IN THE MATTER OF

THE UTILITIES COMMISSION ACT, RSBC 1996, CHAPTER 473

AND

CITY OF RICHMOND APPLICATION FOR AN ORDER PURSUANT TO SECTION 36 OF THE UTILITIES COMMISSION ACT (UCA)

OUTLINE OF FEI'S ORAL SUBMISSIONS

MAY 21, 2021

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INTRODUCTION

1. This document provides an outline of FEI's oral submissions at the SRP. FEI's submissions address the following questions posed by the BCUC:

> 1. In its written submission the City acknowledges the BCUC's jurisdiction to impose the Terms and Conditions that the City proposes. Is it also within the jurisdiction of the BCUC to include in its Order terms and conditions requested by FEI?
>
> 2. In the absence of any Terms and Conditions set by the BCUC, parties would have recourse to the courts to adjudicate any disputes that may arise as a result of the work. If it is within the BCUC jurisdiction to do so, is it reasonable and in the public interest to include such Terms and Conditions or are the courts a more appropriate recourse in this circumstance?
>
> 3. Parties should include in their arguments: i. Any precedent where any commission or other regulatory body (not restricted to the energy sector) has determined the allocation of risk between parties on a prospective basis, either through an operating agreement, or on a case by case basis; ii. All relevant case law.

2. FEI's submission is, in short, that the BCUC's broad public interest jurisdiction under sections 32 and 36 includes the power to set the terms proposed by FEI, including terms related to allocation of risk. The BCUC exercises this jurisdiction routinely when it approves operating agreements. It is in the public interest for the BCUC to exercise its jurisdiction to set terms in this case, rather than defer to the courts.

ISSUE #1: IS IT ALSO WITHIN THE JURISDICTION OF THE BCUC TO INCLUDE IN ITS ORDER TERMS AND CONDITIONS REQUESTED BY FEI?

3. The BCUC has the necessary jurisdiction to approve the terms requested by FEI. FEI addresses this issue by making the following supporting points:

a. The BCUC's jurisdiction to hear this matter arises under both sections 32 and 36. As in prior cases, the BCUC should cite section 32 (either on its own or as well); however, there is no practical significance to the choice in this case.

b. The provisions FEI has proposed fall squarely within the express wording of section 32 and 36, and accord with the purpose and objective of those sections.

c. The BCUC routinely exercises its jurisdiction to impose terms related to risk allocation when it approves operating agreements.

d. There is no merit to the City's jurisdiction arguments based on provisions of the *Community Charter*, *Local Government Act* and *Occupiers Liability Act*.

e. While it has no bearing on the outcome, the City has characterized incorrectly the interrelationship between the *Oil and Gas Activities Act* and the UCA.

A. Sections 32 and 36 Both Confer Jurisdiction to Determine this Application

4. A threshold question (which, at the procedural conference, the BCUC had asked the Parties to address), is whether section 36 is the right section of the UCA for the City to cite. FEI submits that both sections 32 and 36 confer jurisdiction to consider the competing terms proposed by the Parties. While section 32 is typically referenced (and should be in this instance too), the choice has no practical significance to the outcome of this case.

Section 32 and 36 Triggers Are Satisfied, Giving Rise to Jurisdiction

5. Section 32[1] has two statutory triggers, both of which are met. FEI has the right to place its facilities in City public places by virtue of its CPCN. The parties are unable to agree on the terms of use.

[1] Utilities Commission Act (gov.bc.ca)

6. Section 36[2] does not include any triggers, *per se*. Rather, it requires considering "any agreement between a public utility and a municipality and to the franchise or rights of the public utility". FEI has a CPCN and there is no operating agreement.

The BCUC Typically Cites Section 32, but Sections 32 and 36 Overlap in Scope

7. The BCUC has previously used section 32 to address disputes between public utilities and municipalities involving utility infrastructure. This was the case, for instance, in the *City of Surrey Operating Agreement* decision, as well as all of the prior orders referenced by the BCUC in that decision.[3] Section 32 was also the basis for the BCUC's recent decision on the City of Coquitlam's application for reconsideration with respect to the use of lands for the LMIPSU project.[4]

8. By contrast, FEI could not find any example of the BCUC relying on section 36 as the source of its authority to set terms.

9. The main difference between these two sections is the absence of any requirement in section 36 for there to be an existing disagreement / impasse between a public utility and a municipality. The Parties are at an impasse in this case, so either section applies in practice.

10. The other difference is the reference to "highway" in section 36. At one time this mattered, but it has limited significance now and no significance in the present case. Sections 36 and 32 have their origins in the predecessor of the UCA dating back many years. At the time, "highway" was a term used to refer to a road owned by the

[2] Utilities Commission Act (gov.bc.ca)

[3] DOC_53314_FEI-CoS-Approval-of-OT-Decision-G-18-19.pdf (bcuc.com) at p. 6.

