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October 18, 2018

BY E-FILING

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

Attention: Patrick Wruck, Commission Secretary

Dear Mr. Wruck

**Re: British Columbia Utilities Commission
FortisBC Energy Inc. and City of Surrey Applications for
Approval of Terms for an Operating Agreement
Project No. 1598915**

On behalf of the City of Surrey, we enclose for filing the City's response to BCUC Panel IR No. 2 (Exhibit A-16 in the above-referenced proceeding).

Yours very truly,

LAWSON LUNDELL LLP

Ian Webb

cc. FEI counsel

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**1.0 Reference: OPERATING FEE
City of Surrey’s Reply Arguments to FEI, p. 9
Surrey Reply to Final Arguments and FEI Reply Arguments, Section
3.2, p. 8
Use and occupancy of public places by a Public Utility**

In the City of Surrey’s Reply Argument to FEI, page 9, dated June 14, 2018, the City of Surrey indicates that it disagrees with FortisBC Energy Inc.’s (FEI) characterization of the operating fee as a contractual consideration and instead characterizes the operating fee as follows: *“The operating fee can be viewed as a rent for FEI’s use and occupancy of public places.”*

1.1 Please explain what is meant by this argument and provide any evidence that is available to support these assertions.

RESPONSE:

At a high level, there are two issues in this proceeding in relation to the operating fee: (1) should there be an operating fee in the operating agreement between the City of Surrey (the "City") and FortisBC Energy Inc. ("FEI") and, if so, (2) what methodology should be used to calculate the operating fee value.

With respect to the first threshold issue, both the City and FEI agree that the operating agreement between the parties should have an operating fee and both parties have requested the BCUC to approve an operating fee for the terms of an operating agreement.

The disagreement in regards to the operating fee is with respect to what methodology should be used to calculate the operating fee value.

The City's position is that the purpose of the operating fee is to compensate the municipality for FEI’s use and occupancy of highways and other places owned and controlled by the municipality, and that the methodology used to calculate the operating fee value should be the same as the one (and only) methodology the BCUC has approved for FEI operating agreements with municipalities. The BCUC has never approved an operating fee methodology for FEI operating agreements other than the 3.0 percent of gross revenues methodology requested by the City. The City believes that there is substantial public interest in a standardised methodology to calculate compensation FEI will pay to the municipality for FEI’s use and occupancy of highways and other places owned and controlled by the municipality.

FEI's Application and its Tariff confirm that operating fees are for FEI’s use of public places within the municipality to construct and operate its utility and to

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offset the municipality's costs due to FEI. Refer to the City's response to BCUC Panel IR 2.1.7.

The term "rent" as used in the City's Reply Argument (referenced above) has its ordinary meaning: an amount of money paid regularly for the use of property or land. The operating fee can be viewed as an amount of money FEI pays regularly to the municipality for the use and occupancy of highways and other places owned and controlled by the municipality pursuant to an operating agreement.

The point that "the operating fee can be viewed as a rent" was meant to help demonstrate how FEI's proposed methodology to calculate the operating fee value is inapt and uses the wrong inputs given the purpose of the operating fee is to compensate for use and occupancy of public places.

FEI's position is that for the City (only) the operating fee value should be based on FEI's estimate of the expected cost savings to FEI as a result of the proposed terms for the new operating agreement relative to the past arrangements between the parties including the legacy 1957 Agreement. For example, FEI's response to the City's IR 2.4.2 states that the operating fee value FEI proposes for the City is intended as "a reasonable Operating Fee in exchange for what FEI customers are receiving (avoided payment of currently disputed permit / authorisation fees and streamlined processes)". FEI's proposed methodology to calculate the operating fee value is not connected to its use of highways and other places owned and controlled by the City pursuant to the operating agreement.

FEI's proposed approach is inapt and uses the wrong inputs for considering the amount of money (i.e., rent) to be paid regularly for the use of the City's public places.

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1.2 Please discuss in detail why the City of Surrey believes that it should be compensated by FEI and its ratepayers for use and occupancy of public places.

