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ORDER NUMBER
G-80-19

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

and

FortisBC Energy Inc.
Application for Use of Lands under Sections 32 and 33 of the *Utilities Commission Act* in the City of Coquitlam for the Lower Mainland Intermediate Pressure System Upgrade Projects

BEFORE:
D. A. Cote, Panel Chair
W. M. Everett QC, Commissioner

on April 15, 2019

ORDER

WHEREAS:

A. On October 16, 2015, the British Columbia Utilities Commission (BCUC) issued Order C-11-15 approving a Certificate of Public Convenience and Necessity (CPCN), which granted FortisBC Energy Inc. (FEI) approval for the Lower Mainland Intermediate Pressure System Upgrade Projects (LMIPSU Project). A component of the LMIPSU Project is a new Nominal Pipe Size (NPS) 30 Intermediate Pressure (IP) gas line, operating at 2070 kilopascals, that starts at the Coquitlam Gate Station and proceeds in a westerly direction through the cities of Coquitlam, Burnaby and Vancouver, and ends at the East 2nd Avenue Woodland Station in Vancouver (Coquitlam Segment of the LMIPSU Project);

B. On June 28, 2018, FEI filed an application with the BCUC pursuant to sections 32 and 33 of the *Utilities Commission Act* (UCA) for orders setting the terms for FEI's use of lands in the City of Coquitlam (City) for the Coquitlam Segment of the LMIPSU Project (Application);

C. In the Application, FEI also states that, despite agreement in principle to the "Terms Agreed To", the traffic management plans and engineering drawings attached thereto as documented in confidential Appendix E-2 to the Application ("Terms Agreed To"), the City has declined to provide formal approval for the Coquitlam Component of the LMIPSU Project's engineering drawings unless FEI first agrees to two conditions:

   1. FEI repaves the entire width of a 5.5 kilometre segment of Como Lake Avenue, at an estimated cost of $5 million, despite FEI's construction only disturbing primarily two out of four lanes; and
   2. FEI removes, at its own cost (estimated at $5.5 million), approximately 380 metre segment of the NPS 20 Pipeline that is authorized to be abandoned in place, despite the operating agreement between the parties dated January 7, 1957;

D. FEI requested that the BCUC establish a two-phase review process for the Application, with phase one addressing the approval to proceed with the Coquitlam Segment of the LMIPSU Project in the City, in

accordance with the "Terms Agreed To" (Phase One) and phase two addressing the City's two conditions (Phase Two);

E. By Order G-144-18A dated August 1, 2018, the BCUC established a two-phase review process;

F. By Order G-158-18 dated August 22, 2018, the BCUC made its determination on Phase One, granting approval for FEI to proceed with the Coquitlam Segment of the LMIPSU Project, according to the Terms and Conditions jointly agreed by FEI and the City during Phase One;

G. FEI and the City filed evidence for Phase Two on October 31, 2018. BCUC and the parties submitted Information Requests (IR) on the City and FEI's Phase Two evidence on November 15, 2018. FEI and the City filed their final arguments on December 19, 2018, CEC filed its final argument on January 10 2019, and FEI and the City filed reply arguments on January 17, 2019; and

H. The BCUC has reviewed the evidence and makes the following determinations and authorizations.

NOW THEREFORE the BCUC orders as follows:

1. Pursuant to section 121 of the UCA, it is affirmed that FEI is authorized to abandon the decommissioned NPS 20 Pipeline in place.

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

3. The City's request that FEI should be required to repair and repave the whole 5.5 kilometre section on Como Lake Avenue curb to curb is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 15th day of April 2019.

BY ORDER

Original Signed by:

D. A. Cote
Commissioner

Attachment

FortisBC Energy Inc.

Application for Use of Lands under Sections 32 and 33 of the *Utilities Commission Act* in the City of Coquitlam for the Lower Mainland Intermediate Pressure System Upgrade Projects

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Phase 2 Reasons for Decision

April 15, 2019

Before:
D. A. Cote, Panel Chair
W. M. Everett QC, Commissioner

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1.0 Background

On June 28, 2018, FortisBC Energy Inc. (FEI, or the Company) filed with the British Columbia Utilities Commission (BCUC), pursuant to sections 32 and 33 of the *Utilities Commission Act* (UCA), its application (Application) for the Use of Lands in the City of Coquitlam (the City) for the Coquitlam portion of the Lower Mainland Intermediate Pressure (IP) System Upgrade Projects (LMIPSU Project, or Project).

By Order C-11-15 dated October 16, 2015, and its accompanying decision, the BCUC granted a Certificate of Public Convenience and Necessity (2015 CPCN) for the LMIPSU Project. The LMIPSU Project is a new Nominal Pipe Size (NPS) 30 Intermediate Pressure (IP) gas line (NPS 30 Pipeline), operating at 2070 kilopascals, that starts at the Coquitlam Gate Station and proceeds in a westerly direction through the cities of Coquitlam (Coquitlam Component of the Project), Burnaby and Vancouver, and ends at the East 2nd Avenue Woodland Station in Vancouver. The NPS 30 Pipeline will replace the aging NPS 20 IP gas line (NPS 20 Pipeline) which, when decommissioned, FEI proposes to abandon in place.[1]

The existing NP 20 Pipeline was constructed in the municipality of Coquitlam following the grant of a Certificate of Public Convenience and Necessity (CPCN) from the Public Utilities Commission of British Columbia for the project, which was approved by Order in Council on August 23, 1955.[2] The NPS 20 Pipeline is further, authorized by section 45(2) of the UCA, which provides that a public utility operating a public utility plant or system on September 11, 1980 is deemed to have received a CPCN, providing authorization to operate that plant or system. Section 46(8) of the UCA authorizes a public utility subject to the Act "to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption."

The City and FEI have an existing operating agreement dated January 7, 1957 (Operating Agreement), which is included as Appendix B of this decision. The Operating Agreement sets out the terms and conditions on FEI's use of the City's public spaces. These terms and conditions provide, in part, that FEI is required to submit to the City plans and specifications showing the location, size and dimension of FEI's gas lines and related infrastructure and to obtain the approval of the City Engineer before proceeding with construction of projects like the Coquitlam Component of the Project. This approval is obtained in the form of the City Engineer approving/stamping the Main Construction Order Alignment Drawings (Engineering Drawing Approvals). The City Engineer's approval is not to be unreasonably withheld or delayed.[3]

In the Application, FEI states that FEI and the City have substantially resolved key technical issues relating to the construction of the Coquitlam Component of the Project, including the NPS 30 Pipeline alignment, terms of a traffic management plan, and various protocols. Through discussions with the City, FEI noted that key technical issues respecting the Project appeared to be resolved, and such resolutions were recorded in a document called "Terms Agreed To", which at the time of filing the Application was subject to internal discussions within the City. The City had indicated to FEI that it was withholding formal sign-off of engineering / alignment drawings unless FEI agreed to the following conditions:

[1] Exhibit B-1, pp. 1-2.
[2] Ibid., Appendix B, p. 2.
[3] Ibid., p. 2.

- FEI must, at its own cost, remove approximately 380 metres of the abandoned NPS 20 Pipeline if the pipe ultimately conflicts with a planned City project that may proceed within 3 to 5 years, and patch the pavement to temporarily restore the road; and
- FEI must agree to repave (including replacing lower layers of asphalt) the entire width of Como Lake Avenue for 5.5 kilometres after completion of the Project, and to provide security in the form of a letter of credit in the amount of $6 million for all the paving work.[4]

FEI submitted that the parties are at an impasse on the City's demands, and that the City's withholding of Engineering Drawing Approvals was adding risk to the Project.[5]

1.1 Regulatory process

FEI initially requested that the BCUC establish a two-phase review process for the Application:

- Phase One to address FEI's right to proceed with the LMIPSU Project based on the "Terms Agreed To", involving an early determination on an expedited basis with only the involvement of FEI and the City (Phase One); and
- Phase Two to address the City's demands proceed on a less compressed timetable, with intervener participation the BCUC determines to be appropriate (Phase Two).[6]

FEI submitted that if confirmation was obtained on or before August 31, 2018, it could proceed with the Coquitlam Component of the Project on the basis of the "Terms Agreed To" was key to mitigating the risks to the Project schedule and the potential for increased costs.[7] By Order G-144-18A with accompanying decision dated August 1, 2018, the BCUC established a two-phase regulatory process. The review processes for Phase One and Phase Two are described below.

1.1.1 Phase One Review

The BCUC determined that for Phase One of the proceeding, FEI and the City would be the only participants. In its reasons for decision, the BCUC strongly encouraged FEI and the City to work towards a mutually acceptable agreement on the "Terms Agreed To" before the regulatory process for Phase One concluded.

On August 17, 2018, the City and FEI filed a "Final Agreed Terms and Conditions" document, [8] which both parties confirmed they supported.[9]

By BCUC Order G-158-18 dated August 22, 2018, FEI was authorized to proceed with the Coquitlam Component of the LMPISU Project, based on the "Final Agreed Terms and Conditions." The Order also confirmed that Phase Two of the proceeding would continue in accordance with Order G-144-18A.

[4] Exhibit B-1, pp. 1-3.
[5] Ibid., p. 3.
[6] Ibid., p. 4.
[7] Ibid., p. 3.
[8] Attachment to Exhibit C1-5; Exhibit B-6, Attachment 3.1A provided in the FEI response to BCUC IR 3.1.
[9] Exhibit C1-5, cover letter p. 1; Exhibit B-7, p. 1.

1.1.2 Phase Two Regulatory Process

Order G-144-18A established a written regulatory public hearing process for Phase Two, including the participation of interveners.

On September 5, 2018, Commercial Energy Consumers Association of British Columbia (CEC) registered as intervener for Phase Two. FEI and the City filed additional evidence for Phase Two on October 31, 2018. BCUC and the parties submitted Information Requests (IR) on the City and FEI's Phase Two evidence on November 15, 2018. FEI and the City filed their final arguments on December 19, 2018, CEC filed its final argument on January 10 2019, and FEI and the City filed reply arguments on January 17, 2019.

1.2 Phase Two Issues and Orders and Directions Sought By Parties

The Phase Two issues to be resolved are as follows:

- Whether the NPS 20 Pipeline once decommissioned must be removed by FEI at the request of the City or whether it can be abandoned in place and portions removed by FEI as required upon request by the City and, in either case, the appropriate allocation of the costs in connection with its removal, in whole or in part; and
- The interpretation of the Operating Agreement, regarding the extent of FEI's requirement to repair and repave damage to Como Lake Avenue caused by the Coquitlam Component of the Project.

FEI is seeking orders pursuant to sections 32 and 33 of the UCA directing as follows:

- The City may request that FEI remove portions of the abandoned NPS 20 Pipeline to the extent contemplated in section 4 of the Operating Agreement, and the cost associated with the removal will be allocated in accordance with section 5(a) of the Operating Agreement; and
- FEI shall only be responsible for repaving and repair of Como Lake Avenue damaged by the Project to the extent required by the Operating Agreement. For greater certainty, FEI submits it is not required to repave undisturbed portions of Como Lake Avenue as requested by the City, at its cost or otherwise.[10]

Regarding the removal of the decommissioned NPS 20 Pipeline, the City requests the BCUC find that:

- The Operating Agreement does not provide FEI with rights to abandon its permanently decommissioned NPS 20 Pipeline in Como Lake Avenue.
- Section 4 of the Operating Agreement does not apply to the City's request that FEI permanently remove its decommissioned NPS 20 Pipeline from the City's property.