[4] BCUC Order G-80-19, Decision p. 23. document.do (bcuc.com)

Provincial government, where municipalities enjoyed a right of possession only.[5] So, section 36 could be used for provincial highways in municipalities. In the intervening decades, ownership of most highways has vested with municipalities[6], and the term "highway" is defined in the *Community Charter* to encompass roads owned by municipalities.[7]

11. The City notes that section 32 includes the word "allow", whereas section 36 does not. The City seems to suggest that the reference to "allow" means that section 32 only comes into play before infrastructure is in place. FEI submits that this is incorrect. It would also be inconsistent with the BCUC's prior use of section 32. The reference to "allow" is instead related to the fact that section 32 contemplates an impasse having been reached – i.e., the public utility is *allowed* to carry on an aspect of its operations in the face of municipal objections on terms specified by the BCUC.

The Test Under Both Sections is the Same – the Public Interest

12. The test under both sections is the same.

13. The BCUC has determined in the *City of Surrey Operating Agreement* decision that the test under section 32 is a public interest test, with the overall objective being to achieve "fair and balanced terms". The BCUC's reasoning, quoted below, would apply equally to section 36.

> The BCUC, 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

[5] *Highway Act*, R.S.B.C. 1936, c. 116. Section 5 provided that "Unless otherwise provided for, the soil and freehold of every public highway shall be vested in His Majesty, his heirs and successors" and throughout the statute rights and responsibilities relating to highways reside with the Minister of Public Works.

[6] *Community Charter*, s. 35. Community Charter (gov.bc.ca)

[7] "highway" includes a street, road, lane, bridge, viaduct and any other way open to public use, other than a private right of way on private property Community Charter (gov.bc.ca)

> CPCN or otherwise, with the competing interests of the municipality and its inhabitants in order to achieve a fair and balanced agreement.[8]

14. While the City makes reference to the public interest, the analytical approach it is using departs from the public interest test reflected in the passage above. The City's approach is reflected in the following statement, for instance: "The City submits that the question is, rather, whether additional terms are necessary beyond those in the draft order included with the Application. Commercial reasonableness is not at issue – the Application is for a BCUC order, and this is not a negotiation." There are two issues with the City's approach to the test:

    a. First, the City asks the BCUC to start from the premise that only the City's bare bones terms are required, and place the onus on FEI to demonstrate that more terms are required. There is no compelling reason why, when the City is the applicant and the party instigating the alteration of FEI's facilities, the onus should reverse. In reality, section 32 and section 36 do not impose an onus on either FEI or the City. The BCUC is balancing interests and making a "fair and balanced" public interest determination.

    b. Second, the BCUC's discussion on page 14 of the *City of Surrey Operating Agreement* is clear that public interest considerations can include commercial reasonableness of terms, so long as that consideration is not applied to the exclusion of all other non-commercial considerations.[9] The objective reasonableness of terms can be (and, in this case, should be) part and parcel of whether the terms help to achieve the "fair and balanced agreement". Indicia of reasonableness or fairness relevant to this case can include:

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[8] *City of Surrey Operating Agreement* decision, p. 14. DOC_53314_FEI-CoS-Approval-of-OT-Decision-G-18-19.pdf (bcuc.com)

[9] City of Surrey Operating Agreement, p. 14. DOC_53314_FEI-CoS-Approval-of-OT-Decision-G-18-19.pdf (bcuc.com)

i. Terms related to payment for relocation and allocation of risk have been a part of prior agreements between these same sophisticated parties for the same purposes. (The City's legal department has even stamped the prior agreements in several instances indicating its sign-off on the terms.)

ii. They have also been a part of dozens of operating agreements approved by the BCUC.

The BCUC Should Cite Section 32, or Alternatively Section 36

15. In short, either section would provide the necessary jurisdiction to the BCUC to make an order in this Application. In light of the BCUC's past practice and the fact that a dispute exists, it should continue to cite section 32 as authority for its order, but it would be acceptable to also cite section 36.

B. FEI's Proposed Terms Fall Within the Jurisdiction Conferred by Sections 32 and 36

16. The BCUC has jurisdiction to accept FEI's proposed terms. As discussed below, FEI's proposed terms fall squarely within the express wording of section 32 and 36, and accord with the purpose and objective of those sections.

FEI's Proposed Terms Fall Within Express Wording

17. The proper approach to interpreting the UCA is set out in *ATCO Gas*, and essentially requires looking at the wording of the section in the context of the legislative purpose and the overall framework:[10]

> For a number of years now, the Court has adopted E. A. Driedger's modern approach as the method to follow for statutory interpretation:
>
> > Today there is only one principle or approach, namely, 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.

[10] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) - SCC Cases (lexum.com), paras. 37, 38.

