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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-231-13A**

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

and

A Proposed Regulatory Framework including an Exemption
for certain Thermal Energy Service Utilities

BEFORE: D.M. Morton, Commissioner
L.A. O'Hara, Commissioner
R.D. Revel, Commissioner
December 31, 2013

O R D E R

WHEREAS:

- A. On December 27, 2012, the British Columbia Utilities Commission (Commission) issued its Report on the Inquiry into Alternative Energy Solutions, which among other things tasked Commission staff with conducting consultation on a scaled regulatory framework for Thermal Energy Services (TES);
- B. On May 9, 2013, the Commission issued a letter initiating a public comment process on a Commission staff proposal for Thermal Energy System Utilities Regulatory Framework in British Columbia including two consultation working sessions and two rounds of stakeholder submissions;
- C. On August 28, 2013, the Commission issued Order G-132-13 establishing a written public hearing and preliminary Regulatory Timetable for review of the Proposed Regulatory Framework including an Exemption for certain Thermal Energy System Utilities (TES Framework);
- D. On September 13, 2013, the Commission issued Order G-143-13 requesting submissions from Interveners on the implications of the proposed Exemptions and any recommendations for changes to the proposed TES Framework;
- E. The Commission has considered the proposed TES Framework and submissions from Participants in this Proceeding and finds that exemptions from certain provisions of the *Utilities Commission Act* (UCA) properly conserves the public interest and will seek approval from the Lieutenant Governor in Council (LGIC) pursuant to section 88(3) of the UCA. The Commission also finds that further submissions from the Participants on the following elements are needed before final issuance of a TES Framework and Guide for all TES proponents to follow:

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- i. What is the appropriate TES minimum threshold amount (project dollar value below which an Exemption from regulatory oversight exists). When commenting on the appropriate threshold amount, parties are asked to provide any evidence necessary to support their proposal considerations and amount;
- ii. The Panel invites submissions from the parties on the appropriateness of an extension test, in lieu of a CPCN application, for Stream B plant or system extensions and the circumstances under which such a test would be appropriate.

NOW THEREFORE pursuant to section(s) of the *Utilities Commission Act*, the Commission orders, with Reasons for Decision attached as Appendix A to this Order, the Regulatory Timetable is amended as follows:

ACTION	DATE (2014)
Intervener Submissions on Commission requests	Thursday, January 23
Intervener Reply Submissions	Thursday, February 6

DATED at the City of Vancouver, in the Province of British Columbia, this 6th day of January, 2014.

BY ORDER

Original Signed By:

D.M. Morton
Commissioner

Attachment



IN THE MATTER OF

**BRITISH COLUMBIA UTILITIES COMMISSION
PROPOSED REGULATORY FRAMEWORK AND
GUIDE FOR THERMAL ENERGY SERVICE UTILITIES**

REASONS FOR DECISION

December 31, 2013

BEFORE:

D.M. Morton, Panel Chair / Commissioner
L.A. O'Hara, Commissioner
R.D. Revel, Commissioner

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EXECUTIVE SUMMARY

On May 24, 2011, the Commission issued Order G-95-11 which initiated an “Inquiry into FortisBC Energy Inc.’s Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives” (AES Inquiry). Among the objectives of the AES Inquiry, the following are of particular application to this Decision:

- To provide clarity as to the Commission’s views on activities that should be regulated and activities that should be kept outside the regulatory umbrella;
- To provide guidance as to how new activities that are to be regulated should be structured so as to be fair to the traditional ratepayer, the user of the new service and the utility.

On December 27, 2012, the Commission issued the AES Inquiry Report. The report made a number of recommendations, including the following:

Commission Staff will be conducting consultations on a scaled regulatory framework for TES utilities, following the conclusion of this Inquiry. This process will, with further input from stakeholders, establish the form of regulation required, in accordance with the Principles and Guidelines set out in Section 2. The framework that results from this consultation process will be brought to the Commission for approval.

Section 2 of the report also outlined the following Principles and Guidelines:

Key Principles:

Where regulation is required use the least amount of regulation needed to protect the ratepayer.

The benefits of regulation should outweigh the costs.

Guidelines:

The form of regulation should:

- i. provide adequate customer protection in a cost effective manner;*
- ii. consider administrative efficiency;*
- iii. consider the level of expenditure, the number of customers, the sophistication of the parties involved and the track record of the utility in undertaking similar projects; and*
- iv. require the provision of sufficient information to allow the Commission to assess the new business activity, and any rates to be set, against BC’s Energy Objectives and the requirements of the Utilities Commission Act and the Clean Energy Act.*

The report further found that “economic regulation of Discrete Energy Systems is not warranted given the lack of natural monopoly characteristics and the lack of a need for consumer protection in light of the presence of a functioning competitive marketplace.”

Subsequent to the AES Inquiry, Commission staff developed, in consultation with stakeholders, a “Scaled Regulatory framework for TES Systems.” Staff prepared a “straw-man” document describing a proposed framework, held workshops with stakeholders and received submissions on the proposed framework. The proposed framework consists of the following items:

- Single Customer Exemption: Any on-site TES serving only one customer
- Strata Exemption: A TES owned and operated by a strata corporation selling only to its members
- Stream A TES Utilities: on-site TES Systems (Discrete Energy Systems) up to a capital cost of \$15,000,000
- Stream B TES utilities: All other TES Systems

The Stream A exemption can be described as “complaint based” regulation. It provides the ability for parties to mutually agree on rates and terms of service, but also provides customers with recourse to the Commission in the event that a dispute arises.

The Panel has considered Commission staff’s proposed framework, sought further submissions from parties and, in this Decision, makes the following determinations on the proposed framework:

1. The Panel approves the Stream A exemption proposed by staff subject to the following changes:
 - All systems below a “minimum threshold” should be exempt from Part 3, except for sections 42 and 43 of the *Utilities Commission Act* (UCA). This is referred to as the “Micro TES” exemption.
 - The Stream A regulatory model should apply to all on-site TES Systems with a capital cost in excess of the “minimum threshold” and below a “maximum threshold.”