And is seeking orders directing as follows:

- Approval and direction that FEI remove, at its cost, the 380m section of its NPS 20 Pipeline in Como Lake Avenue between North Road and Clarke Road in Coquitlam to facilitate the City's water and sewer main works planned for 2021 and in accordance with the City's specifications.

[10] Exhibit B-1, Appendix A-1; FEI Final Argument, p. 43.

- Approval and direction that FEI remove, at its cost, the rest of the decommissioned NPS 20 Pipeline in Como Lake Avenue between North Road and Mariner Way in Coquitlam when requested by the City and in accordance with the City's specifications.[11]

The City also requests that the BCUC provides encouragement to FEI to negotiate an equitable agreement with the City that allows FEI to leave the approximately 5.1 kilometres section of the NPS 20 Pipeline gas line in Como Lake Avenue between Clarke Road and Mariner Way, until the City determines that a specific section of the NPS 20 Pipeline will conflict with works that the City or a third party plans to construct within one year, and the City gives notice to FEI to remove such specific sections of the NPS 20 Pipeline as requested by the City.[12]

Regarding the repair and repaving of damage to Como Lake Avenue, the City requests that the BCUC in its decision:

- Determine that FEI's Project will result in damage to areas of all four lanes of Como Lake Avenue; and
- Confirm that the City's specification, as laid down by the City Engineer, that FEI must repair and repave the full width of the entire 5.5 kilometres section of Como Lake Avenue is consistent with the Operating Agreement.[13]

FEI and the City have not been able to come to an agreement as to whether the NPS 20 Pipeline can be abandoned and if so, regarding the allocation of costs in the event the decommissioned NPS 20 Pipeline must be removed, in whole or in part. Nor have they been able to come to an agreement on the extent of FEI's responsibility to repair and repave Como Lake Avenue as a result of the Project. As a result, FEI has filed this Application.

Regulatory Legal Framework

FEI filed this Application pursuant to the provisions of sections 32 and 33 of the UCA. In addition, in the Final Agreed to Terms and Conditions, the parties agreed that if they were unable to resolve a matter relating to the Final Agreed to Terms and Conditions, the BCUC could make a determination on the matter under sections 32 and 33 of the UCA.[14] Section 33 addresses extensions and instances where distribution equipment is being placed which is not at issue, and the Panel notes that the parties have primarily focused and relied upon section 32 of the UCA in their respective written arguments. The Panel's decision will therefore focus on that section, which provides as follows:

> 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.

[11] City Final Argument, p. 23.
[12] City Final Argument, p. 23.
[13] Ibid., p. 34.
[14] Attachment to Exhibit C1-5, p. 9.

> (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.

Section 32 provides the BCUC with statutory authority, in certain circumstances, where a public utility and a municipality are unable to resolve an impasse regarding the utility's use of municipal public spaces, to allow the public utility to use the public spaces and to specify the manner and terms of such use.

As stated by FEI, "[section 32] of the UCA come[s] into play when an agreement on the conditions of use of public spaces is outstanding. Section 32 makes the BCUC the final arbiter of disputes over the terms of use, ensuring that public utilities are able to use municipal public places to provide a valuable service on reasonable terms. Section 32 protects the utility – and ultimately the utility customers who pay all costs of service – from unreasonable municipal requirements, while ensuring fair treatment of municipalities."[15] The Panel agrees.

The Panel will address the foregoing Phase Two issues in the following sections of this decision.

2.0 Allocation of Costs Associated with Removal of the Entire 5.5 kilometres of the Decommissioned NPS 20 Pipeline

2.1 Introduction

This unresolved dispute between FEI and the City relates to a disagreement as to whether the entire 5.5 kilometres of the decommissioned NPS 20 Pipeline must, at the City's request, be removed by FEI at the sole expense of FEI and its ratepayers or whether it may be abandoned in place and portions removed by FEI upon request by the City.

The City takes the position that the entire NPS 20 Pipeline must be removed at the City's request and at FEI's sole expense. FEI takes the position that it is entitled to abandon the NPS 20 Pipeline in place on the City's property, but acknowledges that the NPS 20 Pipeline will remain its property and responsibility after it is decommissioned and that FEI will remove it at the City's request if it interferes with municipal infrastructure under the cost allocation methodology outlined in section 5(a) of the Operating Agreement.

The overarching issue, in either case, is the appropriate allocation between FEI and the City of the costs in connection with the removal, in whole or in part, of the NPS 20 Pipeline.

Important considerations in reaching a determination on this issue include, but are not limited to, the 1955 CPCN, the deemed CPCN and the 2015 CPCN granted to FEI and/or its predecessors by the BCUC and/or its predecessors, provisions of the Gas Utility Act, the BCUC's jurisdiction under sections 32 and 121 of the UCA and provisions of the Operating Agreement.

[15] FEI Final Argument, p. 5.

2.2 Summary of the Evidence

A brief summary of the evidence filed by the City and FEI follows.

The City's Evidence

The City is requesting that FEI remove, at FEI's sole cost, the entire 5.5 kilometres of the NPS 20 Pipeline.

The City's most urgent need for the space currently occupied by the NPS 20 Pipeline is the 380 metre section between North Road and Clarke Road in the Burquitlam area, which the City states is needed for the installation of its new water main and sanitary sewer.[16]

The City submits the remaining 5.1 kilometre section of the decommissioned NPS 20 Pipeline will also be needed because the projected and planned growth of the City will require new utilities to be installed under the already congested Como Lake Avenue corridor.[17]

The City also states, "At this time, in certain segments of Como Lake Avenue, there is capacity for utility installations without removal of the NPS 20 pipe."[18]

FEI's Evidence

FEI states that its predecessor was authorized, by the 1955 CPCN granted by the BCUC's predecessor and also by the deemed CPCN granted to FEI pursuant to section 45(2) of the UCA, to place its infrastructure, including the NPS 20 Pipeline, in the City's public space.[19]

FEI further states it was authorized to construct the LMIPSU Project (the new NPS 30 pipeline) and to abandon the NPS 20 Pipeline in place, pursuant to the 2015 CPCN granted by the BCUC.[20]

FEI also states that sections 2(2) and (3) of the *Gas Utility Act* (GUA) affirm FEI's right as a gas utility to operate in the City under its 1955 and 2015 CPCNs and contemplate a public utility agreeing with a municipality, "…on the conditions that a gas utility and the municipality agree to."[21] The conditions the City and FEI have agreed to are set out in the Operating Agreement and the Final Agreed Terms and Conditions approved by the BCUC in Phase One of this proceeding.

FEI has confirmed that the NPS 20 Pipeline will remain its property and responsibility after it is decommissioned and that FEI will remove it if it interferes with municipal infrastructure. [22]

FEI estimates the cost to remove, all at once, the entire decommissioned 5.5 kilometres of the NPS 20 Pipeline to be $77.5 million.[23]

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[16] Exhibit C1-12Responses to FEI IRs 3.1, 3.1.2 and 3.2; City Final Argument, p. 10.
[17] City Final Argument, p. 10.
[18] Exhibit C1-10, Response to BCUC IR 10.5.1.
[19] FEI Final Argument, p. 4.
[20] Ibid., p. 4.
[21] Ibid., pp. 4-5.
[22] Exhibit C1-8, p. 5; Appendix B, p. 2.
[23] FEI Final Argument, p. 41.

2.3 Arguments of the Parties

FEI's Final Argument

FEI makes the following submissions addressing the City's demand that FEI remove the entire NPS 20 Pipeline at a very significant cost which the City says should be borne by FEI and its ratepayers.

CPCN Authorization of FEI's Abandonment Plan

FEI submits it has established its right to enter and place its distribution equipment, including the NPS 20 Pipeline, in the City's public spaces pursuant to the authorizations granted by the 1955 CPCN and the deemed CPCN pursuant to section 45(2) of the UCA. Further, the GUA and the Operating Agreement provide FEI rights to place, operate and maintain the NPS 20 Pipeline.[24]

FEI submits the following wording of the 2015 CPCN decision demonstrates that the BCUC considered the issues associated with abandonment and clearly and unequivocally granted its approval of FEI's abandonment plans in regard to the discontinued NPS 20 Pipeline:

> The Panel approves FEI's abandonment plans and discontinuance of CP [cathodic protection] as proposed for both the Coquitlam Gate and Fraser Gate IP Projects. The steps FEI plans to take to minimize environmental and social impacts are appropriate as they are both cost effective and result in a minimum of disruption. Further, the Panel notes that the interveners raised no concerns concerning pipeline abandonment.[25]

FEI submits that, "…The BCUC cited section 45 of the UCA in the CPCN Order. Section 45(9) authorizes the BCUC to place terms "as the public convenience and interest reasonably require" on the issuance of a CPCN relating to the construction of the Project. Specifying terms on how FEI was to address the NPS 20 IP gas line as part of the Project went to the core of the BCUC's role as a public utility regulator. The decision had economic implications for ratepayers (abandonment was much cheaper than removal), as well as social and environmental implications (which the BCUC concluded favoured abandonment)."[26]

FEI cites section 121 of the UCA which provides that nothing done under the *Community Charter* or *Local Government Act* supersedes or impairs a power conferred on the BCUC or an authorization granted to a public utility, or relieves a person of an obligation under the UCA or the GUA. The UCA defines an "authorization" to mean a CPCN issued under the UCA.[27] As a result, FEI submits that the City's purported exercise of its power under the Community Charter or Local Government Act to demand the NPS 20 Pipeline be removed is precluded by section 121 of the UCA because it would supersede or impair the BCUC's powers under the UCA and its authorization approving FEI's abandonment plan in the 2015 CPCN.[28]

[24] FEI Final Argument, pp. 3-4.
[25] FEI Final Argument, p. 21.
[26] Ibid., p. 23.
[27] Utilities Commission Act, section 121(1) and (2).
[28] FEI Final Argument, pp. 21-22.

In conclusion, FEI points out that it consulted with the City in the lead up to the 2015 CPCN application and the City had every opportunity to participate in the proceeding and make its position known, but did not do so. Nor did it apply for reconsideration of that Decision.[29]

Guidance Provided by the Operating Agreement

FEI takes the position that the City has a contractual right under the Operating Agreement to request that FEI remove the abandoned NPS 20 Pipeline, but submits that right is accompanied by a further term in the Operating Agreement that would make the City responsible for the majority of such removal costs.[30] FEI is prepared to undertake the removal of any portion of the NPS 20 IP gas line, including the entire 5.5 kilometres, if the City exercises its rights under the Operating Agreement and requests such removal. However, FEI does not agree with the City's position that it has to bear the entire cost of such removal.[31]

FEI provides reference to and relies upon Sections 1, 4, 5(a) and 16 of the Operating Agreement (Appendix B of this decision). Section 1 defines the conditions on which the Company may place, construct, remove, repair and maintain and operate its "said works". Section 4 prescribes the Company's responsibilities when the City has requested a change of location. Section 5(a) lays out how the costs are to be allocated in the event of a requested change of location pursuant to section 4 by the City and Section 16 defines the ownership of the "said works."

