



**ORDER NUMBER
G-170-21**

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

and

City of Richmond
Application for an Order pursuant to Section 36 of the *Utilities Commission Act* (UCA)

BEFORE:

D. M. Morton, Panel Chair
R. I. Mason, Commissioner
E. B. Lockhart, Commissioner

on May 31, 2021

ORDER

WHEREAS:

- A. By letter dated April 1, 2021, the City of Richmond (City) applied to the British Columbia Utilities Commission (BCUC) pursuant to section 36 of the *Utilities Commission Act* (UCA) regarding the relocation of FortisBC Energy Inc. (FEI) operating gas mains in three locations where conflicts occur with the City's new storm sewer system (Offset Projects). The City requests that the BCUC direct FEI to complete the Offset Projects by June 30, 2021, and on the terms set forth in the form of Order (Application);
- B. There is no operating agreement between the City and FEI;
- C. The Application includes copies of three Letter Agreements (each a Letter Agreement) regarding the Offset Projects dated August 31, 2020. On September 4, 2020, FEI sent the City a revision to one of the Letter Agreements. Schedule A attached to each Letter Agreement contains FEI's standard terms and conditions (Terms and Conditions);
- D. The parties have not reached agreement on the Terms and Conditions;
- E. By letter dated April 20, 2021, the BCUC invited the City and FEI to provide oral submissions on a suitable regulatory process for the review of the Application, and to outline the chronology of contract negotiations to date;
- F. On Friday April 23, 2021, a procedural conference was held;
- G. By Order G-121-12 dated April 26, 2021, the BCUC established a regulatory timetable for a streamlined review process, which took place on May 21, 2021 and consisted of written submissions and an oral hearing;
- H. On May 7, 2021, FEI submitted a response to the City's Application, including proposed revised Terms and Conditions (Revised Terms) sent to the City on April 27, 2021 in Appendix B;

- I. On May 14, 2021, the City confirmed that it does not agree to the Revised Terms proposed by FEI;
- J. By letter dated May 17, 2021, the BCUC requested oral submissions from parties on the following:
 - 1. In its written submission the City acknowledges the BCUC's jurisdiction to impose the Terms and Conditions that the City proposes. Is it also within the jurisdiction of the BCUC to include in its Order terms and conditions requested by FEI?
 - 2. In the absence of any Terms and Conditions set by the BCUC, parties would have recourse to the courts to adjudicate any disputes that may arise as a result of the work. If it is within the BCUC jurisdiction to do so, is it reasonable and in the public interest to include such Terms and Conditions or are the courts a more appropriate recourse in this circumstance?
 - 3. Parties should include in their arguments: (i) Any precedent where any commission or other regulatory body (not restricted to the energy sector) has determined the allocation of risk between parties on a prospective basis, either through an operating agreement, or on a case by case basis; (ii) All relevant case law;
- K. The City submits that the work must be completed by June 30, 2021; and
- L. The BCUC has reviewed the submissions of the City and FEI, finds that the BCUC has the jurisdiction to order the work and set the Terms and Conditions of that work, and that it is in the public interest to do so and therefore considers the following determinations are warranted.

NOW THEREFORE, with reasons to follow, whether pursuant to section 32 or section 36 of the UCA, the BCUC orders as follows:

- 1. FortisBC Energy Inc. (FEI) is directed to undertake the Offset Projects as specified on the design drawings prepared by FEI and approved by the City's Engineering Planning Department, as provided in Appendix "D" of the Application.
- 2. FEI is directed to complete the Offset Projects in accordance with all applicable regulations, as well as in accordance with the Letter Agreement applicable to each Work and the Terms and Conditions of Order – Construction, attached to each Letter Agreement, being the Terms and Conditions attached to the applicable Letter Agreement dated August 31, 2020 or September 4, 2020 (collectively, the Agreements). Such Terms and Conditions shall be modified as set out below:

Section 1.1 – the description of the location of the Work, currently shown as *Burkeville area*, shall be replaced with one that is more specific to the location, such change to be specific to the area on the applicable Letter Agreement.

Section 11.3 – after the words "right to disclose the same" the following words shall be inserted such that section 11.3 shall read as follows "or which is required to be disclosed in accordance with applicable laws (including without limitation, the Freedom of Information and Protection of Privacy Act (British Columbia))":

OLD 11.3 The obligation of confidentiality set out above shall not apply to material, data or information which is known to the Customer prior to their receipt thereof, which is generally available to the public or which has been obtained from a third party which has the right to disclose the same. The confidentiality covenants of the Customer herein shall survive the termination of this Letter Agreement.

NEW 11.3. The obligation of confidentiality set out above shall not apply to material, data or information which is known to the Customer prior to their receipt thereof, which is generally available to the public

or which has been obtained from a third party which has the right to disclose the same, or which is required to be disclosed in accordance with applicable laws (including without limitation, the Freedom of Information and Protection of Privacy Act (British Columbia)). The confidentiality covenants of the Customer herein shall survive the termination of this Letter Agreement.

