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File No.: 240148.00860/14797

Via Electronic Filing

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Ms. Marija Tresoglavic, Acting Commission Secretary

Dear Sirs/Mesdames:

Re: City of Coquitlam Application for Reconsideration and Variance of Order G-80-19 in the matter of the 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
Project No. 1599008

We enclose for filing in the above proceeding the Submission of FortisBC Energy Inc. on Further Process pursuant to the established regulatory timetable.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Tariq Ahmed

TVA/vde
Enclosure

BEFORE THE BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF THE *UTILITIES COMMISSION ACT*

R.S.B.C. 1996, CHAPTER 473

and

CITY OF COQUITLAM APPLICATION FOR RECONSIDERATION AND VARIANCE OF BRITISH COLUMBIA UTILITIES COMMISSION ORDER NO. G-80-19

Submission of FortisBC Energy Inc. on Further Process

July 2, 2020

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A. INTRODUCTION

1. In these submissions on further process, FortisBC Energy Inc. ("FEI") responds to: (a) the submissions of the City of Coquitlam (the "City") on further process dated June 24, 2020 regarding the City's desire to introduce new evidence;[1] and, (b) the BCUC's broader request for submissions on further process contained in Order G-150-20.[2]

2. FEI submits that the BCUC should determine the reconsideration application based on the evidentiary record as it stands today. The BCUC should reject the City's request to introduce additional evidence at this time for several reasons, each of which is discussed in these submissions.

- First, the parties had ample notice of the issue of cost allocation in the Original Proceeding and both parties directly addressed cost allocation in evidence and submissions. The City is engaging in "interpretive gymnastics" to avoid a more reasonable characterization of the evidence and matters at issue.

- Second, the introduction of the additional evidence would be inconsistent with the BCUC's procedures on reconsideration. The potential additional evidence now identified by the City was available at the time of the Original Proceeding, and the City's decision not to adduce that evidence at the time was tactical.

- Third, the City's new position regarding the need to adduce evidence about other operating agreements and jurisdictions is inconsistent with its position in the Original Proceeding that the operating agreement between the City and FEI[3] (the "Operating Agreement") was irrelevant.

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1 Exhibit B-10.

2 Exhibit A-10.

3 Original Proceeding, Exhibit B-1, FEI Application, Appendix A.

B. COST ALLOCATION WAS AT ISSUE AND ADDRESSED BY THE PARTIES IN THE ORIGINAL PROCEEDING

3. The underlying premise upon which the City claims it should be entitled to introduce new evidence is that "cost allocation was not a live issue within the application that initiated the underlying proceeding nor in the evidentiary phase of the proceeding."[4] This is an inaccurate characterization of the Original Proceeding. The parties had ample notice of the central issue of cost allocation and directly addressed it in evidence and submissions. Specifically, as described below:

(a) one of the primary issues in the Original Proceeding was the cost allocation for the removal of the NPS 20 IP gas line;

(b) the parties filed evidence with respect to the cost allocation for the removal of the NPS 20 IP gas line; and

(c) the parties made submissions with respect to the cost allocation methodology for the removal of the NPS 20 IP gas line.

(a) Cost Allocation Was Directly in Issue in the Original Proceeding

4. Cost allocation was a "live issue" in the Original Proceeding. In fact, one of the two primary issues before the BCUC was the responsibility as between FEI and the City for the costs of removal of the NPS 20 IP gas line (the other primary issue was paving work).

5. The parties took differing positions in the Original Proceeding on how removal costs should be allocated. As described in FEI's application in the Original Proceeding (the document that initiated the Original Proceeding), the City would not formally issue engineering drawing approvals unless, among other things, FEI agreed to remove the NPS 20 IP gas line <u>at its own cost</u>.[5] In the Original Proceeding, FEI's position was that the Operating Agreement allowed the

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[4] Exhibit B-10, p. 2. Similarly, in Exhibit B-1, City Reconsideration Application, p. 12, the City stated that the "decision was made without notifying the parties that the BCUC intended to order a cost allocation methodology, and without seeking evidence and submission[s] from the parties in regards to the matter".

[5] Original Proceeding, Exhibit B-1, FEI Application, pp. 2 and 3.