FEI submits the definition of "said works" in section 1 of the Operating Agreement, specifically includes FEI's "pipes" and there is nothing in the definition of "said works" that excludes FEI's pipes that have been decommissioned. Section 16 confirms that the "said works" placed on any public property remain the property of FEI and may be removed at any time subject to the terms of the Operating Agreement, which FEI says is entirely consistent with its pipes that have been placed and subsequently abandoned being permitted to remain on public property and subject to the Operating Agreement.[32]

FEI further submits that if it is required to remove all of the abandoned NPS 20 Pipeline then, the removal costs are to be allocated between the City and FEI in accordance with the allocation formula set out in section 5(a) of the Operating Agreement. FEI acknowledges that it no longer has records necessary to determine the install costs of the NPS 20 Pipeline. However, it has prepared an estimate of those install costs by itemizing the new NPS 30 pipeline budget estimate in sufficient detail to provide the granularity necessary for FEI to determine which budget components would not be relevant to gas line construction in 1957. FEI then applied appropriate factors and assumptions to the relevant budget components. FEI's estimate of the allocation of the removal of all of the NPS 20 Pipeline, pursuant to the provisions of section 5 (a) of the Operating Agreement, would be $3.8 million to FEI and $73.4 million to the City.[33]

[29] FEI Final Argument, p. 27.
[30] Ibid.
[31] Exhibit B-15, Response to CEC 1.1.
[32] FEI Final Argument, pp. 28-29.
[33] Ibid., pp. 31-32.

In the Event the Provisions of the Operating Agreement Are Not Applicable

FEI submits that in the event the BCUC were to determine that the removal of the decommissioned NPS 20 Pipeline is not covered by the Operating Agreement (with which interpretation FEI does not agree), then given that the request for its removal is being made by the City, it would make sense for the City to pay the entirety of the cost.[34] Alternatively, FEI submits that sections 32 and 33 of the UCA would apply as there would be no agreement in place governing a scenario which includes the requirement of the use of public lands and would permit the BCUC to determine a fair and reasonable cost allocation for the cost of removal.[35] In those circumstances, FEI submits a determination by the BCUC that the cost allocation method provided under section 5(a) of the Operating Agreement would be fair and reasonable for the following reasons:

a) the City's projects are the proximate cause of the removal, not FEI's;

b) costs associated with removal and disposal of pipes should be allocated in the same way as under the Operating Agreement, because there is conceptually little difference between the triggering factor; and

c) inclusion of the cost allocation provision balances FEI's objective of discouraging a municipality from making unnecessary requests for removal of FEI facilities from existing approved locations with the municipality's objective of facilitating development and growth.[36]

Justification for Removal of the Entire 5.5 Kilometres of the NPS 20 Pipeline

FEI also raises a concern with regard to the City's assertion that the NPS 20 Pipeline has to be removed at some point and that it is more cost effective to remove the entire 5.5 kilometres now, rather than later. FEI submits that the City fails to provide sufficient justification for incurring the significant costs of such removal.[37]

In FEI's view the evidence is clear that removal of the NPS 20 Pipeline may never be necessary, in which case removing it now would represent a significant waste of money. FEI states the City's evidence is vague and imprecise noting the City's statement, that "while it is reasonable to assume that some of these works can happen with sections of the NPS 20 pipe left in place, it is also reasonable to assume that at some point large sections of the NPS will be obstacles to future projects undertaken by either the City or another third party utility company." In FEI's submission, the City never states the entire NPS 20 will become an obstacle and the City has only identified a 380 metre section of the NPS 20 Pipeline that needs to be removed for installation of a new water main and sanitary sewer.[38]

With respect to the removal of the 380 metre section of the NPS 20 Pipeline and any future required removal, FEI submits such removals should be coordinated with future infrastructure installations. This is because it would be more cost-effective, and lessen the impact to residents, commuters, businesses and FEI's customers.[39] FEI notes that statements made by the City appear to concede that coordination of projects would "reduce disruption to the public" and "potentially provide some net advantages to overall efficiency and cost

[34] FEI Final Argument, pp. 33, 36.
[35] Ibid., p. 33.
[36] Ibid., p. 36.
[37] Ibid., p. 37.
[38] FEI Final Argument, p. 37; Exhibit C1-12, Response to FEI IR 2.6.
[39] Ibid., p. 39.

effectiveness."[40] FEI further submits that the significant costs of removing the entire NPS 20 Pipeline now would be unfair to FEI's customers as it would require them to contribute to the cost of removal based on the City's speculation regarding the need for such removal. FEI concludes by reporting that it retained an expert to prepare an AACE Class 5 cost estimate. The estimate for the removal of the 380 metre segment of the NPS 20 Pipeline in 2021 totals $9.4 million while the removal of the remainder of the 5.5 kilometres in 2024 is estimated to cost $77.5 million.[41]

FEI also submits the case for abandoning the NPS 20 Pipeline is the least impact solution because removal would face significant logistical and construction challenges given the urban location and development that has occurred since it was installed, environmental impact in parks and sensitive areas, traffic impacts, disruptions to homes and businesses, noise and dust disturbances and significantly higher costs than abandonment.[42]

The City's Final Argument

The City, in its final argument, modified the directions it is seeking and is requesting FEI to remove the entire 5.5 kilometres of the NPS 20 Pipeline at the City's request,[43] and at FEI's sole cost[44] and therefore, ratepayer's expense.

The City is of the view that the removal of the entire length of NPS 20 Pipeline should be carried out once it has been decommissioned because the space it currently occupies will be required at some point in the future. If it is left in place, the City believes it will be an obstacle for future utilities. The City points to its planned growth and the need for additional underground space.[45]

The City submits that FEI does not have the right to leave a decommissioned pipeline in place on the basis there is a difference between pipelines delivering gas and those that are decommissioned, which it views as being stored or trespassing on municipal property.[46]

The City's position is the entire 5.5 kilometres of NPS 20 Pipeline will need to be moved and FEI is responsible for its removal and disposal. In addition, FEI confirms that it retains ownership and responsibility for the decommissioned NPS 20 Pipeline and the City notes there is no scenario where this ownership and responsibility passes to the City.[47] Further, the City submits there is no legislative or other basis requiring the City to contribute to FEI's costs of removing the NPS 20 Pipeline.[48]

City's submissions are based on its view that there is no legal basis for the NPS 20 Pipeline to be abandoned on its public space. It argues as follows:

[40] FEI Final Argument, p. 40.
[41] FEI Final Argument, pp. 41-42.
[42] Ibid., p. 25.
[43] City Final Argument, p. 23.
[44] Ibid., p. 15.
[45] Ibid., p. 9.
[46] Ibid., pp. 14-15.
[47] City Final Argument, p. 9.
[48] Ibid., p. 15.

a) The Oil and Gas Commission's jurisdiction to order the removal (or allow abandonment in place) is pursuant to the Oil and Gas Activities Act ("OGAA"), and is not applicable because the NPS 20 Pipeline is not in Provincial Crown land, but is in land owned and controlled by the City.[49]

b) While the City acknowledges that the GUA and the Operating Agreement provide FEI rights to place, operate and maintain the NPS 20 Pipeline, neither permit or authorize FEI to abandon the decommissioned pipeline that will never be used for the purposes of supplying natural gas to the public.[50]

c) The City further submits that on a proper interpretation, the only rights the Operating Agreement authorizes in relation to storage are the use of real property for the storage of gas and not the use of real property for storage of decommissioned pipes. The City confirms it has requested that FEI remove the NPS 20 Pipeline pursuant to its common law authority as owner of the property (trespass) and its legislative authority under the *Community Charter* to remove the NPS 20 Pipeline from its property. It further submits that there is no legislative or other basis for requiring the City to contribute to FEI's costs of removing the NPS 20 Pipeline under the Operating Agreement because section 4 only applies to a request by the City to move a pipeline from one location on City property to another location on City property.[51] The City therefore submits that section 4 does not apply to the permanent removal of the NPS 20 Pipeline as such removal would mean it no longer exists on public property.[52]

d) With respect to the UCA, the City submits that the BCUC does not have jurisdiction under sections 32 or 33 or 45 and/or 46 of the UCA to grant FEI property rights to facilitate abandonment of the decommissioned NPS 20 Pipeline on municipal property. Further, sections 32 and 33 do not apply to decommissioned pipes that are not used or useful for supplying gas. Section 45, (regarding CPCNs) only applies to construction and operation and not to decommissioned pipelines. Moreover, a CPCN does not permit the BCUC to grant "property rights" on municipal lands. The City further submits the 2015 CPCN did not grant any binding conditions related to the abandonment of the NPS Pipeline and there is no indication in the BCUC's reason for decision that it intended for FEI to expropriate municipal land for the purpose of pipeline abandonment. Nor does the BCUC have authority to expropriate land for the purpose of storing permanently decommissioned pipes.[53]

The City submits that for the reasons stated above there is no CPCN authorizing or requiring FEI to abandon the NPS 20 Pipeline and, accordingly, section 121 of the UCA does not apply in connection with FEI's proposed abandonment.

CEC's Final Argument

CEC's submissions are supportive of and adopt many of FEI's positions regarding the abandonment of the NPS 20 Pipeline and the allocation of costs for its removal. In summary, the CEC:

[49] City Final Argument, p. 11.
[50] Ibid., p. 11
[51] Ibid., pp. 13-15.
[52] Ibid., p. 15.
[53] Ibid., pp. 15-18.

- Is of the view that it is cost effective and safe for the pipeline to be abandoned in place according to the decision in the 2015 CPCN;
- Recommends that the BCUC find that the Operating Agreement is applicable to decommissioned pipes, and recommends that the BCUC deny the City's request to remove the approximately 5.5 kilometres of NPS 20 Pipeline planned for abandonment, unless the City requests that the pipe be removed under the terms of the Operating Agreement;
- Recommends that the BCUC adopt FEI's view of the cost allocation in the event that FEI removes the NPS 20 Pipeline at the request of the City under the Operating Agreement; and
- Submits that it is important that BCUC consider the issue of precedent with regard to the rest of FEI's system, including the impacts of a decision accepting the City's proposals in making its determinations regarding the current issue.[54]

FEI's Reply Argument

FEI submits that the rights permitting the NPS 20 Pipeline to be installed do not lapse as asserted by the City. The City does not challenge that FEI had the right to install the NPS 20 Pipeline. However, in FEI's view, the City fails to identify a contractual or statutory requirement that requires the NPS 20 Pipeline to be removed after it is decommissioned. In addition, there is no provision of the 1955 CPCN, the GUA or any other legislation that requires gas utilities placed in a municipality to be removed after decommissioning.[55] FEI argues the NPS 20 Pipeline is not trespassing as claimed by the City and submits that the NPS 20 Pipeline was placed in accordance with the Operating Agreement and there is no obligation to remove it unless one can be found in contract. The Operating Agreement allows the City to make a request but also spells out the cost allocation provisions.[56]

FEI further notes a key problem with the City's legal argument that the abandoned NPS 20 Pipeline constitutes a trespass, in that it is based on a provision of the *Community Charter* which is made subordinate to the framework of the UCA, pursuant to sections 121, 32 and 33 of the UCA.[57] Moreover, the effect of the City's legal argument based on the abandoned NPS 20 Pipeline constituting a trespass, is that the City and other municipalities (in the absence of agreed terms to the contrary) would have the right to require all decommissioned gas lines to be removed regardless of whether there is any operational reason or need to request such removal. FEI argues the cost implications of removing abandoned gas lines throughout municipalities would be staggering for customers of any gas utility in the province. This, in FEI's view, accounts for the legislature's decision, through sections 32 and 33 of the UCA, to give the BCUC (in the absence of agreement) the power to determine the parties' respective rights and obligations with respect to utility infrastructure. FEI states that the BCUC is positioned to take into account the broader public interest.[58]

[54] CEC Final Argument, p. 2.
[55] FEI Reply Argument, p. 5.
[56] Ibid., p. 6.
[57] Ibid.
[58] FEI Reply Argument, pp. 6-7.

