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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 Reply Argument on New Evidence.

Yours very truly,

LAWSON LUNDELL LLP

Ian Webb

Ian Webb

cc. FEI counsel

BRITISH COLUMBIA UTILITIES COMMISSION

FortisBC Energy Inc. and City of Surrey

Applications for Approval of

Terms for an Operating Agreement

Project No. 1598915

City of Surrey

Reply to Final Arguments of Interveners on New Evidence and Reply to Reply Argument of FortisBC Energy Inc. on New Evidence

November 26, 2018

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1. Introduction

1. This reply argument of the City of Surrey (the "**City**")[1] replies to each of the following:

    - British Columbia Old Age Pensioners Organization et al. ("**BCOAPO**") final argument on new evidence as filed on November 13, 2018;
    - Commercial Energy Consumers Association of British Columbia ("**CEC**") final argument on new evidence as filed on November 13, 2018;
    - Mr. Landale final argument on new evidence as filed on November 9, 2018; and
    - FortisBC Energy Inc. ("**FEI**") reply argument to City of Surrey on new evidence as filed on November 19, 2018.

2. The City's Reply Submissions

2.1. Reply to BCOAPO

2. The BCOAPO filed a one-page letter on November 13, 2018 that does not specifically address any of the new evidence. Accordingly, the City has no submissions in reply to the BCOAPO's letter.

2.2. Reply to CEC

3. The CEC also filed a short letter on November 13, 2018 that does not specifically address any of the City's new evidence. The CEC states in its letter that "the [new] evidence confirms the substantial difference between lower mainland and other areas of the province that were the basis for the historical treatments. Further, the evidence provides no compelling rationale for providing identical fees for each of these substantially different areas of the province." The CEC does not explain or elaborate on what it means by a "substantial difference" between lower mainland and other areas of the province. Assuming that the CEC's comment is referring to FEI's response to Panel IR No. 1 (Exhibit B1-17), the City would reply that FEI's new evidence identifies those

[1] In this Reply Argument, the Corporation of the City of Surrey is referred to as "**the City**". To distinguish the legal entity, the City, from the geographic land area owned and/or controlled by the City, the land area owned and/or controlled by the City is referred to in this argument as "**Surrey**".

municipalities that have operating agreements with and without the operating fee, but FEI's new evidence does not identify any difference between lower mainland and other areas of the province that warrants continuation of this historical inequitable treatment. There is no basis in law or fairness for denying the City its requested 3% of gross revenues operating fee in a new operating agreement with FEI solely because the City did not receive such fee under the previous 1957 Operating Agreement. Please refer to paragraphs 5 and 6 of the City's June 28, 2018 Reply Argument.

2.3. Reply to Mr. Landale

4. At page 2, lines 3 to 6, of his final argument on new evidence, Mr. Landale states his opinion that the operating agreements FEI entered into in 2015 with 26 municipalities on Vancouver Island and the Sunshine Coast are "unique" in as much as the *Vancouver Island Natural Gas Pipeline Act* "is/was a controlling legal framework factor". The City replies that effective January 1, 2015, section 7(5) of the *Vancouver Island Natural Gas Pipeline Act* was repealed. Prior to January 1, 2015, section 7(5) of that statute provided as follows:[2]

> (5) Section 22 *[agreements granting exclusive or limited franchises]* of the *Community Charter* applies to the proponent and the local distribution utilities, but a municipality may not set rates or charge fees by means of a franchise agreement under that Act.

5. The repeal of the above provision removed the prohibition for Vancouver Island municipalities to charge fees by means of a franchise agreement under the *Community Charter*. Such statutory amendment did not require that any new operating agreements between FEI and any of these 26 municipalities must have the operating fee calculated on the basis of 3% of FEI's gross revenues in the municipality. In anticipation of the repeal of the above-referenced provision, the Association of Vancouver Island and Coastal Communities ("**AVICC**") worked collaboratively with FEI to negotiate "a made in

[2] http://www.bclaws.ca/civix/document/id/lc/statreg/96474_pit.