- The “maximum threshold” should be set initially to \$15,000,000. Parties are invited to provide submissions regarding the quantum of the “minimum threshold.”
 - The “maximum and minimum thresholds” should be subject to change as determined by the Commission following a hearing.
 - The Stream A regulatory model should include exemption from sections 45 and 61 of the UCA, in addition to the proposed exemption from sections 44(1), 59 and 60.
 - All other TES Systems are subject to the Stream B regulatory model, including CPCN requirements and rate approval.
2. The Panel approves the exemption, as proposed by staff, where the strata corporation is the Provider of TES.
3. The Panel will make determinations on the following further aspects of the TES framework in a subsequent decision:
- Registration processes, forms, procedures and fees
 - Capital Reserve Fund requirements for Stream A and Stream B TES Systems
 - Reporting requirements for Stream A and Stream B TES Systems

The TES Framework will become effective upon approval of the Lieutenant Governor in Council.

1.0 INTRODUCTION

Following recommendations made in the AES Inquiry Report, Commission staff completed a series of consultations with interested parties that, on August 27, 2013, culminated in the Draft Thermal Energy Service Utility Scaled Regulatory Framework and Guide (Draft TES Framework). The Draft TES Framework, among other things, made recommendations regarding exemption from regulation for certain TES Systems. On August 28, 2013, the British Columbia Utilities Commission (the Commission) established a proceeding and appointed a Panel to conduct a review of the Draft TES Framework. By Order G-132-13, participants in the Proceeding were provided an opportunity to file submissions on the review process and, by Order G-143-13, submissions and evidence on the proposed exemptions and Draft TES Framework.

2.0 COMMISSION STAFF PROPOSAL FOR THE DRAFT TES FRAMEWORK

2.1 Single Customer Exemption

In the proposed TES Framework, a TES Utility that has a contract with a single customer that is not a Strata Corporation is exempt from regulation. This is a two-party transaction and no public interest oversight is needed and just like contracting for any competitive service, the parties should carefully review the terms of the contract before entering into a contractual relationship. Accordingly, an exemption from Part 3 of the *Utilities Commission Act (UCA)*, other than sections 42 and 43 of the UCA is proposed.

2.2 Strata Exemption

A TES System owned by the Strata Corporation that exclusively serves the Strata owners, is exempt from regulation. A Strata Corporation that owns the TES System and provides energy exclusively to its Strata Unit Owners is subject to the *Strata Property Act* which offers some recourse and consumer protection to Strata Unit Owners who are dissatisfied with the manner in which the Strata Corporation operates. Thus, to prevent legislative overlap, it is proposed that Customers

should find recourse under the *Strata Property Act*, and not through the Commission under the UCA.

2.3 Stream A TES Utilities

TES Systems in this stream will be subject to “light-handed” regulation in which regulation for a specific TES System is by initial registration and regulation by complaint thereafter. Characteristics that define a Stream A utility are:

- The thermal generation and distribution equipment and facilities are located on the same Site as the thermal load;
- The TES System is designed to meet the energy demands of a specific Site (one or more customers or buildings);
- The thermal generation or distribution facilities may serve one or more customers or buildings on a single Site but there are no shared or common thermal generation or distribution facilities beyond the boundaries of a single Site;
- There is no, or very limited, use of public rights of way or public streets;
- The TES System has an AACE International Class 3 capital cost estimate of \$15 million or less.

A Stream A Thermal Energy System Utility, is exempt from sections 44(1) and 59-60 of the UCA.

2.4 Stream B TES Utilities

The Stream B TES Utility category is intended to include district energy TES Systems and also larger on-site TES Systems not otherwise excluded from the definition of public utility. Typically, these larger on-site systems may be intended to connect to future customers at other sites. (Exhibit A-2, G-132-13, Appendix A, p. 13)

TES Utilities in this stream are regulated similar to other public utilities, though approval is through a streamlined Certificate of Public Convenience and Necessity (CPCN)¹ and Rate Application process. (Exhibit A-2, G-132-13, Appendix A, p. 9)

The Rate Application guide states that if the rate proposed is based on a regulated Cost of Service rate-setting mechanism the following must be provided:

- analysis of alternative rate setting mechanisms for the Project;
- justification as to why these alternatives are not preferable, making reference to:
 - the natural monopoly characteristics of the system;
 - the competitive market potential for the project;
 - the utility's obligation to serve new customers; and
- rate setting mechanisms that encourage public utilities to increase efficiency, reduce costs and enhance performance.

(Exhibit A-2, G-132-13, Appendix F, p. 7)

2.4.1 Extensions to a Stream B Utility

Once a CPCN is granted for a Stream B TES Utility, a new CPCN Application or extension test will be required if the TES Utility plans to install an extension to the TES. A CPCN for an extension or approval of an extension test must be granted prior to construction or operation of the extension. An extension is typically defined as a capital addition to the system of a material dollar amount.

(Exhibit A-2, G-132-13, Appendix F, p. 20)

¹ Sections 45 and 46 of the UCA address CPCNs.

2.5 TES Utilities Existing at the Time the TES Framework becomes Effective

The TES Framework will become effective upon approval of the Lieutenant Governor in Council (LGIC). **Existing TES Utility that have been operating without a CPCN (or CPCN exemption) prior to effective date of the TES framework implementation are considered a Stream A TES Utility and must file a Stream A registration with the Commission.** Any TES Utility that has been granted a CPCN will continue to operate under that CPCN. (Exhibit A-2, G-132-13, Appendix F, p. 13)

3.0 COMMENTS FROM THE PARTIES ON COMMISSION STAFF PROPOSALS

The following Interveners registered in this proceeding:

- Ameresco Canada Inc. (Ameresco)
- Board of Education of School District No. 37 delta (BESD37)
- British Columbia Sustainable Energy Association and the Sierra Club British Columbia (BCSEA-SCBC)
- British Columbia Pensioners' and Seniors' Organization et al. (BCPSO)
- City of New Westminster
- Corix Utilities Inc. (Corix)
- FortisBC Alternative Energy Services (FAES)
- Heating, Refrigerating and Air Conditioning Institute of Canada (HRAI)
- Independent Contractors and Businesses Association (ICBA)
- Mechanical Contractors Association of British Columbia (MCABC)
- River District Energy (RDE)

On September 13, 2013, by Order G 143-13, the Commission requested that Interveners provide submissions on the following:

- a. Who (what types of TES Utilities or Customers) should or should not be exempt and the implications of exempting/not exempting them;
- b. Impact of any exemption on BC's Energy Objectives (as set out in BC's *Clean Energy Act*);

- c. Recommendations, if any, for changes to the proposed framework;
- d. Any recommended alternative approach to the regulation of TES; and
- e. Any evidence that may be required to support their proposals and recommendations.

Their submissions are summarized below.