RESPONSE:

It is important not to lose sight of the fact that both the City and FEI agree that the operating agreement between the parties should have an operating fee for FEI's use and occupancy of highways and other public places in Surrey, and both parties have requested the BCUC to approve an operating fee for the terms of an operating agreement. The disagreement in regards to the operating fee is in regards to what methodology should be used to calculate the operating fee value.

The City believes that it should be compensated by FEI for FEI's use and occupancy of highways and other public places owned and controlled by the City (by way of an operating fee) for the following reasons.

- **The City incurs substantial costs as a result of FEI's use and occupancy of such public places within Surrey (estimated at about \$4 million / year in 2017 Canadian dollars), and the operating fee revenue will reduce the need for other sources of revenue, primarily property taxes, to pay for these costs.**
- **If the City has purchased lands or needs to purchase additional lands at market value to expand the City’s public services (e.g., roads, water mains, sewers and parks), FEI can piggy-back on the City’s purchase by placing its natural gas distribution facilities in such lands without contributing to the City’s costs of acquiring such lands, all in the context of the high land values in Surrey.**
- **The operating fee revenue will provide for a reallocation of some of the City’s costs due to FEI's use and occupancy of public places, from all taxpayers to FEI customers in Surrey. The operating fee is more of a user**

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pay model, which the City believes is more equitable than continuing to require all taxpayers to pay for these costs whether or not they receive any benefit from FEI's facilities in Surrey.

- **At least 75 other municipalities in British Columbia receive compensation from FEI for its use and occupancy of public places within their boundaries.**
- **Denying the City's requested operating fee would perpetuate the requirement for the City and its taxpayers to pay costs that 75 other municipalities and their taxpayers are not required to pay in other areas of the province because those municipalities receive the operating fee from FEI. Given the adoption of common rates for all FEI ratepayers across the province and the fact of a standard FEI operating fee structure, the City continues to believe that the most appropriate position in terms of transparency, public interest and consistency among FEI ratepayers, most of whom are also municipal taxpayers, is to adopt the same operating fee structure as is in place for other municipalities in the province.**
- **Municipalities in the adjacent jurisdiction of Alberta receive operating fee compensation from gas and electric utilities for their use and occupancy of public places within their boundaries.**

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1.3 Does the City of Surrey believe that in the absence of an operating agreement with FEI, the City of Surrey would be entitled to compensation by FEI and its ratepayers for use and occupancy of public places within the municipality? If so, please explain this rationale.

RESPONSE:

Yes. The City is vested with ownership and control of highways and other public places (e.g., parks) within the municipal boundaries, and has the authority and responsibility to enact and enforce by-laws respecting the use of such highways and other public places. As of 2003, by virtue of legislative change with the introduction of the Community Charter, S.B.C. 2003, c. 26, as amended, the soil and freehold of highways within municipal boundaries are vested in the municipality. The municipality’s jurisdiction over highways changed from having a right of possession to a right of ownership. With the enactment of the Community Charter municipalities were also given the authority to grant others a licence of occupation of such highways under s. 35(11) of the Community Charter. Prior to this, no such authority existed, and such a licence would have had to be granted by the Provincial Crown.

In the absence of an operating agreement providing otherwise, as landowner and local government with authority to enact by-laws and grant licences of occupation of highways, the City can require compensation from FEI for permitting FEI to use and occupy such highways and other public places to place, construct, operate and maintain its natural gas distribution equipment.

If the above was not correct, there would be no need for sections 32, 33 and 36 of the *Utilities Commission Act*, pursuant to which the BCUC may, by order, specify the manner and terms of FEI’s use of a municipality’s public place(s) or structure(s) in circumstances where FEI and the municipality do not agree on the terms to allow such use. The exercise of such powers by the BCUC must not unduly prevent the use of the public place by other persons, and in the City’s view must not be used to overrule reasonable requirements of the municipality,

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including reasonable compensation. The BCUC’s mandate is to exercise its section 32, 33 and 36 powers in a manner that safeguards the public’s interest by balancing all competing public interests, including the public interest in FEI paying reasonable compensation for the use and occupancy of municipal public places. Please refer to the City’s response to BCUC Panel IR 2.1.2, and to section 2.1 of the City’s June 14, 2018 Reply to Final Argument of FEI.

