SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: http://www.bcuc.com

BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER C-8-03

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by BC Gas Utility Ltd.
for Approval of an Operating Agreement and Addendum
with the Corporation of the City of Penticton

BEFORE: R.H. Hobbs, Chair)
K.L. Hall, Commissioner) September 2, 2003

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

WHEREAS:

A. On January 22, 2003, BC Gas Utility Ltd. (now Terasen Gas Inc., "Terasen") applied to the British Columbia Utilities Commission ("the Commission") for approval of an Operating Agreement and Addendum ("the Application") with the Corporation of the City of Penticton ("the Municipality"); and

B. The Operating Agreement has a 21-year term to December 31, 2023 and replaces the franchise agreement approved by Commission Order No. C-17-80. As this Agreement is one of the first of the new form intended to replace all gas franchise agreements, the Addendum contains a favoured municipality provision allowing it to substitute the provisions of any alternative agreement or arrangement that Terasen might negotiate with other municipalities. The Addendum expires December 31, 2007 if this right is not exercised; and

C. Commission Order No. G-27-03 referred the Application to a written hearing process, including an agenda and timetable for Information Requests and Submissions; and

D. The Commission has reviewed the Application and the evidence adduced thereon, all set forth in the Reasons for Decision attached as Appendix A to this Order.

…/2

NOW THEREFORE the Commission pursuant to Section 45 of the Utilities Commission Act, grants a Certificate of Public Convenience and Necessity which shall expire twenty-one years from the 1st day of January, 2003 based on the December 20, 2002 Operating Agreement and Addendum with the Corporation of the City of Penticton.

DATED at the City of Vancouver, in the Province of British Columbia, this 5th of September 2003.

BY ORDER

Original signed by:

Robert H. Hobbs
Chair

Attachment

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: http://www.bcuc.com

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

REASONS FOR DECISION

TERASEN GAS INC.
Application for Approval of Operating Agreement and Addendum with the Corporation of the City of Penticton

1.0 BACKGROUND

Terasen Gas Inc. ("Terasen", "Company") is the successor to BC Gas Utility Ltd. ("BC Gas") and Inland Natural Gas Co. Ltd. ("Inland"). Terasen has natural gas distribution operations throughout the Interior of British Columbia and its predecessors have franchise agreements, operating agreements or similar arrangements with 46 municipalities which are subject to Certificates of Public Convenience and Necessity ("CPCNs") issued by the British Columbia Utilities Commission ("the Commission"). The CPCNs grant Terasen the right to construct and operate its facilities and provide service to its customers. Commission Order No. C-17-80 approved a franchise between Inland and the Corporation of the City of Penticton ("Municipality", "City") for a term of 21 years. That agreement granted Inland (or its successors) the exclusive right to supply gas by pipeline to the Municipality and customers and the right to construct and maintain a distribution system within the boundary limits of the Municipality. The agreement also set out certain terms under which Inland was to construct and operate its distribution system. The Municipality agreed that it would not itself construct and operate a gas distribution system during the term of the agreement, but held an option to purchase the distribution system from Inland if the parties could not agree on all the terms and conditions of a renewal of the agreement.

In compensation for the use by Inland of the public places within the boundary limits of the Municipality, and for the exclusive right to supply gas by pipeline, the agreement specified that the Company shall pay a sum equal to 3% of the amount received in each immediately preceding calendar year by the Company for gas consumed within the boundary limits of the Municipality. When the agreement expired on September 25, 1997, Terasen and the Municipality agreed to extend the terms to allow for the negotiation of a new long-term agreement. A new Operating Agreement and Addendum Agreement was signed by BC Gas and the Municipality on December 20, 2002.

2.0 APPLICATION

On January 22, 2003, BC Gas applied to the Commission for approval of the Operating Agreement and Addendum ("the Application") with the Municipality. The Operating Agreement has a 21-year term to December 31, 2023 and replaces the franchise agreement approved by Commission Order No. C-17-80. The Operating Agreement continues the right to construct and maintain a distribution system within the boundary limits of the Municipality, but no longer includes an exclusive right to supply natural gas to consumers in the Municipality. However, the Municipality's option to purchase the distribution system from Terasen has also been removed. The fees to be paid to the Municipality remain at 3%, but the annual date for payment is moved from November to March.

