



Engineering Department

2019 October 21

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Patrick Wruck
Commission Secretary
British Columbia Utilities Commission
Suite 410, 900 Howe St
Vancouver BC V6Z 2N3

Dear Sirs/Mesdames:

**SUBJECT: BRITISH COLUMBIA UTILITIES COMMISSION AN INQUIRY INTO THE
REGULATION OF MUNICIPAL ENERGY UTILITIES ~ PROJECT NO.
1599027**

Further to British Columbia Utilities Commission (BCUC) Order G-177-19 issued 2019 August 01 establishing an inquiry to examine the regulation of energy utilities affiliated with municipalities and regional districts, please find *enclosed* the following intervenor written submission of the City of Burnaby.

If you have any questions, please contact the undersigned directly.

Yours truly,

A handwritten signature in black ink, appearing to read "James Lota".

James Lota, P.Eng., MBA, MPA
Deputy Director Engineering
Email: James.Lota@burnaby.ca

JL/ac

Attachment

Copied to: City Manager
Director Engineering
Director Corporate Services
Director Planning & Building
City Solicitor
Christopher Weafer, Owen Bird Law Corporation

P:_Clerk Typist\Projects\BCUC Intervenor Submission.jl.docx

Our Vision: A world-class city committed to creating and sustaining the best quality of life for our entire community.

SUBMISSIONS FOR THE CITY OF BURNABY

October 24, 2019

Re: British Columbia Utilities Commission –

An Inquiry into the Regulation of

Municipal Energy Utilities

Order G-177-19, dated August 1, 2019

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I. INTRODUCTION AND SUMMARY POSITION

1. These are the initial submissions of the City of Burnaby (“Burnaby”) in response to issues raised by the British Columbia Utilities Commission (the “Commission”) in Order 6-177-19 (the “Order”) which established the Municipal Energy Utilities Inquiry (the “Inquiry”).
2. Burnaby would like to express its appreciation to the Commission for conducting the Inquiry, and values the opportunity to create more certainty and clarity for all parties in assessing the regulatory status of municipalities and regional districts operating or planning to operate energy services. These entities are more actively assessing significant and strategically important investments in energy services in order to meet climate change concerns, as well as to better serve their constituents. The Inquiry and its specific purposes are welcome, timely and important.
3. A key focus of the Inquiry is to examine the regulation of energy utilities associated with municipalities and regional districts, to explore issues related to ownership structures and operational arrangements and the regulatory status of such organizations under Section 1 of the *Utilities Commission Act*, RSBC 1996, c 473 (the “UCA”), and finally to provide clarity to the Commission, utilities, municipalities and other impacted parties.
4. Burnaby’s position on the topic with respect to municipalities is clear and straightforward: municipalities and municipal utilities operating within the municipal boundaries, either through direct municipal operation, through a municipal-owned corporation, or through a private partner authorized by a municipality but overseen by

municipal council, are clearly excluded from BCUC regulation as the existing Section 1 of the UCA expressly excludes municipal utilities from the definition of a “public utility”.¹

5. “Public utility” is defined in the UCA as:

“public utility” means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or

(b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radio communications if that service is offered to the public for compensation,

but does not include:

(c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries²

6. The legislature was crystal clear in providing that a “public utility” does not include “a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries”.

7. With respect to interpreting the definition of “public utility”, Burnaby submits that Elmer Driedger’s approach to statutory interpretation, namely that the “words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”,³ has been recognized as the modern definitive approach to statutory interpretation. As contained in these submissions, Burnaby submits that such an approach to interpreting

¹ *Utilities Commission Act*, RSBC 1996, c 473, s.1.

² *Ibid*

³ Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), as cited in *Rizzo v Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837) (SCC) at para 21.

the exclusion contained in Section 1 of the UCA can only be read as a broad exclusion empowering municipalities to pursue energy delivery services within their own boundaries outside of the regulatory purview of the Commission.