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1.4 Is the City of Surrey aware of any municipalities in BC in which FEI operates with either i) no operating agreement or ii) an operating agreement that excludes an operating fee? If so, please provide that information.

RESPONSE:

The City does not have information about FEI’s operating agreements or lack thereof with individual municipalities beyond what is available on the BCUC’s website and FEI has reported in this proceeding. The City understands from FEI’s submissions in this proceeding that some of FEI’s legacy operating agreements have an operating fee while other legacy operating agreements do not.

The City understands that all of the modern operating agreements FEI has entered into with municipalities since 2005 have the operating fee. In 2005, FEI (then called Terasen Gas) negotiated a new pro-forma operating agreement with the Union of B.C. Municipalities (“UBCM”) that includes the operating fee.¹

FEI has also confirmed the following facts in this proceeding:

- **at least 75 other municipalities receive an operating fee from FEI calculated on the basis of 3.0 percent of the gross revenues (excluding taxes) received by FEI for provision and distribution of gas consumed in the municipality**
- **no municipality in the province receives an operating fee from FEI other than the 3.0 percent of FEI gross revenues fee**

¹ Refer to BCUC Order No. C-9-06, a copy of which is provided at Tab 9 of the supporting documents included with the City’s Final Argument.

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1.5 Does the City of Surrey believe that a utility operating within a municipal jurisdiction under the authorities of a Certificate of Public Confidence and Necessity (CPCN) is within its rights to use and occupy public places without compensation? If not, please explain, including what rights the City of Surrey believes are conveyed to a utility under a CPCN.

RESPONSE:

No.

Section 45(1) of the *Utilities Commission Act* (“UCA”) provides as follows:

"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."

A public utility issued a CPCN by the BCUC pursuant to section 46(3) of the *UCA* or deemed to have received CPCN pursuant to section 45(2) of the *UCA* will satisfy the requirement of section 45(1), above, and is permitted to begin construction or operation of the plant or system.

Neither a CPCN issued by the BCUC nor a CPCN deemed to be received by a public utility confers rights to use and occupy the lands of others whether the lands are

- Crown land,**
- land owned and controlled by a municipality, or**
- land owned by a private land owner.**

The CPCN does not confer rights on the public utility to use and occupy the lands of others.

Pursuant to subsections 2(1) and 2(2) of the *Gas Utility Act* (“*GUA*”), a gas utility that on April 14, 1954 was carrying on business as a gas utility in a municipality, or to which a CPCN has been granted under the *UCA* or the legislation that preceded it, is authorized and empowered, subject to the *UCA*, to carry on its business as a gas utility in the municipality.

The *GUA*, not the CPCN pursuant to the *UCA*, confers certain rights, subject to important conditions, for such gas utilities (including FEI) to use and occupy lands of others, including highways and other places owned and controlled by the municipality. Of course, FEI can also acquire lands or rights of way by negotiating with land owners.

1. Gas utility may expropriate land

Section 6 of the *GUA* confers on a gas utility the right to expropriate any land in British Columbia reasonably required for the gas utility's undertaking, and, in that event, the *Expropriation Act* applies, including the requirements to compensate the land owner.

Section 7 of the *GUA* empowers the BCUC to authorize the gas utility to enter and use land for constructing and maintaining the gas utility's works, subject to the gas utility deposited with the BCUC security in a form and amount the BCUC considers adequate to indemnify the land owner for damage the owner might sustain by construction of the works, and subject to the gas utility, within a reasonable time, expropriating or otherwise acquiring the land required (for compensation).

