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City of Richmond

Reconsideration and Variance of BCUC Order G-170-21

Decision
and Order G-123-22

May 9, 2022

Before:
D. M. Morton, Panel Chair
M. Kresivo, QC, Commissioner
R. I. Mason, Commissioner

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Executive summary

On October 15, 2021, the City of Richmond, British Columbia (City) filed an application with the British Columbia Utilities Commission (BCUC) pursuant to section 99 of the *Utilities Commission Act* (UCA) for reconsideration and variance of Order G-170-21 dated May 31, 2021 (Original Order) (Reconsideration Application).

The BCUC issued the Original Order on May 31, 2021, and subsequently issued reasons for decision on July 23, 2021 (Original Decision). In the Original Order the BCUC directed, amongst other things, that FortisBC Energy Inc. (FEI) complete a number of projects referred to as the Offset Projects and that they be completed in accordance with FEI's proposed terms contained in the Letter Agreements applicable to each of the Offset Projects, subject to various modifications directed by the BCUC and set out in paragraph 2 of the Original Order.

The City's grounds for reconsideration are that in specifying the Limitation of Liability Clause the BCUC erred in law and jurisdiction by finding that:[1]

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 [of the UCA].

For the reasons set out in this Decision, the Panel finds that the BCUC did not err in law or jurisdiction and dismisses the City's Reconsideration Application. In so doing, the Panel makes a number of findings and determinations, including:

- The BCUC has the jurisdiction under section 32 of the UCA to specify the Limitation of Liability Clause for the City and FEI in the Letter Agreements.
- To the extent that the Limitation of Liability Clause abrogates the common law rights of the City, the BUCC has this jurisdiction pursuant to section 32 of the UCA.
- The Limitation of Liability Clause does not limit FEI's liability in relation to members of the public. However, the Panel also notes that the "Notwithstanding Clause" would have been clearer if it had explicitly repeated the term "incurred by the Customer" that is used in the Primary Liability Clause. To avoid unnecessary future regulatory process, the Panel varies directive 2 of Order G-170-21 by adding the term "incurred by the Customer" to the Notwithstanding Clause so that in its entirety the Limitation of Liability Clause reads:

> 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,

[1] Exhibit B-1, p. 6.

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) incurred by the Customer, arising directly or indirectly from the Work. [Added term emphasized]

1.0 Introduction

On October 15, 2021, the City of Richmond, British Columbia (City) filed an application with the British Columbia Utilities Commission (BCUC) pursuant to section 99 of the *Utilities Commission Act* (UCA) for reconsideration and variance of Order G-170-21 dated May 31, 2021 (Original Order) (Reconsideration Application).[2]

2.0 Background

On July 29, 1955, the Public Utilities Commission (now the BCUC), issued a Certificate of Public Convenience and Necessity (CPCN) to the British Columbia Electric Company Limited (now FortisBC Energy Inc.) for the "supply of natural gas in the Lower Mainland area of British Columbia." The Lower Mainland was defined in the CPCN to include the Township of Richmond (now the City). The CPCN was approved by Order in Council (OIC) 2133 on August 25, 1955. FortisBC Energy Inc. (FEI) also has a deemed CPCN for the system under section 45(2) of the UCA.[3]

FEI is a "gas utility" under the *Gas Utility Act*. FEI operates approximately 732 km of gas lines in the City. [4]

There is no operating agreement between the City and FEI to address the general terms of FEI's use of the City's streets for FEI's gas distribution infrastructure or the terms that apply in the event the City requires FEI to offset its infrastructure to accommodate a City project. [5]

The City is undertaking new drainage sewer, water main, and sanitary sewer upgrades in the Burkeville area of Richmond (the Project). During the Project, three locations were identified where the City's new gravity storm sewer and a new manhole conflicted with FEI's natural gas distribution piping under City-owned highway. The City first installed temporary bypasses in the new storm sewer system but, to complete the Project, it required that FEI's gas distribution piping be altered and offset at the three locations.[6]

The City submitted a request to FEI to offset the gas piping at the three locations in Burkeville where the Project conflicts with FEI's piping system. In the absence of an operating agreement, FEI provided the City with proposed letter agreements (Letter Agreements) in relation to each of the three FEI projects to address the conflicts (Offset Projects), which the City did not agree to sign.[7] FEI indicated it would not commence the Offset Projects unless and until the City agrees to FEI's terms. On April 1, 2021, the City submitted an application to the BCUC for an order requiring FEI to undertake the Offset Projects and the terms under which the work would be done (the Original Application).[8]

The BCUC issued the Original Order on May 31, 2021, and subsequently issued reasons for decision on July 23, 2021 (Original Decision). In the Original Order the BCUC directed, amongst other things, that FEI complete the

[2] Exhibit B-1.
[3] Appendix A to Order G-170-21, p. 4.
[4] Ibid.
[5] Ibid.
[6] City Final Argument, p. 2.
[7] Ibid., p. 3.
[8] Ibid.

Offset Projects and that they be completed in accordance with FEI's proposed terms contained in the Letter Agreements applicable to each of the Offset Projects, subject to various modifications directed by the BCUC and set out in paragraph 2 of the Original Order.

In directive 2 of the Original Order, the BCUC specified, amongst other things, a limitation of liability clause (Limitation of Liability Clause) to apply to the Offset Projects, which is set out as follows:[9]

> 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 ease of reference, the first sentence of the Limitation of Liability Clause (Primary Liability Clause) is as follows:

> 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.

and the second sentence of the Limitation of Liability Clause (Notwithstanding Clause) is as follows:

> 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.

3.0 Regulatory Process

By Order G-343-21 dated November 24, 2021, the BCUC established a regulatory timetable for the review of the Reconsideration Application, providing for public notice, intervener registration, and final and reply arguments.

FEI is the only intervener in this proceeding.

The filings of the City's and FEI's Final Arguments and the City's Reply Argument, were completed by February 10, 2022.