Vancouver Island operating agreement" for Vancouver Island and Sunshine Coast municipalities, a key component of which was an operating fee. AVICC and FEI developed an operating agreement for Vancouver Island and Sunshine Coast municipalities that includes the same, standard 3% of gross revenues operating fee as FEI's other operating agreements with the fee. There is no evidence that FEI even considered a different methodology for the operating fee to be paid to AVICC municipalities. FEI endorsed a new standard operating agreement for AVICC municipalities that includes the same 3% of gross revenues operating fee as many other municipalities receive, and the BCUC determined that these 26 operating agreements are in the public interest and approved them.[3] As was intended by FEI and the AVICC,[4] the operating fee will shift some of the burden presently on the municipality associated with FEI's use and occupancy of public places in the municipality from taxpayers to FEI ratepayers, and hence it will support more of a user pay model.

6. At page 4, line 24, to page 5, line 43, of his final argument on new evidence, Mr. Landale attempts to rebut the expert opinion evidence of Aplin & Martin (attached to Exhibit B2-8-1) by referencing a trend in certain costs of the City shown on a summary table in the City's 2018-2022 Financial Plan. Mr. Landale states incorrectly that the summary table shows the City's capital expenditures on utilities, and on that basis incorrectly infers that the City's costs due to FEI's infrastructure will decline. The City replies that the summary table referenced by Mr. Landale shows operating costs of utilities departments of the City, and not capital costs. Moreover, Aplin & Martin's analysis did not rely on aggregate expenditure levels or trends therein. Aplin & Martin assessed the potential capital costs to the City as a result of FEI's infrastructure by comparing where the FEI infrastructure crosses or runs parallel with the proposed City infrastructure identified in the City's 10-Year Capital plan. That is, Aplin & Martin mapped the locations where the City's planned

[3] Refer to BCUC Orders C-6-15, C-7-15 and C-8-15, which are attached to the City's June 28, 2018 Reply Argument.

[4] Refer to slide 15 – Operating Fees – of the December 4, 2013 joint presentation by AVICC and FEI at https://avicc.ca/wp-content/uploads/2013/11/2013_Dec_Webinar.pdf which was referenced at footnote 22 of the City's June 28, 2018 Reply Argument.

projects will cross or run parallel to FEI infrastructure such that the City will incur additional costs as a result of the FEI infrastructure, and assessed the incremental capital costs to the City of having to work around or relocate the FEI gas lines. The maps included in Appendix I of Aplin & Martin's report are compiled based on the pressure class of the FEI lines and overlaid with each of the City infrastructure types, namely water, sewer, drainage, and roads. Mr. Landale's argument based on the summary table of operating costs is not relevant to the sophisticated analysis performed by Aplin & Martin.

7. At pages 5 to 7 of his final argument on new evidence, Mr. Landale makes arguments about taxation. The City replies that it has been the BCUC and FEI's practice to charge the operating fee directly to FEI's customers in the respective municipality. This practice means that in those municipalities that receive the operating fee, the burden of FEI's infrastructure in the municipality's streets falls more on FEI's customers in the municipality than on all municipal taxpayers. Given that not all municipal taxpayers are FEI customers, it is more equitable for the users of FEI's service to bear the costs of providing the service, instead of non-users having to bear these costs in the form of higher property taxes. That is the basis for the City's position that the operating fee supports more of a user pay model, which 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.

2.4. Reply to FEI Reply Submission

8. In reply to Part A of FEI's Reply Argument on new evidence, it is confirmed that the *Community Charter* is referenced in section 121 of the *Utilities Commission Act* ("*UCA*"). The City addressed section 121 of the *UCA* in section 2.3 of the City's November 5, 2018 Final Argument on new evidence because that section addresses section 32 of the *UCA* and in this proceeding the BCUC is called on to use its power under section 32 of the *UCA* to specify the manner and terms of FEI's use of public places in Surrey. Pursuant to section 121 of the *UCA*, nothing in the *Community Charter* or done under the

Community Charter (*e.g.*, a municipal by-law) supersedes or impairs the BCUC's power to make a lawful order in accordance with section 32 of the *UCA*. As set out in section 2.3 of the City's November 5, 2018 Final Argument on new evidence, the City's position is that the BCUC should only use its section 32 power to override those conditions of the municipality that the BCUC considers excessive, and the BCUC should give deference to the municipal Council's judgment in that regard.