The City's Reply Argument

The City submits that the 2015 CPCN did not order or imply that FEI could construct and operate the new NPS 30 pipeline, if, and only if, FEI obtains the necessary property rights and abandon the NPS 20 Pipeline in place. If that was the BCUC's intention, the 2015 CPCN order and decision would have made that eminently clear.[59] The City also submits that the Operating Agreement does not provide FEI with the right to abandon the NPS 20 Pipeline in place and the City's request that it be removed by FEI from the City's property is not a request pursuant to section 4 of the Operating Agreement and the cost allocation formula in section 5(a) is not applicable in the circumstances.[60]

The City further addresses FEI's submission, that even if sections 4 and 5(a) of the Operating Agreement do not apply in this circumstance, the City, having requested the removal of the NPS 20 Pipeline, should be required to pay the entire costs of the removal. The City submits FEI's position has no basis in law because the NPS 20 Pipeline is not being used to supply gas to the public, its abandonment without any property rights to be there constitutes a trespass and therefore, its removal should be at FEI's expense.[61] The City applies the same argument to FEI's alternative submission, that it would be fair and reasonable for the BCUC to adopt the cost allocation methodology under section 5(a) of the Operating Agreement pursuant to section 32 of the UCA.

2.4 Panel Determination

2.4.1 Abandonment of the NPS 20 Pipeline

The Panel finds that FEI is authorized to abandon in place the NPS 20 Pipeline in the City's public space, subject to FEI's acknowledgement that the abandoned NPS 20 Pipeline will remain its property and responsibility after it is decommissioned, and that FEI will remove it at the City's request if it interferes with municipal infrastructure.

FEI has established its right to enter and place its distribution equipment, including the NPS 20 Pipeline, in the City's public spaces pursuant to the 1955 CPCN and the deemed CPCN pursuant to section 45(2) of the UCA. Further, FEI's authority to construct the Coquitlam Component of the LMIPSU Project, including the new NPS 30 Pipeline is authorized by the 2015 CPCN. The BCUC, in its 2015 CPCN decision, clearly approved FEI's plans to abandon in place the decommissioned NPS 20 Pipeline and stated in part, "…The steps FEI plans to take to minimize environmental and social impacts are appropriate as they are both cost effective and result in a minimum of disruption." In addition, the Panel notes that FEI consulted with the City in the lead up to the 2015 CPCN application and, despite having every opportunity, the City chose not to participate in the proceeding and make its position known, nor did the City seek a reconsideration of the decision.

The City purported exercise of its power under the *Community Charter* or *Local Government Act* to require the NPS 20 Pipeline be removed, is, in the Panel's view, precluded by section 121 of the UCA, which provides that nothing done under the *Community Charter or Local Government Act* supersedes or impairs a power conferred on the BCUC or an authorization (CPCN) granted to a public utility. Section 121 of the UCA is also an answer to

[59] City Reply Argument, p. 3.
[60] City Reply Argument, p. 3.
[61] Ibid., p. 4.

the City's position that the abandonment of the decommissioned NPS 20 Pipeline (given that it is no longer used or useful in carrying gas) is beyond the BCUC's authority as it cannot grant FEI property rights to store an abandoned pipeline or it constitutes a trespass on the City's property. On this issue, the Panel agrees with FEI that the BCUC's authorization to abandon the NPS 20 Pipeline as part of the Project goes to the core of the BCUC's role as a public utility regulator as it had significant economic implications for ratepayers as well as social and environmental implications.

The Panel agrees with FEI's submission that abandoning the NPS 20 Pipeline is the least impact solution because removal would result in significant logistical and construction challenges being faced, given the urban location and development that has occurred since it was installed, environmental impact in parks and sensitive areas, traffic impacts, disruptions to homes and businesses, noise and dust disturbances and significantly higher costs than abandonment. The potential effect of the City's argument based on the abandoned NPS 20 Pipeline constituting a trespass, is that the City and other municipalities, in the absence of agreed terms to the contrary, would have the right to require all decommissioned gas lines to be removed regardless of whether there is any operational reason or need to request such removal. The cost implications of removing abandoned gas lines throughout municipalities would be very significant for customers of any gas utility in the province and would not serve the broader public interest.

The Panel also disagrees with the City's assertion that the NPS 20 Pipeline has to be removed at some point and that it is more cost effective to remove the entire 5.5 kilometres once decommissioned, rather than later, as it is not supported by the evidence. The City has stated that, "while it is reasonable to assume that some of these works can happen with sections of the NPS 20 pipe left in place, it is also reasonable to assume that at some point large sections of the NPS will be obstacles to future projects undertaken by either the City or another third party utility company." The Panel agrees with FEI, that this evidence is vague and imprecise and fails to provide sufficient justification for incurring the very significant costs of removing the entire NPS 20 Pipeline (estimated at $77.5 million), which may never be necessary and would represent a significant waste of money.

FEI acknowledges that the City has identified a 380-metre section of the NPS 20 Pipeline (referred to above) that needs to be removed for installation of a new water main and sanitary sewer. With respect to the removal of the 380 metre section of the NPS 20 Pipeline and any future required removal, the Panel agrees with FEI's and the City's submissions and urges the parties to coordinate such removals with future infrastructure installations as such coordination could potentially provide some net advantages to overall efficiency and cost effectiveness and lessen the impact to residents, commuters, businesses and FEI's customers.

2.4.2 Allocation of Costs of Removal of the NPS 20 Pipeline

The Panel determines the public interest is safeguarded by specifying a term pursuant to section 32 of the UCA that provides the costs of removal of all, or a portion of, the abandoned and decommissioned NPS 20 Pipeline, upon request by the City, in circumstances where it interferes with municipal infrastructure, shall be shared equally between FEI and the City.

Briefly stated, section 32 provides, in circumstances where a public utility has the right to enter a municipality and place its distribution equipment on municipal public spaces, but cannot come to an agreement with the

municipality on the use of the public spaces or the terms of such use, the BCUC may allow the use of such public spaces by the public utility for that purpose and specify the manner and terms of such use.

FEI has confirmed in evidence that the NPS 20 Pipeline will remain its property and responsibility after it is decommissioned and FEI will remove it if it interferes with municipal infrastructure. The issue between the parties is how the costs of such removal are to be allocated.

The Panel does not agree with FEI's position that sections 1, 4, 5(a) and 16 of the Operating Agreement (referred to above) when properly interpreted, provide that the City can request FEI to remove the NPS 20 Pipeline under section 4 of the Operating Agreement and that the formulae for allocating the costs of such removal as set out in section 5(a) of the Operating Agreement would apply and make the City responsible for the majority of such removal costs. In the Panel's view, section 4 of the Operating Agreement is not applicable to the City's request that FEI permanently remove the decommissioned NPS 20 Pipeline. Section 4 addresses circumstances in which the City requests FEI to move a pipe from one location (place A) to another location (place B), where both place A and place B are within the City's public property and does not apply to the permanent removal of a pipe given that such removal would mean it no longer exists on public property. Therefore, the Panel agrees with the City's submission and finds that the request to remove the pipeline from the City's property is not a request pursuant to section 4 of the Operating Agreement and the cost allocation formula in section 5(a) is not applicable in the circumstances.

It is clear from the foregoing that the Operating Agreement does not include terms which determine the method or formulae for allocating the costs of removing all, or portions of the abandoned and permanently decommissioned NPS 20 Pipeline at the request of the City. Nor have the parties been able to come to an agreement on terms for determining the allocation of such costs. Given that the Operating Agreement does not apply to the removal of the decommissioned NPS 20 Pipeline, the Panel must consider alternatives for cost allocation.

The City takes the position that because FEI acknowledges that it retains ownership and responsibility for NPS 20 Pipeline and will remove it if it interferes with municipal infrastructure, FEI should therefore be responsible for the entire costs of its removal and disposal. In opposition to this, FEI has submitted that since the NPS 20 Pipeline was placed in accordance with the Operating Agreement, the City does not have a right, after the fact, to require that it be removed. Further, in such circumstances, the City would be required to reach a negotiated agreement with FEI on the allocation of costs of the removal. It is FEI's position that it would make sense for the City to pay the entirety of the cost given that such removal would occur at the City's request.

In addition, the Panel notes that FEI, in its final argument, points out that where there is no agreement in place and an agreement cannot be reached, section 32 of the UCA permits the BCUC to specify terms for a fair and reasonable allocation of the cost of the NPS 20 Pipeline removal. **The Panel agrees and finds it appropriate to exercise its jurisdiction under section 32 on this matter.**

The Panel notes that Order G-18-19 and accompanying decision for the FEI and City of Surrey Applications for Approval of Terms of an Operating Agreement describes the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA as being 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 municipalities and their inhabitants to the extent they may be affected by the operations of public utilities.[62]

The Panel, 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.

The alternative methods of allocating the costs of removal of the NPS 20 Pipeline put forward by the parties for the Panel's consideration pursuant to section 32 include either FEI or the City paying all the cost of removal, the allocation formulae set out in section 5(a) of the Operating Agreement or some other cost allocation method. In the Panel's view a cost allocation requiring FEI to pay all the costs of removal of the NPS 20 Pipeline at the request of the City would not be in the public interest as it could result in the City making potentially unnecessary requests for removal at a very significant cost to FEI and its ratepayers. On the other hand, a cost allocation requiring the City to pay all the costs of removal or a majority of the costs pursuant to the allocation method under section 5(a) of the Operating Agreement would also not be in the public interest, because it fails to take into account the fact that the NPS 20 Pipeline is owned by FEI and is occupying the City's public spaces. In that sense, FEI is, in part, the cause for the NPS 20 Pipeline having to be removed at the request of the City when it interferes with municipal infrastructure. On the basis of cost causation, it would not, in the Panel's view be in the public interest to allocate all or a majority of the costs of removal of the NPS 20 Pipeline to the City.

The Panel finds the public interest is safeguarded by specifying a term pursuant to section 32 of the UCA that provides the costs of removal of all, or a portion of, the NPS 20 Pipeline, upon request by the City, in circumstances where it interferes with municipal infrastructure, shall be shared equally between FEI and the City. Such a term ensures that FEI, as a public utility, is able to use municipal public places to provide a valuable service as well as the public interest in the convenience and necessity of receiving the delivery of a natural gas service. It also lessens the likelihood of the City making unnecessary or unreasonable requests for removal of the NPS 20 Pipeline, thereby avoiding unnecessary disruption to the City's streets and public spaces and any resulting cost and inconvenience to the residents, commuters and businesses.

3.0 Repair and Repaving of Damage to Como Lake Road

3.1 Introduction

As outlined in Section 1.2, the second unresolved issue relates to a disagreement between the parties as to the handling of repairs and damage caused by the Project to a 5.5 kilometre portion of Como Lake Avenue. It is the City's position that it is a fact the Project, once undertaken, will result in damage to all four lanes of Como Lake Avenue. As a consequence, the City believes FEI should be required to "repair and repave the whole of the 5.5 km section of Como Lake Avenue, curb to curb, to reinstate the paving to an acceptable standard at the end of FEI's Project."[63] FEI's position is that the Project undertaking will affect and disturb only certain portions of

[62] FEI and City of Surrey Applications for Approval of Terms of an Operating Agreement, Order G-18-19, Decision at section 2.4.2.
[63] City Final Argument, p. 24.