8. As discussed below, municipalities have the legislative authority through their enabling legislation the *Local Government Act*, RSBC 1996, c 323 (the “*Local Government Act*”), and the *Community Charter*, SBC 2003, c 26 (the “*Community Charter*”), and their bylaw powers to protect the public interest in the event a municipality chooses to pursue energy service delivery within their municipal boundaries, either directly or through partnership. Further, municipalities have detailed prescribed accountability and responsibility through *Community Charter* provisions which protect the municipality’s constituents. As such, further regulation and oversight by the BCUC is neither required nor mandated by the UCA.

II. CONCERNS TO BE ADDRESSED

9. The key interpretation issues raised in the Inquiry flow from Section 1 of the UCA and the definition of “public utility” contained therein, which states that “public utility” does not include “a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries”.⁴ This language effectively excludes those entities from regulation by the Commission.
10. As the Commission is aware, energy services offered by municipalities and regional districts are increasing and evolving as local governments strive to achieve environmental and economic benefits for their communities. These changes and related matters which

⁴ *Utilities Commission Act*, RSBC 1996, c 473, s.1.

have come before the Commission have raised concerns around the time, energy, and resources expended by the Commission, utilities, municipalities and ratepayers on regulatory processes dealing with the interpretation of the extent of the exclusion granted to municipalities and regional districts. These concerns include but are not limited to:

- a) The inability of municipalities and/or regional districts to plan energy services given the potential risk of being offside the “public utility” exclusion. This uncertainty stymies municipalities, municipality-owned corporations, and private partners from pursuing opportunities which may serve the public interest and be consistent with other legislative obligations of municipalities such as pursuing the objectives of the *Clean Energy Act*, SBC 2010, c22 (the “*Clean Energy Act*”), which will be discussed below.
- b) The regulatory costs incurred by all participants - the Commission, interveners and utilities – resulting from the concerns around lack of clarity, thereby imposing costs on taxpayers and ratepayers, recognizing that ratepayers pay their own intervention costs, as well as costs incurred by regulated utilities which may be challenging the exclusion applicability to a set of facts. Incurrence of these costs does not serve any particular benefit.
- c) Potential duplication of regulatory oversight in the event a municipal-related energy service is not deemed excluded from the definition of public utility. Municipal councils may also pass by-laws establishing and overseeing the energy service, resulting in inefficient duplication of regulatory oversight.

III. DESCRIPTION OF BURNABY AND ITS INTEREST IN THE INQUIRY

11. Burnaby is the third-largest city in British Columbia by population. Incorporated in 1892, Burnaby occupies approximately 100 square kilometers situated between the city of Vancouver on the west and Port Moody, Coquitlam and New Westminister on the east. Burnaby has a population of 233,000 and is home to many industrial and commercial businesses, including British Columbia's largest commercial mall. Burnaby features major commercial town centres, high-density residential areas, two rapid transit lines, high-technology research, business parks, film studios and television stations such as Global TV. Major technology firms such as Ballard Power Systems, DWave Systems, Creo Software, Creo Imaging and EA Canada have their headquarters in Burnaby. Heavy industry companies include Parkland Fuel Corporation on the shores of Burrard Inlet. Burnaby is also home to Simon Fraser University and British Columbia Institute of Technology's main campus. In summary, Burnaby is a large, developed, sophisticated city.

12. Burnaby has efficiently and effectively delivered a wide array of public services such as water, sewer, and roads, and has done so for over a century. Like many municipalities in British Columbia, Burnaby has been assessing the feasibility and advisability of providing municipal energy services. This interest in energy services development is based on a number of factors including; firstly and predominantly concerns around climate change and the need to assess new ways to reduce carbon emissions and secondly the possibility that through municipal energy delivery services Burnaby may better serve its community.