3.1 FortisBC Alternative Energy Services

“FAES agrees with the staff’s approach to regulating Stream A and Stream B utilities. FAES does not agree with the proposal for a blanket exemption for on-site energy systems with a single customer. FAES submits that these customers should be included within the proposed Stream A framework. FAES further submits that this customer group should have the ability to opt-in to a blanket exemption on a case-by-case basis should the customer wish to do so.” (Exhibit C3-2, p. 2)

FAES submits that the Alternative Energy Solutions Report provides a recommendation that an exemption be considered for systems where there is no need for consumer protection. In the view of FAES, this is not a directive and is not binding on this Panel. FAES further submits that this passage makes clear that exemption is only appropriate where there are no monopoly characteristics and no consumer protection is needed. FAES also submits that the appropriate response to this recommendation is the Stream A model, not just for the utilities/systems that meet the currently proposed Stream A criteria, but also for systems with single customers (SWSCs) (Exhibit C3-2, p. 4).

In FAES’ submission, a blanket exemption for (SWSCs):

“goes too far because it takes the regulatory protection of the Act away from the customers who are likely the most in need of it. The appeal of the Stream A model is that it retains the backstop consumer protection of the Act, at minimal regulatory cost. FAES sees no good reason to remove the Act’s protection from the most vulnerable group of customers. In particular:

(a) FAES believes that the distinction between SWSCs and the currently defined Stream A utilities/customers is artificial, and that both groups are in need of compliant based regulation (i.e. the Stream A framework);

(b) the Stream A framework provides considerable benefits for SWSCs and has very little corresponding administrative burden;

(c) Stream A will have no impact on competition in the TES market, while at the same time it provides a real benefit to customers;

(d) the blanket exemption ignores that TES can be scale-able and will create regulatory uncertainty regarding scale-able TES Systems going forward.”

(Exhibit C3-2, p. 4)

In the previous staff led process, FAES stated, “Customers receiving a regulated service under the UCA should have recourse to the Commission if the need arises.” (Exhibit C2-2, Appendix A, p. 2)

With respect to Stream B Utilities, FAES submits:

“First, FAES would like to suggest deleting references to ‘traditional cost of service rates’ for the purposes of the TES Guide. The Rate Setting Guide states that Stream A projects are dissuaded ‘from using the traditional cost of service rate model,’ while still requiring rates to be ‘set on a cost recovery basis.’ FAES believes that the discussion of ‘traditional cost of service rates’ may simply lead to confusion and detract from the purpose of the Regulatory Framework which is to provide guidance as to what an application should provide.

Alternatively, if the term is to remain in the Guide, then a more fulsome definition and explanation will be necessary to avoid the inevitable confusion that it will generate. (Exhibit C2-2, Appendix A, p. 6)

Second, under the heading ‘General Principles for TES Rate Setting,’ Commission staff states the following principle, ‘take advantage of the competitive environment for the market,’ and gives ‘competitive bidding process’ as an example. FAES would like to note for

consideration that in many instances, a direct bidding process is not feasible for the purchase of goods or services necessary to provide TES and include in customer rates. Nonetheless, FAES supports the principle noted on page 9 of the Regulatory Guide of ‘cost reasonableness in construction and operation.’” (Exhibit C2-2, Appendix A, p. 6)

3.2 Corix Utilities Inc.

Corix agrees with a “scaled regulation” approach that would be calibrated to the need for regulation in the market. In its view, “the public interest is best served when the Commission regulates only when some aspect of the market is failing, and then only as necessary to protect against the imbalance of market power.” (Exhibit C3-2, pp. 1-2)

Corix submits that certain categories of TES utilities may typically exhibit sufficient competitive conditions to be exempt, but it is the competitive conditions and not the type of utility that are the foundation for the exemption. For that reason, it is better to list the necessary conditions for exemption, and then apply those conditions to the TES utilities that fall initially within the definition of “public utility” under the UCA (Exhibit C3-2, p. 2).

Corix submits that “When the market is sufficiently competitive to protect the interests of the TES utility and the customer, then an exemption is appropriate regardless of the type of TES utility because no public interest is served by regulation.” (Exhibit C3-2, p. 1)

3.3 Ameresco Canada Inc.

In Ameresco’s view, an over reliance on economic regulation could ultimately put the customer at a greater risk (Exhibit C6-2, p. 3).

Ameresco questions why on-site one customer TES Systems should not be exempt, noting that a Strata owned TES project, which may contain a few, several or many unsophisticated retail energy consumers is proposed for exemption in the TES Framework (Exhibit C6-2, p. 3).

In its view, not enacting a Single Customer Exemption will send a signal to the marketplace “that this jurisdiction wants to supplant market competition with economic regulation.” (Exhibit C6-2, p. 8)

However, in Ameresco’s view, by approving the Single Customer Exemption, the Commission will signal “that the responsibility for a project rests with the sophisticated parties who enter into contracts that create the project and not the Commission.” (Exhibit C6-2, p. 3)

Ameresco further points out that, in the event of a dispute, the Commission does not have to act as arbiter because contractual mechanisms can deal with how disputes will be settled and who will pay for future adverse events. It submits that “there is a major moral hazard in having a ‘convenient’ regulator to use as a shield against poor judgement in the execution of a long term energy supply agreements. This is not good practice for a sophisticated customer. The best way to avoid this consequence is to implement the Single Customer Exemption.” (Exhibit C6-2, pp. 4-5)

Ameresco also notes the cost to the utility to provide regulatory filings, submitting that ultimately, the utility customer pays these costs (Exhibit C6-2, pp. 4-5).