9. In reply to Part B of FEI's Reply Argument on new evidence, we did not mean to imply that the BCUC's power under section 32 of the *UCA* applies only in relation to low-pressure pipelines. We only meant to note again that the BCUC's powers in relation to high-pressure gas pipelines are not the same as they are in relation to low-pressure pipelines because FEI's high-pressure pipelines are also subject to the *Oil and Gas Activities Act,* the Pipeline Crossing Regulation, and the jurisdiction of the Oil and Gas Commission as reviewed in the City's previous arguments.

10. In reply to Part C of FEI's Reply Argument on new evidence, the City submits that this current argument phase is about the new evidence (submitted by the City and FEI on October 18, 2018 in response to the Panel's IRs), which is focused on the methodology for calculating the operating fee for the terms of a new operating agreement between the City and FEI. The Supreme Court of Canada decision referenced by FEI in paragraph 6 of its Reply Argument on new evidence did not relate to the purpose of or methodology for calculating an operating fee for an operating agreement. The referenced Supreme Court of Canada Decision, at page 122, describes the matter that was before the Court as follows, "…the real dispute is as to the power of the Commission to grant this certificate [of public convenience and necessity] without the consent of the appellant municipalities."

11. This current proceeding does not involve any exercise of the BCUC's power to grant a CPCN, nor is there any issue in this proceeding related to FEI's right to carry on its

business as a gas utility in Surrey.[5] This current proceeding is about the terms for FEI's use and occupancy of highways and other public places (primarily parks) that are owned and controlled by the City. The City is of the position that the BCUC should give deference to City's Council's judgment in relation to the terms for FEI's use and occupancy of highways and other public places owned and controlled by the City because deference is a necessary and appropriate implication of the statutory scheme:

- the City is vested with ownership and has the authority to regulate and prohibit in relation to all uses of or involving a municipal highway or park, including the authority to require compensation for use and occupancy of such places;

- the elected City Council is itself responsible to make decisions that support the public interest;

- pursuant to subsection 2(3)(c) of the *Gas Utility Act* ("*GUA*"), FEI may place, construct, maintain and operate its natural gas distribution equipment on, along, over or under the City's highways and other public places, on the conditions that FEI and the City agree to; and

- only if FEI and the City are not able to agree on the terms and conditions for FEI's use and occupancy of the City's highways and public places (which would necessarily mean that FEI is of the opinion that the City's conditions are unreasonable and/or excessive), the BCUC may, by order pursuant to section 32 of the *UCA* (or section 33 or 36, as applicable), specify the manner and terms of FEI's use of such places for such purposes.

12. Given this legislative scheme where (i) FEI's use and occupancy of municipal highways and other public places is subject to conditions agreed to with the municipality, including compensation; and (ii) only if FEI and the municipality are not able to agree on such conditions will the BCUC have the power to specify the conditions, the necessary

[5] For example, refer to paragraph 34 of the City's November 5, 2018 Final Argument on new evidence.

and appropriate implication is that the BCUC's mandate in this situation is to consider the municipality's conditions and to only override those conditions of the municipality that the BCUC considers excessive, unreasonable, or effectively prevent FEI from exercising its conditional right to use such places. If the BCUC's mandate was simply to substitute its own views in all of these cases, subsection 2(3)(c) of the *GUA* would not make FEI's rights subject to conditions that the municipality agrees to, and the BCUC's power under section 32 of the *UCA* would not be limited to those circumstances where FEI and cannot reach agreement with the municipality.

13. In reply to Part D of FEI's Reply Argument on new evidence, the City submits that FEI's evidence that there are no Regional Districts that receive an operating fee would have been more complete and helpful to the BCUC if the evidence had explained that the *GUA* specifies different quite regimes apply to highways and other public places owned and controlled by municipalities versus highways and public places in areas outside of municipalities (including in regional districts). Highways outside municipalities are owned and controlled by the Provincial Government (and in some cases First Nations or the Federal Government) and the terms of the use of those highways are not subject to the BCUC's powers under sections 32, 33 or 36 of the *UCA*.

3. Conclusion

14. The new evidence and arguments in this phase of the proceeding confirm that there is nothing unreasonable about the City's request to include 3.0% of gross revenue operating fee compensation for the terms of a new operating agreement with FEI. The City's requested operating fee methodology is reasonable and consistent with the operating fee methodology used across the province.

All of which is respectfully submitted this 26th day of November 2018.

By: Ian Webb

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