City of Richmond

6911 No. 3 Road
Richmond, BC V6Y 2C1
www.richmond.ca

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Law
Telephone: 604-247-4636
Fax: 604-276-4037
email: acapuccinelloiraci@richmond.ca

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

Attention: Patrick Wruck, Commission Secretary

Dear Mr. Wruck:

Re: City of Richmond
Application to the British Columbia Utilities Commission (BCUC) for Reconsideration and Variance of BCUC Order G-170-21

The City of Richmond (the **City**) encloses its application (**Application**) for reconsideration and variance of BCUC Order G-170-21.

The Application is submitted in accordance with Part V of the BCUC's Rules of Practice and Procedure, and in accordance with BCUC Order G-256-21 granting the City an extension to file an application for reconsideration of Order G-170-21 within 30 days after the issuance of the Court of Appeal's decision in *Coquitlam (City) v. British Columbia (Utilities Commission)*, CA46903.

The City requests that the BCUC exercise its powers under section 99 of the *Utilities Commission Act* to reconsider and rescind paragraph 2 of Order G-170-21 as elaborated in the Application.

Yours truly,

Anthony Capuccinello Iraci
City Solicitor
ACI:aci

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City of Richmond

Application for Reconsideration and Variance of

British Columbia Utilities Commission Order No. G-170-21

1. Introduction

This is an application ("**Application**") in accordance with Part V of the BCUC's Rules of Practice and Procedure requesting that the BCUC reconsider and vary Order No. G-170-21 dated May 31, 2021 regarding an application by the City of Richmond (the "**City**") for an order requiring FortisBC Energy Inc. ("**FEI**") to forthwith undertake three natural gas line offset projects in accordance with FEI's design drawings and on terms proposed by the City. Pursuant to section 99 of the *Utilities Commission Act* ("***UCA***"), the BCUC may reconsider, vary or rescind a decision or order made by it.

The BCUC issued Order G-170-21 on May 31, 2021 with reasons to follow, which reasons were issued by the BCUC on July 23, 2021.

On August 17, 2021, the City submitted a letter to the BCUC requesting an extension to file an application for reconsideration of Order G-170-21. The City proposed that its deadline for filing its application be extended to 30 days after the issuance of the Court of Appeal's decision in *Coquitlam (City) v. British Columbia (Utilities Commission)*, CA46903 (the "**Coquitlam Appeal**") as the BCUC in the Order G-170-21 decision referenced certain findings of the BCUC Panel in the underlying Coquitlam BCUC proceeding. On September 1, 2021, the BCUC issued Order G-256-21, granting the City's proposed extension.

On September 17, 2021, the Court of Appeal issued its reasons in the Coquitlam Appeal (indexed as 2021 BCCA 336). The City does not refer to the Coquitlam Appeal further in this Application, as the references to the Coquitlam BCUC proceeding in the Order G-170-21 decision concerned matters that were ultimately not taken up by the Court of Appeal.

2. Subject matter of Order G-170-21

The City is undertaking new drainage sewer, water main, and sanitary sewer upgrades in the Burkeville area in Richmond (the "**Project**"). In the course of the Project, there were three specific locations in the Burkeville area where the City's new gravity storm sewer and a new manhole conflicted with FEI's natural gas distribution piping system. The City first installed temporary bypasses in the new storm sewer system but, to complete the Project, the City required that FEI's gas distribution piping be offset at the three locations.

The City submitted a request to FEI to offset the gas piping at the three locations where the Project conflicts with FEI's piping system. In response to the City's request, FEI provided the City with proposed letter agreements for each of the three FEI offset projects. The letter agreements included, among other things, terms and conditions pursuant to which FEI will complete the offset projects. The letter agreements stated that the City must sign the agreement and return it to FEI before FEI will commence work, and that by signing the City agrees to FEI's terms and conditions.

The City did not sign the letter agreements. In the City's view, the terms and conditions FEI required the City to agree to before FEI would commence its work were either not applicable, not necessary, or not reasonable. On April 1, 2021 the City filed the underlying application with the BCUC.