13. At a September 9, 2019 Council meeting, Burnaby Council received a report from staff on climate change.⁵ Council accepted the recommendation that Council declare a Climate Emergency to demonstrate understanding of and commitment toward addressing the climate crisis and the necessity of an energy transition strategy.⁶
14. One of the key aspects of that report was to provide a direction to Burnaby municipal staff to “investigate district and energy sharing opportunities and encourage their development in appropriate locations”.⁷
15. Related to that direction, Burnaby has been investigating opportunities with Metro Vancouver on an ownership model using the heat source from the Metro Vancouver Waste-to-Energy Facility (the “Facility”). The Facility is located in the Big Bend area in Burnaby and is operated by Covanta Burnaby Renewable Energy ULC. Since its opening in 1988, the Facility has been responsible for the environmentally safe disposal of over 25% (approximately 295,000 tons) of the region’s waste per year.⁸ The Facility produces approximately 100 MW of waste heat, but due to the low energy efficiency process, it is converted to 20 MW of electricity, and the generated electricity is sold to BC Hydro. Metro Vancouver’s contract with BC Hydro expires in 2025, and Metro Vancouver is looking at using all available waste heat for the thermal needs of neighbouring residents and businesses, which is more efficient than producing electricity and offsets more GHG emissions. The Facility is an extension to and bi-product of the municipal waste

⁵ City of Burnaby Meeting September 29, 2019 Council Report Environment and Social Planning Committee
Subject: Climate Change

⁶ *Ibid*

⁷ *Ibid*, page 3

⁸ City of Burnaby Meeting September 29, 2019 Council Report Environment and Social Planning Committee
Subject: Climate Change, page 9

collection and processing service provided by the regional district and is appropriately excluded from the definition of a “public utility” under the UCA.

16. The above-noted developments highlight Burnaby’s strong and practical interest in the pursuit of opportunities which are consistent with global, national, provincial and local policy directions to improve energy service delivery and management consistent with responding to the Climate Emergency. Burnaby believes there is a need to look constructively and creatively at ways within its community to have a positive impact on this global concern.

IV. CLIMATE ACTION CONCERNS FOR MUNICIPALITIES

17. Municipal governments are facing increased pressure to pursue energy service initiatives to respond to climate change challenges. Greater flexibility to structure arrangements to deliver energy services and pursue clean energy opportunities within their municipal boundaries will assist municipalities in meeting these objectives.
18. The *Clean Energy Act* is instructive in setting out British Columbia’s energy objectives. Burnaby submits that broad interpretation of the exclusion allowing municipalities and/or affiliated entities or partners to provide energy services is consistent with key objectives set out in the *Clean Energy Act*. Part 1 sets out British Columbia’s energy objectives, and Part 1, Section 2 states as follows:

The following comprise British Columbia’s energy objectives:

- d) to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources;
- h) to encourage the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia;

- i) to encourage communities to reduce greenhouse gas emissions and use energy efficiently;
- j) to reduce waste by encouraging the use of waste heat, biogas and biomass;
- k) to encourage economic development and the creation and retention of jobs;⁹

19. Burnaby submits that municipalities are uniquely positioned to contribute to those objectives under the *Clean Energy Act*, and regulatory constraints should be removed which would hinder those key policy objectives.

20. The Province has also recognized the importance of municipalities in the energy sector through its Community Energy Leadership Program (“CELP”), established in 2015 to support local government and First Nation’s investments in energy efficiency and clean energy projects. One of the key areas for community energy partnerships is to encourage investments in small-scale common community-owned energy generation from sources such as biomass, biogas, geothermal heat, hydro, solar, ocean or wind power to offset community energy use. Clearly a narrow interpretation of regulatory constraints on municipal involvement in such initiatives is not consistent with provincial policy objectives. This view is also set out in “Clean BC: Our Nature, Our Power, Our Future”,¹⁰ a provincial government policy which highlights the importance of local government and municipalities, and the government’s objective to “Improve Where We Live and Work.”¹¹ The Clean BC document refers to the importance of local governments and states the following:

Local governments. From land-use planning to citizen engagement, local governments are often best positioned to make a difference in our daily lives. As we continue down the path to a cleaner future, they will play a critical role in areas such as developing new

⁹ *Clean Energy Act*, SBC 2010, c 22, s 2.

¹⁰ <https://www.cleanenergybc.org>

¹¹ *Ibid*, page 27

clean energy sources, supporting active and cleaner transportation options and helping B.C. transition to zero waste. Their ongoing efforts to make communities more compact, complete and energy-efficient are essential to this strategy's success.