Como Lake Avenue, not the entire width of the four-lane road. In accordance with this, FEI plans to repave all portions of the road that have been disturbed by required trenching and repair any other damage that has occurred.[64]

Important considerations in reaching a determination of this issue in this proceeding are the Operating Agreement between the City and FEI and the jurisdiction provided by section 32 the UCA. Among the issues the Panel must determine is whether the commercial terms agreed to in the Operating Agreement adequately describes the repair and paving obligations between the City and FEI, and if so, whether the BCUC has jurisdiction in this matter.

3.2 Summary of the Evidence

Both the City and FEI filed evidence. A brief summary of the evidence filed by each of the parties follows.

The City's Evidence

The City states that all four lanes of Como Lake Avenue will be damaged by the Project and FEI's proposal to restrict its paving to only the middle two lanes will not abide by the terms of the Operating Agreement. The City contends that in addition to the middle two lanes being fully involved in the Project and subject to damage, the curb lanes will also be subject to damage from the following:

- Numerous lateral cuts required to relocate lateral utilities;
- Grinding of portions of the surface layer of asphalt allowing for changes to pavement markings;
- Changes to the in-pavement traffic loops during construction;
- Excessive wear and tear related to the excavators and other heavy construction equipment; and
- Cuts to access the existing NPS 20 Pipeline.[65]

The City describes Como Lake Avenue as a critical corridor for the region noting that it is one of Coquitlam's busiest highways with 27,000 vehicles travelling on it each day. In addition, three public transit routes run along this street and it is designated as a Primary Emergency Response route. Como Lake Avenue has two lanes in each direction with traffic signals at 18 of the intersections and auxiliary left-turn lanes at many intersections. As such, the roadway serves eight schools located at or near it and has 895 residential and 71 commercial properties adjacent to the route. Adding to traffic management in the area, are large land use features like Mundy Park and the Vancouver Golf Course. These physical features limit detour options for travellers and add to Como Lake Avenue's importance to the community and the region.[66]

The City states that it is "common ground" that section 8 of the Operating Agreement requires FEI to reinstate the disturbed paving or surface on public property to be in as good a state of repair as it was prior to its disturbance and this is to be done according to reasonable specifications laid down by, and subject to the supervision of the Municipal Engineer. The City further states that FEI acknowledges it has responsibility for

[64] FEI Final Argument, pp. 7-9.
[65] Exhibit C-1-8, p. 9.
[66] Ibid., pp.3-4.

costs of repairing the damage that will result from the Project. The City also confirms that the requirement for FEI to pay for pavement restoration is consistent with longstanding policies and practices requiring third parties (including utilities) working on its streets to pay the costs of repairing the damage caused by their work. In the view of the City, it is not whether FEI is responsible to reinstate Como Lake Avenue to be in as good a state of repair that existed prior to the Project disturbance but rather, the extent of the disturbance caused by the Project and the amount of repair and paving that is required to achieve this.

Based on the municipality's decades of experience with underground utility construction, replacement and repair, the City believes that Como Lake Avenue will be in need of full rehabilitation following the work done to complete the Project. The City explains that cuts and excavation along and across the street will damage the road base as well as the surface asphalt and FEI's proposed approach to repairing it will leave the road degraded and no longer be adequate to meet the demands on it.[67] Noting that the project has already begun, the City has filed a number of photos[68] it describes as showing "extensive damage to the lands adjacent to the trench, including excessive wear and tear from FEI's large excavators and/or heavy construction equipment."[69]

FEI Evidence

FEI states that activities related to the construction of its NPS 30 Pipeline trench will be confined to two lanes of traffic and, in addition, will require the excavation of a 3 metre by 3 meter bell hole every 300 meters within a third lane for decommissioning and abandonment of the existing line. FEI acknowledges that under section 8 of the Operating Agreement, it is required to reinstate the disturbed paving or surface on public property to a state as good as it was prior to the disturbance. As noted in the City's evidence, this must be done in accordance with reasonable specifications and subject to the supervision of the Municipal Engineer. FEI confirms that it is committed to the repair of any Como Lake Avenue damages that have resulted from the Project in accord with the Operating Agreement and the City's Paving Specifications.[70]

FEI has identified and provided evidence on five issues related to damage repairs.

Existing Road Condition

FEI reports that it engaged WSP Canada Inc. (WSP) to conduct a preconstruction assessment of the 5.5 kilometre stretch of Como Lake Avenue covered by the Project and prepare a report documenting pre-construction conditions and existing roadway distresses. FEI states that the report confirms there are many existing pavement distresses in the curb and outside lanes of Spuraway and Como Lake Avenues and, within the next five to ten years, several sections of these roadways will likely require full width rehabilitation treatment or extensive repairs.[71]

City's Technical Specifications for Paving

FEI states that the City has developed its own specifications for paving and trenching. With respect to trenches, FEI considers the City's demands to be reasonable and states that by complying with these specifications, it

[67] Exhibit C-1-8, pp. 8-10.
[68] Exhibit C-1-8, Appendix H.
[69] Ibid., p. 10.
[70] Exhibit B-12, p. 3.
[71] Ibid., p. 3-4.

would satisfy the Operating Agreement requirements. With respect to paving, the City's Paving Specifications[72] describes paving restoration requirements in City streets and specify that, "pavement restoration depth matches existing asphalt depth for the width of the trench, and a 35 millimetre depth for a width of 200 millimeters on either side of the trench."[73]

City's Changing Demands for Paving and Road Remediation

FEI has submitted a chronological outline of its submissions to the City with regard to Project Engineering drawings at the 30, 60 and 90 percent review stages. FEI describes how at the 30 percent review stage in October 2016, the City increased its requirements beyond what is required by the City's Paving Specifications (an increase in the depth of asphalt restoration from 35 millimetres to 50 millimetres) which was agreed to in the interests of gaining approval of the Engineering Drawings. FEI reports that at the 90 percent review stage the City added a requirement that all four lanes be repaved as a precondition to gaining approval of the Engineering Drawings.[74]

FEI states that it believes that the City is seeking to impose costs on the Company that are beyond requirements of the Operating Agreement and notes that this is without regard for the portion of Como Lake Avenue that is damaged by construction of the Project. In its view, the City's demands extend well beyond what is required to return the street to as good a condition as existed prior to the start of construction. FEI states that requiring work on parts of Como Lake Avenue not impacted by the project at an estimated additional cost of $4.0 million would impose excessive costs on its ratepayers and are an attempt to subsidize "the City's objective to rehabilitate Como Lake Avenue."[75]

Paving Scenarios

FEI's evidence outlines three scenarios and related costs to demonstrate the implications of different road remediation and paving requirements.

Scenario #1 – Paving and Restoration of the Trench and Additional Asphalt Key Depth

FEI states that Scenario #1 is in alignment with the City's Paving Specifications and meets its obligations under the Operating Agreement. FEI explains that this scenario is based on the expectation that construction impacts will be limited to the trench and is less than the width of two lanes of roadway and this area will be restored in accordance with the Agreed Expanded Paving Specifications referred to above. The restoration work will be completed immediately following the new gas line installation and provides the least cost and is the least disruptive to residents and business in the City. The estimated cost of this scenario is approximately $601,000.[76]

Scenario #2 – Paving Over and Repair of Four Lanes

FEI states that Scenario #2 (the City's demand) exceeds the Company's obligations under the Operating Agreement and the Paving Specifications. It would involve replacing 125 millimetres of subsurface materials and

[72] Exhibit B-12, Appendix C.
[73] Ibid., pp. 4-6.
[74] Exhibit C-1-8, pp. 6-7.
[75] Exhibit B-12, pp. 8-9.
[76] Ibid., pp 9-11.

repaving 4 lanes or 14 meters for 5.5 kilometres of Como Lake Avenue. This remediation would be conducted in stages over a period of several years with the first step being restoration of the trench and repaving over it following installation of the new pipe. This would allow the road to be reopened in September of 2019. The full depth curb to curb repair of the subgrade and paving of Como Lake Avenue would begin in June of 2021 and likely end in August of 2021. FEI states it assumes the paving work would be completed in sections with half of Como Lake Avenue closed at any one time. In FEI's view this option would be the highest cost at $4,573,000 and the most disruptive to residents and businesses.[77]

Scenario #3 – Scenario #1 with Paving over Two Full Lanes

This would involve paving the whole lane for any lanes where there is damage to any part of the lane caused by the Project. In this scenario, it would perform road remediation beyond the trench footprint replacing 50 millimeters of pavement seven meters wide across two lanes for 5.5 kilometres of Como Lake Avenue which would move the paving seam to the edge of the lane. The work on this approach, which is slightly more disruptive than Scenario #1, would cost $959,000 and begin following installation of the new pipeline. FEI reports that this represents a similar approach to that negotiated with the City of Vancouver and the City of Burnaby with respect to the Project.[78]

The three Scenario Cost Estimates and related Rate Impacts

Table 1 below outlines the costs related to each of the three scenarios and the impact on rates.

Table 1 Summary of Cost of Service and Rate Impacts for Each Scenario[79]

	Scenario 1	Scenario 2	Scenario 3
Capital Cost $000's	$601	$4,573	$959
Levelized Rate Impact $ / GJ	$0.000	$0.002	$0.000
Annualized Cost of Service $000's	$43	$324	$68
Present Value of Incremental Cost of Service for 50 Years $000's	$710	$5,402	$1,132

3.3 Arguments of the Parties

The City's Final Argument

The City states that the problem with FEI's proposed approach is it is based on the assumption there will be little damage caused outside the main workspace and where it does occur, it will be repaired on an *ad hoc* basis. In the City's view the damage outside the main workspace will be far more extensive than FEI seems aware of. For instance, the City cites as an example of this FEI's assumption that water service can be cut and repaired within the main trench. The City states this is incorrect as existing Specifications for Service Connection Installation requires water service connections to be installed as one continuous length of pipe. According to the City when the FEI contractor moves part of the water service connection it will need to replace the entire service connection resulting in pavement cutting and excavation outside the main trench. In a similar vein, the City notes FEI's presumption that the contractor will not need to operate equipment to any degree outside of the

[77] Exhibit B-12, pp.12-14.
[78] Ibid., pp. 15-18.
[79] Ibid., pp. 19.

two centre lanes. The City states that FEI does not know these things because the contractor has yet to mobilize its machinery or dig any trenches. The City's position is that FEI's proposal to pave only the middle lanes and patch the other cuts made over the course of the Project does not abide by the terms of the Operating Agreement. This is because the cuts outside the main trench will be far more extensive than anticipated by FEI and repairing the pavement to look like it did prior to construction "will not reinstate the pre-existing structural strength or longevity of the pavement."[80] The City argues:

> If such a superficial approach is employed, the longitudinal pavement joints, longitudinal and lateral cuts and numerous patches will over time crack, settle and create potholes and bumps that would not otherwise have occurred and which will impose inconvenience and safety impacts to the public, and ongoing maintenance costs on the City. Reinstating the pavement to its preconstruction condition means restoring it in such a way that the impacts to the public and ongoing costs to the City are obviated.[81]

The City further explains that pavement "is an engineered structure that works by flexing and transmitting traffic loads to a wide area of the pavement's superstructure." The pipeline construction will involve numerous cuts through the pavement structure and end its ability in the cut area to flex and distribute loads as a unit and the overall strength and longevity of the pavement is degraded. The City argues that repairing the surface layer of the pavement does not reinstate the pre-existing structural strength or pavement longevity and results in a roadway that will have a smooth running surface for only a year or two. The City points out that the weakness in the underlying asphalt will soon result in cracks from the surface of the pavement to the gravel layer below. Over time, this will create potholes and bumps and reduce the life of the pavement while increasing maintenance requirements.[82]