3. Scope of Reconsideration Application

The BCUC issued Order G-170-21 on May 31, 2021, and subsequently issued reasons for decision on July 23, 2021. This Application seeks reconsideration and variance of paragraph 2 of Order G-170-21, which provides, in part:

> **NOW THEREFORE,** with reasons to follow, whether pursuant to section 32 or section 36 of the UCA, the BCUC orders as follows:
>
> 2. FEI is directed to complete the Offset Projects in accordance with all applicable regulations, as well as in accordance with the Letter Agreement applicable to each Work and the Terms and Conditions of Order – Construction, attached to

each Letter Agreement, being the Terms and Conditions attached to the applicable Letter Agreement dated August 31, 2020 or September 4, 2020 (collectively, the Agreements). Such Terms and Conditions shall be modified as set out below:

...

Section 12 shall be deleted in its entirety and replaced with the following new Section 12:

NEW 12. Limitation of Liability

FortisBC, its employees, contractors, subcontractors or agents are not responsible or liable for any claim, expense, loss, cost, or other liability incurred by the Customer caused by or resulting directly or indirectly from the Work, except and only to the extent that the claim, expense, loss, cost or other liability is directly attributable to the negligence or wilful misconduct of FortisBC, its employees, contractors, subcontractors or agents. Notwithstanding the foregoing in no event shall FortisBC, its employees, contractors, subcontractors and agents be liable for any incidental, special, punitive, or consequential damages of any kind (including, but without limitation, loss of income, loss of profits, or other pecuniary loss), arising directly or indirectly from the Work [the "**Limitation of Liability Clause**"].

For greater certainty, this Application is not seeking any reconsideration or variance of paragraphs 1, 3, 4, or 5 of Order G-170-21.

Section 26.04 of the BCUC's Rules of Practice and Procedure identifies the items that must be addressed in an application for reconsideration – the application must:

(a) Be in writing and, unless prior permission of the BCUC is obtained, not longer than 30 pages (excluding appendices and/or attachments).

It is confirmed that this Application is not longer than 30 pages excluding appendices and/or attachments.

(b) Identify the decision affected.

This Application requests reconsideration of paragraph 2 of BCUC Order G-170-21 dated May 31, 2021.

(c) State the applicant's name and the representative's name (if applicable).

The applicant is the City of Richmond. The City of Richmond's representatives for this Application are identified on the cover letter.

(d) Describe the impact of the decision and how it is material.

The impact and materiality of Order G-170-21, paragraph 2, are addressed in Section 2 of this Application.

(e) Set out the grounds for reconsideration in accordance with Rule 26.05.

The grounds for reconsideration are set out in Section 3 of this Application.

(f) Set out the remedy the applicant is seeking.

The remedy sought is addressed in Section 4 of this Application.

Rule 26.02 of the BCUC's Rules of Practice and Procedure specifies that an application for reconsideration by a party to the original proceeding is to be filed within 60 days of the date of the order or reasons for decision, whichever is later, unless prior permission of the BCUC is obtained. As reviewed in section 1, above, the BCUC consented to the City submitting an application for reconsideration within 30 days after issuance of the Court of Appeal's decision in the Coquitlam Appeal.

4. Impact and Materiality of Order G-170-21, Paragraph 2

The City submits that the BCUC's imposition of the Limitation of Liability Clause in Order G-170-21 reflects an error of law and jurisdiction. This error has material implications for the City and the public, especially in respect of its future projects that require FEI to offset its distribution piping and in respect of potential future liability arising from FEI's offset work at the three locations impacted by the Project.

The Limitation of Liability Clause purports to:

- release FEI, its employees, contractors, subcontractors or agents from responsibility or liability for any claim, expense, loss, cost, or other liability incurred by the City caused by or resulting directly or indirectly from FEI's offset work, except and only to the extent that the claim, expense, loss, cost or other liability is directly attributable to the negligence or wilful misconduct of FEI, its employees, contractors, subcontractors or agents; and
- notwithstanding the foregoing, release FEI, its employees, contractors, subcontractors and agents from liability for any incidental, special, punitive, or consequential damages of any kind (including, but without limitation, loss of income, loss of profits, or other pecuniary loss), arising directly or indirectly from FEI's offset work.