4.0 Legislative Framework

Pursuant to section 99 of the UCA the BCUC may reconsider, vary, or rescind an order made by the BCUC.[10]

[9] Order G-170-21, directive 2.
[10] BCUC Rules of Practice and Procedure, Order G-15-19, dated January 22, 2019, Appendix A.

Specifically, section 99 of the UCA provides that the BCUC, "on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

Rule 26.05 of the BCUC's Rules of Practice and Procedure provides that an application for reconsideration must contain a concise statement of the grounds for reconsideration and include one or more of the following grounds: [11]

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

b) facts material to the decision that existed prior to the issuance of the decision were not placed in 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 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.

5.0 Reconsideration Application

5.1 Scope of the Reconsideration Request

The Reconsideration Application seeks reconsideration and variance of the Limitation of Liability Clause specified by the BCUC in directive 2 of the Original Order. The City requests that the BCUC rescind the Limitation of Liability Clause.[12]

The City is not seeking any reconsideration or variance of directives 1, 3, 4, or 5 of the Original Order.[13]

5.2 Grounds for Reconsideration

The City's grounds for reconsideration are that in specifying the Limitation of Liability Clause the BCUC erred in law and jurisdiction by finding that:[14]

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 [of the UCA].

[11] Ibid., pp. 15-16.
[12] Exhibit B-1, pp. 3, 10.
[13] Ibid., p. 3.
[14] Ibid., p. 6.

6.0 Reconsideration Decision

In this section, the Panel addresses the following issues raised by the City:

- whether the Limitation of Liability Clause addresses liability between FEI and the public;
- the BCUC's jurisdiction to specify the Limitation of Liability Clause;
- whether the BCUC has the jurisdiction to alter the legal relationship between FEI and the City to abrogate certain common law rights of the City to sue FEI for recovery of certain losses; and
- whether the BCUC's specification of a term addressing liability is without precedent.

6.1 Liability between FEI and the Public

The City states that under the Notwithstanding Clause, members of the public would be limited in their remedies if they suffered injury or loss arising directly or indirectly from FEI's work, and would lose their common law rights to sue in tort for recovery of certain losses as against FEI.[15]

Positions of the Parties

The City submits it is concerned that the Limitation of Liability Clause purports to limit the common law rights of the public "to recover from FEI in tort (or other causes of action) for injury or loss or other liability resulting from FEI working on its equipment." The City adds that the abrogation of such common law rights is "neither explicitly provided for by the applicable legislation nor can it be necessarily implied." [16]

FEI submits that the Limitation of Liability Clause, properly construed, "allocates liability as between the City and FEI, not in relation to members of the public" [Emphasis in original].[17]

FEI submits that the express language of the Limitation of Liability Clause deals only with the liability as between FEI and the City, and nothing in the Limitation of Liability Clause purports to preclude a third party from making claims against FEI or the City.[18]

FEI also submits that the BCUC expressly noted in the Original Decision that the Limitation of Liability Clause did not address FEI's liability to third parties when it stated:[19]

> In conclusion, what emerges is a limitation of liability clause, which limits FEI's liability to the City, but is silent with regards to third parties. [Emphasis added by FEI]

The City submits in reply that FEI's submission that the Limitation of Liability Clause is untenable, and that it is clear from the Notwithstanding Clause that the wording is intended to apply to "claims by the public against FEI and/or claims by the public against the City where the City brings FEI in by third party claim arising directly or indirectly from FEI working on its equipment:"[20]

[15] Exhibit B-1, pp. 5, 7.
[16] City Final Argument, pp. 5, 10.
[17] FEI Final Argument, p. 2.
[18] Ibid.
[19] Appendix A to Order G-170-21, p. 29.
[20] City Reply, p. 2.

> 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. [Underlining added by the City]

The City submits that FEI appears to accept that it is not appropriate or necessary to limit FEI's liability to the public caused by FEI working on its equipment in City-owned highway. [21]

Panel Determination

The Panel finds that the Limitation of Liability Clause does not limit FEI's liability in relation to members of the public.

The Primary Liability Clause provides:

> 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 [meaning the City] 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. [Emphasis added]

It is clear on a plain reading that the Primary Liability Clause addresses only liabilities that may arise between FEI and the City. There is no wording, explicit or otherwise, that refers to liabilities arising between FEI and members of the public.

In contrast, the Notwithstanding Clause provides:

> 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 Notwithstanding Clause is not explicitly limited to liabilities arising between FEI and the City, and could be read as including liabilities incurred between FEI and members of the public. However, the Panel concludes that the BCUC's intent in the Original Decision was to limit the Notwithstanding Clause to liabilities arising only between FEI and the City and a proper reading of the clause is consistent with that intent.

The Limitation of Liability Clause consists of one paragraph containing exactly two sentences: the Primary Liability Clause followed by the Notwithstanding Clause. The Panel finds that the Notwithstanding Clause, by its position in the same paragraph following immediately from the Primary Liability Clause, implicitly contains the same limitation as the Primary Liability Clause; that is, the Notwithstanding Clause only applies to liabilities incurred by the City.

[21] City Reply, p. 3.

In support of this interpretation, the BCUC specifically stated in the Original Decision that the Limitation of Liability Clause "is silent with regards to third parties;"[22] that is, with regards to parties other than FEI and the City, such as members of the public. The BCUC clearly intended that the entirety of the Limitation of Liability Clause, including the Notwithstanding Clause, apply only to liabilities that may arise between FEI and the City, and does not apply to liabilities that may arise between the public and FEI, and a reasonable reading of the Notwithstanding Clause supports that conclusion.

The Notwithstanding Clause would have been clearer if it had explicitly repeated the term "incurred by the Customer" that is used in the Primary Liability Clause. **To avoid unnecessary future regulatory process, the Panel varies directive 2 of Order G-170-21 by adding the term "incurred by the Customer" to the Notwithstanding Clause so that in its entirety the Limitation of Liability Clause reads**:

> 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) incurred by the Customer, arising directly or indirectly from the Work. [Added term emphasized]

6.2 Jurisdiction to Specify the Limitation of Liability Clause

The City alleges that the BCUC erred in law and jurisdiction by finding that:[23]

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 [of the UCA].