> 38 But more specifically in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers). [SCC's citations omitted]

18. Sections 32 and 36 are broadly-worded express powers to impose terms:

    a. Section 32 contemplates "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."

    b. Section 36 contemplates: "the commission may, by order, specify the terms on which the public utility may use for any purpose of its service…".

FEI Terms Consistent With Statutory Purpose and Framework

19. In its *City of Surrey Operating Agreement* decision, the BCUC characterized the purpose of section 32 in a manner that favours the BCUC having considerable latitude to determine the terms governing public utility infrastructure in municipal public places:

> In the Panel's view, the objective of the legislative scheme in the sections of the GUA referred to above and section 32 of the UCA is to enable a public utility to provide its natural gas services in a municipality. The legislation provides a means by which a public utility or a municipality (in circumstances where the public utility has the right to operate in a municipality's public spaces but cannot reach agreement as to the manner and terms of the use of such public spaces) may turn to the BCUC to have it determine the matter by specifying the manner and terms of such use. The objective is consistent with the public interest in the convenience and necessity of a public utility providing a natural gas service to a municipality. <u>That objective is met by interpreting section 32 as providing the BCUC with jurisdiction, in circumstances where a public utility and municipality cannot agree on the terms of an operating agreement, to end the impasse and specify the manner and terms of the use of such public spaces,</u>

> including the level and method of calculating an Operating Fee.[11] [Emphasis added.]

20. *ATCO Gas* makes clear that the limits of the BCUC's jurisdiction under broadly-worded powers are defined with reference to the BCUC's mandate, which relates to rate setting and the integrity of the system.[12]

21. Terms allocating risk in respect of infrastructure, just like terms addressing payment of costs or fees in respect of infrastructure, have a direct bearing on the BCUC's mandate because they affect a public utility's ability to provide cost-effective public utility service within municipalities over time. A risk allocation can affect a public utility's costs just as much as, or more than, the amount charged for work. The close inter-relationship between risk allocation and cost/price is why one would generally see both being addressed in any construction contract (e.g., to address unknown subsurface conditions or delay).

22. The City advocates an interpretation of sections 32 and 36 that excludes terms related to allocation of risk, stating: "The BCUC's power is to, by order, specify the terms on which FEI may use the City's highway; it is not to impose liability and indemnity obligations on the City." There is nothing in the wording of sections 32 or 36 that would support such a narrow interpretation, and it would be at odds with the purpose of the sections.

C. BCUC Has Previously Approved Terms Related to Payment and Allocation of Risk

23. The BCUC has routinely approved terms between FEI and dozens of municipalities that address allocation of risk in the context of approving operating agreements. These

[11] *City of Surrey Operating Agreement* decision, p. 6. DOC_53314_FEI-CoS-Approval-of-OT-Decision-G-18-19.pdf (bcuc.com)

[12] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) - SCC Cases (lexum.com) para. 7: "The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system."

operating agreement approvals are the most analogous precedent within our legislative framework.

24. In cases where the operating agreements have been brought forward for approval with the agreement of both parties, the BCUC has exercised its jurisdiction to approve them under its public interest power in section 23. Where there has been a dispute, the BCUC has exercised its public interest jurisdiction under section 32.

25. The standard form operating agreement that has been approved by the BCUC for dozens of municipalities (sometimes referred to as the "Keremeos terms") includes a third party risk indemnity (s. 10), terms relating to damage to municipal facilities (s. 6.4.3), and terms relating to municipality damage to FEI facilities (s. 13.1.7) and force majeure (s. 18.9). All of these terms are concerned with the allocation of risk – risk of damage, risk of liability to third-parties, risk of non-performance, risk of delay etc..[13]

> **6.4.3.** Repair Damage to Municipal Facilities
>
> To the extent that any of the work being done by FortisBC results in damage to Municipal Facilities or Public Places, other than the usual physical disruption to Public Places caused by the installation of Company Facilities that FortisBC shall restore in accordance with Section 6.4.2 above, FortisBC will, as soon as reasonably possible, report such damage and reimburse the Municipality for its costs arising from such damage calculated in accordance with Section 14.1 below. Where such damage results directly from inaccurate or incomplete information supplied by Municipality, and FortisBC has complied with all applicable laws and regulations, and with instructions supplied by the Municipality, then the cost of repairing damaged Municipal Facilities or Public Places will be at the expense of the Municipality.

[13] Provisions taken from Kelowna operating agreement. The terms at this link (FEI-City of Kelowna Operating Agreement (bcuc.com)) were approved, with slight modifications, by Order G-99-19. DOC_53981_G-99-19-FEI-Kelowna-Operating-Agrmt-Final.pdf (bcuc.com); DOC_53816_G-81-19-FEI-Kelowna-Operating-Agrmt-Reasons.pdf (bcuc.com)

13.1.7. The Municipality shall provide notice to FortisBC of any damage caused by the Municipality to Company Facilities or Transmission Pipeline Markers as soon as reasonably possible. To the extent that any of the work being done by the Municipality results in damage to the Company Facilities, the Municipality will report such damage and pay FortisBC its costs arising from such damage in accordance with Section 14.1 below.