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

NEW 12. Limitation of Liability

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

3. The parties are at liberty, but not required, to mutually agree on further revisions to the Terms and Conditions, for example, to change "Customer" to "Municipality" or as otherwise set out in FEI's email to the City dated April 27, 2021.
4. FEI is directed to complete the Offset Projects by June 30, 2021, or such later date as may be agreed to between FEI and the City.
5. The City is directed to pay FEI for the Offset Projects in accordance with the Letter Agreements.

DATED at the City of Vancouver, in the Province of British Columbia, this 31st day of May 2021.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

City of Richmond

Application for an Order pursuant to Section 36 of the
Utilities Commission Act

Reasons for Decision

July 23, 2021

Before:

D. M. Morton, Panel Chair
E. B. Lockhart, Commissioner
R. I. Mason, Commissioner

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Executive summary

On April 1, 2021, the City of Richmond (City) applied to the British Columbia Utilities Commission (BCUC) for an order pursuant to section 36 of the *Utilities Commission Act* (UCA). The requested order relates to the relocation of FortisBC Energy Inc.'s (FEI) operating gas mains in three locations where conflicts occur with the City's new storm sewer system (Offset Projects).

FEI has done work at the City's request on numerous occasions, using a form of terms and conditions (FEI Terms and Conditions). FEI proposed a set of terms and conditions for the Offset Projects and agreed to revise two of three of those proposed Terms and Conditions that City staff identified as problematic, however FEI declined to revise the provision regarding liability and indemnity (FEI Section 12).

The City requests that the BCUC direct FEI to complete the Offset Projects in accordance with FEI's design drawings by June 30, 2021, and on the terms set forth in the form of the draft Order attached to its application (Application).

Following a procedural conference held on April 23, 2021, the BCUC issued Order G-121-12 dated April 26, 2021, establishing a regulatory timetable for a streamlined review process (SRP) consisting of written submissions and culminating in an oral hearing on May 21, 2021.

The parties agree that the Panel has jurisdiction under either section 32 or 36 of the UCA to impose terms and conditions on the Offset Projects, although they disagree on the nature of the terms that we can impose. The Panel is proceeding under its jurisdiction pursuant to section 32, or in the alternative section 36.

The Panel finds that:

1. We have the jurisdiction pursuant to section 32 of the UCA to impose terms and conditions for the Offset Projects, including terms such as liability and indemnity, that impose positive obligations on the City;
2. Any terms and conditions that we impose must fit within the parameters of our Core Mandate, i.e. be related to either rate setting or protecting the supply system; and
3. Any terms and conditions that we impose must safeguard the public interest.

We therefore direct that the Offset Projects be completed under terms and conditions, as specified in this decision, that allocate risk between the parties in a manner that preserves the public interest.

We also order the City of Richmond to pay the actual costs of the work.

1.0 Background and Context

1.1 Approvals Sought

On April 1, 2021, the City of Richmond (City) applied to the British Columbia Utilities Commission (BCUC) for an order pursuant to section 36 of the *Utilities Commission Act* (UCA) regarding the relocation of FortisBC Energy Inc.'s (FEI) operating gas mains in three locations where conflicts occur with the City's new storm sewer system (Offset Projects).¹

The City requests that the BCUC direct FEI to complete the Offset Projects in accordance with FEI's design drawing by June 30, 2021, and on the terms set forth in the City's draft form of Order attached to its application (Application).²

1.2 Background

The City is a municipality in British Columbia.

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 FEI) 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 of Richmond). The CPCN was approved by Order in Council 2133 on August 25, 1955. 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. Approximately 600 km of this total are distribution pressure gas lines, most of which are located in City public places. The gas lines involved in the Offset Projects are distribution pressure lines and are all in operation.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

As part of a multi-phase plan, the City is undertaking new drainage sewer, water main and sanitary sewer upgrades in the Burkeville area. The project (Phase 2) is the second out of a total of eight Phases. For the works the City is installing in Phase 2, there are three locations where the new gravity storm sewer and a new manhole conflict with FEI's gas distribution piping.⁶

On August 12, 2020, the City submitted a request to FEI to offset the gas piping at the three locations that conflict with FEI's gas lines. On August 31, 2020, FEI sent a "Quote Letter" to the City for each of the three

¹ Exhibit B-1, p. 2.

² Exhibit B-1, p. 5, Appendix E.

³ Exhibit C1-2, p. 2.

⁴ Ibid.

⁵ Exhibit B-1, p. 3.

⁶ Ibid., p. 1.

locations, which included an estimate of the cost FEI requires the City to pay to FEI for FEI's offset project work and terms and conditions.⁷ FEI updated the cost estimate for one of the locations on September 4, 2020.⁸ The Quote Letters (hereafter, Letter Agreements) state that the City must sign the agreement and return it to FEI with the full amount of the cost estimate as prepayment before FEI will start work, and that by signing, the City agrees to the terms and conditions.⁹

FEI used the same terms and conditions for each Letter Agreement (FEI Terms and Conditions).

