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British Columbia Utilities Commission
Suite 410, 900 Howe Street
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Attention: Commission Secretary

Filed On-line

Dear Mesdames/Sirs:

re: FortisBC Energy Inc. ~ Application to Exclude Employee Information from 2015 Data Order G-161-15

This is MoveUP's response to Exhibit B-7, FEI's responses to Exhibit A-11, the Commission Panel's Information Request in this proceeding.

FEI's dilemma

FortisBC has a problem. The Panel IRs bring it into clear focus.

Order G-161-15 is all about protecting the security of information maintained by the utility for operating and regulatory purposes. In the case of records about individuals, "security" translates into a privacy protection issue. Recently, FEI discovered that with respect to employee information, it has unwittingly been non-compliant with the security measures set out in that Order, of which FEI itself was the author and proponent.

Rather than bring itself into compliance, which would be the usual course in such circumstances, it has chosen instead to bring this application to remove the references to this one category of affected information from the Order. As part of that effort, it has argued that the Commission acted without jurisdiction when it acceded to FEI's own request that it issue Order G-161-15. Among other things, it has argued that the Commission lacks the authority to make an order for the purpose of protecting the privacy of personal information – that such an order is not within the Commission's explicit statutory mandate, nor does it arise by "necessary implication".

Their dilemma is that the section 44(2) conditions set out in Order G-161-15 are not only about protecting the privacy of employee information. They also address the privacy of *customer* information. In fact, that is the entire point of the Order with respect to both of these collections of personal records. The reason for the security measures stipulated in the Order, whether with regard to employee or customer personal information, is the same – privacy protection: securing them against intrusive third-party access.

That leaves FEI attempting to differentiate between *employee* personal information and *customer* personal information, when it comes to the range of conditions the Commission can attach to an order under section 44(2).

Why does this create a dilemma? Because if the hair cannot be split – if FEI's arguments about jurisdiction are correct but there is no basis valid to differentiate between customer and employee records – then *all* of the privacy-protection provisions of Order G-161-15 are a nullity. In that event there is nothing left of the Order except with respect to sensitive system information. It becomes an all-or-nothing exercise.

FEI indicates in Exhibit A-1 that it does not currently maintain customer records physically outside of the province, but we assume that the utility is not interested in this class of records losing its protected status as a result of its own application. One might conjecture that customers could be concerned about such a development. Otherwise, one would assume that the utility would be content to simply see all of the privacy-related provisions of the Order set aside.

In Exhibit B-2, FEI said that "*the test for implying jurisdiction – 'necessary implication' - is not met where the purpose or effect of an order is to regulate privacy . . . .*" If this is so, then the only part of the Order that survives is the portion dealing with sensitive system-related data unless FEI can persuade the Commission that the customer data protection provisions were not intended to secure those records from intrusive third-party access. They were not about privacy.

This entails a vigorous exercise in hair-splitting. FortisBC is required to maintain the personal information (whether of employees or of customers) for purposes that include enabling the Commission to carry out one of the most fundamental pillars of its core mandate: the regulation of utility rates. In Exhibit B-7, FEI ventures ever deeper into that exercise, which we say is entirely fallacious.

FEI's chosen strategy is to try to characterize customer information as being necessary for the fulfilment of the Commission's mandate (which is certainly true) but employee pension and post-employment benefit information as falling outside of that role (which is patently wrong).

Un-splitting the Hair (Responding to FEI's Response to Commission Panel IR 1.1)

We agree with FEI's first bulleted point at the start of its response to this IR. The Commission relied on section 44(2) in making the Order. The other two bullets summarize the company's two substantive arguments in support of its position and we will engage on each of these.

FEI Argument No. 1:

FEI essentially says that when the Order was made, people were talking about customer information but not about employee information. As FEI put it in Exhibit B-7 responding to Commission Panel IR 1.1, "*the data-related orders were addressing customer data and sensitive system-related data, not employee data*."

MoveUP's Answer No. 1:

The Order speaks for itself. It explicitly deals with employee information, including a definition and rules for its safekeeping. FEI put those words into its proposal. Obviously it did this deliberately.

Employee records were undeniably "addressed" in the proceedings, captured in the words of the Order that Fortis asked the Commission to pronounce. Apparently, what they mean is that people were not talking much about employee information during the proceeding.

The impact and enforceability of a Commission order is not limited to the range of written or oral discourse in its proceedings. Persons who may not like aspects of Commission orders do not get to review the application record to determine whether they can safely disregard elements that were not explicitly highlighted in the proceedings. The suggestion that it might be otherwise is, frankly, astonishing.

FEI Argument No. 2:

FEI says in response to Panel IR 1.1, "*in any event, the BCUC's power to impose conditions under section 54 is similarly limited to conditions that relate to the BCUC's core mandate, like customer and system data*." One reason why the utility has to maintain these records (their argument goes) is to enable the Commission to perform its statutory role. Therefore, the secure keeping of customer information falls within the permissible rationales for conditions the Commission can impose pursuant to s. 44(2), not because the Commission's statutory authority encompasses customers' *privacy rights* (not even by "necessary implication" they tell us) but because – well – customer records are grist for the regulatory mill, one might say. *They are Commission-stuff*.