B.C. local governments are leaders on climate action, managing their corporate and community wide GHG emissions and creating clean, compact, more energy efficient communities. CleanBC will leverage partnerships with B.C. local governments. Both urban and rural communities have a role to play as part of CleanBC and will be further engaged to help inform the next initiatives in the plan.¹²

21. In the document entitled “Local Government, Communities & Built Environment” the Provincial government states as follows:

Local Government Climate Action

Local governments recognize that together they have direct or indirect influence over more than half of BC's provincial inventory of GHG emissions. Climate actions such as supporting cleaner and active transportation, complete urban design, energy conservation, transitioning to zero waste, and renewable power generation will lower the carbon footprint of their community, support a circular economy, and make life more affordable, secure and safe for their residents.¹³

22. This commitment is also reflected in the Climate Action Charter which was initiated at the Union of British Columbia Municipalities (“UBCM”) Conference in 2007 and continues to be referenced by the province and UBCM members as a key statement of common understanding. Section 4 of the British Columbia Climate Action Charter provides that:

(4) The Parties share the common goals of:

(c) removing legislative, regulatory, policy, or other barriers to taking action on climate change;¹⁴

23. Further at paragraph (6)(d):

the parties commit to share and explore to additional opportunities to support climate change activities, through enhanced collaboration amongst the Parties, and through encouraging and promoting climate change initiatives of individuals and businesses within communities.

¹² *Ibid*, page 56

¹³ www2.gov.bc.ca/gov/content/environment/climate-change

¹⁴ www2.gov.bc.ca/assets/gov/british-columbians

24. All of the above background information is persuasive commentary that the province is encouraging local government to pursue opportunities in energy-related areas which can contribute to reduction in GHG and lead to energy efficiency.
25. In Burnaby's view, a broad interpretation of Section 1, and the exclusion of municipalities and affiliates or partners in providing energy services from the definition of public utilities, is consistent with the province's desire for innovative response to climate action challenges and the role that local government can play within such response. As noted, Burnaby submits the existing language should be interpreted to provide this flexibility. If the Commission is not persuaded the language is clear enough to allow the flexibility sought by municipalities, amendments to the UCA should be sought as part of the report from the Inquiry to ensure this flexibility exists.

V. ORDER G-177-19

26. Turning to the Order and the specific questions put to Inquiry participants, Burnaby submits that the scope of the exclusion for municipalities in the "public utility" definition in Section 1 of UCA should be interpreted in a broad manner. Burnaby encourages the Commission to conclude that the exclusion does capture the scenarios under Section 4.1 of the Order. Section 4.1 of the Order is set out in full below:

"4.1 The BCUC requests registered interveners provide written submissions to address the following:

- 1) Whether a utility affiliated, in some way, with a municipality or regional district is considered a public utility as defined by section 1 of the UCA. Forms of affiliation include, but may not be limited to:
 - a. The utility's assets are owned by a corporation of which the municipality or regional district is a shareholder or the sole shareholder;
 - b. The utility's assets are owned by a partnership of which the municipality or regional district is a partner, a limited partner or a general partner;

- c. The utility's assets are owned by a third party, but the municipality or regional district has granted a franchise agreement, a licence and/or has enacted enabling bylaws to facilitate the construction and/or operation of the utility;
- d. The utilities' assets are owned by a municipality or regional district but are operated by a third party; and
- e. The municipality or regional district, by agreement with the utility owner, sets or approves the setting of rates for the utility."¹⁵

27. Burnaby submits that the exclusion for a municipality or regional district noted above is broad enough to capture each of the examples set out in Section 4.1 (a-e) of the Order. A municipality operating within its own boundaries, through the exemption recognized in section 1 of UCA, has the legal authority to operate in accordance with the powers granted to a municipality pursuant to the *Community Charter*.