10. MUTUAL INDEMNITY

10.1 Indemnity by FortisBC

10.1.1. FortisBC indemnifies and protects and saves the Municipality harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal discomfort and illness), loss or damage to property caused by FortisBC in:

(a) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Company's Facilities on or under any Public Places;

(b) any breach of this Agreement by FortisBC;

except to the extent contributed by negligence or default of the Municipality or the Municipal Employees.

10.1.2. This indemnity expressly extends to all acts and omissions of FortisBC Employees.

10.2 Indemnity by the Municipality

10.2.1. The Municipality indemnifies and protects and saves FortisBC harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal discomfort and illness), loss or damage to property to the extent caused by the Municipality in:

(a) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Municipal Facilities on or under any Public Places;

(b) any breach of this Agreement by the Municipality;

except to the extent contributed by the negligence or default of FortisBC or FortisBC Employees.

10.2.2. This indemnity expressly extends to all acts and omissions of Municipal Employees.

10.3 Limitations on Municipality's Liability

All property of FortisBC kept or stored on the Public Places will be kept or stored at the risk of FortisBC. For further certainty, FortisBC acknowledges that the Municipality has made no representations or warranties as to the state of repair or the suitability of the Public Places for any business, activity or purpose whatsoever. FortisBC accepts its use of Public Places on an "as is" basis.

18.9 Force Majeure

Neither party shall be liable to the other for temporary failure to perform hereunder, if such failure is caused by reason of an Act of God, labour dispute, strike, temporary breakdown of facilities, fire, flood, government order or regulations, civil disturbance, non-delivery by program suppliers or others, or any other cause beyond the parties' respective control.

26. The Surrey Operating Agreement approved by the BCUC under section 32 also included risk allocation provisions, including provisions similar to those quoted above addressing responsibility for damage (s. 6.5, 13(d)), indemnification provisions (s. 11), and force majeure (s. 18.12). It also imposed requirements on FEI to hold insurance (s. 3.3):

3.3 Insurance

(a) FortisBC shall obtain and maintain throughout the term of this Agreement, the following insurance, from insurers registered in and licensed to underwrite insurance in British Columbia, and provide proof of coverage to the Municipality upon request from time to time:

(i) Workers' Compensation Insurance in accordance with the statutory requirements in British Columbia;

(ii) For motor vehicles owned and operated by FortisBC and used in the performance of Work in Public Places, motor vehicle insurance coverage providing third party liability and accident benefits insurance with minimum inclusive limits for bodily injury and property damage (third party) of not less than $2,000,000.00; and

(iii) Comprehensive General Liability Insurance against claims for bodily injury, death and property damage in the amount of not less than $5,000,000 per occurrence.

(b) All such policies shall, to the extent attainable, provide that the insurance shall not be cancelled without the insurer giving at least thirty (30) calendar days' written notice to the Municipality.

6.5 Repair Damage to Municipal Facilities

To the extent that any of the Work being done by FortisBC results in damage to Municipal Facilities or Public Places, other than the usual physical disruption to Public Places caused by the installation of Company Facilities that FortisBC shall restore in accordance with section 6.3 (*Restoration and Maintenance)*, FortisBC will, as soon as practicable, provide notice to the Municipality of such damage and either repair such damage or reimburse the Municipality for its reasonable costs of repairing such damage.

11. INDEMNITY AND LIMITATIONS OF LIABILITY

11.1 Indemnity by FortisBC

(a) FortisBC indemnifies and protects and saves the Municipality harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal discomfort and illness), loss or damage to property caused by FortisBC in:

(i) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Company's Facilities on, along, across, over or under any Public Places;

(ii) any breach of this Agreement by FortisBC;

except to the extent contributed by negligence or default of the Municipality or the Municipality's Representatives.

(b) This indemnity expressly extends to all acts and omissions of FortisBC's Representatives.

11.2 Indemnity by Municipality

(a) The Municipality indemnifies and protects and saves FortisBC harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal discomfort and illness), loss or damage to property to the extent caused by the Municipality in:

(i) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Municipal Facilities on, along, across, over or under any Public Places;

(ii) any breach of this Agreement by the Municipality,

except to the extent contributed by the negligence or default of FortisBC or FortisBC's Representatives.

(b) This indemnity expressly extends to all acts and omissions of the Municipality's Representatives.