MoveUP's Answer No. 2:

Rate-setting is a major part of the Commission's "core mandate." Section 59(5)(b) of the UCA requires the Commission to set rates at a level that enables the utility to recover its reasonable operating costs in the provision of regulated services. Those costs include the reasonable cost of its workforce, their pensions and their other post-retirement benefits. Therefore, one reason why the utility has to maintain employee information is to enable the Commission to perform its statutory role. . . its "core mandate".

MoveUP agrees with FEI that the security of personal information about customers is a permissible and appropriate rationale for conditions the Commission can impose pursuant to section 44(2).

Just as with customer records, the employee records are the source of aggregated data that finds its way into evidence in Commission proceedings. Both sets of records "relate to the BCUC's core mandate," to adopt FEI's words. The utility's duty to maintain both collections of records for the purposes of regulatory oversight creates a risk to their security, especially if they are kept on US soil. At FEI's request, the Commission made an order to mitigate that risk for *both* sets of personal records.

In the context of the Commission's jurisdiction to make the Order, it is a distinction without a difference.

As we argued in our October 16 Final Argument on jurisdiction, FEI had it right when it proposed the Order and the Commission had it right when it granted the Order. It had the power to attach conditions for the safekeeping of records that it requires the utility to maintain. Frankly, this is plain and obvious.

<u>On the status of the previous orders: BCUC Panel IRs 1.1.1 and 1.1.1.1</u>

MoveUP says that Order G-161-15 was a valid and appropriate exercise of the Commission's authority. It superseded the previous decisions and they need not be reviewed unless an issue were to arise about events while they remained in force. We are aware of none.

If on the other hand FEI's argument were to prevail, if the Commission is not permitted to mitigate security risks to personal information flowing from an order permitting it to be kept outside of the province, then all of the Order (concerning both customer and employee records) is a nullity except the portions addressing sensitive system-related data.

If the present Order that superseded the previous orders is a nullity, then those orders would potentially remain in force. In that scenario, they were never validly replaced. In

effect, they could spring back to life and would need to be evaluated through the same lens as Order G-161-15.

They would probably not survive that scrutiny, if FEI's arguments prevail. Privacy protection has been the cornerstone of the Commission's s. 44(2) orders permitting FEI records to be kept outside of BC. This goes back to the November 10, 2005 decision in the KMI purchase of Terasen Gas (Decision and Order G-116-05):

> **In order to address concerns related to privacy** and the general removal of critical functions from the Utilities' service areas, the Commission Panel concludes that it should establish a condition that requires KMI not to change the geographic location of any existing functions or data currently in the Terasen Utilities' service areas, without prior approval of the Commission. [bold added]

If FEI is correct that the Commission cannot be motivated by issues of privacy protection in the conditions it attaches to a s. 44(2) order, and it cannot split the hair between the personal regulatory records of customers and employees, then it is left with the UCA default: all records required by the Commission must be kept exclusively within BC (with the possible exception of the sensitive system information addressed in the Order, which was unrelated to privacy protection).

FortisBC may wish to be more careful what it wishes for, as the saying goes.

<u>Commission Panel IRs 2.x</u>

For the most part, FEI's responses to these questions retrace the ground they followed in the IR1.x series, and to avoid repetition we will comment only on two points the company raises here.

First, in its response to IR 2.3, we now have FEI's agreement with our argument that "*the BCUC has the jurisdiction to make determinations regarding the scope of its jurisdiction / powers*. . . ." This is right at the heart of our position: the legislature has left it to the Commission to determine what considerations it may take into account when formulating a s. 44(2) condition.

Second, regarding its response to IR 2.4, we submit that FortisBC's formulation has stood the matter on its head. In its response to BCUC Panel IR 2.3, the utility said:

> *". . . FEI does not believe that the prior restrictions under orders G-116-05, G- 75-06, and G-49-07 had applied to Employee Information in any event. That requirement was introduced for the first time in 2015."*

This is all wrong. A Commission order under section 44(2) is not restrictive: it is *permissive*. It provides relief from the default requirement of the Act, which is that all records the Commission requires of a utility be kept exclusively within British Columbia. The Act does not provide for the *unconditional* removal of any such records from British Columbia:

> **Duty to keep records**
>
> 44 (1) A public utility must have in British Columbia an office in which it must keep all accounts and records required by the commission to be kept in British Columbia.
>
> (2) A public utility must not remove or permit to be removed from British Columbia an account or record required to be kept under subsection (1), **except on conditions specified by the commission**. [bold added]

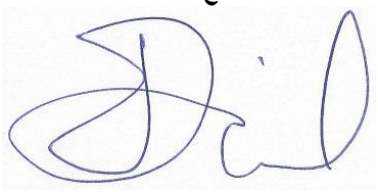
If FortisBC is correct that the earlier orders (G-116-05, G-75-06 and G-49-07) did not refer at all to regulatory records that consisted of employee information, then the default rule continued to govern those records and the impugned Order (G-161-15) provided the utility's earliest authorization to maintain the employee data in the USA.

Therefore, we submit that even if FEI were to prevail entirely in this application, the result would be that section 44(2) would require the utility to repatriate all of the employee data unless it obtained an order permitting those records to be kept outside of the province on conditions specified by the Commission.

All of which is respectfully submitted.

Yours very truly

ALLEVATO QUAIL & ROY



per **Jim Quail**
Barrister & Solicitor