City to request the removal, but also expressly required the City to pay the majority of the removal cost.[6] FEI's position was that the Operating Agreement gives the City the right to request that FEI remove abandoned gas line, but also contains an allocation methodology that makes the City responsible for the vast majority of those removal costs.[7] "Cost allocation" was specifically mentioned in FEI's application at pages 8 and 16 as the genesis of the application with respect to removal:

> FEI had previously requested that the City formally issue the Engineering Drawing Approvals on the agreed technical terms, with agreement to refer the issue regarding cost allocation for the removal of the NPS 20 IP line to the Commission at a future date (the City's request for the Extra Paving post-dated this discussion, as it only arose very recently). The City has declined that proposal. Accordingly, FEI is filing this Application to limit cost and schedule impacts to the Project. …
>
> …
>
> The City's first significant condition is with respect to the allocation of the cost of removing a portion of the existing NPS 20 IP gas line that FEI has regulatory approval (both BCUC and OGC) to abandon in place.
>
> [Emphasis added.]

6. FEI's second filing in the Original Proceeding, its reply submissions on process, also made clear that cost allocation was at issue, noting for example:

- "Moreover, only cost allocation is at issue, and the dispute over allocation has no impact on construction schedule or Project work" [Emphasis added];[8]
- "The City never reconciles its view that the cost allocation for a 380 metre section of the NPS 20 IP line must be resolved immediately with its concession

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[6] Original Proceeding, Exhibit B-1, FEI Application, pp. 3, 8 and 9.

[7] Original Proceeding, Exhibit B-1, FEI Application, pp. 16-17.

[8] Original Proceeding, Exhibit B-2, p. 3.

that the cost allocation for the remainder of the same pipe could wait until a future process" [Emphasis added];[9] and

- "The fundamental issue of disagreement between the parties is purely financial - how much the City is obligated to contribute towards the movement of a gas line."[10]

7. In its Original Decision, the BCUC referenced the City's position on who should pay for the cost of removal and properly encapsulated the issue as "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":[11]

> 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.
>
> [Emphasis added.]

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[9] Original Proceeding, Exhibit B-2, p. 3.

[10] Original Proceeding, Exhibit B-2, p. 4.

[11] Original Decision, p. 7.

8. The Original Application was brought pursuant to sections 32 and 33 of the *Utilities Commission Act* (the "*UCA*"), which allow the BCUC to specify terms, such as the allocation of costs. Section 32 of the *UCA* provides in part:

> … (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.
>
> [Emphasis added.]

9. Section 33 of the *UCA* provides in part:

> … (2) On application and after a hearing…the commission may, by order,
>
> (a) allow the use of the street or other place by the public utility, despite any law or contract granting to another person exclusive rights, and
>
> (b) specify the manner and terms of the use.
>
> [Emphasis added.]

10. Sections 32 and 33 of the *UCA* were referenced in the title of the application in the Original Proceeding. These references also provided clear notice as to what was at issue. It was open to the City to provide submissions and file evidence on the terms of any cost allocation beyond the applicability of the Operating Agreement. Instead of providing submissions on what the "terms of use" should be under sections 32 and 33 of the *UCA*, the City took the position that the BCUC did not have jurisdiction under sections 32 and 33.[12]

11. In its submissions on further process the City also appears to tether its desire for new evidence to a claim that evidence is required regarding a "process for the City, FEI and/or the BCUC to confirm a portion of the NPS 20 pipe shall be removed".[13] This is a manufactured issue and has not arisen in this case. There is no basis to conclude that FEI would not comply with a request for removal by the City. If a disagreement were to arise over the reasonableness

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[12] See for example, paras. 43 to 54 of the City's Final Argument in the Original Proceeding.

[13] Exhibit B-10, p. 3.

of such a request, it would be a matter that the BCUC could resolve pursuant to sections 32 and 33 of the *UCA*, as it did in the Original Proceeding.

12. The fact that the City's position in the Original Proceeding was that it should bear no costs does not mean that cost allocation was not an issue in the Original Proceeding. Rather, it means that allocation was very much at issue, and the City took the position that the allocation should be 100% to FEI and 0% to the City. The application filed by FEI in the Original Proceeding was premised on the City sharing in (i.e., being allocated a portion of) any removal cost.

13. Accepting the City's argument that cost allocation was not at issue in the Original Proceeding would require accepting the untenable position that neither (a) FEI bearing 100% of the cost, nor (b) FEI and the City sharing the cost, was an allocation of cost.

(b) Evidence Was Sought and Provided on Cost Allocation in the Original Proceeding

14. There was also ample evidence sought and provided with respect to cost allocation in the Original Proceeding. This includes evidence that was provided by the City itself.