3.4 Independent Contractors and Businesses Association

In ICBA’s view, the consequence of not exempting this class of customer is a de-facto monopoly where small businesses will be unable or unwilling to meet the burden of operating in a regulated environment and would be forced to work for FAES on their terms to participate in this business. (Exhibit C9-2, p. 1)

3.5 Mechanical Contractors Association of British Columbia

MCABC “fully supports the draft exemption language for On-Site Energy Systems with a Single Customer resulting from the TES Regulatory Framework Workshop (as per Appendix A to Order G-

132-13). This exemption is consistent with the clear and unambiguous opinion of the need for such an exemption stated in the AES Inquiry Report and is required (subject to LGIC approval) to fulfill the objectives of BCUC Order G-201-12.” (Exhibit C11-2, p. 1)

MCABC submits that “[w]ith the exemption in place, the two sophisticated parties involved in these TES Systems can address risk sharing where it belongs, in their negotiated contractual documents, without the naïve assumption that regulation will always protect the customer from unexpected rate increases.” (Exhibit C11-2, p. 1)

In MCABC’s view, the exemption will result in a much higher level of confidence in the energy savings and greenhouse gas (GHG) emissions reduction estimates for TES Systems for Public Sector Organizations (PSOs) because the TES supplier will not be able to count on the regulated model to absolve them of any risk associated with system or project performance. If a TES supplier is held accountable for actual results, they are far less likely to inflate performance assumptions at the outset to make the project look better financially than it really is. This leads to much better business case decisions and a more appropriate distribution of tax payer investments in these projects. (Exhibit C11-2, p. 2)

3.6 Heating, Refrigerating and Air Conditioning Institute of Canada

The HRAI submit that the Single Customer Exemption would reinforce the basic regulatory concepts outlined in the AES Inquiry Report whereby regulation should be the option of last resort and competition should always be preferred over regulation. Given the absence of any natural monopoly characteristics or any benefits to them from regulation for this class of customers, the exemption would allow a competitive market to function which can only enhance cost competitiveness and innovation. (HRAI Submitting Comments regarding Proposed Regulatory Framework, p. 1)

3.7 B.C. Sustainable Energy Association and the Sierra Club British Columbia

BCSEA-SCBC do not support the proposed exemptions. In their view, the proposed exemptions are too broad in scope and would frustrate the implementation of thermal energy services in B.C. in situation where such services would foster B.C.'s energy objectives particularly concerning greenhouse gas emissions reductions (Exhibit C4-2, p. 2).

BCSEA-SCBC support the Stream A and Stream B concepts set out in the proposed Thermal Energy Services Regulatory Framework document (Exhibit C4-2, p. 3).

Regarding the proposed Strata Exemption, BCSEA-SCBC's view is that there is little or no evidence indicating that the exemption is necessary. In their view, it would be preferable to include such thermal energy services in Stream A (Exhibit C5-2, p. 3).

However, with the Single Customer Exemption, BCSEA-SCBC submits that:

“the Commission proposes to adopt the position of certain energy service companies that the regulated cost-of-service model used for example by the Delta School District should be prohibited because it is, or can be, more attractive to customers than the unregulated long-term contract model preferred by these energy service companies. While this position is claimed to promote competition, in BCSEA-SCBC's view the effect would be the exact opposite. The market for thermal energy services is characterized by competition between disparate parties offering disparate products using various energy sources (including electricity and natural gas, as well as 'alternative' sources), various distribution methods and, significantly, both regulated and unregulated financial models. Plainly, the proposal to legislatively prohibit thermal energy services to a single customer on a regulated cost-of-service basis is intended to remove from the marketplace this one type of offering. The effect would be to stifle competition, not to promote competition. The proposed Single Customer Exemption is designed to include thermal energy services provided to a single

customer. The intended effect is to prevent a single customer from obtaining thermal energy services on a regulated cost-of-service model from a public utility. The Commission expressly acknowledges that the proposed Single Customer Exemption is intended to prevent future use of the cost-of-service model approved by the Commission on a one-off basis in the case of Delta School District No. 37 and FortisBC Alternative Energy Services (FAES).” (Exhibit C4-2, p. 2)

BCSEA-SCBC recommend changes to the wording in the TES Framework document concerning the concepts of thermal energy service, thermal energy system. They submit that these terms are defined in the Glossary but are not used consistently and appropriately throughout the draft. In particular, BCSEA-SCBC are of the view that the language in many places reflects an assumption that a single public utility is necessarily associated with one single thermal energy system. “For example, the term ‘Stream A TES Utility’ makes sense only if the Utility has only one project and that project meets the Stream A description. In reality, it is not the Utility that is in Stream A but the utility’s project. For example, FortisBC Alternative Energy Services is a ‘Thermal Energy Service Utility.’ But it makes no sense to say that FAES is a ‘Stream A TES Utility’ or a ‘Stream B TES Utility,’ because FAES will have some projects in Stream A and some projects in Stream B.”

BCSEA-SCBC add that a similar point of confusion arises with the terms “Existing TES Utility” and “New TES Utility.” In BCSEA-SCBS’s view, what matters is not whether the utility existed at that time but whether the thermal energy system existed at the time the Guide comes into effect. (BCSEA-SCBC Final Submission, p. 3)

3.8 British Columbia Pensioners’ and Seniors’ Organization et al.

BCPSO does not share the view that TES is a truly competitive market, given the limitations to meaningful and ongoing “choice” to end-users. BCPSO submits that the net result of the proposed regulatory framework is an erosion of customer protection. This has the very real potential of

leaving some TES end users with very little recourse should their TES rates rise significantly over time. (Exhibit C5-2, p. 2)

In BCPSO's view, "exemptions from Commission oversight are only appropriate where actual market conditions exist, parties have equal bargaining power and access to information, and the parties affected by the contract are involved in its formation." (Exhibit C5-2, p. 3)

The BCPSO submission continues: "Both proposed exemptions seem to anticipate that the party negotiating the terms of the contract is also the customer; however, the party to the contract does not always match up with the end user (e.g., tenant, strata unit owner). For example, a strata developer or owner developer is likely to make the decision to install a TES before strata units are sold to individual owners. Exemption from regulation should exist only where there is a single provider, a single customer, *and* the end user agrees to exemption from regulation." (Exhibit C5-2, p. 3)

"With respect to the strata exemption specifically, BCPSO submits the exemption puts a great deal of confidence in the ability of a strata council to resolve issues with the TES. Even if this confidence is well-founded, it provides no protection to end-users who are not strata owners (i.e. tenants) and have no decision-making power with respect to the building." (Exhibit C5-2, pp. 3-4)

BCPSO expresses the concern that property owners and residents not participating in the initial contract are left particularly vulnerable. "This same assumption informs the complaint based process in Stream A, where the customer would be the strata corporation, and not the individual end users." (Exhibit C5-2, p. 4)

BCPSO recommends exempting utilities from regulation only where actual market conditions exist; namely, where the end user is a party to the contract with the TES utility. (Exhibit C5-2, p. 5)

BCPSO submits that proposed Stream A TES Utilities should be subject to stricter regulation than existing Stream A TES Utilities. Rather than a self-assessment of eligibility for Stream A prior to filing (subject to Commission review), BCPSO submits that it would be reasonable to require a more robust initial filing by new applicants, after which the Commission (rather than the Utility) determines the appropriate Stream. (Exhibit C5-2, p. 5)