Positions of the Parties

The City accepts that the BCUC has jurisdiction under section 32 (or section 36) of the UCA to "specify the manner and terms of [FEI's] use" of the City's highway as authorized by the *Gas Utility Act*. The City submits, however, that there are limits on the BCUC's jurisdiction to specify the terms of FEI's use of City-owned highway, and that the BCUC exceeded its jurisdiction by ordering the Limitation of Liability Clause.[24]

[22] Appendix A to Order G-170-21, p. 29.
[23] Exhibit B-1, p. 6.
[24] City Final Argument, p. 8.

The City submits that section 32 of the UCA empowers the BCUC to specify terms of two kinds:[25]

a) conditions that must exist for FEI's use of the City's highway to be lawful; or

b) obligations that FEI must meet if it uses the City's highway.

The City submits that the Limitation of Liability Clause is neither necessary to make FEI's use of the City's highway lawful, nor does it consist of obligations FEI must meet in order to lawfully use the City's highway, and submits that the BCUC's power under section 32 of the UCA is not directed to altering other legal relationships between FEI and the City or other persons.[26]

The City submits that a BCUC order under section 32 of the UCA does not fix rates for FEI's utility service for gas customers, and that specifying the manner and terms of FEI's use of City-owned highway for its distribution equipment is "clearly not necessary to the fixing of just and reasonable rates." [27]

FEI submits that the Limitation of Liability Clause "falls squarely within the express wording of sections 32 and 36 [of the UCA], and accords with the purpose and objective of those sections and the scheme of the UCA."[28]

FEI submits that the proper approach to statutory interpretation, as set out in the Supreme Court of Canada's (SCC) *ATCO Gas* decision,[29] requires looking at the wording "in the context of the legislative purpose and the overall framework:"[30]

> [37] 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.
>
> [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).

FEI submits that the Limitation of Liability Clause is consistent with the purpose of section 32 of the UCA, characterized by the BCUC in the Surrey Operating Agreement decision as follows:[31]

> 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

[25] City Final Argument, p. 8.
[26] Ibid., p. 9.
[27] Ibid., pp. 11–13.
[28] FEI Final Argument, p. 4.
[29] *ATCO GAS & Pipelines Ltd v. Alberta (Energy & Utilities Board)*
[30] FEI Final Argument, p. 4.
[31] Ibid., p. 5.

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

FEI submits that the Limitation of Liability Clause falls within the BCUC's core mandate of "rate setting and the dependability and integrity of the supply system." FEI submits that terms allocating risk between a utility and a municipality in respect of infrastructure do have a bearing on the BCUC's core mandate because such terms affect the utility's ability to provide cost-effective utility service over time, and that risk allocation can affect a utility's costs just as much as, or more than, the amount charged for the work performed by the utility at the request of another party.[32]

FEI cites the Court of Appeal in the Coquitlam Appeal, which stated: "It is clearly important for the commission to be able to decide whether, how and at what cost a decommissioned pipeline should be decommissioned. That is an integral part of the decision to install a new pipeline." FEI submits that the same can be said for the BCUC's decision to order a utility to alter infrastructure at the request of a municipality, and that there may be circumstances like the Offset Projects where the risk associated with alteration is "too great to require the public utility customers to bear it without a limitation on FEI's liability to the City except to the extent that the claim or loss incurred by the City results from FEI's negligence or willful misconduct."[33]

FEI submits that the BCUC has, in effect, determined that it is unreasonable for FEI customers to bear certain risks associated with the work that the City has requested, and that it is unreasonable for the City to expect that all of the risk could be allocated back to FEI customers without increasing the price to compensate FEI for having to incur additional risk to perform work that it would not have undertaken but for the City's request.[34]

FEI submits that allocating some risk to the City "imposes additional discipline on the City when making requests to alter FEI's infrastructure," and that municipalities should make determinations about whether to request alterations to public utility infrastructure "having regard not only to what it will cost them to reimburse construction costs, but also the overall risk exposure that their projects are creating."[35]

FEI submits that the City's interpretation of section 32 of the UCA is untenable because there is nothing in the broad wording of that section that would support such a narrow interpretation and such an interpretation "would be at odds with the purpose of the section discussed above."[36]

FEI further submits that the City's argument that terms imposed by section 32 of the UCA must be strictly necessary for FEI's use of the highway to be lawful is inconsistent with the overall statutory framework and the Court of Appeal's decision in the Coquitlam Appeal. In FEI's view, sections 121 and 32 of the UCA demonstrate that the BCUC's determination of the public interest prevails, and the determination of the public interest

[32] FEI Final Argument, pp. 5-6.
[33] Ibid., pp. 6-7.
[34] Ibid., p. 8.
[35] Ibid., p. 8.
[36] Ibid., p. 9.

involves what the Court of Appeal in the Coquitlam Appeal referred to as a "multifactorial" assessment, rather than a presumption of municipal rights and an onus on the utility to demonstrate its terms of use are minimally invasive on the municipality's rights. [37]

FEI adds that the Coquitlam Appeal also involved a challenge to a BCUC order made under section 32 of the UCA that had expressly addressed the allocation of risk and liability associated with utility infrastructure in municipal lands, and that the Court of Appeal cited the BCUC's term allocating risk between a municipality and FEI as a consideration favouring upholding the BCUC's order. FEI submits that the City's position that the BCUC was precluded from including terms in the Original Decision addressing the risk between a municipality and a utility under section 32 of the UCA "cannot be reconciled with the Court of Appeal's decision."[38]

FEI submits that the City has mischaracterized the BCUC's commentary in the Original Decision[39] as suggesting the Original Decision was a rate setting exercise. Rather, FEI submits that the BCUC was observing, correctly, that the Limitation of Liability Clause is consistent with the BCUC's core mandate.[40]

The City submits in reply that FEI's reliance on the Court of Appeal's Coquitlam Appeal is misplaced because the Coquitlam Appeal concerned a CPCN issued by the BCUC pursuant to sections 45 and 46 of the UCA whereas the reconsideration proceeding concerns an order made pursuant to section 32 or 36 of the UCA specifying terms of FEI's use of the City's highway in relation to conflicts with the City's Project requiring the Offset Projects.[41]

The City disagrees with FEI's suggestion that the Limitation of Liability Clause is "somehow related to the compensation payable to FEI for gas line relocation work" and allows FEI to charge less for the Offset Projects than it would without the clause. The City submits that FEI does not charge a premium in excess of the gas line relocation costs when a clause like the Limitation of Liability Clause is not in place, as demonstrated by FEI's municipal operating agreements which do not contain a term "remotely similar" to the Limitation of Liability Clause and do not allow FEI to charge a premium in excess of its costs to relocate its equipment.[42]

Panel Discussion

The Panel finds that the BCUC has the jurisdiction under section 32 of the UCA to specify the Limitation of Liability Clause for the City and FEI in the Letter Agreements.