15. In fact, the City referenced its previously proposed cost allocation in an information request response and urged an "equitable" form of cost sharing. The City's information request response provided in part:[14]

> …The City has also pointed out to FEI that the trench restoration cost should not be 100% borne by the City since FEI would have 100% of this cost if it were to remove the NPS 20 pipe when it is decommissioned. <u>The City has proposed cost sharing this work,</u> as shown on a diagram labeled "COQ-G5" on the attached Attachment 3, and which was discussed with FEI staff. However, FEI has refused Coquitlam's proposals and suggestions for compromise.
>
> In the absence of an equitable agreement with FEI on construction methodology and cost sharing for such work, Coquitlam would prefer that FEI simply remove the NPS 20 pipe immediately once the NPS 30 pipeline is in service.
>
> [Emphasis added.]

[14] Original Proceeding, Exhibit C1-10, BCUC-City Phase Two IR 2.10.6.

16. The proposal shown in the referenced diagram provided for a 50%/50% cost sharing to a certain depth, with FEI bearing 100% of the costs further below that depth. This demonstrates that even before the Original Proceeding was initiated, the City was aware of (and apparently accepting of) a more balanced allocation of costs between the parties.

17. The City's response to a Commercial Energy Consumers Association of British Columbia ("CEC") information request also made clear that cost allocation was at issue, again referencing the City's proposal and explaining that the City had decided to take an absolute position:[15]

> It is the City's position that FEI is responsible to pay the costs of removing the full 5.5km length of the NPS 20 pipeline. The City has proposed a compromise where FEI and the City would share the costs related to the removal of the NPS 20 pipe but FEI declined the City's proposal. Therefore, the City would prefer that FEI simply remove all of the NPS 20 pipe so that it will not expose the City to any increased costs or liabilities.
>
> [Emphasis added.]

18. In an information request to the City, the BCUC asked that the City "specifically address the legislative basis for allocation of costs for the removal of the pipeline" [emphasis added]. The City responded in part as follows:[16]

> The City has legislative and common law authority to require FEI to remove the decommissioned NPS 20 pipe from the City's lands. …
>
> There is no legislative or other basis requiring the City to contribute to FEI's costs of removing the NPS 20 pipe. As noted above, the 1957 Operating Agreement sets out a contractual cost-sharing mechanism only for changes in location, not removal. Absent a valid legislative authorization or contractual agreement, the City says the decommissioned NPS 20 line will be trespassing on Como Lake Avenue and therefore the entire cost of removing it must be borne by the trespassing pipe's owner—FEI. These ownership rights (to remove trespassing items and recover the removal costs) are codified in section 46(1) of the *Community Charter*. The only basis on which the costs for removal of the

[15] Exhibit C1-11, CEC-City Phase Two IR 1.2.1.

[16] Exhibit C1-10, BCUC-City Phase Two IR 2.11.5.1.

> decommissioned NPS 20 pipes will be shared by FEI and the City is if those parties voluntarily enter into a cost-sharing agreement. No such agreement has been reached.
>
> [Emphasis added.]

19. In other words, the City's evidence was that an allocation of 100% to FEI was the appropriate allocation unless the City agreed otherwise.

20. FEI's also submitted evidence with respect to cost allocation in the Original Proceeding. For example, "NPS 20 IP Removal Cost: Cost Allocation" was the title of the section of FEI's Phase Two supplemental evidence filing that dealt with removal of the NPS 20 IP gas line.[17]

(c) The Parties Provided Submissions on Cost Allocation in the Original Proceeding

21. In addition to filing evidence on cost allocation in the Original Proceeding, the parties also made submissions on that issue.

22. The City outlined its position on contributing to removal costs in paragraph 42 of its Final Argument:

> There is no legislative or other basis requiring the City to contribute to FEI's costs of removing the decommissioned NPS 20 pipes. As noted above, the 1957 Operating Agreement sets out a contractual cost-sharing mechanism only for changes in location (from place A to place B), not permanent removal of permanently decommissioned equipment. Absent a valid legislative authorization or contractual agreement, the City submits that the decommissioned NPS 20 pipes will be trespassing on Como Lake Avenue and therefore the entire cost of removing them must be borne by the trespassing pipe's owner—FEI. These ownership rights (to remove trespassing items and recover the removal costs) are codified in section 46(1) of the *Community Charter*. The only basis on which the costs for removal of the decommissioned NPS 20 pipes will be shared by FEI and the City is if those parties voluntarily enter into a cost-sharing agreement. No such agreement has been reached.
>
> [Emphasis added.]

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[17] Original Proceeding, Exhibit B-12, FEI Supplemental Evidence for Phase Two, pp. 20-35.