With regard to the *Clean Energy Act*, BCPSO submits that facilitating the emergence of TES through exemptions supports BC's energy objectives only insofar as the system is producing *clean* energy. Where choosing or switching to a TES utility does not contribute to reduced waste and/or decreased greenhouse gas emissions, facilitating the project's development through exemptions from regulation is at best neutral with respect to the objectives. (Exhibit C5-2, p. 4)

Finally, if the proposed framework for Stream A TES Utilities is implemented, BCPSO is unclear why the Draft Order exempts Stream A TES Utilities from section 44(1) of the UCA (i.e. the requirement to have an office in British Columbia in which the Utility must keep all accounts and records required by the commission). (Exhibit C5-2, p. 5)

4.0 APPLICABLE AES INQUIRY FINDINGS

On May 24, 2011, the Commission issued Order G-95-11 which initiated an "Inquiry into FortisBC Energy Inc.'s Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives" (AES Inquiry). Among the objectives of the AES Inquiry, the following are of particular application to this proceeding:

- To provide clarity as to the Commission's views on activities that should be regulated and activities that should be kept outside the regulatory umbrella;
- To provide guidance as to how new activities that are to be regulated should be structured so as to be fair to the traditional ratepayer, the user of the new service and the utility.

(AES Inquiry Report, p. 2)

On December 27, 2012, the Commission issued the AES Inquiry Report. The Report states, “The definition of public utility is set out in the UCA but, given the discussion on the economic purposes of regulation, applying the legal definition of public utility does not always lead to an outcome that makes the most economic sense. The Panel notes that the UCA was developed at a time when many of the technologies at issue in this Proceeding were not contemplated. The current energy market requires a practical definition of public utility. There would be greater clarity if the Government were to explicitly amend the UCA to exclude regulation of activities where competitive forces are found to provide sufficient protection to the public. Given the current lack of clarity in the UCA the Commission Panel recommends the use of exemptions, which are contemplated under the UCA, where the Commission finds regulation is not warranted.” (AES Inquiry Report, pp. 15-16)

Further, the Commission found “that economic regulation of Discrete Energy Systems is not warranted given the lack of natural monopoly characteristics and the lack of a need for consumer protection in light of the presence of a functioning competitive marketplace.” The AES Inquiry Report recommends that when the UCA is next reviewed it should be amended to allow the Commission to forebear from regulating where it finds there is no natural monopoly or need for consumer protection. However, until such time as the UCA is amended, an exemption from regulation pursuant to subsection 88(3) of the UCA should be considered for Discrete Energy Systems with no natural monopoly characteristics or need for consumer protection. (AES Inquiry Report, pp. 71-72)

The AES Inquiry Report also outlined the following Key Principles and Guidelines:

Key Principles:

Where regulation is required use the least amount of regulation needed to protect the ratepayer.

The benefits of regulation should outweigh the costs.

Guidelines:

The form of regulation should:

- v. *provide adequate customer protection in a cost effective manner;*
- vi. *consider administrative efficiency;*
- vii. *consider the level of expenditure, the number of customers, the sophistication of the parties involved and the track record of the utility in undertaking similar projects; and*
- viii. *require the provision of sufficient information to allow the Commission to assess the new business activity, and any rates to be set, against BC's Energy Objectives and the requirements of the Utilities Commission Act and the Clean Energy Act.*

(AES Inquiry Report, p. 18)

The Commission also found that the cost of service methodology, or the “model of last resort,” is unsuited to many projects that are regulated under the UCA, especially those with few natural monopoly characteristics and which require little consumer protection. In making this finding, it cited the Delta School District Decision (at p. 83):

“In a competitive environment, the Panel is not convinced that a COS [cost of service] model, where any cost overruns are paid by the ratepayer, is the most appropriate pricing model as competition itself will incent the service provider to determine a fair price. It is clear that the own/operate model contains much stronger built-in incentives to increase efficiency, reduce costs and enhance performance, which a regulator would struggle to emulate within the COS model. In the presence of an actively competitive market, there appears to be no reason to apply a model which was developed to be a surrogate for competition. The Panel sees the traditional COS rate-base model as the ‘model of last resort’ that was initially developed for traditional utilities with natural monopoly attributes.”

(AES Inquiry Report, p. 19)

The presence of market-based pricing or the protection of consumer interests through the execution of long term contracts may result in a better alignment and balance of risks and incentives between ratepayers and the thermal provider. Regulation by complaint may also provide the appropriate level of consumer protection. (AES Inquiry Report, p. 77)

5.0 COMMISSION DETERMINATIONS

5.1 TES Utilities and TES Systems

The Panel agrees with BCSEA-SCBC that there may be confusion over the use of the terms utility and system. This confusion arises because the UCA defines a public utility as a person providing, in this case, certain thermal energy related services. However, the proposed exemption framework is based on the characteristics of a particular TES system and not on the person providing those services.

Accordingly, the regulatory models provided in the TES Framework are more appropriately applied to TES systems, not persons. Accordingly, the Panel will hereafter refer to Stream A Systems and Stream B Systems and not to a TES Utility. A person may own and operate one or more TES Systems with the characteristics associated with the Stream A regulatory model. It may also operate one or more TES with the characteristics of the Stream B regulatory model.

5.2 Changes to the Draft TES Framework

The Panel generally agrees with the need for a “lightheaded” form of regulation for TES Systems with certain characteristics. However, for the reasons outlined in subsequent sections of this Decision, the Panel finds the following changes to the proposed Framework are appropriate:

- All projects below a “minimum threshold” should be exempt from Part 3, except for sections 42 and 43 of the UCA. This is referred to as the “Micro TES” exemption.
- The Stream A regulatory model should apply to all on-site TES Systems with a capital cost in excess of a “minimum threshold” and below the “maximum threshold.”
- The Stream A regulatory model should include exemption from sections 45 and 61 of the UCA, in addition to the proposed exemption from sections 44.1, 59 and 60.