FEI states that it next heard from the City regarding the Letter Agreements approximately seven months later. During this interval, however, FEI proceeded with the design work on all three projects despite not having signed Letter Agreements, in the expectation that the City would be proceeding with the work. In addition, it submitted the design drawings to the City for all three projects, and the City approved the design drawings.¹⁰

FEI states that the City provided comments on the Letter Agreements on February 12, 2021, requesting only three changes to the FEI Terms and Conditions.¹¹ On February 19, 2021, FEI advised the City that it agreed in principle to two of the City's three proposed changes. The only outstanding issue, therefore, that FEI was aware of was the indemnity provision in section 12 of the FEI Terms and Conditions (FEI Section 12).¹²

FEI sent proposed revised terms to the City on April 27, 2021. The City rejected them on May 4, 2021 in favour of the terms it proposes, and which it includes in the Application (the City Terms and Conditions).¹³

The City has not signed the Letter Agreements, and is of the view that the terms and conditions that FEI requires the City to agree to before FEI will commence its work are either not applicable, not necessary or not reasonable given the nature of the Offset Projects and the roles and responsibilities of each party in relation to these projects.¹⁴

1.3 Chronology of Events

FEI submits timelines of key events during the planning process and the subsequent correspondence.¹⁵ The City confirms that the revised timeline provided by FEI is accurate, and adds that on April 1, 2021 the City notified FEI in writing that the City does not agree to the proposed terms, nor to any revisions of those terms discussed with FEI representatives previously.¹⁶

⁷ Exhibit B-1, p. 2.

⁸ Exhibit C1-1, p. 3 of pdf.

⁹ Exhibit B-1, p. 2.

¹⁰ Exhibit C1-1, p. 1.

¹¹ Ibid.

¹² Exhibit B1-1, p. 2; Exhibit C1-2, p. 4.

¹³ Exhibit C1-2, pp. 4-5; Exhibit B-2, p. 3.

¹⁴ Exhibit B-1, p. 3.

¹⁵ Exhibit C1-2, p. 10; Appendix A.

¹⁶ Exhibit B-2, p. 3.

The City submits that the historical timeline is not relevant to the Application because it does not provide a basis one way or other for the BCUC to, by order, specify particular terms.¹⁷

The table below, based largely on FEI's information summarizes the timeline relevant to our discussion.

Date	Event
PART 1 - PLANNING PROCESS FOR FEI JOBS	
August 12, 2020	FEI receives request for gas main alterations in Burkeville for the next phase of the City's project from City's contractor.
August 14, 2020	The City's contractor provides FEI with marked up sketches showing the locations where the alterations of FEI's gas mains are required.
August 19, 2020	FEI responds to the City's contractor providing FEI order numbers for the three requested locations. FEI asks for a timeframe for the alterations and confirmation of who will be paying for the alterations.
August 31, 2020	FEI provides Quote Letters (with terms and conditions) to the City. FEI confirms that the request for alteration work at the three locations will be processed once FEI receives purchase order numbers from the City.
August 31, 2020	The City's contractor informs FEI that crews plan to start work in the next couple of weeks and will start at the end closest to the location of FEI Job #28500502946 and requests that that job be scheduled first. The City's contractor confirms the City will be paying for the alterations.
September 4, 2020	FEI provided revised Quote Letter (with terms and conditions) to the City for Job 2800502946. The revision is to the Estimated Cost.
October 14, 2020	The City's contractor emails FEI inquiring about the status of gas main alterations. FEI responds that detailed design drawings for the alterations have not been completed yet because the City has not returned the signed Quote Letters (and purchase order numbers). FEI explains that once FEI receives the signed Quote Letters, the detailed design drawings will be prepared and submitted to the City for approval, and FEI will schedule the work following receipt of the City's approvals.
November 20, 2020	Although the City has not provided a signed Quote Letters (and purchase order numbers), FEI proceeds with preparation of the detailed design drawings.
PART 2 - CORRESPONDENCE REGARDING CITY'S CONCERNS WITH QUOTE LETTER WITH TERMS AND CONDITIONS	
February 12, 2021	<p>City emails FEI asking FEI to send an updated agreement with the following changes:</p> <ul style="list-style-type: none"> (i) Change on date of estimate. (ii) Change to Terms and Conditions: <ul style="list-style-type: none"> • s. 1.1 more specific site location - clearer definition of site. • s. 11.3 add reference to disclose in accordance with law including Freedom of Information and Protection of Privacy Act (British Columbia). • s. 12 change to Limitation of Liability and Indemnity – deletion of "gross" throughout the section. <p>Email states: These changes were requested by the City of Richmond Legal Department. All we need is these changes and we will sign the agreement and send the purchase order.</p>

¹⁷ Exhibit B-2, p. 3.