23. The City's phraseology "contribute to FEI's costs" and "costs…will be shared" are synonyms for cost allocation.

24. The City also addressed cost allocation in its Final Argument at paragraphs 57 and 58:

> … The City has also pointed out to FEI that the trench restoration cost should not be 100% borne by the City since FEI would have 100% of this cost if it were to remove the NPS 20 pipe when it is decommissioned. The City has proposed to FEI staff that the parties share the costs of this work, as shown on a diagram labeled "COQ-G5" on Attachment 3 to the City's response to BCUC IR No. 2; however, FEI has refused the City's proposals and suggestions for compromise.
>
> The City might agree to some cost sharing with FEI in the context of FEI agreeing to an efficient construction methodology that mitigates risks and uncertainties related to FEI causing delays to the City's contractors and minimises disruption to the community. In the absence of such equitable agreement with FEI on construction methodology and cost sharing for such work, the City would prefer that FEI simply remove the 5.5km NPS 20 Pipeline once it has been taken out of service. …
>
> [Emphasis added.]

25. The above excerpts from the City's submissions, along with the information requests cited previously, contradict the City's claim that there had been no notice regarding cost allocation. The City took an absolute position in which it would bear none (i.e., 0%) of the costs for the work that it demanded be undertaken by FEI, and that FEI should bear all (i.e., 100%) of the cost (despite referring to its previous, more balanced, cost allocation proposals). It is evident that cost allocation was a key consideration, but that the City's position was that the allocation of costs to it should be zero. An allocation of 0% to the City and 100% to FEI is still an allocation.

26. The BCUC has held that "The Commission's discretion to reconsider and vary a decision or order is applied with a view to ensuring there is consistency and predictability in the Commission's decision-making process. A reconsideration is not a vehicle for applicants or

intervenors to reargue their submissions from a hearing simply because they do not agree with the decision."[18]

27. It is evident from the City's evidence in the Original Proceeding, and its submissions throughout, that the City was set on a cost allocation that involved FEI paying the full cost, and refused to acknowledge that the BCUC could specify a cost allocation method under section 32 of the *UCA*. The City was entitled to take this tactical "all or nothing" legal position; however, in doing so, it was assuming the risk that the BCUC would disagree with its position. The City had every opportunity to provide evidence (or submissions) on the matter, even for the BCUC's consideration "in the alternative" (i.e., in the event that the BCUC were to disagree with the City's primary position). The City is, in effect, seeking to use the reconsideration process as a further "kick at the can" after having made a deliberate tactical decision to adhere firmly to a 100%/0% allocation.

C. INTRODUCTION OF THE CITY'S PROPOSED EVIDENCE WOULD BE INCONSISTENT WITH BCUC PROCEDURES FOR RECONSIDERATION

28. In considering whether to allow the City to introduce new evidence, the BCUC should be guided by its procedures regarding reconsideration. The BCUC's procedures suggest that the evidentiary record should remain as it stands, given that cost allocation was a live issue and the additional evidence was available to the City.

29. An application for reconsideration of a decision must contain a concise statement of the grounds for reconsideration, which must include one or more of the following:[19]

> a) the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision;

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[18] *An Application for Reconsideration of the Commission's Decision Approving the Application by West Kootenay Power Ltd. to Rebuild the No. 44 Transmission Line from Oliver to Osoyoos*, BCUC Order G-93-98, October 29, 1998, Reasons, p. 2. Online: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/114399/1/document.do.

[19] BCUC Order G-15-19, Rules of Practice and Procedure, Part V, s. 26.05.

b) facts material to the decision that existed prior to the issuance of the decision were not placed into evidence in the original proceeding and could not have been discovered by reasonable diligence at the time of the original proceeding;

c) new fact(s) have arisen since the issuance of the decision which have a material bearing on the decision;

d) a change in circumstances material to the decision has occurred since the issuance of the decision; or

e) where there is otherwise just cause.

[Emphasis added.]

30. In its submissions on further process the City refers to its desire to adduce "evidence related to how other jurisdictions deal with circumstances where municipalities require owners or operators of operating public utility infrastructure to remove or relocate their equipment".[20]

31. The City does not explain why the evidence it seeks to introduce "could not have been discovered by reasonable diligence at the time of the Original Proceeding" (leaving aside materiality). Nor does the City claim that this evidence has arisen since the issuance of the Original Decision (again, leaving aside that it is also required to have a material bearing).