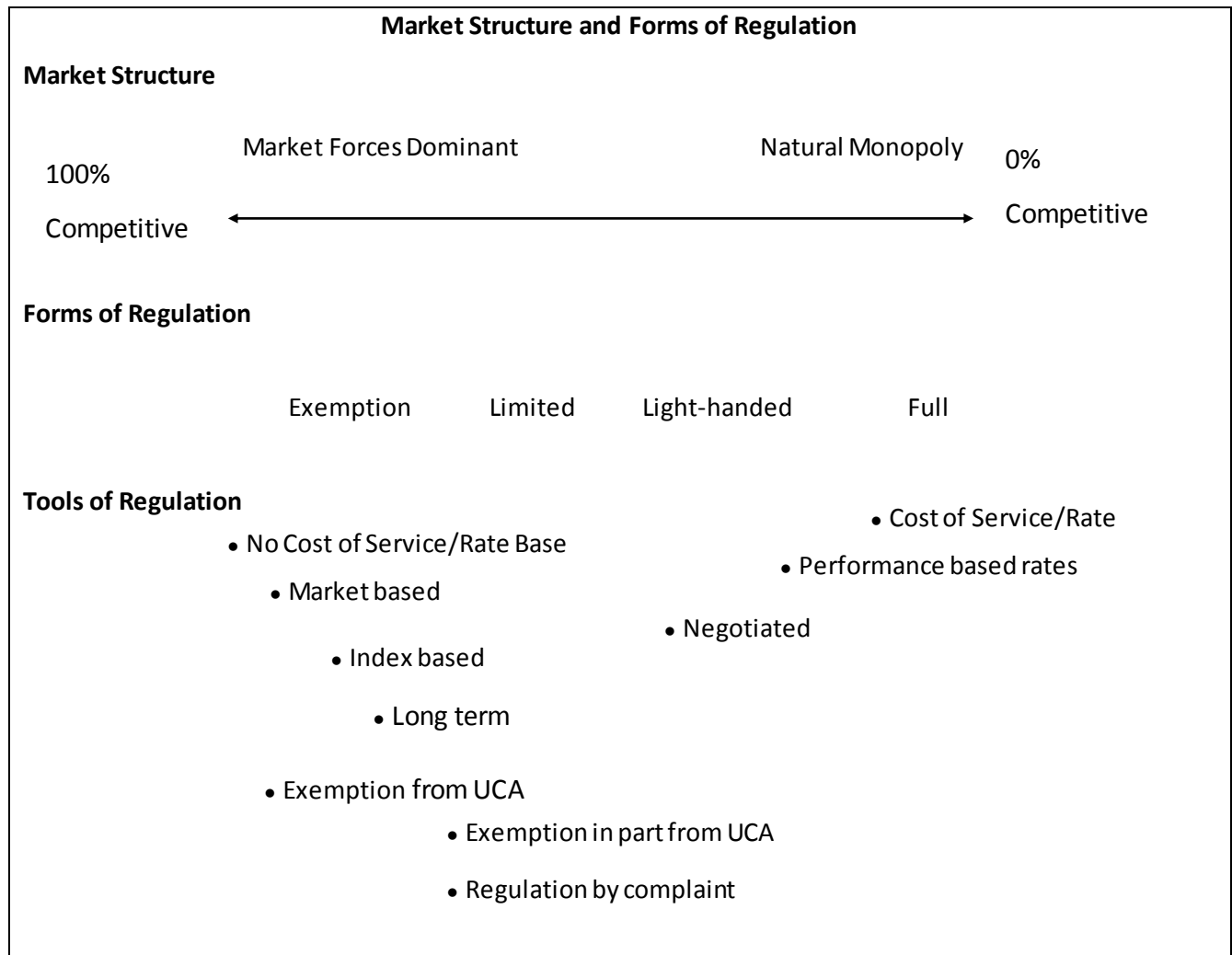
- All other TES Systems are subject to the Stream B regulatory model, including CPCN requirements and rate approval.
- Both the minimum and the maximum (\$15,000,000) threshold can be changed from time to time by the Commission, following a hearing on the matter. Parties are asked to provide further submissions on the specific amount at which the “minimum” threshold should initially be set.

The figure below illustrates the TES Framework the Panel is prepared to approve.

	On Site	Other
\$XXXXX	Micro TES	Micro TES
\$15 M.	Stream A Regulation	Stream B Regulation

5.3 The Economic Purpose of Regulation

In its review of the TES Framework proposed by Commission staff, the Panel considered the recommendations of the AES Inquiry. The Inquiry found that the form of regulation should be determined by the market structure. The Panel agrees with this assessment. The figure below illustrates the Panel’s view of the relationship between market structure and the various tools of regulation.



The Panel also agrees with the basic regulatory concepts outlined in the AES Inquiry Report whereby regulation should be the option of last resort and competition should always be preferred over regulation.

Ameresco submits that the Single Customer exemption signals “the responsibility for a project rests with the sophisticated parties who enter into contracts that create the project and not the Commission.” (Exhibit C6-2, p. 3) The Panel concurs. Further, the Panel is of the view that when sophisticated parties are able to set rates by mutual agreement, it is appropriate that the Commission not provide any economic regulation. However, the Panel also recognizes that

circumstances may change after a contract is entered into. In this regard, the Panel is mindful of BCSP0's comment that "exemptions from Commission oversight are only appropriate where actual market conditions exist, parties have equal bargaining power and access to information, and the parties affected by the contract are involved in its formation." (Exhibit C5-2, p. 3)

Generally, at this time, market conditions exist when parties enter into a TES agreement. The TES developer is chosen from among many providers, each of which is free to offer any terms they wish. In some circumstances, the contract may subsequently be assigned to another party (such as in the course of a property title transfer). Although in this circumstance, the purchaser did not negotiate the original contract, at the time of the transfer the purchaser is free to accept or reject the terms of the contract. If the terms are not satisfactory to a purchaser, and a change cannot be negotiated, that purchaser is under no obligation to assume the contract. This assumes there are no natural monopoly conditions existing in the on-site thermal energy market. If, on the other hand, the market is dominated by a single TES Service provider, a de-facto monopoly may exist, thus restricting the choices available to a customer.

The Panel agrees with BCPSO that an exemption is only appropriate where parties have equal bargaining power. In the Panel's view, the presence of a contract is not a sufficient condition for that equality to exist. If an individual seeks to subscribe, for example, to British Columbia Hydro and Power Authority (BC Hydro) for electricity service, they are required to take that service under the applicable tariff, which is a contract. Thus, although there is a contract, because of BC Hydro's monopoly franchise, they can't escape having to agree to the tariff, they have no effective bargaining power. For equal bargaining power, there must be viable alternatives to the customer.