11.3 Limitations on Municipality's Liability

All property of FortisBC kept or stored on the Public Places will be kept or stored at the risk of FortisBC. For further certainty, FortisBC acknowledges that the Municipality has made no representations or warranties as to the state of repair or the suitability of the Public Places for any business, activity or purpose whatsoever. FortisBC accepts its use of Public Places on an "as is" basis.

[section 13]

> (d) **The Municipality shall provide notice to FortisBC of any damage to Company Facilities located on, along, across, over or under Public Places, caused by any work being done by the Municipality and pay FortisBC its reasonable costs to repair such damage. Where such damage results directly from inaccurate or incomplete information supplied by FortisBC, and the Municipality has complied with all applicable Laws, and with instructions supplied by FortisBC, then the cost of repairing the damaged Company Facilities will be at the expense of FortisBC.**
>
> **18.12 Force Majeure**
>
> **Neither party shall be liable to the other for temporary failure to perform hereunder, if such failure is caused by reason of an Act of God, labour dispute, strike, temporary breakdown of facilities, fire, flood, government order or regulations, civil disturbance, non-delivery by program suppliers or others, or any other cause beyond the parties' respective control.**

27. The Coldstream operating agreement was approved following a dispute pursuant to section 32 by Order G-113-12. It included similar risk allocation provisions to those above.[14]

28. The liability and *force majeure* clauses were not specifically disputed in the case of Coldstream or Surrey. However, the BCUC was clear in the *City of Surrey Operating Agreement* decision that it was approving all of the operating terms, not just those in dispute. It also determined that, since an operating agreement was a package of terms, the BCUC could deviate from individual negotiated provisions, so long as elements of the overall agreement remained unresolved:

> The Panel finds that section 32 of the UCA provides the BCUC with jurisdiction, in circumstances where a utility has the right to operate in a municipality but cannot reach agreement on the use of the municipality's public spaces, to not only specify the manner and terms of such use in respect of the disputed terms of a proposed operating agreement, but to also specify its approval as to the manner and terms of such use in respect of the entire proposed new operating agreement.

[14] Order G-113-12, approving the Coldstream operating agreement. The terms are appended to the decision, and the risk allocation provisions in ss. 6.4.3, 10.1, 10.2, 10.3, 10.4, 13.1.7, 18.9. IN THE MATTER OF (bcuc.com)

The Panel also finds that section 32 of the UCA provides the BCUC with jurisdiction, in circumstances where a utility and a municipality cannot come to an agreement on an entire proposed new operating Agreement, but have reached agreement on some terms of the proposed new operating agreement, to specify the manner and terms of use that may differ from those agreed to, but that in doing so the BCUC should give weight to the consensus reached on such terms so that they are preserved to the extent possible.

In the Panel's view, it is important to note that the wording of section 32(1)(b) of the UCA refers to a circumstance where the public utility and a municipality cannot come to "an agreement" on the use of municipal public spaces or on the terms of the use. Parties applying under section 32 will have failed to come to "an agreement" either because they could not reach any agreement at all or because they were unable to reach agreement on some of the terms under a proposed operating agreement. In either case section 32(2) provides the BCUC "may" by order allow the use of the public space and specify the manner and terms of the use. In the Panel's view, the words "an agreement" in section 32(b) together with the word "may" in section 32(2) provide the BCUC with jurisdiction and a wide discretion to allow the use of municipal public space and specify the manner and terms of such use. The wording is broad enough to provide the BCUC with jurisdiction to specify the manner and terms of such use in respect of the terms upon which the Parties were unable to reach agreement and/or in respect of the entire proposed operating agreement.

In addition, the wording of section 32 of the UCA is also broad enough to provide the BCUC with jurisdiction, in circumstances where the Parties cannot come to an agreement on the entire operating agreement, but have reached agreement on some terms of the proposed operating agreement, to specify wording which may differ from the wording agreed to by the Parties. However, the Panel should give weight to specifying the terms the Parties have reached agreement upon as part of a proposed operating agreement. In this regard, the Panel recognizes that FEI and the City have been party to lengthy negotiations, have the background knowledge and expertise and have examined the issues in considerable detail and that specifying the Agreed Terms without change is likely to contribute to an improved relationship, a reduction in disputes going

forward and improved efficiencies all to the benefit of FEI, its customers and the City.[15]

29. The agreements that the BCUC has approved under the same provisions and legislation are the best precedent. However, the AUC has approved franchise agreements that contain terms that allocate risk. For instance, FortisAlberta's agreement with Hinton includes the following risk-related provisions:

    a. Clause 14:

> For greater clarity, the Municipality acknowledges that the Company does not represent, warrant or guarantee the accuracy of the Plans and Specifications provided to the Municipality under this Article for any purpose other than enabling the Municipality to conduct its approval process in accordance with this Article. Prior to commencing any Work, the Company shall obtain such other permits as are required by the Municipality.