As this Operating Agreement is one of the first of the new form intended to replace all gas franchise agreements, the Addendum contains a favoured municipality provision allowing it to substitute the provisions of any alternative agreement or arrangement that Terasen might negotiate with other municipalities. The Addendum expires December 31, 2007 if this right is not exercised.

3.0 WRITTEN HEARING

Commission Order No. G-27-03 referred the Application to a written hearing process, including an agenda and timetable for Information Requests, Responses and Submissions. Submissions were received from the Lower Mainland Large Gas Users Association ("LMLGUA"), the BC Greenhouse Growers Association, Elk Valley Coal Corporation (Elk Valley"), BC Old Age Pensioners' Organization, Council of Senior Citizens' Organizations of BC, Federated Anti-poverty Groups of BC, Senior Citizens' Association of BC, End Legislated Poverty, West End Seniors' Network, and Tenants Rights Action Coalition ("BCOAPO et al."). The submissions were responded to by Terasen. The City of Penticton and the District of Salmon Arm also provided input, and were supported by the Interior Municipalities Group, which represents a number of interior municipalities that have operating agreements with Terasen.

4.0 INTERVENOR ISSUES

4.1 Standard Form Operating Agreements

None of the intervenors objected to the general terms of the Operating Agreement. However, the BCOAPO et al. submitted that, before Terasen proceeds too far along the road of replacing franchise agreements with operating agreements, it would be appropriate for the Commission to assess whether the benefits to the ratepayers of such agreements outweigh the costs. Elk Valley submitted that it is impractical from an administrative perspective to deal with each standard form agreement as an individual agreement and requested that the Commission convene an Inquiry in 2003. The LMLGUA states that the Operating Agreement is intended to replace the current form of franchise agreement in effect in various communities in its service areas, and that approval would set a dangerous precedent.

In response to a December 6, 2001 application by BC Gas for approval of a standard form agreement between BC Gas and the municipalities in its Inland and Columbia service areas, the Commission issued Letter No. L-4-02. In that letter, the Commission found that it would be inappropriate for it to undertake a general review to establish a general form agreement. Instead, the Commission expected that the Company and the municipalities would make every effort to negotiate new operating agreements. Acknowledging that, due to the commonality of many of the issues, it may be appropriate to review several applications in one proceeding, the Commission stated that it would review the circumstances in each municipality and determine the appropriate terms and conditions on an individual basis. Based on the Commission's findings, BC Gas withdrew its December 6, 2001 application and undertook to file such individual applications as appropriate.

Terasen has already signed, and been given Commission approval for, renewals of several operating agreements. As noted in the Response to BCUC Staff Information Request question 12, seventeen other municipalities have between three to sixteen years before their CPCN's must be renewed.

While the Commission is not bound by precedent, it finds no reason to change its determination in Commission Letter No. L-4-02.

4.2 The 3% Franchise Fee

Does Terasen receive value for the 3% fee?

Some intervenors objected to the continuation of the 3% fee in the new Operating Agreement. The LMLGUA suggested that the fee might have been properly paid in consideration for disruptions caused by the initial construction in the 1950's. However, the City of Penticton submission noted that the Operating Agreement grants certain rights relating to the use of public property to Terasen and provides that the Municipality will not charge or levy against Terasen, approval, licence, or permit fees related to the Company constructing, maintaining or operating gas distribution facilities upon or under public places. It also provides for the City of Penticton to pay the costs associated with the movement of any Terasen facilities resulting from the City's requirement to do so, in contrast to areas outside municipalities.