If a similar situation occurred where an individual wanted to move to a development that was served by a TES Provider, they may similarly be required to take the service at the terms imposed by the contract with the TES provider. However, a key difference is that the individual may choose not to take the service and instead move to a different location.

In the Panel's view, if TES services are available from many competitive TES Providers, little or no regulation is required because sufficient choice is available. If choice is significantly restricted or eliminated, then more comprehensive regulation is required.

Over the course of the contract, circumstances may arise that are not explicitly provided for in the contract. At this juncture, if parties are unable to resolve the issues themselves, they will have recourse to arbitration or to the courts for the resolution of their differences. However, it is the Commission's explicit role to regulate utilities to ensure reasonable, safe, adequate and fair service and rates and it has specific expertise in that regard. Further Commission regulation may be more timely and cost effective than the courts. Accordingly, the Panel is of the view that if a dispute arises over utility service or rates, it is appropriate for customers to continue to have recourse to the Commission.

5.4 Exemptions for Discrete Energy Systems – Stream A

An on-site TES system is less likely to restrict a customer's choice than is a district energy system - which has the potential to cover substantial areas, thus limiting choice appreciably - provided there are sufficient on-site TES providers. In the AES Inquiry, the Commission found that regulation of Discrete (i.e. On-Site) Energy Systems is not warranted "given the lack of natural monopoly characteristics and the lack of a need for consumer protection in light of the presence of a functioning competitive marketplace." (AES Inquiry Report, p. 71) There is no evidence before the Panel that the market has changed since the AES Inquiry Report, such that a monopoly currently exists in the on-site TES marketplace. The Panel considers the presence of the parties to this Proceeding to be evidence that a competitive market exist. Corix argues that if the market is sufficiently competitive, exemption is appropriate. **The Panel agrees and finds that in the case of on-site thermal systems an exemption is appropriate.**

BCPSO agrees that utilities should be exempt from regulation where actual market conditions exist, but expresses concerns that tenants and others that have no decision making power with respect

to the building, and that did not participate in the original contract discussions, are left vulnerable. With regard to participation in the original contract discussions, BCPSO cites the example of a developer, as the sole member of a strata corporation making decisions on behalf of that strata.

The Panel is sympathetic to this concern. However, this is insufficient grounds to find that competition does not or will not continue to govern the marketplace. Provided there remains a variety of options for tenants and owners, and that no individual is forced into a TES contract that is against their interests, the Panel is of the view that regulation is not required.

If, at a future time, choice could no longer be exercised, for example because of a lack of sufficient TES providers in the market, the Panel recommends that this finding be re-evaluated. In making this determination, the Panel has considered the views of the ICBA and other Interveners that argue persuasively that regulation is burdensome to many businesses, and may prevent them from actively participating in the TES market. To the extent this is the case, a light-handed approach to regulation could mitigate that effect, by ensuring appropriate choice remains available.

The Panel considers the exemption from a CPCN requirement and rate review, as proposed by staff for Stream A Systems, to be an appropriate balance between exemption from economic regulation and the need for Commission oversight when it may be warranted. By providing for complaint only regulation, Stream A thereby enables TES providers and their customers to negotiate contract terms they find appropriate, while at the same time providing customers with access to an efficient mechanism to adjudicate potential contract disputes should that prove necessary.

However, the Panel is not persuaded there is an adequate material difference between an on-site TES with one customer and an on-site TES with more than one customer such that a single customer of a TES requires a different approach to regulation than do two customers of a similar TES. A single customer of an on-site TES Provider should have the same access to the Commission in the event of a complaint than that customer would have if they were one of two customers of

the same TES Provider. **Accordingly, the Stream A exemption should apply regardless of the number of customers.**

The Panel is also of the view that exemption from all regulation is appropriate for TES Systems below a threshold size, and will address this issue further below in section 5.5 Micro TES Exemption. **Accordingly, the exemption from rate regulation will apply to all on-site TES Systems with an initial book value greater than an a minimum threshold and less than a maximum threshold.**

The Panel agrees with Commission staff's proposal to set a maximum limit to the size of a Stream A TES Project. The Panel considers the \$15,000,000 maximum limit reasonable, based on previous applications for on-site TES Systems that have been received by the Commission. Further, in the Panel's view, large discrete TES Systems have the potential to grow into a district energy system, thus becoming a Stream B project. In the Panel's view, it is appropriate that a large on site TES System be regulated in the same manner as a district energy system, under the Stream B framework. **The maximum threshold is set at \$15,000,000, and is subject to future change by the Commission following a hearing.**

This approach is consistent with the findings of the AES – namely that regulation should be the option of last resort and competition should always be preferred over regulation. It provides exemption from economic regulation for all on-site projects up to \$15,000,000. It preserves the benefit of competition when a new TES provider is selected, while providing regulation, if needed, if, as and when competition is no longer an option.

The Panel notes that there will be no initial review, by the Commission, of the contracts or rates for Stream A Systems. Accordingly there will be no determination made as to the rates being just and reasonable. If competition exists, the Panel considers that no such test is required. Further, the Panel is of the view that it is not appropriate to conduct a full review of the rates at a future date, for example as the result of a complaint about the rate, unless there is a significant change of

circumstance. Doing so could result in significantly increased uncertainty, and accordingly a perception of risk, for TES providers. This could, in turn, result in higher rates for all consumers of TES services and/or reluctance by TES providers to participate in the TES marketplace. The Panel does not consider these eventualities to be in the public interest.

However, the Panel is of the view that, in response to a complaint, it may be appropriate for the Commission to determine whether the rates described in the terms of the contract are being applied in an appropriate manner along with other issues regarding the provision of utility service.

Because the Commission will not be reviewing rates or the contracts upon which those rates are based, all Stream A TES Systems must contain the following clause:

*The Customer acknowledges *** is a public utility as defined in the UCA. However, this TES System has a limited exemption, granted by the Lieutenant Governor in Council, from direct oversight of rates. Accordingly, the BCUC has not reviewed this Agreement, nor has it approved the rates charged for thermal services.*

Exemption from Section 61 of the UCA

The Panel considers that Stream A should also include an exemption from section 61 of the UCA. Accordingly, above the threshold amount, and up to \$15,000,000, for on-site TES Systems, the TES Framework should provide exemptions from sections 44(1), 45, and 59-61 of the UCA.