…

[15] City of Surrey Operating Agreement Decision, p. 10. DOC_53314_FEI-CoS-Approval-of-OT-Decision-G-18-19.pdf (bcuc.com)

For the purposes of obtaining the approval of the Municipality for Major Work under this Agreement, the Company will provide the Municipality with the Plans and Specifications for the proposed Major Work in Electronic Format (or upon request, the Company will provide the Municipality with a hard copy of the materials). The Plans and Specifications will include a description of the project and drawings of a type and format generally used by the Company for obtaining approvals from Municipalities, and will illustrate the proposed changes to the Distribution System. Notwithstanding anything to the contrary that may be contained in any approvals granted under this Agreement, as liability and indemnification are dealt with under the EUA (and the regulations promulgated thereunder) and in Article 19 of this Agreement, the Company and the Municipality agree that any approval granted under this Agreement that incorporates an indemnity provision different than the indemnification provisions set out in the EUA (and the regulations promulgated thereunder) and in Article 19 of this Agreement, shall, to the extent necessary to eliminate such difference, be deemed to be rejected and shall form no part of the agreement between the Company and the Municipality regarding the subject matter of this Agreement unless such approval:

i) explicitly amends the liability and indemnification provisions of this Agreement, wherein this Agreement is specifically referenced as being superseded; and

ii) is accepted in writing by both Parties. In addition, for the purpose of clarity, any approval granted under this Agreement shall be subject to the indemnification provisions set out in the EUA (and the regulations promulgated thereunder) and in Article 19 of this Agreement.

19) RECIPROCAL INDEMNIFICATION AND LIABILITY

a) It is intended that this provision create reciprocal rights and obligations between the Company and the Municipality.

b) The Company, as an owner of the Distribution System, is provided liability protections under the EUA, and nothing in this Agreement is intended to abrogate, alter or diminish the liability protections granted to the Company under the EUA. The Company further acknowledges and agrees that the liability protection provisions, if any, under the EUA shall apply, with the necessary changes, to the Municipality with reciprocal rights thereunder.

c) The Company will indemnify and save the Municipality, its servants, agents, employees, licensees, contractors and invitees, harmless from and against any and all liability, actions, demands, claims, damages, losses and expenses (including all legal costs and disbursements) which may be brought against or suffered, sustained, paid or incurred by the Municipality, its servants, agents, employees, contractors, licensees and invitees, arising from, or otherwise caused by:

   i) any breach by the Company of any of the provisions of this Agreement; or

   ii) the negligence or wilful misconduct of the Company, or any of its servants, agents, employees, licensees, contractors or invitees in carrying on its business within the Municipal Service Area.

d) The Municipality shall indemnify and save the Company, its servants, agents, employees, licensees, contractors and invitees, harmless from and against any and all liability, actions, demands, claims, damages, losses and expenses (including all legal costs and disbursements) which may be brought against or suffered, sustained, paid or incurred by the Company, its servants, agents, employees, licenses, contractors and invitees, arising from, or otherwise caused by:

   i) any breach by the Municipality of any of the provisions of this Agreement; or

   ii) the negligence or wilful misconduct of the Municipality, or any of its servants, agents, employees, licensees, contractors or invitees, that has a direct adverse effect on the Electric Distribution Service of the Company.

e) In accordance with the liability protections under the EUA, notwithstanding anything to the contrary herein contained, in no event shall the Municipality or the Company be liable under this Agreement, in any way, for any reason, for any loss or damage other than direct loss or damage, howsoever caused or contributed to. For the purpose of this Article, "direct loss or damage" does not include loss of profits, loss of revenue, loss of production, loss of earnings, loss of contract or any other indirect,

special or consequential loss or damage whatsoever, arising out of or in any way connected with this Agreement or the actions or omissions of the Company or the Municipality.

25) FORCE MAJEURE

If either Party shall fail to meet its obligations hereunder within the time prescribed, and such failure is caused or materially contributed by an event of "force majeure", such failure shall be deemed not to be a breach of the obligations of such Party hereunder, but such Party shall use best efforts on a commercially reasonable basis to put itself in a position to carry out its obligations hereunder. The term "force majeure" shall mean any acts of God, strikes, lock-outs, or other industrial disturbances, acts of the Queen's enemies, acts of terrorism (either foreign or domestic), sabotage, war, blockades, insurrections, riots, epidemics, lightening, earthquakes, storms, fires, wash-outs, nuclear and radiation activity or fall-out, restraints of rulers and people, orders of governmental authorities or courts of law having jurisdiction, the inability to obtain any necessary approval from a governmental authority having jurisdiction (excluding in the case of the Municipality that requires an approval from itself, the particular Municipality), civil disturbances, explosions, mechanical failure, and any other causes similar in nature not specifically enumerated or otherwise specified herein that are not within the control of such Party, and all of which by the exercise of due diligence of such Party could not have been prevented. Lack of finances shall be deemed not to be an event of "force majeure".