In the section 6.1 of this Decision, the Panel found that the Limitation of Liability Clause does not limit FEI's liability in relation to members of the public. From this point on, we address the Limitation of Liability Clause with regards only to FEI's liability to the City.

The Panel finds that the BCUC had the jurisdiction to specify the Limitation of Liability Clause for the following reasons:

[37] Ibid., pp. 9-10.
[38] FEI Final Argument, pp. 11-12.
[39] Appendix A to Order G-170-21, p. 23.
[40] FEI Final Argument, p. 13.
[41] City Reply, p. 2.
[42] Ibid., pp. 2-3.

- section 32 of the UCA gives the BCUC express powers to specify terms when a municipality and utility cannot come to an agreement;
- section 32 of the UCA gives the BCUC broad powers with respect to the scope of the terms that it may specify; and
- the Limitation of Liability Clause is consistent with the purpose of the UCA and with the BCUC's core mandate.

Express Powers of the BCUC to Specify Terms for the City and FEI

The Panel finds that section 32 of the UCA expressly provides the BCUC with powers to specify terms for FEI's use of the City's public land.

Section 32 of the UCA expressly provides that, once the two conditions set out in section 32(1) of the UCA are met (Conditions Precedent), the BCUC "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]. In the "grammatical and ordinary sense,"[43] the BCUC has the express power to specify terms for a public utility and a municipality with regard to how the public utility uses public land in the municipality.

Neither the City nor FEI disputes that section 32 of the UCA applies in this reconsideration proceeding. In the proceeding that led to the Original Decision (Original Proceeding), the City applied to the BCUC for resolution of its dispute with FEI under section 36 of the UCA, but both parties agreed during the Original Proceeding that nothing turned on whether section 32 or section 36 of the UCA applied. In the Original Decision, the BCUC found that section 32 of the UCA was applicable, but in the alternative found that section 36 of the UCA would apply.

Neither the City nor FEI disputes that the two Conditions Precedent have been met in this case. The two Conditions Precedent are: 1) FEI has the right to operate in the City; and 2) it cannot come to agreement with the City on the use or terms under which it operates in the City. The first Condition Precedent is met by FEI's CPCN, approved by OIC 2133, which gives FEI the right to supply gas in the City, or alternatively by the deemed CPCN provided under section 45(2) of the UCA, because FEI was operating its gas system in the City on September 11, 1980. The second Condition Precedent is met by the City's application in the Original Proceeding and this reconsideration proceeding which demonstrate that FEI and the City cannot come to an agreement on the terms under which the Offset Projects are to be completed.

Broad Powers of the BCUC to Specify Terms on the City and FEI

The Panel finds that the BCUC has broad powers under section 32 of the UCA to impose terms on the City and FEI with respect to FEI's use of the City's public lands that are consistent with the UCA and with the BCUC's core mandate.

The Panel disagrees with the City's interpretation that section 32 of the UCA empowers the BCUC to specify only two kinds of terms, namely:[44]

[43] FEI Final Argument, para. 7, E. A. Driedger's modern approach as the method to follow for statutory interpretation.
[44] City Final Argument, p. 8.

a) conditions that must exist for FEI's use of the City's highway to be lawful; or

b) obligations that FEI must meet if it uses the City's highway.

Section 32 of the UCA gives the BCUC broad powers to specify terms for public utilities' use of municipal lands, and includes no express limitations on the nature of the terms that may be specified by the BCUC once the Conditions Precedent have been met.

Further, section 32 of the UCA does not require express reference to terms on liability for such terms to be included in the BCUC's jurisdiction. In the Coquitlam Appeal Decision, the Court of Appeal found that the lack of explicit reference in the UCA to abandoned public utility equipment was not critical to that case: [45]

> I agree with Fortis' submission that express reference to abandonment in place in the enabling statute is not critical in this case. Some consideration must be given to the fact that different approaches to legislative drafting may be taken by federal and provincial legislators. I would place little weight on the absence of specific references to the BCUC's power to give directions with respect to the handling of decommissioned equipment in its enabling statute.

The absence of an express reference in section 32 of the UCA to terms on liability is analogous to the absence of an express reference to abandoned public utility equipment from the UCA. In both cases, the BCUC has broad powers to determine the public interest, subject to the object of the UCA and the BCUC's core mandate.

Limitation of Liability Clause is Consistent with the Object of the UCA and the BCUC's Core Mandate

As the Court of Appeal stated in the Coquitlam Appeal Decision,[46] the extent of the BCUC's jurisdiction cannot be determined by considering whether it is in the public interest for the BCUC to have the asserted jurisdiction. Rather, the Court of Appeal found it appropriate to consider whether the UCA is consistent with the BCUC's asserted jurisdiction.

The BCUC set out the object of the UCA in the Coquitlam Reconsideration Decision:[47]

> In the ATCO decision, the SCC considered a case under the public utility legislation in Alberta, and concluded that the main functions of a public utilities regulator are "rate setting" and "protecting the integrity and dependability of the supply system." The Panel considers these functions set out the "object" of the UCA, to use the SCC's term in Rizzo.