While acknowledging that once the roadway has been repaved it will likely be in better condition than today, the City contends this is unavoidable since restoration work will always renew older pavements. The City describes the issue as follows:

> The issue seems to be that FEI is not currently aware of the extent to which its Project will damage the curb lanes of Como Lake Avenue such that FEI is proposing an approach that will have the end result of leaving the pavement in a degraded and worse condition than it is today. [83]

The City cites Section 8 of the Operating Agreement as specifying FEI's obligations with respect to reinstatement of paving or surface on public property which has been disturbed (see Appendix B). In its view, FEI's obligations are not in dispute. The disagreement is based on the level of damage Como Lake Avenue will sustain and in particular, the structural degradation the pavement will suffer as a whole even in those areas where the surface damage is localized to the two lanes. As noted by the City, the reasonableness of FEI's plan to reinstate the paving is subject to the specifications laid down by and subject to the supervision of the City Engineer. The City's stated position is that the approach proposed by FEI will result in leaving the pavement in worse condition and consequently does not abide by the terms of Section 8 of the Operating Agreement. The City also states it has

[80] City's Final Argument, pp. 24-27.
[81] Ibid., p. 27.
[82] Ibid., p. 29-31.
[83] Ibid., p. 27-28.

the ability to enforce its contractual right to reinstate the highway's condition at FEI's expense and recover its damages and expenses through the indemnity in Section 11 of the Operating Agreement.[84]

The City submits that a potential upcoming project that is comparable to this Project is the Trans Mountain Expansion Project and notes that this project will repave United Boulevard from the curb to the median and restore an adjacent sidewalk. The City also notes that FEI's responses to BCUC IRs 12.4.1 and 12.4.2 indicate that the paving redone in the City of Vancouver and the City of Burnaby where there were no lateral cuts outside the trench width, appears to be more than what is proposed for Como Lake Avenue.[85] In summation, the City argues that the requirement to repave Como Lake Avenue does not exceed City specifications and given the damage that will result from the Project and FEI's obligation to reinstate paving pursuant to the Operating Agreement, is reasonable.[86]

FEI Final Argument

With respect to the Operating Agreement's requirements for reinstatement of disturbed portions, FEI relies on Section 8 of the Operating Agreement which specifies the required state of repair for the paving or surface property and requirements to adhere to specifications as laid down by and subject to the Municipal Engineer's supervision.

Further, Section 9 the Operating Agreement speaks to the repair of damage to City property:

> If at any time the Company [FEI] does destroy or damage the property of the Corporation [the City], the Company shall bear the cost of repairing the same in such a manner as to leave the same in as good a state of repair as it was prior to the doing of such destruction or damage and to the reasonable satisfaction of the Municipal Engineer.

In FEI's view, there are several elements of note; first, Section 8 is specific to reinstatement of the excavated portion while Section 9 deals with the more general concept of damage; second, requirements imposed by the City must be "reasonable specifications"; and third, the terms reinstating and restoring involve returning something to the condition it was before and not betterment.[87]

FEI notes that the City has raised a number of concerns with respect to damage to the curb lanes including the number of lateral cuts crossing the route, changes to pavement markings, changes to in pavement loops and excessive wear and tear from the construction equipment. With regard to these, FEI makes the following submissions:

- It is anticipated that work will be completed within the trench and making lateral cuts or impacting the curb lane is not anticipated.
- FEI has used hydro-blasting or surface grinding in the Cities of Burnaby and Vancouver to minimize and mitigate damage to the pavement. Due to the use of this technique, full depth paving repairs to pavement markings are not likely required.

[84] City's Final Argument, pp. 28-29.
[85] Ibid., pp. 32-33.
[86] Ibid., p. 33.
[87] FEI Final Argument, pp. 8-9.

- Pavement damage caused by removal and reinstatement of traffic loops will be repaired in accordance with the City's paving specifications.
- Large excavators and other heavy construction equipment are not needed and FEI's work will be within the two inside lanes of Como Lake Avenue. It is not anticipated that its construction contractors will cause wear and tear on the curb and outside lanes.

In addition, FEI points out that the existing pavement in the curb lanes show wear and tear already as they have been in place for many years and subject to heavy traffic. Further, FEI states that its approach to reinstating the excavation disturbance is what has been mandated by the City's paving specifications and is standard industry practice for trench restoration for utility projects and previously accepted by the City for other third party work.[88]

FEI states that in its Phase Two evidence, it has described its approach to be taken with repaving work. FEI confirms it will return all disturbed areas to their pre-Project work condition with any damage repaired and will meet the requirements of the Operating Agreement. FEI provides examples of the City's specifications for repairs to trenches which state that the pavement depth need only match the depth of the existing asphalt and normal restoration width extends only 200 millimetres beyond the trench. FEI states that it has provided a technical description of how these requirements would be met.[89]

FEI argues that the extra paving demanded by the City amounts to "betterment" and exceeds the City's paving specifications, noting that the City acknowledges that the street will likely be in better condition than it is today. Pointing out that the street being better is a certainty, not a likelihood, FEI states that the City has exceeded its own paving specifications in two respects:

- It is requiring the paving of all four lanes with no regard to the actual disturbance; and
- It has required FEI to perform subgrade work on the full road width rather than a financial contribution towards repaving.

FEI states that when the City was asked whether requiring curb to curb repaving is standard practice for other third party utilities, its response did not address the question directly but rather, indicated there were no recent third party utility jobs that were comparable.[90]

As noted in its Phase Two Evidence, FEI obtained a roadway condition report from WSP. This report confirms there are many pavement distresses especially in the curb lanes of Como Lake and Spuraway Avenues. With regard to surface condition the Report in part states:

> In our opinion, based on the observed surface conditions of the pavements, including the type, severity, and scope of distresses observed along Como Lake Avenue and Spuraway Ave, several sections of these roadways will likely need a full width rehabilitation treatment or extensive repairs within the next five to ten years.[91]

[88] FEI Final Argument, pp. 9-11.
[89] Ibid., pp. 11-13.
[90] Ibid., pp. 13-15.
[91] Exhibit B-12, FEI Phase Two Evidence, Appendix B, p.9.

FEI notes that WSP counted a total of 577 distress instances in the portion of Como Lake Avenue surveyed with more than half of these described as being medium to high in terms of severity. Further, FEI noting the City's answer to an IR states that "[t]he City confirmed that over a third of the 5.5 kilometer length of the Project is slated to be resurfaced within five years regardless of the Project."[92]

FEI contends that the City is requiring work to be done that wouldn't be undertaken if the City was paying the cost. FEI notes that the WSP report identified 310 utility cuts and despite the extent of these, has only identified a 2-kilometre stretch in need of repaving over the next five years. FEI continues:

> Otherwise, the City seems perfectly prepared to accept a road with existing utility cuts and other wear and tear, characterizing the current, well-worn state of the road as follows: "All other sections are considered acceptable to the City. The City considers roads that are analyzed based on assessed condition and available funding resulting in optimum network condition as 'acceptable' for service.

FEI argues that determining whether there is a need for repaving and replacement of the subsurface should not be dependent upon which party is bearing the cost.[93]

FEI notes that it originally offered to contribute $3.2 million toward the repaving costs as part of an overall proposal to obtain the permits and approvals from the City to allow it to proceed with construction of the Project. FEI observes that the BCUC Phase One Decision has removed the threat of Project delay and states that the most reasonable approach at this time is to determine the issues on their merits.[94]

CEC Final Submission

CEC states that it generally adopts FEI's positions with regard to interpretation of the Operating Agreement.

With respect to the anticipated extent of damage, CEC submits that the City's evidence suggests there is potential for it to extend beyond the 2.5 metre trench but this falls short of supporting the view the damage cannot be confined to areas anticipated by FEI. CEC also submits it is not a fact the Project will result in damage to all four lanes on Como Lake Avenue and the BCUC should factor in the utility's experience with such work. [95]

CEC is in agreement with the City that repair of the pavement to look like it did prior to construction does not restore the longevity or the pre-existing strength of the pavement. However, in its view the City has failed to provide convincing evidence the damage caused by the Project could not be effectively repaired by FEI. Its view is that FEI needs to provide a sufficiently robust repair to meet its obligations and notes this is not in dispute by the utility. CEC states that a curb to curb repair should not be based on a set of assumptions under dispute but should be determined based on the actual state of the damage.[96]

Noting that FEI has agreed to and states that it would repair all damage caused by its work in accordance with the City's paving specifications, the CEC submits it agrees with the FEI position on the paving specifications being

[92] FEI Final Argument, pp. 15-17; Exhibit B-12, Appendix B, WSP Report, pp. 6 and 8.
[93] FEI Final Argument, p. 17
[94] Ibid., pp. 18-19.
[95] CEC Final Argument, pp. 4-5.
[96] Ibid., pp. 6-7.

an appropriate interpretation for required repairs in context of the Operating Agreement. In addition, the CEC points out that the City simply asserting that their requests do not exceed their own specifications is not convincing evidence that their own paving specification have not been exceeded. CEC asserts that if this is the case the evidence should be easy to produce. Further, CEC submits that the answers provided by the City to various IRs indicates that curb to curb repairs are not a matter of policy when conducting its own repairs and points out that "this is a telling situation". It concludes that the evidence is that the paving specifications for this project exceed the City's own specifications and those for other projects. CEC states that it recognizes that the City may for itself make justifiable decisions to weigh upfront costs against ongoing maintenance costs but such a trade-off is not appropriate to be applied to a third party. Its view is the evidence related to repairs provided by FEI is much more credible than that of the City and notes the City has recourse in the event the pavement is not reinstated to its satisfaction. [97]

Noting that the WSP report indicated that an estimated 32 percent of the total pavement area along the 5.5 kilometre project has noticeable distresses and the City's admission that the proposed repaving would leave the road in better condition than today, the CEC's position is that it is not up to ratepayers to significantly improve the roadways. In its view, the BCUC should put heavy weight on the existing condition of the road in making determinations on the required repairs.[98]

With respect to FEI's three potential paving and restoration scenarios, CEC submits the cost differential for Scenario #2 is very significant as compared to the other two scenarios and "it is not appropriate for FEI ratepayers to pay significantly more than is required under the Operating Agreement to repair the area to its pre-Project condition." In its view extending the repair to cover a natural break point may represent a reasonable compromise.[99]

Noting that FEI no longer intends to offer the $3.2 million contribution to the City, the CEC states it is unfortunate the parties were unable to reach an agreement that would likely have resulted in lower costs to ratepayers. In its view the parties should reconsider the option of repaving curb to curb with a maximum contribution of $1 million from the utility.[100]

FEI Reply to the City's Final Argument

FEI states that contrary to the evidence it has provided, the City is speculating that damage will occur to all four lanes and reinstating will require curb to curb paving for the 5.5 kilometre section of Como Lake Avenue. FEI contends the City would like the Panel to presume, before the work has begun, there will be damage to the entire 5.5 kilometre road section. In its view, this is inconsistent with the contractual framework and ignores evidence to the contrary.[101]

FEI points out that the onus is on FEI to perform the work properly or pay restorative damage. FEI notes the Operating Agreement prescribes that work must be done "in a good and workmanlike manner" and states there is no reason to believe that it will not abide by this requirement. FEI contends its evidence is that there is an

[97] CEC Final Argument, pp. 7-11.
[98] Ibid., pp. 10-11.
[99] Ibid., pp. 11-12.
[100] Ibid., p. 13.
[101] FEI Reply Argument, p. 11.

expectation that damage will be limited to a small area the City wants repaved. As noted, FEI's evidence demonstrates the trench construction activities will be confined to a 2.5 metre-wide trench, an area less than two lanes with bell hole excavation every 300 metres within a third lane.[102]

In FEI's view, the City has focused on the extent of lateral cuts that will be outside the work area. As an example FEI cites the City's reference to its specifications for the installation of new water service lines. FEI notes that the specifications quoted refer to the initial installation of water services connections and do not refer to replacement after cutting for subsequent projects. FEI further notes this may not even be an issue referring to its response to an IR where it explains that the contractor may place the NPS 30 Pipeline beneath the water service with no cutting required.