32. As described above, cost allocation was at issue in the Original Proceeding, and the City had every opportunity to introduce this evidence at that time. It appears that the City's reason for not introducing this evidence in the Original Proceeding was to avoid undercutting its position that it should bear 0% of the removal costs. In other words, it was a tactical decision. As the BCUC has held, "A reconsideration is not an opportunity to re-argue or supplement previous arguments that have already been submitted."[21] The BCUC should not permit the City to introduce evidence that was already available regarding a live issue in the

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[20] Exhibit B-10, p. 4 [emphasis from original removed].

[21] *Andy Shadrack Application for Reconsideration in the matter of FortisBC Energy Inc. and FortisBC Inc. Application for Approval of COVID-19 Customer Recovery Fund Deferral Account Request to Reconsider Panel Decision of May 15, 2020*, BCUC Order G-131-20, June 2, 2020, Reasons, p. 3.
Online at: https://www.ordersdecisions.bcuc.com/bcuc/orders/en/479994/1/document.do.

Original Proceeding to allow the City to attempt to re-argue its position with respect to cost allocation.

D. MORE RELEVANT EVIDENCE WAS ALREADY FILED IN THE ORIGINAL PROCEEDING

33. There is another reason why the BCUC should deny the City's request to introduce new evidence: better evidence was already before the BCUC in the Original Proceeding (and forms part of the record for the reconsideration).

34. As described above, the evidence the City says it intends to introduce is "related to how other jurisdictions deal with circumstances where municipalities require owners or operators of operating public utility infrastructure to remove or relocate their equipment" [Emphasis in original].[22] The City submits that this evidence will have "probative value".[23]

35. The underlined word "operating" is significant because the City now appears to be taking the position that agreements about removal of infrastructure that is *currently in service* are of assistance to the BCUC. In contrast, the City took the position in the Original Proceeding that the Operating Agreement did not apply to the removal of the decommissioned NPS 20 IP gas line because it would no longer be in service. In its Reply Argument, in response to FEI's alternative argument that a fair and reasonable outcome under section 32 of the *UCA* was still to adopt the same allocation methodology as under the Operating Agreement, the City submitted that FEI's argument had "no basis in law".[24] The City's position at that time was not that the Operating Agreement was of relevance.

36. The BCUC decided in the Original Proceeding that the Operating Agreement was not applicable because the provision dealt with circumstances in which the City requests the relocation of gas line from one location to another location within the City's public property (and did not apply to the removal of the NPS 20 IP gas line).[25] In light of that determination, it

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[22] Exhibit B-10, p. 4.

[23] Exhibit B-10, p. 4.

[24] Original Proceeding, City Reply Argument, paras. 9 and 10.

[25] Original Decision, p. 17.

is challenging to see how the BCUC would benefit from receiving new evidence about how other jurisdictions have addressed relocation of in-service infrastructure. To the extent that the analogy to in-service infrastructure remains relevant despite the BCUC's determination, the best evidence would be the parties' own agreement about how to allocate costs for the removal of this *very same piece of gas line*. That evidence was already in the record in the Original Proceeding.[26]

37. The City concedes that the precedents it wants to adduce – which relate to other parties, other jurisdictions, and even other types of infrastructure (e.g., telecommunications) – are not "directly on point".[27]

38. The City's newfound interest in these documents lays bare that it is not seeking reconsideration, but rather is looking for an opportunity to argue what it ought to have argued at first instance. The City took advantage of its opportunity to file evidence in the Original Proceeding,[28] filing over 150 pages of evidence. It was open to the City to have included these documents at that time.

E. SUBMISSIONS REGARDING FURTHER REGULATORY PROCESS, IF REQUIRED

39. FEI submits that a written regulatory process remains appropriate for this proceeding. If the City were to be permitted to file additional evidence, FEI requests that the regulatory timetable provide an opportunity for information requests and rebuttal evidence from interveners.

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[26] Section 4 of the Operating Agreement. FEI's Application in the Original Proceeding included as Appendix A the Operating Agreement, which includes a provision dealing with cost allocation for the relocation of a gas line.

[27] Exhibit C1-10, p. 4.

[28] Exhibit C1-8.

F. CONCLUSION

40. FEI submits, for the reasons described above, that it is just and reasonable for the BCUC to determine the City's reconsideration application based on the evidentiary record as it stands today.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: July 2, 2020 ***[original signed by Matthew Ghikas]***
Matthew Ghikas
Counsel for FortisBC Energy Inc.

Dated: July 2, 2020 ***[original signed by Tariq Ahmed]***
Tariq Ahmed
Counsel for FortisBC Energy Inc.