2. Gas utility may use municipal lands and structures subject to municipal consent

Pursuant to subsection 2(3)(c) of the *GUA*, such a gas utility (including FEI in Surrey) may,

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... in a municipality, on the conditions that the gas utility and the municipality agree to [underlining added]

Accordingly, the *GUA* authorizes FEI, subject to the *UCA*, to carry on its business as a gas utility in Surrey, and confers on FEI the right to expropriate any land in B.C. in accordance with and subject to the *Expropriation Act* including payment of appropriate compensation. The *GUA* also gives FEI the right to use and occupy municipal public places to place, construct, operate and maintain its distribution equipment, but this right is subject to the municipality's agreement, which could

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include terms in regards to compensation. Please also refer to the City's response to BCUC Panel IR 2.1.3.

The overall purpose of the operating agreement is to set out the terms and conditions of FEI's use and occupancy of the highways and other public places owned and controlled by the municipality, including applicable fees and charges.

If FEI and the municipality are not able to agree on the terms and conditions for FEI's use and occupancy of municipal public place(s) or structure(s), the BCUC may, by order pursuant to section 32, 33 or 36 of the *Utilities Commission Act* as applicable, specify the manner and terms of FEI's use of public places in the municipality for such purposes.

The exercise of such powers by the BCUC must not unduly prevent the use of the public place(s) by other persons, and in the City's view must not be used to overrule reasonable requirements of the municipality which owns and has responsibility for the public place(s), including reasonable compensation. The BCUC's mandate is to exercise its section 32, 33 and 36 powers in a manner that safeguards the public's interest by balancing all competing public interests, including the public interest in FEI paying reasonable compensation for the use and occupancy of municipal public places. Please refer to the City's response to BCUC Panel IR 2.1.2 and to section 2.1 of the City's June 14, 2018 Reply to Final Argument of FEI.

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Further, in the City of Surrey’s reply argument to BCOAPO’s final argument contained in the Surrey Reply to Final Arguments and FEI Reply Arguments dated June 28, 2018, paragraph 21, Section 3.2, page 8, the City of Surrey submits that:

...to our 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.

1.6 Please explain this statement in detail, including reference to what is meant by “precedent” and “benefit to the utility and ratepayers.”

RESPONSE:

The BCOAPO made the following submission at page 7 of its final argument:

“While BCOAPO may disagree with the need for an operating fee absent any demonstration that it ultimately is of benefit to the Utility and its ratepayers, the parties have agreed to the concept of an Operating Fee.”

The term "benefit to the utility and its ratepayers" is the BCOAPO's term.

The City understands the BCOAPO’s position as quoted above to be that operating agreements generally should not include operating fee compensation unless there is evidence demonstrating that the operating fee itself (independent of the other operating agreement terms) will benefit the utility and its ratepayers. The BCOAPO did not explain the types of benefits an operating fee could provide to the utility and its ratepayers.

The term “precedent” as used in the City's reply argument referenced above has its ordinary meaning: a principle or rule established in a previous decision (in this case a previous decision of a public utility regulatory body) or a regulation that provides an example or authority for deciding similar issues later. As submitted in the referenced reply argument, to our knowledge there is no previous decision of a public utility regulatory body or a regulation that provides an example or authority for approaching the operating fee issue in the manner suggested by the BCOAPO position.

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1.7 Please provide details of the evidence which the City of Surrey believes is supportive of the assertion that the operating fee is intended to offset some of the costs the city incurs as a result of FEI’s use of public places.

RESPONSE:

The referenced submission by the City was in reply to the BCOAPO’s position, as we understand it, that operating agreements generally should not include operating fee compensation unless there is evidence demonstrating that the operating fee itself (independent of the other operating agreement terms) will benefit the utility and its ratepayers. Please refer to the City’s response to BCUC Panel IR 2.1.6.

The referenced submission by the City was intended to highlight that the operating fee itself (independent of the other operating agreement terms) is a benefit to the municipality and its taxpayers in that the revenue will offset costs the municipality incurs as a result of FEI’s use of municipal public places. The term "intended to offset some of the costs the city incurs as a result of FEI’s use of municipal public places" was not meant as anything different than the operating fee is compensation for FEI’s use and occupancy of public places in the municipality and the operating fee revenue will provide for a reallocation of some of the City’s costs due to FEI’s use and occupancy of public places, from all taxpayers to FEI customers in Surrey.