VI. THE MUNICIPALITY'S LEGAL AUTHORITY TO PROVIDE ENERGY SERVICES

28. The *Community Charter* provides municipalities with broad powers to provide services to their citizens. Section 8(2) of the *Community Charter* states as follows:

Fundamental Powers

8. ... (2) A municipality may provide any service that the council considers necessary or desirable, and may do this directly or through another public authority or another person or organization.¹⁶

29. Municipal councils are largely unfettered in their authority to decide what sorts of services they wish to provide, subject to jurisdictional constraints. The authority to provide a district energy service arises from section 8(2), consistent with the authority to provide services such as sewers, water, streets, and garbage collection, as well as other services. The *Community Charter* Schedule provides a definition for "service" that is

¹⁵ BCUC Order G-177-19

¹⁶ *Community Charter*, SBC 2003, c 26, s 8(2).

sufficiently broad to capture this wide variety of activities; under the statute, the term is defined as “in relation to a municipality, an activity, work or facility undertaken or provided by or on behalf of the municipality”.¹⁷

30. Further, section 40(1) of the provincial *Interpretation Act*, RSBC 1996, c 238 provides that the definitions contained in the Schedule to the *Community Charter* apply, so far as the terms defined can be applied, to all enactments relating to municipal and regional district matters.¹⁸ The interpretation of an exclusion to the definition of “public utility” under Section 1 of the UCA for municipal and regional districts providing “services” should be read with the broad scope provided for and defined in the *Community Charter*.¹⁹
31. In addition to Elmer Driedger’s modern approach to statutory interpretation, specifically with respect to statutes empowering municipalities, the Supreme Court of Canada has further recognized that the evolution of the modern municipality has required a shift in interpretation principles; a broad and purposive approach to the interpretation of municipal powers has been embraced as the proper method of interpreting and facilitating municipal empowerment.²⁰
32. Section 8(3)(a) of the *Community Charter* provides that a municipality may regulate requirements in relation to a municipal service pursuant to a bylaw. Sections 8(7) and 8(8) as well as section 12 of the *Community Charter* provide scope to the authority in

¹⁷ *Community Charter*, SBC 2003, c 26, Schedule s 1.

¹⁸ *Interpretation Act*, RSBC 1996, c 238, s 40(1).

¹⁹ *Community Charter*, SBC 2003, c 26, Schedule s 1.

²⁰ *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, as cited in *Compagna v. Nanaimo*, 2018 BCCA 396 at para 60.

relation to such bylaws. Michael Hargraves' paper *Local Government Law* prepared for Continuing Legal Education stated this in regard to district energy bylaws:

It is significant that municipalities may exercise such a broad array of powers in relation to municipal services, in contrast to other subject matters where municipalities are more limited, such as signs and other advertising, in which case they may only regulate and impose requirements, but not prohibit, and business, in which case they may only regulate.²¹

33. In terms of how municipalities may provide energy services, the general power under section 8(2) of the *Community Charter* clearly provides that a municipality may run a municipal energy system. The *Community Charter* also provides a municipality with the ability, subject to approval by the Inspector of Municipalities, to incorporate or purchase an interest in a corporation to act as a vehicle for energy service delivery.²² The *Community Charter* also enables the municipality to enter into a partnering agreement.

Partnering agreement is defined in the *Community Charter* as follows:

“partnering agreement” means an agreement between a municipality and a person or public authority under which the person or public authority agrees to provide a service on behalf of the municipality, other than a service that is part of the general administration of the municipality.²³

34. It is worth noting that under a partnering agreement a municipality is not entitled to delegate any power that is exercisable only by bylaw. Therefore, the municipality retains its obligation to regulate, prohibit and impose requirements in relation to a municipal energy service.
35. As the Commission is aware, the existence of the legislative authority to establish energy supply systems has resulted in a number of long-standing municipal electric utilities, such as those represented in this proceeding by the British Columbia Municipal Electric

²¹ Continuing Legal Education, *Local Government Law District Energy: An Overview of Legal Issues*, Michael Hargraves, November 2012

²² *Community Charter*, SBC 2003, c 26, s 185.

²³ *Community Charter*, SBC 2003, c 26, s 21.

Utilities (BCMEU). The BCMEU is comprised of the long-serving municipal electric utilities serving the Cities of Nelson, Grand Forks, Summerland and Penticton. Each of these interior municipalities have successfully operated electric distribution utilities with municipal council oversight for decades.