Date	Event
February 19, 2021	FEI emails City indicating FEI has no issue changing s.1.1 and s. 11.3 as per City's request, however, will not make change to s. 12. FEI explains the terms and conditions in the Quote Letter is not just for City of Richmond, and has been created to quote to Municipalities without an operating agreement.
February 24, 2021	City's lawyer speaks to FEI Planner and follows up with email requesting contact information for FEI lawyer.
March 5, 2021	City's lawyer and FEI's lawyer (with Planner) have a conference call. City's lawyer advises that City of Richmond objects to indemnity provision of terms and conditions and advises that City will pursue all avenues to resolve including asking BCUC to impose short term solution prior to getting new operating agreement. FEI's lawyer indicates will need to consult internally regarding City's requested changes to indemnity. FEI's lawyer commits to providing an update to City.
March 11, 2021	FEI's lawyer leaves voicemail message for City's lawyer.
March 12, 2021	FEI's lawyer misses a call from an unrecognized number, no voicemail. FEI's lawyer calls the number, believes it to be the City's lawyer's answering service and leaves a voicemail message for City's lawyer.
March 16 and 17, 2021	FEI's lawyer and City's lawyer exchange telephone calls. No discussions occur.
March 18, 2021	FEI's lawyer receives call from City's lawyer. No voicemail is recorded but FEI's records indicate the call is over 3 minutes in duration.
April 1, 2021	City files the Application with BCUC.
April 12, 2021	FEI's lawyer calls City's lawyer and leaves a voicemail message.
April 23, 2021	Procedural Conference.
April 27, 2021	FEI sends proposed revised terms and conditions to City.
May 4, 2021	City responds to FEI confirming it does not agree to the revised terms and conditions.

1.4 Regulatory Process

By letter dated April 20, 2021, the BCUC invited the City and FEI to provide oral submissions at a procedural conference on a suitable regulatory process for the review of the Application, and to outline the chronology of contract negotiations to date.

Following the procedural conference held on Friday April 23, 2021, the BCUC issued Order G-121-12 dated April 26, 2021, establishing a regulatory timetable consisting of FEI's proposal to the City on the terms of the contract, followed by the City's response to those terms, and a streamlined review process (SRP) if the parties had not reached agreement.¹⁸

On May 7, 2021 FEI submitted its response to the Application, which submission attached revised terms and conditions that it proposed to the City on April 27, 2021.¹⁹

¹⁸ Transcript Volume 1, p. 37.

¹⁹ Exhibit C1-2.

On May 14, 2021, the City confirmed that it does not agree to the revised terms proposed by FEI.²⁰ By letter dated May 17, 2021, the BCUC requested oral submissions from parties on the following:

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

The SRP took place on Friday May 21, 2021.

1.5 Framework of this Decision

In our instructions to the parties we set out the two questions listed above. The parties' submissions and our deliberations, however, have followed a slightly different path. Therefore, although we are satisfied that our two questions have been thoroughly addressed, we approach these reasons in a slightly different format to that suggested by the questions.

We address two issues relating to our jurisdiction in section 2 below: first, whether we have the jurisdiction under the UCA to impose on the City the liability and indemnity section that FEI seeks in the FEI Terms and Conditions; and second, our specific jurisdiction to order terms and conditions for the Offset Projects. This necessarily includes a discussion of the limits to our jurisdiction.

In section 3, we consider which of the proposed terms and conditions of FEI's work on the Offset Projects are in the public interest for us to include in the Order.

2.0 Jurisdiction

In this section we set out the provisions of the UCA that apply to this matter. In particular, although the City applied pursuant to section 36 of the UCA, we also considered, and invited submissions on our jurisdiction and other relevant sections of the UCA.²¹

²⁰ Exhibit B-2, p. 5.

²¹ Transcript Volume 1, p. 37.

2.1 Applicable Sections of the UCA

Section 32 of the UCA addresses the use of municipal thoroughfares.

- 1) This section applies if a public utility
 - a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and
 - b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.
- 2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use. [Emphasis added]

Section 36 concerns the use of municipal structures:

Subject to any agreement between a public utility and a municipality and to the franchise or rights of the public utility, and after any hearing the commission considers advisable, the commission may, by order, specify the terms on which the public utility may use for any purpose of its service (emphasis added)

- a) a highway in the municipality, or
- b) a public bridge, viaduct or subway constructed or to be constructed by the municipality alone or jointly with another municipality, corporation or government.