The LMLGUA submits that Terasen has offered no evidence to support the Application and that, if the Commission proceeds to approve the Operating Agreement, there will have been a breach of the 'rules of natural justice'. As well, it states that the Commission will have exceeded its statutory powers by having acted arbitrarily and with no reasonable evidentiary basis. The LMLGUA rationale is that circumstances have changed dramatically since franchise fees were introduced in the 1950's; first, because there is no longer a grant of a franchise and second, because the commodity cost of natural gas has increased dramatically. The LMLGUA submits that no explanation is offered as to why adjustments to the fee were not made to reflect changed circumstances and that the Application should not be approved without evidence to demonstrate that there will be no adverse impact on the competitiveness of natural gas relative to other energy sources in the Municipality.

The LMLGUA submits that the Commission has jurisdiction pursuant to Section 63 of the Act to consider and approve the Operating Agreement in the same manner as setting a rate, but that Terasen has not provided any evidence upon which the Commission could conclude that the fee is fair, just and reasonable. The LMLGUA submits that, absent some reasonable evidence that the fee is reasonably and necessarily incurred by Terasen in order to provide service, the fee cannot and should not be included in the tolls charged by Terasen.

Section 63 of the Act states:

> "A public utility must not, without the consent of the commission, directly or indirectly, in any way charge, demand, collect or receive from any person for a regulated service provided by it, or to be provided by it, compensation that is greater than, less than or other than that specified in the subsisting schedules of the utility applicable to that service and filed under this Act and the regulations."

The BC Greenhouse Growers Association is concerned that renewal of the franchise fee would likely stimulate similar applications and outcomes in other jurisdictions. While it does not state which jurisdictions it is referring to, the BC Greenhouse Growers Association submission states that such fees undermine the competitiveness of customers located in municipalities that charge franchise fees. The BC Greenhouse Growers Association therefore supports the submission of the LMLGUA.

The Terasen Reply states that the value to the Company of franchise agreements has always been the ability to make use of streets and other public places. With regard to the competitiveness of customers located in municipalities that charge franchise fees, Terasen submitted that it is appropriate that fees relating to the use of streets and other public properties be paid. As well, the Company notes that the introduction of transportation service has actually reduced the amount that would otherwise be payable under the agreements by reducing Terasen revenues.

The Commission agrees with Terasen that the provisions of the Operating Agreement provide value to the Company and support approval of the Application, as do the responses to the Information Requests provided as evidence in this hearing. The Commission finds that the 3% fee is not unreasonable for the concessions provided by the municipality. However, the Commission considers that the inclusion of the gas commodity cost in the calculation of fees for Sales Service customers has led to considerable volatility in recent years. The Commission directs Terasen to seek a method in future agreements to convert the fee to a charge on Utility Margin, so as to stabilize the costs to utility customers.

Section 607 of the Local Government Act

The LMLGUA submitted that the fee is a tax levied by the City of Penticton and, as such, the Municipality did not have the authority to do so. The LMLGUA submitted that the Operating Agreement does not grant franchise rights and therefore Section 607 (and the subsequent approval of the Inspector of Municipalities) does not apply. However, subsection 607(1)(b) allows a council to enter into or ratify or adopt agreements granting an exclusive or a limited franchise to supply gas to the inhabitants of the municipality. Section 607(2) states that an agreement may, with the approval of the Inspector of Municipalities, be renewed for one or more further terms and Section 607(4) states that a subsequent agreement to supply gas to the inhabitants of the municipality made between the parties to an agreement under subsection (1)(b) is deemed to be a renewal of the agreement.

The fees are billed to, and collected from, only those customers located in municipalities to whom the fee is paid. As customers, they are represented by Terasen, and, as tax payers, they are represented by the elected Council of the City of Penticton. The Municipality submitted that it has received no complaints from resident tax payers during the 21 years. As well, the Commission received no complaints from resident tax payers after the Notice of Written Hearing on this matter was published in the Penticton Western News.

Despite the Terasen response to BCUC Staff Information Request question 1, it is the Municipality's position that the Operating Agreement does provide Terasen with a limited franchise to supply gas to the inhabitants of the municipality and it is therefore an agreement which is valid and enforceable pursuant to the Local Government Act.

The Application has been made pursuant to the Utilities Commission Act and issues related to the Local Government Act are not relevant to its approval. It is open to any Intervenor to pursue these issues with the Municipality or the Inspector of Municipalities in the courts.