FEI's offset work was completed in June 2021 and to date there has been no injury or loss to the City or the public. There is, however, a material risk that Order G-170-21 will serve as a precedent for future requests by the City for FEI to relocate its equipment where there could be injury or loss or other liability that is the responsibility of FEI. It also presents a material risk in respect of latent liability arising from FEI's offset work at the three locations impacted by the Project. In either of these scenarios, the City would be limited in its ability to sue were FEI to cause injury or loss or other liability. Under the "notwithstanding the foregoing" portion of the clause, the City and members of the public would also be limited in their remedies if the City or a member of the public suffered injury or loss arising directly or indirectly from FEI's work.

The potential damages that could be incurred by the City or members of the public as a result of FEI's work in connection to future projects or in connection with latent liabilities arising from the Project itself, are large, and if the Limitation of Liability Clause applies it would purport to prevent recovery of damages, including consequential or indirect damages, that would not ordinarily be foreseen by FEI (or the City) and that would otherwise be recoverable. These types of damages are inherently difficult to predict, and may include losses incurred by the City to compensate surrounding property owners or businesses or regulatory penalties. In the City's

submission, it is imperative at this time to reconsider paragraph 2 of Order G-170-21 limiting FEI's liability to the City and the public in relation to injury or loss or other liability arising from FEI's work on the City's lands.

5. Grounds for Reconsideration

The grounds for reconsideration are that in making the Limitation of Liability Clause ordered pursuant to Order G-170-21, paragraph 2, the BCUC erred in law and jurisdiction by finding that:

(1) the BCUC has jurisdiction under section 32 of the *UCA* to alter the legal relationship between FEI and the City and members of the public by limiting common law rights to seek recovery in tort from FEI for injury or loss or other liability resulting from FEI's work on its equipment in City lands including City-owned highway; and

(2) the allocation of risk between FEI and the City and the public in respect of FEI's work on its equipment in City lands is a necessary component of fixing just and reasonable rates, and therefore within the jurisdiction of the BCUC under section 32.

The BCUC's reasons relevant to the Limitation of Liability Clause are contained within sections 3.1 and 3.2 of the Order G-170-21 Decision. The BCUC's findings include that "allocating risk is a necessary component of fixing just and reasonable rates; it would be difficult if not impossible for the BCUC to effectively set fair rates if we were precluded from allocating risk."[1]

Section 32 of the *UCA* provides as follows:

> 32 (1) This section applies if a public utility
>
> (a) has the right to enter a municipality to place its distribution equipment on along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and

[1] Order G-170-21 Decision, section 3.1, page 23.

(b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.

(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.

The City agrees that the BCUC has jurisdiction under section 32 of the *UCA* (or section 36) to "specify the manner and terms of [FEI's] use" of the City's highway; however, the breadth of discretion to specify terms clearly has limits. The City submits that under section 32 the BCUC may specify terms of two kinds:

(1) conditions that must exist for FEI's use of the municipality's highway to be lawful, or

(2) obligations that FEI must meet if it chooses to use the municipality's highway and proceeds to do so.

In other words, the BCUC has the power under section 32 to specify the terms on which FEI's lawful use of municipal highway is dependent. The BCUC's power is not directed to altering other legal relationships between FEI and the municipality or other persons. The BCUC can relieve FEI of obligations under otherwise applicable municipal bylaws in connection to its use of municipal highway, for example, but not liability to members of the public or the municipality arising under the law of negligence or other torts.

The Limitation of Liability Clause goes well beyond the scope of section 32 of the *UCA*—it eliminates the common law rights of the City and members of the public to sue in tort for recovery of certain losses as against FEI. Modification, alteration, or abrogation of a common law right must be explicit in the legislation or by necessary implication.[2] In this case, the abrogation of the common law rights of the City and the public is neither explicitly provided for

[2] *Bryan's Transfer Ltd. v. Trail (City)*, 2010 BCCA 531 at paras.46-55.

by section 32 of the *UCA* — which provides only that the BCUC may specify the manner and terms of FEI's use of the City's highway, as outlined above—nor can it be necessarily implied.

Clear language would be required before section 32 could be interpreted as allowing the BCUC to, by order, defeat or limit negligence or nuisance claims brought by the City or members of the public. If, for example, FEI leaves its excavation unprotected and a member of the public is injured as a result, the Legislature must have intended that person to have their usual claim in negligence unconstrained by any order of the BCUC under section 32. The same must apply to the City. As regards to negligence claims in relation to an unsafe FEI worksite, the City is just another person. The City stands in the same relationship with FEI as do other persons who might be injured by FEI's actions or inactions in respect of its work.