Positions of the parties

Both the City and FEI agree that nothing turns on whether section 32 or section 36 of the UCA applies. The City confirms that it is not seeking a particular determination in this proceeding whether section 32 or section 36 applies.²² It states that the “question of whether section 32 or 36 of the *Utilities Commission Act* applies to the Application is an academic one in that both parties agree that the BCUC has jurisdiction over the matters raised by the Application and the relief sought.”²³

FEI submits that the BCUC has the jurisdiction to approve its proposed terms under both sections 32 and 36.²⁴

Panel Discussion

The Panel asked the parties to consider whether section 36 of the UCA, the section under which the City applied, or section 32 provides the BCUC the necessary jurisdiction to proceed. The parties agree that we have jurisdiction under the UCA, whether under section 32 or section 36, to impose terms on FEI’s use of municipal land in the City. Although both parties agree that we have jurisdiction under either section 32 or 36, the Panel is proceeding under its jurisdiction pursuant to section 32 of the UCA for the following reasons:

²² Transcript Volume 2 2, p. 150, PDF 114/125.

²³ Exhibit B-2, p. 2.

²⁴ Exhibit C1-5, para 47, p. 27.

1. The issues before us arise out of a dispute between the City and FEI, and those contentious issues have given rise to this Application. This is squarely within the parameters of section 32, and is clearly what section 32 was intended for, as evidenced by the section's reference to the inability of the parties to agree on the terms of use;
2. The terminology of section 32 is broader than section 36 and therefore contemplates wider application. For example, section 32 permits the BCUC to 'allow the use' and 'specify the manner and terms of use'; and
3. There are numerous BCUC decisions relying on section 32, which we discuss below in section 2.2.2, and consistency with prior decisions promotes greater certainty.

In the alternative, we also find that we have jurisdiction pursuant to section 36 of the UCA to impose terms on FEI's use of municipal highways and structures.

2.2 BCUC Jurisdiction under the UCA to Order Terms and Conditions

The parties do not agree, however, on the nature of the terms we can impose on the Offset Projects. The City submits that the liability and indemnity section in the FEI Terms and Conditions, FEI Section 12, which the City refers to as a 'positive obligation', is not available in law because legislation other than the UCA creates limits to the BCUC's jurisdiction to impose positive obligations on the City.²⁵ The City also submits that the remainder of the FEI Terms and Conditions are either not necessary, not applicable or not appropriate."²⁶

FEI submits that the BCUC has broad jurisdiction to impose terms, including positive obligations.²⁷

In this section, we address our jurisdiction pursuant to section 32 of the UCA to impose terms and conditions on the Offset Projects, as follows:

- The narrow issue of our jurisdiction under the UCA to impose positive obligations on the City;
- The broader issue of our jurisdiction to order any terms and conditions on the Offset Projects, including limits on our jurisdiction, and
- The legal test to exercise our jurisdiction under the UCA, which is a public interest test.

2.2.1 BCUC Jurisdiction to Impose Positive Obligations on the City

Parties' Submissions

The City

The City notes that the parties agree that the BCUC has the power to order specific terms in regards to the matters raised in the Application. The issue, according to the City, is the nature of terms that the BCUC can

²⁵ Transcript Volume 2, p. 52, PDF 16/125.

²⁶ Ibid.

²⁷ Ibid., p. 102, PDF 66/125.

impose.²⁸ The City presents several arguments in support of its position that the BCUC cannot impose positive obligations on the City. It begins with the premise that while both sections 32 and 36 of the UCA provide the BCUC with the jurisdiction to impose terms on FEI in respect of its use of municipal land, neither section provides for the BCUC to impose positive obligations on the City, such as liability and indemnity obligations, for damages caused by FEI's use of the City's highway.²⁹

The City further submits that the BCUC cannot impose positive obligations on the City because of the City's statutory immunity from liability under section 744 of the *Local Government Act*. The City argues that this immunity, and other defenses available to municipalities at common law, lead to the conclusion that the BCUC cannot impose liability and indemnity obligations on the City that would have the effect of eliminating or lessening these immunities, defenses and protections. Further, it would not be reasonable or in the public interest to do so.³⁰

The City submits that section 121 of the UCA is not directly applicable in this case. Section 121 states:

Nothing in or done under the *Community Charter* or the *Local Government Act*

- a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or
- b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.

In the City's view, the application of section 121 does not arise until the BCUC exercises its power under either section 32 or 36. At that point, section 121 becomes relevant, to determine what the BCUC's order means in relation to the *Community Charter*.³¹

Next, the City argues that the soil and freehold of the three locations in this matter are vested in the City, by authority of the *Community Charter*.³² In the absence of clear and express statutory authority under the *Gas Utility Act*, the BCUC may not specify terms that diminish the City's vested rights of ownership any more than are required to accomplish the objective of extending safe and reliable gas service to consumers. Further, to the extent that the diminishment of vested rights cannot be avoided, then terms and conditions in favour of the City may be imposed to minimize to the greatest extent possible any such impact.³³

The City notes that although the *Gas Utility Act* gives FEI rights to use and access municipal property, such rights do not include the right to impose positive obligations on a municipality. In support of this position the City refers to the *Atco Kootenay*³⁴ decision, which held that a statutory right of way cannot impose positive and personal covenants and still create an interest in land.³⁵

²⁸ Ibid., p. 51, PDF 15/125.