The BCUC also noted the SCC's *District of Surrey* decision, which identified the BCUC's role in safeguarding the public interest: [48]

[45] Coquitlam v. BCUC, 2021 BCCA 336, para. 85.
[46] Ibid., para. 75.
[47] Appendix A to Order G-75-20, p. 12.
[48] Ibid.

> In the District of Surrey decision, the SCC made it clear that "The whole tenor of the Act [PUC now UCA] shows clearly that the safeguarding of the interests of the public, both as to the identity of those who should be permitted to operate public utilities and to the manner in which they operate, was a duty vested in the Commission."

The BCUC concluded that, considering both the *ATCO* decision and the *District of Surrey* decisions together, the primary role of the BCUC is "rate setting and protecting the supply system in a manner which safeguards the public interest (together the Core Mandate)." [49]

The Panel finds that the Limitation of Liability Clause is in the public interest and is consistent with the object of the UCA and with the BCUC's Core Mandate for the following reasons:

- the BCUC has express powers under the UCA to oversee gas utilities' use of municipal lands for the provision of gas service;
- the cost of gas utilities' use of municipal lands is a rate setting matter for the BCUC, and rate setting is part of the BCUC's Core Mandate;
- gas utilities' liabilities associated with their use of municipal lands for the provision of gas service are part of their cost;
- specifying the Limitation of Liability Clause is part of the BCUC's rate setting role because it determines the appropriate allocation of the liabilities associated with FEI's use of City land; and
- specifying the Limitation of Liability Clause is also part of the BCUC's role to protect the gas supply system as it protects FEI's financial viability.

Gas utilities use municipal lands to deliver gas to their customers, including laying gas pipe under municipal streets. The BCUC has express powers under the UCA to determine whether gas utilities' use of public lands is in the public interest and on what terms. For example:

- section 45 of the UCA allows the BCUC to grant a certificate of public convenience and necessity (CPCN) to a gas utility giving it the right to operate gas facilities on municipal lands if such use is in the public interest;
- section 23 of the UCA allows the BCUC to make orders with respect to gas utilities' proper carrying out of a contract or franchise involving the use of public property or rights;
- section 32 of the UCA allows the BCUC to allow gas utilities to use public lands and to specify the manner and terms of use with no limitation on that power as long as the Conditions Precedent are met;
- section 36 of the UCA allows the BCUC to specify the terms on which gas utilities may use certain municipal lands such as highways and bridges; and
- section 121 of the UCA provides that nothing in or done under the *Community Charter* or the *Local Government Act* supersedes or impairs a power conferred on the BCUC or an authorization granted to a gas utility.

[49] Ibid.

Thus, the BCUC has the jurisdiction under the UCA to determine the appropriate rights and responsibilities of gas utilities and municipalities in the gas utilities' use of public lands, in the public interest. This is part of the "multifactorial" balancing of interests referred to by the Court of Appeal in the Coquitlam Appeal Decision. The BCUC routinely makes such decisions in its approval of gas utilities' municipal operating agreements under section 23 of the UCA and franchise agreements under section 45 of the UCA, and in its resolution of disputes between gas utilities and municipalities under section 32 of the UCA.

The BCUC's Core Mandate includes rate setting in a manner that preserves the public interest. The UCA gives the BCUC express powers under sections 59 to 61 to set gas utility rates that are "a fair and reasonable charge for service of the nature and quality provided by the utility."[50] In other words, the BCUC has the express power to allow gas utilities to recover from their customers the fair and reasonable costs the gas utilities incur in delivering gas to their customers.

The BCUC's rate setting role is not limited to the approval of specific rates for utilities. Such an interpretation would be unduly narrow and inconsistent with the scheme and intent of the UCA. The BCUC has many powers under the UCA to make decisions that are in the public interest, such as granting a CPCN or approving a municipal operating agreement. The effect such decisions have on utilities' rates are one factor in the BCUC's multifactorial decision-making process, and this is an integral part of the BCUC's rate-setting role.

The BCUC's governance of gas utilities' use of municipal lands includes consideration of the effect on gas utilities' rates. The effect on rates was one factor in the BCUC's decision to allow FEI to abandon in place decommissioned gas pipeline in Coquitlam, a decision upheld by the Court of Appeal in the Coquitlam Appeal Decision.

Liabilities incurred by gas utilities in their use of municipal lands to provide gas service are part of their cost of using those lands. Liabilities are the potential to incur costs in future, even though the timing and magnitude of the costs may be uncertain. If a liability associated with a gas utility's use of municipal land "crystalizes" and the utility incurs an actual cost, that actual cost is as much part of the utility's cost of using the municipal land as if it had been a directly incurred cost.

Specifying the Limitation of Liability Clause is part of the BCUC's rate setting role. The Offset Projects involve work conducted by FEI, a gas utility, on its gas utility assets that use municipal land in the City. The BCUC determined it was in the public interest that the work should take place, and that it was in the public interest that the City be allocated 100 percent of the direct costs and some but not all of the liabilities associated with the work. The BCUC's determination of whether it was in the public interest that the work should take place and at what cost to FEI, including any associated liabilities, falls squarely within the BCUC's rate setting role as the decision contributes to FEI's cost of using municipal land for the provision of gas service to its customers, in addition to being within the BCUC's powers under section 32 of the UCA.

The Panel disagrees with the City's suggestion that the BCUC has no jurisdiction over the treatment of FEI's liabilities related to municipal relocations simply because FEI does not charge a premium to cover such liabilities in the absence of a limitation of liability clause in FEI's municipal operating agreements. FEI's liabilities associated with municipal relocations are still costs to FEI even if FEI does not charge an explicit premium to

[50] UCA section 59(5)(a).

cover such liabilities in the absence of a limitation of liability clause. Further, FEI's municipal operating agreements contain many terms, each of differing value to one party or the other. The two parties agree to an overall exchange of value and not to each term of the agreement separately. It is not reasonable to conclude that the addition of a clause similar to the Limitation of Liability Clause to a municipal operating agreement would not also have required other compensating changes to the operating agreement.