The following evidence supports the City’s position that the operating fee is intended as compensation to the municipality for FEI’s use and occupancy of public places in the municipality and to offset the municipality’s costs due to FEI’s use and occupancy of such public places:

- The definition of “Municipal Operating Fees” in the FEI Tariff General

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Terms and Conditions provides that the operating fee is for FEI’s use of public places within the municipality to construct and operate its utility business, relating to the revenues received by FEI for gas delivered and consumed within the municipality.²

- **In its Application in this proceeding, FEI states that an “Operating Fee is a fee collected by the Company from its customers within a municipality and remitted to the municipality in consideration of covenants made by the municipality contained in an operating agreement and costs incurred by the municipality as a result of the Company’s operations in the municipality’s streets.”³**
- **In its Order No. C-7-03 Decision, the BCUC referred to FEI’s (then Terasen’s) argument that operating fees are paid for the use of streets and other public places in the municipality.⁴**

² The complete definition of “Municipal Operating Fees” in the FEI Tariff General Terms and Conditions is quoted in Exhibit B2-8-1, the City’s response to BCUC IR 1.5.3. A copy of page D-4 of FEI’s General Terms and Conditions with the definition of “Municipal Operating Fees” is provided at Tab 7 of the supporting documents provided with the City’s Final Argument.

³ FEI Application, page 13, lines 20-24.

⁴ A copy of the Order No. C-7-03 Decision is provided at Tab 10 of the supporting documents provided with the City’s Final Argument.

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...to our 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.

1.8 Does the City of Surrey believe that FEI would be entitled to operate within its municipality boundaries without an operating agreement in place? If no, please explain.

RESPONSE:

The *Gas Utility Act* provides that FEI is authorized and empowered, subject to the *Utilities Commission Act*, to carry on its business as a gas utility in Surrey. That authorization applies whether or not there is an operating agreement in place. However, that authorization does not confer on FEI the right to use and occupy the lands of others, including highways and other public places owned and controlled by the City. The overall purpose of the operating agreement is to set out the terms and conditions of FEI’s use and occupancy of such municipal public places, including applicable fees and charges. Please refer to the City’s response to BCUC Panel IR 2.1.5.

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...to our 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.

1.9 What amount or proportion of the City of Surrey's proposed operating fee is intended to offset some of the costs incurred by the city as a result of FEI's use of municipal public places?

RESPONSE:

Please refer to the City's response to BCUC Panel IR 2.1.7 for explanation of the term "intended to offset some of the costs the city incurs as a result of FEI's use of municipal public places".

The City's proposed operating fee structure (that is, 3.0 percent of the gross revenues (excluding taxes) received by FEI for provision and distribution of gas consumed in the municipality) is a standard fee that it is used in at least 75 operating agreements FEI has with municipalities in British Columbia.

The requested 3.0 percent of gross revenues operating fee will not result in revenue from FEI equal to the actual costs the City incurs in any given year as a result of FEI's use of public places in Surrey. The actual costs the City will incur as a result of FEI's use and occupancy of public places in Surrey will vary from year to year with activity levels, and the operating fee revenue will also vary from year to year as FEI gross revenues vary.

Based on the City's best estimate of the costs it incurs due to FEI's use and occupancy of public places in Surrey, the City estimates that the revenue from the City's requested operating fee will not recover all of the City's costs due to FEI. Please refer to paragraphs 42 to 52 of the City's Final Argument.

The City is a non-profit organization such that all of the operating fee revenue will provide for a reallocation of some of the City's costs due to FEI's use and occupancy of public places, from all taxpayers to FEI customers in Surrey. The operating fee is more of a user pay model, which the City believes is more

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equitable than continuing to require all taxpayers to pay for these costs whether or not they receive any benefit from FEI's facilities in Surrey.