CPCN Exemption

With regard to the exemption from CPCN requirement required for Stream A TES Systems, the Panel notes that the proposed TES Framework assumed that this would be done by the Commission, under section 45(4) of the UCA:

The commission may, by regulation, exclude utility plant or categories of utility plant from the operation of subsection (1).

The Panel is of the view that it is more efficient to use a section 88(3) exemption from section 45(1) of the UCA for Stream A TES Systems.

Cost of Service Rate-Making for Stream A Utilities

BCSEA-SCBC submit that “there are situations in which the provision of thermal energy services to a single customer on a regulated cost-of-service basis is the customer’s preferred option...” (BCSEA-SCBC Final Submission, p. 2) However, while BCSEA –SCBC are not supportive of the one to one exemption proposed by Commission staff, it is supportive of the proposed Stream A Exemption.

For clarification, the Panel notes that Stream A Systems will be exempt from rate regulation, and consequently regulated cost or service rates. Rates under Stream A are established on a contractual basis between the provider and its customer(s). As such, the notion of a regulated Cost of Service does not apply and customers will not have access to that option. However, parties are free to build into their contract any provisions that are mutually agreed upon. The Commission will not approve the contracts, nor will it approve any regulatory accounts associated with the TES System. There will be no approval of capital expenditure through the issuance of a CPCN, no notion of a regulated return on the equity deployed in the TES and no rate-base on which to base that return.

5.5 Micro TES System Exemption

The Micro TES System exemption is intended to capture the case of a homeowner or a small business entering into an agreement with a TES provider. The TES provider may potentially supply the customer with any of a range of thermal services involving a furnace, air conditioner, air source heat pump, ground source heat pump (GSHP) or similar apparatus.

The Panel does not consider any regulatory oversight of these TES Systems to be in the public interest, noting that these activities have historically never been under active Commission oversight. However, the Commission must retain sufficient authority to inquire into an arrangement to ascertain whether, in the event of a complaint, a TES System satisfies the criteria for this exemption. **Accordingly, a Micro TES should be exempt from Part 3 of the UCA, except for sections 42 and 43.** Further, the Panel does not consider any requirement for such systems to register with the Commission to be in the public interest.

In the Panel's view, the Micro TES System exemption should be large enough to accommodate a project undertaken by or for a small group of homeowners or small businesses, such as a GSHP that may be shared by that group. Further, the threshold should be subject to change from time to time, by Commission order.

The Panel invites parties to provide comment on the appropriate quantum of this threshold and supporting evidence for their proposal. **Parties are requested to provide comment within 30 days of the date of this Decision.**

5.6 Where the Strata Corporation is the Provider of TES

There is a significant economic relationship between the strata corporation and its unit holders. The strata corporation routinely arranges services on behalf of its unit holders. The strata corporation is operated by a council that is duly elected by the unit holders. Further, unit holders are, in effect, shareholders of the utility.

In this situation, the Panel is not persuaded that any Commission oversight is required. However, as with the Micro TES exemption, the Commission must retain sufficient authority to inquire into an arrangement to ascertain whether, in the event of a complaint, a TES Provider satisfies the criteria for this exemption. **Accordingly, a Strata Corporation providing TES Utility services to its unitholders should be exempt from Part 3 of the UCA, except for sections 42 and 43.**

5.7 Stream B TES Systems

In the Panel's view, unless a Stream B TES Project constitutes a natural monopoly, it may not necessarily require the same approach to regulation as does a traditional utility. With regard to district energy systems, as with an on-site TES, there is generally competition in the market for a provider at early stages of the development. Depending upon the circumstances of the project, customers may have choice when deciding whether to connect to the system. However, if, for example, there are municipal bylaws requiring connection, this choice may be lessened or eliminated. In this case, depending upon the size of the district energy system relative to the size of the municipality, customers in a district energy service area may be faced with a monopolistic TES Provider.

Accordingly, the Panel agrees with Commission staff that it is not appropriate at this time to exempt Stream B Systems from any aspect of the UCA. However, the Panel also agrees with the findings of the AES Inquiry that alternatives to cost of service based rates may be more appropriate rate setting mechanisms. In this regard, the Panel notes the streamlined CPCN application process and the rate setting guidelines for Stream B Systems in the proposed TES Framework. **The Panel agrees with this approach.**

With regard to a cost of service approach to rate setting for Stream B Systems, where the TES Provider also owns one or more Stream A Systems, the Panel has concerns about the potential of cross subsidization. Accordingly, during the review process for a Stream B utility the TES Provider

should be prepared to demonstrate that sufficient controls are in place to prevent any cross-subsidization with Stream A Systems.

With regard to extensions to a Stream B System, the Panel notes that Commission staff have suggested an extension test or a CPCN. However, there have been no submissions on this issue.

The Panel invites submissions from the parties on the appropriateness of an extension test, in lieu of a CPCN application, and the circumstances under which such a test would be appropriate.

Parties are requested to provide their submission within 30 days of the date of issuance of this decision. Parties are asked to consider the following cases in their submissions:

1. an extension to the distribution portion of a district energy system
2. an extension to the generation portion of a district energy system

5.8 Stream A Registration

The Panel agrees with Commission staff's proposal regarding the registration of TES Systems. Any potential Stream A TES Project is subject to registration and Commission confirmation of its Stream A status.

5.9 Existing TES Systems

The Panel agrees with Commission staff proposal that existing TES Systems be required to register as Stream A Systems.

5.10 BC's Energy Objectives

The Panel finds no evidence that cost of service regulation, or rate regulation in general, provides significant benefit in terms of BC's Energy Objectives. **Accordingly, the Panel finds the revised TES Framework to be consistent with BC's Energy Objectives.**

5.11 Opting In or Out of Regulation

The Panel does not agree that utilities or customers should be able to opt-in to or opt-out of regulation. The Panel agrees with the conclusion reached in the AES Inquiry that “customer preference does not determine the need for regulation.” (AES Report, p. 15) **Accordingly, regulation as set out in TES Framework is compulsory for all TES Providers.**

5.12 Public Service Organizations and Debt

A number of parties provided submissions that the proposed one-to-one exemption would prevent PSOs from taking on debt to acquire TES services. The Panel finds these submissions are not within the scope of this Proceeding and will consider them no further.

5.13 Further Determinations on the TES Framework

The Panel will make further determinations on the following aspects of the TES framework in a subsequent decision:

- Registration processes, forms, procedures and fees
- Capital Reserve Fund requirements for Stream A and Stream B TES Systems
- Reporting requirements for Stream A and Stream B TES Systems