The Panel also disagrees with the City when it states:[51]

> Specifying the manner and terms of FEI's use of City-owned highway for its distribution equipment is not an exercise of rate setting and the Limitation of Liability Clause does [not] have precedent in the BCUC's setting of rates for FEI. It is therefore clearly not necessary to the fixing of just and reasonable rates.

In the Panel's view, the City's interpretation of the BCUC's rate-setting role is overly narrow. Although determining the allocation of project liabilities to a public utility does not directly set a specific customer rate, the BCUC has many powers under the UCA that influence a utility's costs which ultimately determine customers' rates. For example, the approval of infrastructure spending under sections 45 and 46 of the UCA does not directly set a specific customer rate, but it does influence the utility's future costs to provide service and these costs will be recovered in rates.

In addition to rate setting, the BCUC's Core Mandate includes protecting the supply system in a manner that preserves the public interest. In the Panel's view, it is in the public interest for the utilities that supply the public with energy to remain financially sound. This consideration underlies many BCUC decisions, such as the BCUC's determination of a reasonable financial return to utilities to enable them to attract sufficient capital.

It is not in the public interest for utilities to be exposed to unlimited liabilities, as such exposure would threaten utilities' financial viability and their ability to deliver energy services to the public.

Utilities' exposure to liabilities may be mitigated in various ways, including limitation of liability clauses in utilities' contracts and utilities' purchase of liability insurance. These mitigation measures can serve to reduce a utility's financial risk, and therefore enhance its ability to continue to supply energy to the public. The approval of utilities' approach to risk management, including any limitations of liabilities in their contracts, is therefore within the BCUC's Core Mandate and in the public interest.

Conclusion

For the foregoing reasons, the Panel is satisfied that the BCUC had the jurisdiction under section 32 of the UCA to specify the Limitation of Liability Clause.

It is not a matter for this proceeding to determine whether the specific allocation of liabilities between FEI and the City in the Limitation of Liability Clause was appropriate. The City is not requesting a different allocation of liabilities, but rather takes the position that the BCUC does not have the jurisdiction to make any allocation of liabilities and should rescind the Limitation of Liability Clause entirely. Therefore, the Panel takes no position on

[51] City Final Argument, p. 13.

whether the Limitation of Liability Clause was appropriate, merely that the BCUC has the jurisdiction to specify it.

6.3 Abrogation of the City's Common Law Rights

The City states that the BCUC does not have the jurisdiction to alter the legal relationship between FEI and the City by including the Limitation of Liability Clause which abrogates the common law rights of the City to sue in tort for recovery of certain losses as against FEI.[52]

Positions of the Parties

The City submits that the BCUC does not have the jurisdiction to alter the legal relationship between FEI and the City to defeat or limit negligence or nuisance claims (or claims pursuant to other torts or causes of action) brought by the City. The City adds that the effect of the Limitation of Liability clause is "to eliminate common law rights of the City…to sue FEI in negligence or other causes of action for recovery of certain losses resulting from FEI working on its equipment."[53]

The City cites the *Bryan's Transfer Ltd. vs. Trail (City)*[54] case in support of its position, wherein the City submits that the BC Court of Appeal "expressly rejected the argument that the inclusion of a public interest component in the *Land Title Act* was sufficient to show a legislative intention to modify the doctrine [that legislatures are presumed to respect the common law, and any modification, alteration, or abrogation of a common law right must be explicit in the legislation or by necessary implication]." [55]

The City submits that there is likewise "no clear legislative intention in the *Gas Utility Act* or section 32 of the UCA to allow for the BCUC to strip the City or the pubic of common law rights to claim as against FEI for damages caused by FEI working on its equipment," and that considerations of the BCUC's Core Mandate are of no assistance in these circumstances.

FEI submits that there are four reasons the City is misapplying the principle related to abrogation of a common law right.[56]

First, FEI submits that section 32 of the UCA explicitly circumscribes the City's rights, and explicitly places the BCUC in the position of arbiter of disputes between public utilities and municipalities regarding the terms of public utilities' use of municipal lands.

Second, FEI submits that the Coquitlam Appeal Decision demonstrates there is no need for the UCA to enumerate every type of term that could be imposed under the broadly worded section 32.

Third, FEI submits that the BC Court of Appeal specifically determined that a gas utility's rights "are not exhaustively defined by the GUA and that the GUA does not limited the BCUC's jurisdiction under section 32 [of the UCA]."

[52] Exhibit B-1, p. 7.
[53] City Final Argument, p. 9.
[54] Bryan's Transfer Ltd. v. Trail (City), 2010 BCCA 531.
[55] City Final Argument, pp. 9-10.
[56] FEI Final Argument, pp. 14-17.

Fourth, FEI submits that *Bryan's Transfer* is distinguishable based on its facts and does not support the City's position, as the legislation in that case "was not conferring broad public interest jurisdiction on a statutory decision maker to decide substantive rights." Rather, FEI submits that the legislation was only imposing "a requirement on a Surveyor General to consider the public interest in the limited sense of determining when to certify a new survey plan." By contrast, under section 32 of the UCA the BCUC is charged with undertaking "a multifactorial public interest assessment to determine the appropriate terms of use of municipal lands—a substantive determination of public utility and municipal rights and obligations."

Panel Discussion

The Panel finds that to the extent that the Limitation of Liability Clause abrogates the common law rights of the City, the BCUC has this jurisdiction pursuant to section 32 of the UCA.

The Panel has already found in section 6.2 of this Decision that pursuant to section 32 of the UCA, the BCUC has jurisdiction to specify terms that apply to FEI's use of City land for FEI's gas utility assets. Section 32 of the UCA is broadly worded, and an appropriate interpretation provides the BCUC with the jurisdiction to impose the Limitation of Liability Clause. As the BC Court of Appeal in the Coquitlam Appeal has held, in upholding the BCUC's CPCN condition regarding decommissioning and abandonment of pipes on city owned property, the UCA does not need to provide for every specific power that could be imposed under section 32. Section 32 of the UCA is broadly worded and does not restrict the nature of terms that may be imposed by the BCUC in the public interest.

The Panel finds that the *Bryan's Transfer* case is distinguishable on the facts and does not support the City's position.