30. The City's examples from other jurisdictions turned on the different statutory mandate and facts. The OGC described its mandate to be related to safety, with allocation determined by regulation (OGC reasons p. 3). The CTA decisions turned on the absence of a power to impose terms (GVWD v. BCRC decision, paras. 9, 23-29). As stated above, the best examples are provisions determined by this regulator under the UCA (including section 32 itself).

31. The City's narrow interpretation of sections 32 and 36 would, if accepted, hamstring the BCUC in its role regarding comprehensive operating agreements. In any agreement, the allocation of risk can be as important as the allocation of benefits. They are closely interrelated. Each has an impact on public utilities and their customers, and on municipalities and their constituents, making them appropriate matters for consideration under sections 32 and 36. FEI submits that the City's position that the BCUC lacks jurisdiction is untenable.

D. City's Argument Based on Ownership and Statutory Limitations of Liability Is Without Merit

32. The City argues that the BCUC is precluded from establishing liability and indemnity terms by the provisions of the *Community Charter, Local Government act and Occupiers Liability Act*. This, too, is without merit.

33. As discussed above, the BCUC has approved provisions addressing allocation of risk and liability as part of a set of terms that collectively served the public interest.

34. The BCUC has the jurisdiction to do so, irrespective of the provisions cited by the City:

    a. The *Local Government Act* and the *Community Charter* are expressly subject to the UCA, by virtue of section 121 of the UCA.[16]

    b. In any event, the limitation of municipal liability section 744 of the *Local Government Act* is related to liability in nuisance or on the rule in the *Rylands v. Fletcher*[17], and only applies in the event "the damages arise, directly or indirectly, out of the breakdown or malfunction of (a)a sewer system, (b)a water or drainage facility or system, or (c)a dike or a road."

    c. The fact that municipalities are exempt from the *Occupiers Liability Act* does not make them exempt from all potential sources of liability at common law. The *Occupiers Liability Act* provides an additional recourse against owners, over and above what is conferred by common law. In *Talarico v. Town of Fort Nelson*, the BC Supreme Court held:[18]

> [53] I have concluded, as set out above, that s. 8(2)(b) of the Occupiers Liability Act excluded the defendant Town from the duty of care otherwise created by s. 3(1) of that Act because the accident occurred on a public road.

[16] Utilities Commission Act (gov.bc.ca)

[17] The rule is, in essence, that strict liability exists for harm resulting from the miscarriage of lawful activity that, considering its place and manner, is unusual, extraordinary, or inappropriate.

[18] 2008 BCSC 861 (CanLII) | Talarico v. Town of Fort Nelson | CanLII

> [54] The inter-relationship between the law of negligence and the Occupiers Liability Act with respect to highways was discussed in Brown v. British Columbia (Minister of Transportation and Highways), 1994 CanLII 121 (SCC), [1994] 1 S.C.R. 420. There, at 439-40, Cory J. addressed an argument that s. 8 of the Occupiers Liability Act and s. 3(2)(f) of the Crown Proceeding Act, R.S.B.C. 1979, c. 86, exempted the Department of Highways from any liability. Cory J. wrote at 440:
>
> Further, the Occupiers Liability Act simply has no place in a consideration of the obligations of the Department of Highways for the repair and maintenance of its highways. The enactment of occupiers' liability acts in common law provinces resulted from two legitimate concerns of the legislator. The first was the desire to do away with the medieval morass of "pigeon holing" and labelling that governed cases prior to the passage of the acts. The other was a concern for the increasing risk of liability for occupiers of property arising from accidents occasioned by snowmobilers running into wire fences or wire gates on farm and rural properties. I cannot believe that the Occupiers Liability Act of British Columbia was passed with a view to exempting the Department of Highways from liability for its negligent acts, whether they be acts of misfeasance or nonfeasance. To achieve that result a clear exemption would have to be found in the Highway Act. There is no such exemption here.
>
> [55] <u>It is clear from those comments that s. 8(2)(b) does not exempt Fort Nelson from liability for negligence with respect to repair and maintenance of its roads if it has a duty of care at common law.</u> [Emphasis added.]

The *Occupiers Liability Act* poses no impediment to the BCUC setting terms to address causes of action arising under common law.

E. *Oil and Gas Activities Act*, *Gas Utility Act* and the UCA

35. Although nothing turns on it given the facts of this case, FEI takes issue with the City's characterization of how the UCA, *Gas Utility Act* and OGAA interact. The BCUC's jurisdiction under section 32 is not limited to low pressure pipelines, as the City suggests.