²⁹ Transcript Volume 2, p. 52, PDF 16/125.

³⁰ Ibid., p. 53 PDF 17/125.

³¹ Ibid, p. 67, PDF 31/125.

³² Community Charter, SBC 2003, c 26 <<https://canlii.ca/t/54wx4>>

³³ Transcript Volume. 2, p. 54, PDF 18/125.

³⁴ *Atco Lumber Ltd. v. Kootenay Boundary (Regional District)*, 2014 BCSC 524 (CanLII), <<https://canlii.ca/t/g6bj0>>

³⁵ Transcript, Volume 2, p. 55-56, PDF 19-20/125.

The City also cites two decisions of the Canadian Transportation Agency (CTA), exercising its jurisdiction under provincial legislation, that specifically considered whether its jurisdiction to authorize the construction of utility crossings of railways includes the jurisdiction to include liability and indemnity provisions in these crossing orders.³⁶ In one case, it concluded that “liability for negligence by either party at railway or utility crossings ought to be determined by the civil courts in the province in which the crossing is situated. Therefore consistent with its precedent, the agency will not impose any terms and conditions with respect to liability.”³⁷ In another case the CTA³⁸ concluded that it did not have the jurisdiction under its legislation.³⁹ The City submits that similar to the CTA, the BCUC does not have the jurisdiction to impose liability and indemnity provisions.

FEI

FEI disagrees with the City’s interpretation that “[t]he BCUC’s power is to, by order, specify the terms on which FEI may use the City’s highway; it is not to impose liability and indemnity obligations on the City.” FEI submits there is nothing in the wording of sections 32 or 36 that would support such a narrow interpretation, and it would be at odds with the purpose of the sections.⁴⁰

FEI argues that although the immunities, protections and other limitations that the City lists do exist, FEI disagrees that they exist in a way that would prevent the BCUC from imposing an order that it believes is in the public interest under section 32.⁴¹ For example, the *Local Government Act* and the *Community Charter* are subject to the UCA by virtue of section 121 of the Act. Rather than reading section 121 in isolation, after determining whether section 32 (or section 36) applies, as the City submits, FEI argues that principles of statutory interpretation dictate that these two sections be read in conjunction. Therefore, the *Local Government Act* and the *Community Charter* are expressly subject to the UCA, by virtue of section 121.⁴²

FEI submits that section 744 of the *Local Government Act* only applies to nuisance in case of a “sewer system, water or drainage facility system, or a dyke or road,” and not in a construction project.⁴³

FEI disagrees with the City’s interpretation of whether FEI or the BCUC has the power to impose positive covenants in interests in land.⁴⁴ FEI notes that whereas section 218 of the *Land Title Act* prohibits positive covenants on a landowner, section 219 of the *Land Title Act* permits positive covenants, and therefore “it depends on the framework you look at.”⁴⁵

³⁶ Transcript Volume 2, p. 58, PDF 22/125.

³⁷ Ibid., p. 60, PDF 24/125.

³⁸ CTA 28-R-2019, cited in Transcript Volume 2, p. 61 PDF 25/125.

³⁹ Transcript Volume 2, p. 148, PDF 112/125.

⁴⁰ Exhibit C1-5, p. 10.

⁴¹ Transcript Volume. 2, p. 119, PDF 83/125.

⁴² Exhibit C1-5, para. 34, PDF 22.

⁴³ Transcript Volume 2, p. 121, PDF 85/125.

⁴⁴ Ibid., p. 118, PDF 82/125.

⁴⁵ Ibid.

FEI distinguishes the decisions of the CTA on the basis that its legislation does not have the broad language of section 32 in the UCA.⁴⁶ FEI submits that the City's examples from other jurisdictions or regulatory bodies turn on different statutory mandate and facts.⁴⁷ It emphasizes the importance of considering the statutory framework and notes that the BCUC operates under a statutory framework that provides broader powers than the CTA and therefore it is consistent to interpret the BCUCs jurisdiction more broadly than the CTA.⁴⁸

Panel Discussion

We are satisfied that we have the jurisdiction to impose positive obligations on the City. In particular, we disagree with the City's interpretation that our jurisdiction under the UCA permits us to specify the terms on which FEI may use the City's highway but does not permit us to impose positive obligations, such as liability and indemnity, on the City.

We are not persuaded by the City's argument that the fact that a municipality has immunity from certain liabilities under some statutes, or various defences under the common law, leads to the inevitable conclusion that municipalities should enjoy equivalent protection under the UCA or that the UCA cannot have paramountcy over other statutes.

In the Panel's view, section 121 of the UCA is clear that nothing in the *Community Charter* or the *Local Government Act* can supersede or impair a power conferred on the BCUC or an authorization granted by the BCUC to FEI as a public utility. Furthermore, we disagree with the City's suggestion that section 121 of the UCA only applies to what the Panel's order might mean in relation to the *Community Charter*. There is nothing in the language of section 121, whether express or by implication, to support such an interpretation.