In *Bryan's Transfer,* the Province argued that sections 94 to 96 of the *Land Title Act*,[57] which required the Surveyor General to consider the Public Interest when approving a land survey, changed the common law doctrine of accretion.

The BC Court of Appeal applied the presumption against the implicit modification of the common law and found the language of the relevant Land Title legislation was not sufficiently clear in its intention to modify, alter or abrogate the common law doctrine of accretion. The BC Court of Appeal rejected the Province's argument that the additional consideration of the public interest by the Surveyor General in section 94 of the *Land Title Act* altered the common law and found that the statute wording was far from explicit and could not be said to be clearly implicit.[58]

The BC Court of Appeal also came to the same conclusion, that the common law had not been changed by the relevant *Land Title* legislation, by applying the modern approach to statutory interpretation. On reading the words of sections 94 to 96 of the *Land Title Act* in their entire context and in their grammatical ordinary sense harmoniously with the scheme of the Act and related legislation, the BC Court of Appeal found that the general expertise of the Surveyor General was not directed at the public interest generally but to the accuracy and utility

[57] *Land Title Act*, R.S.B.C. 1996 c. 245
[58] Bryan's Transfer Ltd. v. Trail (City), 2010 BCCA 531, para. 55.

of survey plans within the system of land management in the province.[59] Under sections 94 to 96 of the *Land Title Act*, the Surveyor General was empowered only to determine whether the land survey was an accurate depiction of boundaries. The Surveyor General was not empowered to determine more substantive legal issues like title or transfer to title.[60]

The legislation in *Bryan's Transfer*, the *Land Title Act*, was not conferring broad public interest jurisdiction on a statutory decision maker to decide substantive rights. In contrast, as set out in section 6.2 of this Decision, section 32 of the UCA expressly provides the BCUC with powers to specify the terms for FEI's use of the City's public land and provides for the BCUC to undertake a broad public interest assessment to determine the appropriate terms of use of municipal lands.

Thus, the appropriate interpretation is that section 32 of the UCA provides for the BCUC to determine and allocate risk between the municipalities and the utilities, in the public interest whenever the parties have reached an impasse over the use of public land. By necessary implication this means the section provides the BCUC with the jurisdiction to abrogate common law rights.

6.4 Precedents to Terms Addressing Liability

The City submits that the Limitation of Liability Clause is extraordinary in that FEI "does not enjoy comparable protection" under any of the following:[61]

- the *Gas Utility Act*, which authorizes and empowers FEI to carry on business in a municipality and authorizes FEI to use municipality-owned highway and other property for FEI's distribution equipment, subject to conditions;
- FEI's operating agreements with other municipalities, which specify the conditions for such use in such municipalities;
- the UCA; and
- FEI's Tariff General Terms and Conditions, which govern FEI's provision of utility service to its customers.

The City acknowledges that "terms relating to a utility's liability to customers in relation to deficiencies in utility service or failure to supply utility service are common in utility tariffs, however, the Limitation of Liability Clause is without precedent in FEI's Tariff General Terms and Conditions of gas service." [Emphasis in original] [62]

The City submits that 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 and the municipality) in respect of FEI's use of municipal streets to place, maintain and alter FEI's gas distribution equipment."[63]

The City further submits that the Limitation of Liability Clause is without precedent in the operating agreements FEI has with other municipalities, and that the City is not aware of any FEI operating agreement that limits the

[59] Ibid., para. 68.
[60] Ibid., para. 74.
[61] City Final Argument, p. 6.
[62] Ibid., p. 11.
[63] Ibid., p. 13.

common law rights of the municipality "to seek recovery from FEI for injury or loss or other liability resulting from the presence of FEI's distribution equipment in the municipality's highway and other public places or from FEI working on its equipment there."[64]

FEI submits that the BCUC has "approved dozens of operating agreements over the course of many years that address allocation of risk" and that these include "clear instances where risk is being allocated (a) to the municipality and (b) in a manner that departs from the common law."[65]

FEI cites the example of section 10 of the standard form operating agreement approved by the BCUC for "dozens of municipalities" (Standard Operating Agreement) which involves the municipality indemnifying FEI, thus shifting risk to the municipality in a way that departs from the common law. FEI adds that section 14 of the Standard Operating Agreement sets out an exhaustive list of the types of damages that are recoverable, and that (similar to the Limitation of Liability Clause) the list does not include special, punitive or consequential damages. [66]

The City submits in reply that FEI "does not identify any limitation of liability terms considered, approved or accepted by the BCUC in another context that are comparable to the Limitation of Liability Clause ordered in this case." The City repeats its position that the Limitation of Liability Clause is "a complete outlier" and is "entirely without precedent."[67]

Panel Discussion

The Panel finds that the BCUC has previously specified terms limiting the liability of gas utilities with respect to municipalities, but that such precedents do not determine the BCUC's jurisdiction in this matter.

The BCUC routinely approves operating agreements between gas utilities and municipalities that limit the utility's liability from claims made by the municipality. For example, in the FEI – City of Surrey operating agreement, approved under section 32 of the UCA, the BCUC approved a limitation of liability clause (11.5) as follows:[68]

> Except as otherwise specifically provided for in sections 8 (Changes to Facilities), 11.1 (Indemnity by FortisBC) and 11.2 (Indemnity by Municipality), neither party shall be liable to any person in any way for special, incidental, indirect, consequential, exemplary or punitive damages, including damages for economic loss, business loss, loss of profits, delay costs, stand-by costs or for failure to realize expected profits, howsoever caused or contributed to, in connection with this Agreement or non-performance of its obligations hereunder.

The above clause limits the City of Surrey's common law rights to sue FEI for "special, incidental, indirect, consequential, exemplary or punitive damages" in connection with FEI's operations in the City of Surrey, and is a

[64] Ibid., pp. 13, 15.
[65] FEI Final Argument, p. 19.
[66] Ibid., pp. 20-21.
[67] City Reply, p. 3.
[68] FortisBC Energy Inc. and City of Surrey Applications for Approval of Terms for an Operating Agreement, Exhibit C1-3, Attachment 5, p. 21.

clear example of the BCUC previously specifying a term limiting the liability of a gas utility with respect to a municipality.