In FEI's view, many of the City's assertions exaggerate the harm caused by erosion and repairs pointing to its earlier submission that a seam of asphalt is standard industry practice that has been previously accepted by the City. Also with reference to the construction in Burnaby and Vancouver, FEI notes it has explained that different approaches were taken in those areas based on the parties' alignment with the Project and there were agreements which, in some cases, included cost sharing with the municipality.[103]

FEI has been clear that its proposal is to use what has been mandated by the City's paving specifications and points out there is no policy regarding repaving the entire width of streets. Further, when asked, the City was unable to provide examples of projects similar to this one and FEI argues this is insufficient to justify FEI being required to go beyond the paving specifications. In the Company's view what the City requires amounts to significant "betterment" and its demands exceed its paving specifications resulting in a windfall to the City.[104]

City's Reply to FEI and the CEC Final Arguments

The City takes issue with FEI's interpretation of its requirements under the Operating Agreement and states that it would result "in a patchwork of extensive repairs to Como Lake Avenue that would leave the community with on-going and long-term negative impacts contrary to FEI's obligations." The City also disagrees with FEI as to the damage that will be incurred by the roadway as a result of the Project. The City's position remains that there will be damage to areas of all four lanes and terms FEI's approach to repairing such damage as superficial and *ad hoc.* In its view, to reinstate the pavement to its preconstruction condition should be interpreted to mean that it is restored "in such a way that the impacts to the public and ongoing costs to the City are obviated."[105]

The City contends that in the case of Vancouver and Burnaby, FEI did not follow what the City describes as a minimal patchwork approach that is proposed for Coquitlam. In those cases the City understands FEI has agreed to pay $4 million of road works on the Broadway corridor in Burnaby which will fund improvements such as curb and gutter, street lights, sidewalks and full-width road paving. Finally, with regard to FEI's assertion regarding its demands resulting in a windfall, the City states it is not a windfall because it does not exceed the City's specifications. Moreover, in the City's view, this requirement is reasonable given the damage that will result

[102] FEI Reply Argument, p. 12.
[103] Ibid., pp. 13-14.
[104] Ibid., pp. 14-15.
[105] City Reply Argument, pp. 5-6.

from the Project and FEI's obligation with regard to reinstating the pavement pursuant to the Operating Agreement.[106]

The City states that CEC's final submission contains misquotes and a misunderstanding of the City's evidence, which has resulted in it coming to unfounded conclusions. The City provides a number of examples of these and submits that the "BCUC ought to give little weight to the CEC's conclusions and opinions that are transparently based on a misunderstanding of the evidence."[107]

Panel Determination

As noted in Section 4.1, two issues the Panel must consider are whether the terms as outlined in the Operating Agreement adequately describe FEI's repair and paving obligations and if so, whether the BCUC has jurisdiction in this matter.

1. Operating Agreement – FEI's Repair and Paving Obligations

As stated under Section 8 of the Operating Agreement, the utility is required to "reinstate the paving or surface on public property which it has disturbed in as good a state of repair as it was prior to its disturbance and in accordance with reasonable specifications laid down by, and subject to, the supervision of the municipal Engineer." This excerpt from Section 8 clearly describes the "end state" of the public roadway following the reinstatement of the paving or surface. The balance of this excerpt provides guidance that this must be done in accordance with "reasonable specifications" that have been laid down and subject to the supervision of the municipal engineer. **Given that these instructions are clear and specific, the Panel finds that Section 8 of the Operating Agreement is adequate in its description of the responsibilities of FEI with respect to reinstatement of a damaged roadway and how it is to work with the City in undertaking this work.**

While Section 8 of the Operating Agreement adequately describes a prescribed end state, the Panel notes the work must be completed before an assessment can be made as to whether FEI's responsibilities have been met. The problem arising in this instance is there is a difference of opinion between the parties as to whether execution of the Project will inflict damage on Como Lake Avenue beyond the two lanes where trenching will be undertaken. This leads to quite different views as to the work required to remediate the damage caused by the Project. Regardless of assurances from FEI to the contrary, the City asserts that all four lanes will be damaged by the implementation of the Project. In addition to the damage to the inside trench lanes, the City is adamant the curb lanes will be subject to damage from activities including lateral cuts, the grinding of the surface layer of asphalt and excessive wear due to excavators and heavy construction equipment.

FEI has steadfastly held the position that its construction activities will be limited to the two lanes plus the excavation of a nine square meter bell hole within a third lane.

The Panel notes that the Project is in the initial stages and work has just begun. At this point in time there is insufficient progress on the project and evidence on the record to determine whether the damage is restricted

[106] City Reply Argument, pp. 6-7.
[107] Ibid., pp. 7-8.

to two lanes or whether all four lanes are sustaining damage. The parties have taken widely different positions based on their expectations as to the level of damage that will result from the Project. In effect, both of the parties are asking the Panel to presume a level of damage that will occur prior to the work being completed. The Panel is not persuaded that reaching a determination on this matter is reasonable as there is no way to assess the end-results of a project when the work has not been done. Accordingly, the Panel finds a determination on the level of damage that will result from implementing the Project, is premature and speculative**.** In the view of the Panel there is no way to reasonably determine whether the assessment of either of the parties is correct or whether the resulting damage to the roadway will be somewhere in between the two opposing positions held by the parties.

With respect to "reasonable specifications", the City has argued that its requirement to pave all four lanes does not exceed its specifications. However, the Panel notes the City's specifications provide no specific direction with regard to when it is appropriate to repair and reinstate all four lanes of a major roadway. When the City was asked in an IR what its practice was with respect to curb to curb paving of its own lateral or service cuts, it responded that its practice depends on various factors for a given situation. Where it is not done, the implication is that the City will be responsible for ongoing safety and maintenance of the roadway.[108] Similarly, when the question was applied to third party utilities, the response was equally non-specific stating there were no recent third party jobs that were comparable to the LMIPSU project. From these responses the Panel infers that the City has no standard operating practice with respect to when curb to curb repaving is a requirement. When WSP's report, which has identified 577 distress instances with 310 of these being lateral cuts which remain unrepaired, is added to this, it is apparent to the Panel that the City utilizes a broad degree of discretion when determining whether there is a need for curb to curb replacement or even repair of an existing roadway. Given this use of a broad degree of discretion and the fact the City has provided no examples where it has required a third party utility to conduct curb to curb paving, the Panel is not persuaded the City's specifications as laid down by the City Engineer in this instance are reasonable.

The Panel accepts that this determination does little to settle the matter or provide a level of comfort to either of the parties. The Panel also accepts that unless the parties are able to reach agreement on a satisfactory resolution as to how to conduct repairs and repaving of the roadway, it is likely that FEI will complete its Project and undertake the necessary remedial work based on its assessment of the damage created and the requirements under the City's specifications. If the City takes issue with the state of repair of the roadway under the Operating Agreement, it could take steps under Section 11 to enforce what it alleges to be its contractual rights to have the condition of the roadway reinstated at FEI's expense. If the City were successful, in all likelihood this would result in the roadway being redone at significant cost to ratepayers and inconvenience to the public.

2. BCUC Jurisdiction in this Matter

The Panel notes that the Operating Agreement is a legal contract that was signed by The City and British Columbia Electric Company (the gas company) on January 7, 1957. This contract describes the conditions upon which the utility (now FEI) is to operate on public property within the municipality of Coquitlam. The contract has not been modified or replaced since that date and remains in force. With respect to the reinstatement of roadways which have been damaged as a result of work done by FEI, the Panel has found that Section 8 of the

[108] Exhibit C-12, Response to FEI IR 4.5.

Operating Agreement is adequate in its description of the responsibilities of FEI with respect to reinstatement of a damaged roadway and how it is to work with the City in undertaking this work. **Given these circumstances, the Panel finds that a binding agreement between the parties exists and therefore, under Section 32 of the *UCA,* the BCUC does not have jurisdiction in this matter. Any dispute arising concerning the interpretation of the contract, which cannot be resolved through negotiation, is therefore, a matter for the Courts to decide.**

Panel Discussion

CEC in its final submission states, "it is disappointing that the COC [the City] and FEI were unable to reach an agreement that would likely have resulted in a reduction of the overall costs being delivered to the combined taxpayer/ratepayer base." The Panel agrees. The positions of the parties are such that the potential for further disagreement is likely, and given the Panel's finding with respect to jurisdiction, the potential for future litigation is very real. This will result in further costs to the taxpayers and ratepayers and potentially impact the ability of the parties to effectively and efficiently work together in the future. Because of this, the Panel, in spite of the lack of jurisdiction, believes it may be of some value to provide its assessment of certain aspects of the positions held by the two parties with respect to Section 8 of the Operating Agreement.

In the Panel's view, the source of the disagreement lies in the interpretation of the meaning of Section 8 of the Operating Agreement. What is clear from Section 8 is that FEI is required to restore the roadway to a state of repair that existed prior to the Project's disturbance. In the Panel's view, interpretation of reinstatement to be "in as good a state a repair as it was prior to the disturbance" means what it says. It does not include betterment unless it is unavoidable. As provided in FEI's evidence, WSP has prepared a pre-construction assessment report of the roadway noting many pavement distresses and concluded that within the next five to ten years, full width rehabilitation or extensive repairs will be required in several sections. This is confirmed by the City in answer to an IR where it stated that 2000 metres of the 5.5 kilometre roadway are in need of full-width repaving in the next five years.[109] Therefore, the Panel concludes that if the entire 5.5 kilometre roadway is repaired and repaved to the full width as demanded by the City at no cost, it could constitute betterment resulting in a windfall to the City at the expense of FEI ratepayers. In the Panel's view, the condition of the existing roadway is far from optimal and work will be required in the near future. The Operating Agreement is specific in requiring FEI to return the roadway to its existing condition. Repairing and repaving all four lanes as required by the City will result in what is effectively a new roadway and could be argued to be excessive and not in the interests of FEI's ratepayers.

As noted previously, the City has argued that its requirement to pave all four lanes does not exceed its specifications. However, for reasons related to the broad degree of discretion used by the City and the lack of cases where curb to curb paving was a requirement for third party utilities, the Panel found that the City's specifications as laid down by the City Engineer are unreasonable.
The foregoing serves to demonstrate that if an agreement on a plan to repair and reinstate Como Lake Avenue following completion of the Project is not reached both parties will be at risk. If FEI does not complete its repair work in a manner that is acceptable to the City, it runs the risk of further litigation and potentially having to redo the repair at high cost. However, the City also bears the risk as there is no guarantee that if they choose to litigate, the cost of the additional repairs it seeks will be recovered. To mitigate this risk, the Panel recommends

[109] Exhibit C1-10, Response to CEC IR 14.1.

that the parties, in the interest of their respective ratepayers and taxpayers, would be well served by getting together to resolve this issue. The City has noted that FEI has agreed to pay significant amounts to both the City of Burnaby and the City of Vancouver to fund road improvements related to the Project within their respective municipalities. A similar offer was made by FEI to the City but was not accepted. Given the risk of not reaching agreement the parties may wish to revisit this type of approach and attempt to resolve this matter.