The City referred us to the *Atco Kootenay* decision, in particular as authority for its position that we cannot impose positive obligations on the City. The *Atco Kootenay* decision, however, deals with a statutory right of way, unlike the present case. Therefore, while *Atco Kootenay* states that "a statutory right of way cannot impose positive and personal covenants and still create an interest in land," in the Panel's view, that finding does not assist the City.⁴⁹

We agree with FEI's argument that other regulatory bodies such as the CTA have narrower jurisdiction than the UCA, and that differences in their governing legislation, their mandate and specific circumstances make it difficult to draw helpful comparisons. For example, the relevant section of the *Canada Transportation Act*⁵⁰ permits the Agency to 'authorize construction' or 'specify who shall maintain,' both of which actions are much narrower than section 32 of the UCA, which permits the BCUC to 'specify the manner and terms of use' of municipal land. This is consistent, in our view, with the CTA's interpretation of its jurisdiction in the GVWD decision, where it found that "it does not have jurisdiction to order terms and conditions in relation to a utility

⁴⁶ Ibid., p. 117, PDF 81/125.

⁴⁷ Exhibit C1-5, p. 21.

⁴⁸ Transcript, Volume 2, p. 117, PDF 81/125.

⁴⁹ Exhibit B-3, para. 100, PDF 22.

⁵⁰ Ibid., para. 19, PDF 34.

crossing other than the terms and conditions directly related to the suitability of the crossing, those being related to construction and maintenance.”⁵¹

2.2.2 BCUC Jurisdiction to Order Terms and Conditions in General

In the previous section we concluded that we do have the jurisdiction pursuant to section 32 of the UCA to impose positive obligations on the City. In this section we deal with the more general aspect of our jurisdiction to specify terms and conditions for the Offset Projects, including consideration of limits to our jurisdiction, above and beyond positive obligations.

Parties' Submissions

The City

The City acknowledged during the SRP that the parties agree that the BCUC has the power to order specific terms in regards to the matters raised in the Application. (Such agreement, however, does not extend to the power to impose positive obligations on the City, as addressed in the previous section.) The issue, according to the City, is “what nature of terms are available to the Commission and appropriate to impose. FEI argues that its requested terms are commercially reasonable. The City submits that the question is rather whether additional terms are necessary beyond those in the draft order included with the application.”⁵²

FEI

FEI submits that the BCUC has broad powers under the UCA to impose terms and conditions, and that it exercises this jurisdiction routinely when it approves operating agreements.⁵³ It argues that the proper approach to interpreting the UCA is set out in the Supreme Court of Canada decision in *ATCO Gas*,⁵⁴ which essentially requires looking at the wording of the section in the context of the legislative purpose and the overall framework. Sections 32 and 36 of the UCA have broadly-worded express powers to impose terms:⁵⁵

- a) Section 32 contemplates: “the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use.”
- b) Section 36 contemplates: “the commission may, by order, specify the terms on which the public utility may use for any purpose of its service...”.

FEI submits that *ATCO Gas* makes clear that the limits of the BCUC’s jurisdiction under broadly-worded powers are defined with reference to the BCUC’s mandate, which relates to rate setting and the integrity of the system.⁵⁶ Therefore, it argues that there is a legislative intention (whether in section 32 or 36) to provide for a

⁵¹ Exhibit B-3, CTA GVWD Decision No. 28-R-2019, para 28, PDF 45.

⁵² Transcript Volume 2, p. 51, PDF15/125.

⁵³ Exhibit C1-5, para. 3, p. 4.

⁵⁴ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* - SCC Cases (lexum.com).

⁵⁵ Exhibit C1-5, para 18.

⁵⁶ Exhibit C1-5, p. 10.

more efficient and expeditious means of allowing municipalities and public utilities to carry on their respective mandates.⁵⁷

In fact, argues FEI, rather than looking to other regulators governed by different legislation, such as decisions of the CTA to which the City refers, “agreements that the BCUC has approved under the same provisions and the same legislation are the best precedent for the Commission to consider and give weight to.”⁵⁸ FEI points to the operating agreements that the BCUC has approved for dozens of municipalities, which contain terms regarding liability and indemnity, and submits that these “operating agreement approvals are the most analogous precedent within our legislative framework.”⁵⁹

FEI states that the “City’s narrow interpretation of sections 32 and 36 would, if accepted, hamstring the BCUC in its role regarding comprehensive operating agreements.”⁶⁰

The City Reply to FEI

The City disagrees with importance that FEI attaches to the operating agreements it has with other municipalities. It submits that the operating agreements between FEI and other municipalities are the product of negotiation, and “the fact that the BCUC has granted approval for operating agreements executed by FEI and the municipality does not mean that the BCUC has determined it has jurisdiction to by order impose all of the terms in those agreements. There’s no opposition, there’s no challenge of jurisdiction. There’s an agreement both parties have accepted in their own discretion.”⁶¹