On the matter of necessary implication, the implication must be clear, not just reasonable. In the case of section 32 of the *UCA*, it is neither explicit nor necessarily implied. Contrary to the BCUC's determinations in the Order G-170-21 Decision, the allocation of risk between FEI and the City and the public in respect of damages arising from FEI's work on its equipment in City lands (as specified in the Limitation of Liability Clause) is not "necessary" to fixing just and reasonable rates.

The Limitation of Liability Clause is without precedent in the BCUC's setting of FEI's rates. The City accepts that provisions limiting a utility's liability to customers in relation to deficiencies in utility service or failure to supply service are common in utility tariffs, including the Tariff terms and conditions of FEI's service to its natural gas customers. Section 24 of FEI's General Terms and Conditions[3] in effect at this time include:

- section 24 ("Limitations on Liability"), which limits FEI's liability to its customers in respect of costs or injury incurred as a result of a problem or defect with FEI's gas service;

[3] FortisBC Energy Inc. General Terms and Conditions, effective November 1, 2018.

- section 24.2 (“Responsibility Before Delivery Point”), which provides that the customer is responsible for expense, risk, and liability with respect to the presence of gas and the presence of FEI-owned facilities serving the customer if the loss is caused or contributed by an act or omission of the customer or person for whom the customer is responsible; and

- section 24.5 (“Customer Indemnification”), which provides that the customer is responsible for and will indemnify FEI for any loss suffered by anyone as a result of the presence of gas once the customer has taken ownership and possession of it.

The approval by the BCUC of the above liability and indemnity provisions in FEI’s General Terms and Conditions for natural gas service is an exercise of rate-setting – in fixing the above terms by order pursuant to sections 58 to 60 of the *UCA* the BCUC set the terms and conditions under which gas customers will take service from FEI should they choose to take it. In the context of FEI’s service to its customers, the limitations on FEI’s liability and the indemnity obligations imposed upon customers are (i) specific to customers taking gas service from FEI (or those non-customers claiming through a customer), and (ii) specific to injury or loss stemming directly from FEI’s gas service to the customer or a defect in such service. But—importantly—FEI’s General Terms and Conditions do <u>not</u> address <u>at all</u> liability in respect of injury or loss to the public (including to customers as members of the public) caused by FEI working on its equipment. FEI’s General Terms and Conditions do not contain any limitation of FEI’s liability to non-customers (other than those claiming through the customer in connection to natural gas service). They also do not address at all FEI’s liability in respect of costs or injury incurred by the public as a result of FEI’s work (for example, injuries caused by an unsafe FEI worksite on a street). Not even to FEI’s customers is FEI’s liability limited under the Tariff in respect of costs or injury suffered as a result of FEI doing work on its equipment unsafely, for example.

Yet the BCUC has ordered such terms in Order G-170-21 in the very different context of purporting to “specify the manner and terms of [FEI’s] use” of the City’s streets—not in the context of FEI’s gas service to rate-paying customers. What the BCUC has done in Order G-170-

21 is equivalent to limiting FEI's liability to the City and the public for injury or loss caused by unsafe driving by an FEI employee or contractor on the City's street.

In setting rates for FEI, the BCUC has never sought to limit FEI's liability to the public (including customers as members of the public) in respect of FEI's use of streets to place and maintain FEI's equipment. But, in making Order G-170-21, the BCUC found that it had jurisdiction to impose terms limiting FEI's liability to non-customers for loss or injury in respect of FEI's work on its own equipment in the City's street.

The Limitation of Liability Clause is not an exercise of rate setting nor does it have any precedent in the BCUC's setting of rates for FEI. It is therefore clearly not necessary to rate setting. The BCUC's jurisdiction under section 32 is to, by order, specify the conditions that must exist for FEI to use the municipality's streets, or the obligations that FEI must meet if it chooses to use the municipality's streets and proceeds to do so—not to limit FEI's liability for loss or injury incurred by the City and the public caused by FEI working on its equipment in the City's street.

6. Remedy Sought

The City requests that the BCUC rescind the Limitation of Liability Clause (as defined above) in paragraph 2 of Order G-170-21.