36. Nelson Hydro is somewhat unique in that it also operates a hydraulic dam generation facility within the municipal boundaries and also has one portion of the electric utility which operates outside of the municipal boundary which is subject to Commission oversight.
37. The fifth member of the BCMEU is the electric utility operated by the City of New Westminister, which is the province's oldest electric utility commencing operations in 1891. New Westminister opted to establish a municipal Utility Commission to separate oversight from municipal council.
38. The long-standing recognition of the exclusion of municipal utilities from the UCA stems from the pragmatic reality that municipal councils which determine that an energy service will be provided within a municipality by a municipality are subject to effective regulatory oversight of the electorate. The dissatisfaction of the electorate with the activities of a municipal utility are brought directly to council through public meeting opportunities provided for under municipal legislation, or arguably more directly threatening the municipal council operator, through the power of the vote at municipal election times. The Commission has previously recognized the accountability of municipality-run energy service providers to ratepayers, stemming from the fact that ratepayers are typically entitled to vote in municipal elections and can therefore exert a

certain amount of indirect control over the operation of utility in protecting their own interests.²⁴

39. Municipalities additionally have a statutory obligation to act in the interests of their constituents. The *Community Charter* recognizes that municipalities are to have the authority to provide effective management and delivery of services in a manner that responds to community needs.²⁵
40. The exemption also recognizes the legislative obligation of a municipality to act in a manner which serves the interest of the community pursuant to the *Local Government Act* and *Community Charter*. Unlike the regulatory compact which is essential to a private utility operating under the UCA, that they be entitled to a fair rate of return, the municipal utility is measured by the test of whether the municipal utility is accepted and supported by the elected council and the community the council is elected to serve, and that it operate consistent with the applicable empowering bylaw. That acceptance may not be entirely assessed based on the financial return of the municipal utility to the municipality as opposed to the private utilities obligation to provide a fair financial return to the shareholder.

VII. FURTHER SUBMISSIONS

41. In the event the Commission determines that there is not sufficient clarity with respect to how broad the existing exclusion is for municipalities, affiliated entities, or partners of municipalities providing energy, Burnaby submits the Commission should seek

²⁴ Commission Order No. G-175-16 dated December 1, 2016 (Order No. G-175-16).

²⁵ Community Charter, section 1(2)(e), see *London Lane Industrial Park Ltd. v. Richmond (City)*, 2005 BCCA 452 at para 49.

legislative amendments from the Provincial government to confirm that the exclusion is broad. Further, Burnaby submits that such legislative amendments from the Provincial government should clarify or expand the exclusion in the definition of “public utility” to include other municipal energy initiatives consistent with British Columbia’s clean energy objectives noted in paragraph 18 above, including but not limited to municipal entities and partners producing biomethane, biomass and thermal energy from waste materials. This clarification or expansion of the municipal exclusion is clearly consistent with provincial policy, as set out in the *Clean Energy Act*, and the objective and mandate of municipalities to meet climate change goals.

VIII. CONCLUSION

42. Burnaby’s position on the matter in issue in the Inquiry is clear and straightforward: municipalities and municipal utilities operating within the municipal boundaries, either through direct municipal operation, through a municipal-owned corporation, or through a private partner authorized by a municipality but overseen by municipal council, are clearly excluded from BCUC regulation as the existing Section 1 of the UCA expressly excludes municipal utilities from the definition of a “public utility”.²⁶
43. In the event the Commission determines that there is not sufficient clarity with respect to how broad the existing exclusion is for municipalities, affiliated entities, or partners of municipalities providing energy, Burnaby submits the Commission should seek legislative amendments from the Provincial government to confirm the exclusion is broad. Further, any such legislative amendments should clarify or expand the exclusion

²⁶ *Utilities Commission Act*, RSBC 1996, c 473, s.1.

in the definition of “public utility” to include other municipal energy initiatives consistent with British Columbia’s clean energy objectives.

44. Burnaby appreciates the opportunity to comment and will participate in any further processes in the Inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

City of Burnaby