET AL*. (BCOAPO)** Letter dated August 14, 2017 Request to Intervene by Leigha Worth and Kate Feeney

C3-2 Letter dated September 8, 2017 – BCOAPO Submitting IR No. 1 to FEI

C3-3 Letter dated September 8, 2017 – BCOAPO Submitting IR No. 1 to Surrey

C3-4 Letter Submitted October 13, 2017 – BCOAPO Submissions on Further Process

C3-5 Letter dated January 11, 2018 – BCOAPO notice of change regarding counsel

C3-6 Letter dated February 2, 2018 - BCOAPO Submitting IR No. 2 Comments

C4-1 **ROBINSON, RANDOLPH (ROBINSON)** Letter dated August 11, 2017 Request to Intervene by Randolph Robinson

C4-2 Letter dated September 8, 2017 – Robinson Submitting IR No. 1 to FEI

C4-3 Letter dated September 8, 2017 – Robinson Submitting IR No. 1 to Surrey

INTERESTED PARTY DOCUMENTS

D-1 Furlan, Maria – July 31, 2017 Request for Interested Party Status

D-2 Huang, Sally – July 31, 2017 Request for Interested Party Status

D-3 A'Bear, Geoffrey– July 31, 2017 Request for Interested Party Status

D-4 Pushie, Brian Lee – July 31, 2017 Request for Interested Party Status

D-5 Gilmartin, Mike – August 1, 2017 Request for Interested Party Status

D-6 Gustainis, Jacinta – August 2, 2017 Request for Interested Party Status

D-7 Vanderbyl, Cindy - August 2, 2017 Request for Interested Party Status

D-8 Williams, Derrick - August 17, 2017 Request for Interested Party Status

D-9 BC Oil and Gas Commission – September 20, 2018 Request for Interested Party Status by Dorothy Foster

LETTERS OF COMMENT

E-1 Lewko, M – Submitting letter of comment dated July 28, 2017

E-2 Forrest, A – Submitting letter of comment dated July 30, 2017

E-3 Dhillon, K – Submitting letter of comment dated August 2, 2017

E-4 Dhillon, M – Submitting letter of comment dated August 2, 2017

E-5 Essex, J– Submitting letter of comment dated August 3, 2017

E-6 Hammond, S– Submitting letter of comment dated August 3, 2017

E-7 Peck, B – Submitting letter of comment dated August 5, 2017

E-8 Mehat, S. – Submitting letter of comment dated August 11, 2017

E-9 Incantalupo, J– Submitting letter of comment dated August 13, 2017

E-10 Roark, T and Wolczuk, P – Submitting letter of comment dated September 7, 2017

E-11 Anderson, C.M., – Submitting letter of comment dated September 3, 2017

E-12 Cridge, L – Submitting letter of comment dated September 20, 2017

E-13 Selinger, J – Submitting letter of comment dated September 29, 2017

E-14 Udy, G – Submitting letter of comment dated October 27, 2017

E-15 Strand, C – Submitting letter of comment dated January 27, 2018