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Sent via eFile

FEI – COMPLAINT BY CASCADIA ENERGY, DIRECT ENERGY AND ACCESS GAS EXHIBIT A-8

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Re: FortisBC Energy Inc. – Administration of Rate Schedules 22, 23, 25 and 27 - Complaint filed by Cascadia Energy Ltd., Direct Energy Marketing Ltd. and Access Gas Services Inc.

Dear Ms. Black, Mr. Caumanns and Mr. Bartlett:

Cascadia Energy Ltd., Direct Energy Marketing Ltd. and Access Gas Services Inc. (the BCGMC), in its letter dated February 20, 2020 (Exhibit B-4), asserts that the evidence it has submitted establishes a reasonable apprehension of bias in this matter. No party to this matter has alleged any concerns of actual bias. However, in determining an impermissible bias, one need not prove that the bias actually exists.

In response, FortisBC Energy Inc. (FEI) took no position on the question of whether a reasonable apprehension of bias exists. Instead, FEI provided certain background facts, which I find particularly relevant to the matter at hand, at pp. 1-2 (Exhibit C-1-4):

- Commissioner Loski retired from FEI effective November 1, 2014.
- During his tenure with FEI, he was appointed to the position of Vice President, Customer Service on October 1, 2010.
- Since October 1, 2010, Commissioner Loski had no involvement, direct or indirect, with regulatory matters, including the maintenance, enforcement and amendments to the Transport Model Rate Schedules 22, 23, 25 and 27 as suggested by the BCGMC.
- As discussed in FEI's Sur-Reply Comments, there have been no substantial changes to the Transport Model, the related rate schedules, nor how the Transport Model business rules have been managed and administered by FEI since its inception in 1985.
- The most significant recent changes which took place were a result of the decision in FEI's 2016 Rate Design Application (2016 RDA), where the Transport Model was extensively reviewed.
- Internal development of the 2016 RDA began in 2015 and included stakeholder engagement sessions which took place starting February 26, 2016 and continued to August 31, 2016. The 2016 RDA was filed on December 19, 2016, and the BCUC issued its Decision and G-135-18 on July 20, 2018 (2016 RDA Decision).

The facts raised in support of the BCGMC are limited to the period 1985-2016 when the Transport Model Rate Schedules were in effect. I worked at FortisBC, and its predecessors, beginning in February 1982 until my retirement on November 1, 2014. During the mid to late 1990's, I worked in the industrial marketing and energy supply groups. Each of these roles required a thorough understanding of the tariff and rate schedules, in order to carry out my day to day responsibilities. As part of the industrial marketing team, I had account manager type responsibilities with many transportation customers. As the tariff and rate schedules set out the terms of service and the rights and obligations of the customers and the utility, I would need to ensure my actions were consistent with the tariff. In the energy supply group, I was part of the team that made day to day operational decisions regarding, among other matters, the availability of balancing service and potential curtailments for transportation customers. Although my responsibilities required me to have a thorough understanding of the tariff and transportation rate schedules, I did not have managerial authority or responsibility to maintain, propose amendments, or make amendments to the transportation business model, and the related rate schedules.

Between 2000 and September 30, 2010, I worked in various capacities in the regulatory affairs group: from 2000 as the Rate Design Manager; from 2004 as Director, Regulatory Affairs; and from 2007 as Chief Regulatory Officer until September 30, 2010. As Chief Regulatory Officer, my responsibilities included developing regulatory strategy and administrative oversight of all regulatory submissions to ensure they were made consistent with legislative requirements and corporate business objectives. I was also responsible for or made submissions in, numerous proceedings before the BCUC and other regulatory agencies in support of various applications. Additionally, I had compliance responsibilities which included administrative maintenance of the entire tariff and accompanying rate schedules. However, I did not have managerial authority or responsibility either to propose amendments or to make amendments to the transportation business model, and the related rate schedules, as alleged by BCGMC.[1]

The Current model and related rate schedules were reviewed in 2016 and all of which was completed subsequent to my retirement from FortisBC in 2014, therefore I had no direct or indirect involvement with their development or implementation.