Sections 23 and 45 of the Utilities Commission Act

In its response to BCUC Staff Information Request question 1, Terasen stated that the Operating Agreements contain provisions which suggest they involve a "privilege" or "concession" and that approval was required under Section 45 of the Act. The LMLGUA submits that Section 45 is irrelevant to the Application since that section is concerned with Certificates of Public Convenience and Necessity where a person wishes to begin the construction or operation of a public utility. The LMLGUA submits that the Application might fall under Section 23(g) of the Act, but that Terasen has given no basis for, and provided no evidence to support, such a determination by the Commission.

Section 45(1) of the Act states:

> "Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation."

Section 45(7) states:

> "Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission."

Section 45(8) states:

> "The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest."

Section 45(9) states:

> "In giving its approval, the commission
> (a) must grant a certificate of public convenience and necessity, and
> (b) may impose conditions about
> (i) the duration and termination of the privilege, concession or franchise, or
> (ii) construction, equipment, maintenance, rates or service, as the public convenience and interest reasonably require."

Section 23 of the Act does give the Commission general supervision over public utilities. However, Commission Order No. C-17-80 granted a CPCN to Terasen for a 21 year term. That CPCN has now expired and, in order for Terasen to continue to construct or operate its plant or system, or an extension thereof, it has properly applied pursuant to Section 45 of the Act. There is no need for the Commission to make any determinations pursuant to Section 23(g).

Is the fee discriminatory?

The LMLGUA also submits that the fee is discriminatory because it impacts Terasen's full service customers far more significantly than its transportation service customers, without being related to the cost of providing service to one class of customer versus the other, and because there is no explanation why the fee is not collected from other utilities that operate in the Municipality. Terasen replied that there is nothing discriminatory regarding the fee as it is charged to all customers receiving gas service within the Municipality.

Although Transportation Service has created an anomaly between Sales Service and Transportation Services the Commission does not find it to be unduly discriminatory. Even though the development of competition in the provision of gas commodity to industrial and large commercial customers since the mid 1980's has resulted in a change to the gross revenues of the Utility, the Commission accepts that the changes in gross revenue and franchise payments continued to be calculated in accordance with the franchise agreement and did not result in an undue discrimination to either party. However, a fee

structure based on the Utility Margin, exclusive of gas commodity cost, would avoid the current anomaly. Whether other utilities operating in the Municipality collect such fees is not an issue here.

4.3 Other Issues

The LMLGUA submits that Terasen invoices its customers at the rate of 3.09% and therefore collects 0.09% in excess revenues without contractual authorization. The Commission approved a Terasen Gas Tariff franchise fee charge of 3.09%. However, as noted in the Terasen Reply, this is the amount which must be collected from customers to equal the 3% paid by Terasen.

The Commission agrees that there are no excess revenues.

The LMLGUA states that it is disturbed that the Application fails to disclose that Terasen paid $70,000 to the Municipality in respect of the Operating Agreement, and that the Company agreed to pay only because it expected to simply flow the cost through to its customers. It asks that the Commission inquire into the extent to which Terasen provides donations, grants, or other forms of compensation to parties with whom it contracts, and direct that Terasen at all times fully disclose the full consideration in relation to such contracts. Terasen replied that $20,000 of this amount relates to capital expenditures which may or may not have been payable by the City. Terasen states that $50,000 was a contribution to a community capital project that was considered to be a reasonable expenditure to enable the negotiations to conclude and to avoid ongoing costs. Terasen also notes that, as the 2002 revenue requirements application was withdrawn, this expense has no effect on customer rates.

While the Commission believes that it should not have taken a request to the Municipality under the Freedom of Information and Protection of Privacy Act to obtain the information, the Commission considers that LMLGUA request for an inquiry and a direction in this matter is not warranted.

5.0 COMMISSION DETERMINATION

Based on its review of the issues in this proceeding, the Commission concludes that the issuance of a CPCN, based on the Operating Agreement and Addendum, is required for the public convenience and necessity.