36. For context, the City says in paragraph 2:

> The FEI piping system in the area conveys gas at less than 700 kPa pressure, and therefore this piping is under the jurisdiction of the BCUC and not the Oil and Gas Commission.
> …
> [footnote] Pursuant to the *Oil and Gas Activities Act* the Oil and Gas Commission has jurisdiction over construction and operation of pipelines and relocation of pipelines used to convey natural gas, unless the piping conveys gas at less than 700 kPa to consumers by a gas utility as defined in the Gas Utility Act. The piping that is the subject matter of this Application falls within the prescribed exception and is therefore not under the jurisdiction of the Oil and Gas Commission.

37. The BCUC's jurisdiction under section 32 and section 36 is not dependent on the operating pressure of the infrastructure. Those sections apply to a "public utility", as that term is defined in the UCA.

38. The *Gas Utility Act* applies to natural gas facilities irrespective of pressure.[19]

39. The Oil and Gas Commission and the BCUC have concurrent jurisdiction over high pressure pipelines operated by public utilities.[20] The only constraint imposed on the BCUC's section 32 or section 36 jurisdiction by the OGAA is the cost allocation methodology in the *Pipeline Crossing Regulation*, which applies only to high pressure pipelines subject to the OGAA.

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[19] "gas utility" means a person that owns or operates in British Columbia equipment or facilities for the production, generation, storage, transmission, sale, delivery or furnishing of gas for the production of light, heat, cold or power to or for the public or a corporation for compensation, but does not include a company within the meaning of that word as defined in the *National Energy Board Act* (Canada); Gas Utility Act (gov.bc.ca)

[20] The OGC's jurisdiction relates to an "oil and gas activity". "Oil and gas activity" includes "(e) the construction or operation of a pipeline". A "pipeline" means "…piping through which any of the following is conveyed: (a) petroleum or natural gas;…and includes installations and facilities associated with the piping, but does not include (f) piping used to transmit natural gas at less than 700 kPa to consumers by a gas utility as defined in the *Gas Utility Act*,…".

40. As indicated above, since these are low pressure pipelines the OGAA has no implications for this proceeding. Both parties agree that the BCUC has jurisdiction under the UCA in this case.

ISSUE #2: IS IT REASONABLE AND IN THE PUBLIC INTEREST TO INCLUDE SUCH TERMS AND CONDITIONS OR ARE THE COURTS A MORE APPROPRIATE RECOURSE IN THIS CIRCUMSTANCE?

41. The BCUC is empowered and best equipped to set terms. The BCUC should not simply decline to decide the dispute in deference to the courts.

42. First, the Legislature has conferred upon the BCUC public interest jurisdiction to resolve disputes between municipalities and public utilities regarding terms of use of municipal public places.[21] As is clear from the following passage from *ATCO Gas*[22], public interest determinations are an exercise that is primarily the formulation of opinion based on a variety of considerations that will vary in a particular circumstance:

> 106 A regulatory power to be exercised "in the public interest" necessarily involves accommodation of conflicting economic interests. It has long been recognized that what is "in the public interest" is not really a question of law or fact but is an opinion. In TransAlta (1986), the Alberta Court of Appeal (at para. 24) drew a parallel between the scope of the words "public interest" and the well-known phrase "public convenience and necessity" in its citation of Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co., [1958] S.C.R. 353, where this Court stated, at p. 357:
>
> > [T]he question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest . . . . [Emphasis added.]

43. The courts are not equipped to make public interest determinations in advance. They determine liability after the fact, applying the allocation of risk inherent in the common law.

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[21] *City of Surrey Operating Agreement* decision, p. 14. DOC_53314_FEI-CoS-Approval-of-OT-Decision-G-18-19.pdf (bcuc.com)

[22] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) - SCC Cases (lexum.com)

44. A decision to *decline* jurisdiction to set terms regarding risk allocation is still, in substance, a risk allocation decision. It is just, in substance, accepting a different risk allocation from the one that FEI is proposing i.e., the allocation that the law defaults to in absence of contract. The BCUC should be actively considering which of these risk allocations – the terms FEI has proposed or the default at common law - is in the public interest in these circumstances, rather than having the outcome determined by a non-decision that fails to assess the result against the public interest.

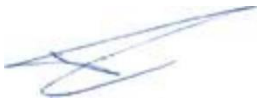
45. Second, section 32 and 36 also provide for a much more efficient and expeditious means of addressing these issues, which is in the interest of public utilities (and their customers) and municipalities (and taxpayers). This proceeding is a good example of an efficient approach to dispute resolution.

46. This proceeding calls out for BCUC intervention to make terms that balance public interest considerations to achieve a fair and balanced outcome.

CONCLUSION

47. FEI respectfully submits that the BCUC has the jurisdiction to approve its proposed terms under both sections 32 and 36. The BCUC should exercise its jurisdiction by finding that the terms proposed by FEI are in the public interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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