The test for a reasonable apprehension of bias was set out in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (*Committee for Justice and Liberty*), at p. 394, per de Grandpre J (dissenting):

> [T]the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

The Supreme Court of Canada has consistently endorsed and clarified this test in numerous cases, including most recently in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 SCR 282 and in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 (*Wewaykum*), where, at paras. 76-77, the Court provided guidance on the application of the test (paras. 76–77):

> 76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

[1] Exhibit B-4.

> The grounds for this apprehension must, however, be substantial, and I … refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". (*Committee for Justice & Liberty v. Canada (National Energy Board)*, supra, at p. 395)

> 77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd v. Auckland City Council*, [2002] 3 N.Z.L.R. 577 (New Zealand P.C.), at para. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

Further, the SCC decision in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners Public Utilities*), [1992] 1 SCR 623 (*Newfoundland Telephone Co*), at paras 27-29, specifically addressed the unique nature of administrative tribunals in the context of the standard of a reasonable apprehension of bias (paras. 27–29):

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.
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> Janisch published a very apt and useful Case Comment on *Nfld. Light & Power Co. v. P.U.C. (Bd.)* (1987), 25 Admin. L.R. 196. He observed that Public Utilities Commissioners, unlike judges, do not have to apply abstract legal principles to resolve disputes. As a result, no useful purpose would be served by holding them to a standard of judicial neutrality. In fact to do so might undermine the legislature's goal of regulating utilities since it would encourage the appointment of those who had never been actively involved in the field. This would, Janisch wrote at p. 198, result in the appointment of "the main line party faithful and bland civil servants." Certainly there appears to be great merit in appointing to boards representatives of interested sectors of society including those who are dedicated to forwarding the interest of consumers.
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> Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their

> relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the Board.

As stated in *Wewaykum,*[2] there is a strong presumption of impartiality. The burden of proof is on the party alleging a real or apprehended breach of the duty of impartiality, who must establish actual or a reasonable apprehension of bias.[3] The allegation made by BCGMC is that because of my past employment and roles within FEI, this creates a reasonable apprehension of bias. I disagree. As noted by FEI, I was not involved in the development of the Transport Model Rate Schedules 22, 23, 25 or 27, at issue in this complaint; nor, have there been any substantial changes to the Transport Model since 1985 – a time when I was employed in a non-managerial role in the finance department at FEI. During my career at FEI, I was not involved in the development, maintenance, or amendments to the rate schedules in question.

The prior employment of a panel member alone does not raise a reasonable apprehension of bias. The SCC in *Newfoundland Telephone Co.* commented on the appropriateness of selecting members with expertise for administrative tribunals.[4] Further, Laskin C.J., in *Committee for Justice and Liberty*, stated at para. 45, in part:

> It follows that the National Energy Board is a tribunal that must be staffed with persons of experience and expertise. As was said by Hyde J. of the Quebec Court of Appeal in *R. v. Picard et al.*, at p. 661:
>
> > Professional persons are called upon to serve in judicial, quasi-judicial and administrative posts in many fields and if Governments were to exclude candidates on such ground, they would find themselves deprived of the services of most professionals with any experience in the matters in respect of which their services are sought. Accordingly, I agree with the Court below that this ground was properly rejected.

In my view, the factual background does not support the allegation that might lead one to conclude that I should recuse myself for a reasonable apprehension of bias and that "…a replacement commissioner be selected and appointed in this proceeding."[5]

Although it is true that I previously worked for FEI and was familiar with how the transport rate schedules worked, in my view, there is no real possibility that any reasonable and right-minded person, properly informed, viewing the circumstances realistically and practically, and having thought the matter through could conclude that it is more likely than not that I, whether consciously or unconsciously, would not decide this matter fairly because of my prior employment.

I therefore deny the request of BCGMC that I recuse myself from this proceeding.

Sincerely,

Original signed by:

Tom Loski
Commissioner

[2] *Wewaykum* at para. 76.
[3] *Ontario Provincial Police Commissioner v. MacDonald*, 2009 ONCA 805
[4] Newfoundland Telephone Co. at paras. 27-29.
[5] Exhibit B-4, p. 2.