Appendix B

January 7, 1957 Operating Agreement

THIS AGREEMENT is made the 7th day of January, 1957

BETWEEN:

THE CORPORATION OF THE DISTRICT OF COQUITLAM
(hereinafter called "the Corporation"),

OF THE ONE PART,

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED
(hereinafter called "the Company"),

OF THE OTHER PART.

WHEREAS:

A. Section 3 of the "Gas Utilities Act" reads as follows:

> "3. Every gas utility which at the date when this Act comes into force is carrying on business as such in a municipality or area in unorganized territory shall in such municipality or area, and every gas utility to which a certificate of public convenience and necessity is thereafter granted under the "Public Utilities Act" shall in the municipality or area in unorganized territory mentioned in such certificate, be authorized and empowered to carry on, subject to the provisions of the "Public Utilities Act", its business as a gas utility, and, without limiting the generality of the foregoing, shall be authorized and empowered:-
>
> (a) To produce, generate, store, mix, transmit, distribute, deliver, furnish, sell, and take delivery of gas;
>
> (b) To construct, develop, renew, alter, repair, maintain, operate, and use real and personal property for any of the said purposes; and
>
> (c) To 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 upon, along, across, over, or under any public street, lane, square, park, public place, bridge, viaduct, subway, or watercourse upon such conditions:-

(i) In a municipality as the gas utility and the municipality may agree upon; and

(ii) In unorganized territory as the Minister of Highways may approve."

B. The Company has obtained from the Public Utilities Commission of British Columbia a Certificate of Public Convenience and Necessity dated the 29th day of July, 1955 and approved by Order in Council made the 23rd day of August, 1955, which Certificate, inter alia, certifies that public convenience and necessity will require the construction and operation by the Company of a project for the supply of natural gas to the public for compensation in the area within the jurisdiction of the Corporation (hereinafter called "the Municipality"), among other places.

C. The parties desire to agree upon the conditions under which the Company may exercise in the Municipality its powers under the "Gas Utilities Act" and the Certificate of Public Convenience and Necessity referred to in Recital "B" hereof.

NOW THIS AGREEMENT WITNESSETH that the parties hereto have mutually agreed as follows:

1. The Corporation and the Company hereby agree that the conditions upon which the Company may, pursuant to the "Gas Utilities Act" and the said Certi-

ficate of Public Convenience and Necessity, place, construct, renew, alter, repair, maintain, remove, operate and use its pipes and other equipment and appliances for mixing, transmitting, distributing, delivering, furnishing and taking delivery of gas (which pipes and other equipment - including gas regulating vaults and vents therefrom and cathodic protection equipment - and appliances are hereinafter called "the said works") upon, along, across, over, or under any public street, lane, square, park, public place, bridge, viaduct, subway, or watercourse in the Municipality (all or any of which are hereinafter called "public property") shall be those set out in the paragraphs hereof numbered 2 to 17 and the Corporation hereby consents to the Company undertaking construction or work on or over any public property in the Municipality in compliance with such terms and conditions.

2. Subject to paragraph 3 hereof, before placing or constructing any of the said works on public property, or removing such works, the Company shall submit details thereof in writing to the Corporation's Municipal Engineer. Such details shall include plans and specifications showing the location, size and dimension of the said works. The Company shall not proceed with such placing, construction or removal of the said works until the Municipal Engineer shall have approved the proposed works, such approval not to be unreasonably withheld or delayed. If such approval is not acted upon within one (1) year then a new approval shall be obtained.

3. The Company may from time to time without

submitting details to or obtaining the approval of the Municipal Engineer but subject to paragraph 8 hereof

(i) open up any public property for the purpose of carrying out repairs and maintenance to any part of the said works, and

(ii) place and construct on public property gas service pipes (including valves) from its mains to the premises of its customers; but the Company shall place and construct such service pipes in accordance with any reasonable written instructions, either of general or particular application, that the Municipal Engineer may from time to time give to the Company and shall, if so required in writing by the Municipal Engineer, supply to the Municipal Engineer each month a list of addresses of premises to which service pipes shall have been so placed and constructed during the preceding month.

4. Upon the written request of the Corporation or the Municipal Engineer on its behalf, the Company shall change the location (which in the case of pipe means any change of either or both of line and elevation) of any part of the said works on public property to some other reasonable location on public property, and shall carry out each such change with reasonable speed.

5. (a) If the part of the said works of which the location is changed as provided in paragraph 4 hereof was (i) installed as to both line and elevation in accordance with the approval or instructions of the Municipal Engineer, or (ii) was installed as to line in accordance with the approval or instructions of the Municipal Engineer and was laid at a depth of at least 18 inches under a roadway paved with at least two inches of concrete or asphalt, or (iii) was installed as to line in accordance with the approval or instructions of the Municipal Engineer and is being changed because its line is no longer satisfactory to the Corporation, the Corporation shall bear and pay to the Company the entire cost of the change less an amount equal to two (2) per cent of the installed value on the Company's books of any of the said part of the said works which the Company takes out of service as a result of the change multiplied by the number of years during which it has been in service.

(b) If the said part of the said works was not installed, or installed and laid, in one of the manners specified in clause (a) of this paragraph, the cost of such change shall be shared between the Corporation and the Company in such manner as they may mutually agree and in default of agreement in such manner as shall be settled by arbitration pursuant to the "Arbitration Act".

6. Notwithstanding anything hereinbefore contained, if either party shall request the other party to make some temporary change in such other party's pipes, equipment, plant or appliances installed on, over, under or adjacent to, public property in order to facilitate the installation or construction of new pipes,

equipment, plant or appliances by the requesting party, such other party shall, if it reasonably can, carry out the change or alteration requested and shall charge the requesting party with the entire cost thereof.

7. Before the Corporation stops up or closes to the public for the benefit of some person or corporation other than the Corporation any public property it shall inquire of the Company in writing whether the Company has any of the said works on, over, or under, such public property. If within ten (10) days of receiving such inquiry the Company advises the Corporation in writing that it has any of the said works on, over, or under, such public property, the Corporation shall not so stop up or close such public property until the Company shall have agreed with such person or corporation for the removal, abandonment, or relocation, of the said works at the expense of such person or corporation.

8. The Company shall carry out all work done by it on public property pursuant to this agreement substantially in accordance with the details approved pursuant to paragraph 2 hereof (where applicable) and in a manner reasonably satisfactory to the Municipal Engineer, without undue delay, in a good and workmanlike manner, and so as to cause as little damage and obstruction as practicable, and shall reinstate the paving or surface on public property which it has disturbed in as good a state of repair as it was prior to its disturbance and in accordance with reasonable specifications laid down by, and subject to the supervision of, the Municipal Engineer. Except in the case of emergency work the time at which all work is carried out shall be subject to the

approval of the Municipal Engineer. The Municipal Engineer may require that he shall be given reasonable notice of the proposed time at which any work, other than emergency work, is to be carried out.

9. In the placing, construction, renewal, alteration, repair, maintenance, removal, operation and use of the said works the Company shall not destroy or damage the property of the Corporation except as it is authorized to do so by this agreement or by the Corporation; but, if at any time the Company does destroy or damage the property of the Corporation, the Company shall bear the cost of repairing the same in such manner as to leave the same in as good a state of repair as it was in prior to the doing of such destruction or damage and to the reasonable satisfaction of the Municipal Engineer.

10. If the Corporation shall destroy or damage any part of the said works on, over, or under, public property which was installed

(i) before the date hereof and is deemed under paragraph 13 hereof to have been property placed, constructed, maintained and operated in accordance with this agreement, or

(ii) after the date hereof either substantially in accordance with the plans and specifications approved by the Municipal Engineer under paragraph 2 hereof, or substantially in accordance with instructions given under paragraph 3 hereof, whichever is applicable,

the Corporation shall bear the cost of repairing the same in such manner as to leave the same in as good a state of repair as it was in prior to the doing of such destruction or damage and to the reasonable satisfaction of the Company. In all other cases the cost of repairing such destruction or damage shall be borne by the Company.

11. The Company agrees that it will indemnify and save the Corporation harmless against and from all loss, costs, damages, expenses, suits, demands, actions, claims and liabilities of every kind (other than such as are caused by or arise from any wilful act of the Corporation or act of the Corporation amounting to negligence on the part of the Corporation) caused by or arising out of the Company placing, constructing, renewing, altering, repairing, maintaining, removing, operating or using any of the said works upon, along, across, over or under any public property.

12. The parties hereto agree from time to time to execute such further assurances, approvals and consents as may be necessary to carry out the intent of this agreement.

13. The Corporation agrees that all the said works heretofore placed, constructed, maintained and operated within the Municipality shall be deemed to have been property placed, constructed, maintained and operated in accordance with this agreement and that the Company may exercise its said powers in respect of them subject to the terms of this agreement so far as they are applicable thereto.

14. It is hereby mutually agreed that, in the event the Corporation does not have a Municipal

Engineer, the Municipal Clerk will act in the place and stead of the Municipal Engineer in respect of all matters pertaining to or arising out of this agreement.

15. The said works shall be placed, worked upon, or removed, in such manner as not to interfere with any pipe, conduit, wire, duct, manhole, drainage ditch, culvert, or any other structure which shall have been laid down in any public property by the Corporation or under the permission of the Corporation or by virtue of any charter granted by competent authority.

16. The said works and every part of them from time to time placed, constructed or maintained on any public property shall be and remain the property of the Company which shall be entitled at any time to remove the same subject to the terms of this agreement.

17. This agreement shall enure to the benefit of and be binding upon the parties hereto, their sucessors and assigns.

IN WITNESS WHEREOF the parties hereto have executed this agreement as of the day and year first above written.

The Corporate Seal of the Corporation was affixed hereto in the presence of:

"L. J. Christmas"
Reeve

"F. L. Pobst"
Clerk

The Common Seal of the Company was affixed hereto in the presence of:

"H. L. Purdy"
Vice-President

"G. G. Woodward"
Secretary

Form 1908

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED

MEMO FROM: R. R. Dodd 3rd April, 1957

TO: Messrs. P. W. Barchard, R. M. Bibbs, G. Hargreaves, K. F. Kangas, H. T. Libby, W. C. Mainwaring, C. A. Manson, J. L. McLean, H. J. Merilees, H. L. Purdy, A. B. Robertson, E. H. Rohrer and O. E. Zwanzig

Our File: 111/56

RE: Corporation of the District of Coquitlam - Use of Streets for Natural Gas Pipes

Enclosed herewith please find a copy of the agreement dated 7th January, 1957 entered into with the Corporation of the District of Coquitlam setting out the conditions under which we may use their streets for laying gas pipes.

This agreement is in the standard form and is identical to the Port Moody and Port Coquitlam ones.

The original certified copy together with the by-law approving this agreement is filed in the President's office and a true copy of the by-law with an executed copy of the agreement is available in the legal division file.

Robert R. Dodd

RRD:ls

Enclosure