As a further example, the BCUC approved the FEI – City of Kelowna operating agreement under section 23(1)(g) of the UCA, which included such liability terms as (section 10.1.1):[69]

> 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.

The City's position that the Limitation of Liability Clause is "a complete outlier" and "entirely without precedent" is not supported by previous cases.

That said, precedents do not determinatively establish the BCUC's jurisdiction. Even if the BCUC had never previously specified a term limiting the liability of a gas utility with respect to a municipality, which it has routinely done, the BCUC has the jurisdiction to specify such terms as the Panel has set out in section 6.2 above.

6.5 Overall Determination

For the foregoing reasons, the Panel finds that the BCUC did not err in law or jurisdiction and **dismisses the City's Reconsideration Application seeking to rescind directive 2 of Order G-170-21**.

As set out in section 6.2 of this Decision, **the Panel varies directive 2 of Order G-170-21 by adding the term "incurred by the Customer" to the Notwithstanding Clause so that in its entirety the Limitation of Liability Clause reads**:

> 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) incurred by the Customer, arising directly or indirectly from the Work. [Added term emphasized]

[69] Ibid., Attachment 4, p. 10.

DATED at the City of Vancouver, in the Province of British Columbia, this 9th day of May 2022.

Original signed by:

D. M. Morton
Panel Chair / Commissioner

Original signed by:

M. Kresivo, QC
Commissioner

Original signed by:

R. I. Mason
Commissioner

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ORDER NUMBER
G-123-22

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

City of Richmond
Application for Reconsideration and Variance of BCUC Order G-170-21

BEFORE:
D. M. Morton, Panel Chair
M. Kresivo, QC, Commissioner
R. I. Mason, Commissioner

on May 9, 2022

ORDER

WHEREAS:

A. On October 15, 2021, pursuant to section 99 of the *Utilities Commission Act* (UCA), the City of Richmond (City) filed with the British Columbia Utilities Commission (BCUC) an application for Reconsideration and Variance of Order G-170-21 (Reconsideration Application);

B. By Order G-170-21 dated May 31, 2021, and accompanying reasons for decision dated July 23, 2021, the BCUC issued its decision regarding the City's Application for an Order pursuant to section 36 of the UCA regarding the relocation of FortisBC Energy Inc. (FEI) operating gas mains in three locations where conflicts occurred with the City's new storm sewer system (Offset Projects). The BCUC ordered, among other things, that FEI 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, and that such Terms and Conditions be modified as set out in paragraph 2 of Order G-170-21;

C. In its Application, 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;

D. By Order G-343-21 dated November 24, 2021, the BCUC established a public hearing process consisting of public notice, intervener registration, final and reply arguments. FEI was the sole intervener; and

E. The Panel has reviewed the submissions and considers that the following determinations are warranted.

NOW THEREFORE, pursuant to sections 99 and 32 of the UCA, the BCUC orders as follows:

1. The City's Reconsideration Application seeking that the BCUC rescind paragraph 2 of Order G-170-21 is dismissed.

2. The Panel varies directive 2 of Order G-170-21 by adding the term "incurred by the Customer" to the Notwithstanding Clause so that in its entirety the Limitation of Liability Clause reads:

> 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) incurred by the Customer, arising directly or indirectly from the Work. [Added term emphasized]

DATED at the City of Vancouver, in the Province of British Columbia, this 9th day of May 2022.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

City of Richmond
Application for Reconsideration and Variance of BCUC Order G-170-21

GLOSSARY AND ACRONYMS

ACRONYM / GLOSSARY	DESCRIPTION
BCUC	British Columbia Utilities Commission
City	the City of Richmond
Conditions Precedent	Section 32 of the UCA applies if both conditions set out in section 32(1) of the UCA are met
Core Mandate	The primary role of the BCUC is "rate setting and protecting the supply system in a manner which safeguards the public interest"
CPCN	Certificate of Public Convenience and Necessity
FEI	FortisBC Energy Inc.
Letter Agreements	Letter agreements for each of the three FEI Offset Projects
Limitation of Liability Clause	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
Notwithstanding Clause	The second sentence of the Limitation of Liability Clause
now FEI	British Columbia Electric Company Limited
now the City	Township of Richmond
Offset Project	The relocation of FEI operating gas mains in three locations where conflicts occur with the City's new storm sewer system
OIC	Order in Council
Original Decision	Order G-170-21 dated May 31, 2021 with reasons for decision dated July 23, 2021
Original Order	Order G-170-21 dated May 31, 2021
Original Application	Application for an Order pursuant to Section 36 of the *Utilities Commission Act*

ACRONYM / GLOSSARY	DESCRIPTION
Original Proceeding	Application for an Order pursuant to Section 36 of the *Utilities Commission Act* proceeding
Primary Liability Clause	The first sentence of the Limitation of Liability Clause
Project	New drainage sewer, water main, and sanitary sewer upgrades in the Burkeville area of Richmond
Reconsideration Application	Application for Reconsideration and Variance of BCUC Order G-170-21
SCC	Supreme Court of Canada
UCA	*Utilities Commission Act*

City of Richmond
Application for Reconsideration and Variance of BCUC Order G-170-21

EXHIBIT LIST

Exhibit No.	Description
COMMISSION DOCUMENTS	
A-1	Letter dated November 1, 2021 – Appointing the Panel for the review of City of Richmond Application for Reconsideration and Variance of BCUC Order G-170-21
A-2	Letter dated November 24, 2021 – BCUC Order G-343-21 establishing a regulatory timetable
APPLICANT DOCUMENTS	
B-1	**CITY OF RICHMOND (RICHMOND)** – Application for Reconsideration and Variance of BCUC Order G-170-21 dated October 15, 2021
INTERVENER DOCUMENTS	
C1-1	**FORTISBC ENERGY INC (FEI) –** Letter dated January 5, 2022 Request to Intervene by Diane Roy