Panel Discussion

The Panel is satisfied that we have the jurisdiction pursuant to section 32 of the UCA to impose terms and conditions, including, as discussed previously, terms that impose positive obligations on the City. Our jurisdiction is not unlimited, however, because we are constrained by our Core Mandate. The BCUC summarized the Core Mandate in the Coquitlam Reconsideration Decision: “rate setting and protecting the supply system in a manner which safeguards the public interest.”⁶² In the Coquitlam Reconsideration Decision, the BCUC found that the UCA gives the BCUC broad powers over public utility assets because the costs of public utility assets are recovered in rates and because public utility assets are essential for the integrity and dependability of the supply system.⁶³

However, the City’s submission that the BCUC should decline to impose the remainder of the terms that FEI seeks because such terms are not necessary, applicable or appropriate addresses the *content* of the terms and conditions that we might order in this proceeding, and not to our jurisdiction *per se*. Therefore, we address the

⁵⁷ Transcript v. 2, p. 132, PDF 96/125.

⁵⁸ Transcript Volume 2, p. 78/125.

⁵⁹ Exhibit C1-5, para. 23, p. 11; Transcript Volume 2, p. 106, PDF 70/125.

⁶⁰ Exhibit C1-5, para 31, p. 21.

⁶¹ Transcript Volume 2, p. 81, PDF 45/125.

⁶² Order G-75-20 dated April 2, 2020 Application for Reconsideration and Variance of Order G-80-19 in the matter of the FortisBC Energy Inc. Application for Use of Lands under Sections 32 and 33 of the Utilities Commission Act in the City of Coquitlam for the Lower Mainland Intermediate Pressure System Upgrade Projects.

⁶³ Coquitlam Reconsideration Decision, p. 12, PDF 15/34.

City's views on the necessity or applicability of the terms that FEI requests in section 3 below, when we determine the appropriate terms of work for the Offset Projects.

In the Panel's view, section 32 of the UCA is worded broadly enough, as well as plainly, to provide us with the jurisdiction to specify the terms of a public utility's use of a municipality's streets or other places, provided such terms are related to rate setting or protecting the supply system in a manner which safeguards the public interest. The terms of the work to complete the Offset Projects affect FEI's costs to maintain its assets required to deliver utility service, and thus potentially affect the cost to FEI's ratepayers. Therefore, setting terms for the Offset Projects is squarely within the BCUC's Core Mandate.

Finally, and as FEI points out, the BCUC has established relevant precedents under the UCA, for example the operating agreements between FEI and municipalities that the BCUC has approved in dozens of instances and which contain terms regarding liability and indemnity. In this regard, we disagree with the City that BCUC approval of an operating agreement "does not mean that the BCUC has determined it has jurisdiction to by order impose all of the terms in those agreements"⁶⁴. In fact, BCUC approval of the terms and conditions set out in an operating agreement is evidence that the BCUC has turned its mind to, and confirmed it does have, the jurisdiction to impose those terms. The fact that the parties may have agreed to those terms is, in our view, tangential to the BCUC's determination of its jurisdiction to approve the agreements.

We find support for our conclusion that we do have jurisdiction in the decision of the BCUC regarding the operating agreement between FEI and the City of Surrey (Surrey Decision), insofar as it found that the UCA provides the BCUC with jurisdiction, "in circumstances where a utility has the right to operate in a municipality but cannot reach agreement on the use of the municipality's public spaces, to not only specify the manner and terms of such use in respect of the disputed terms of a proposed operating agreement, but to also specify its approval as to the manner and terms of such use in respect of the entire proposed new operating agreement."⁶⁵ While the current dispute does not involve an operating agreement, in our view the situation is analogous because both parties are asking us to impose terms and conditions on the parties relating to the work on the Offset Projects. An operating agreement similarly imposes terms and conditions on parties relating to work on similar projects.

The BCUC also approved terms in the Coldstream decision, relying on its jurisdiction pursuant to section 32 of the UCA, when the District of Coldstream and FEI could not agree on terms for an operating agreement.⁶⁶

⁶⁴ Transcript Volume. 2, p. 81, PDF 45/125.

⁶⁵ Decision and Order G-18-19 dated January 1, 2019, FortisBC Energy Inc. and City of Surrey Application for Approval of Terms for and Operating Agreement, p. 10.

⁶⁶ District of Coldstream Operating Terms Decision and Order G-113-12 (link: https://www.bcuc.com/Documents/Proceedings/2012/DOC_31601_G-113-12-FEI_Coldstream-Operating-Terms-Reasons-for-Decision.pdf).

2.2.3 The Legal Test for the BCUC when Exercising its Jurisdiction under Section 32 of the UCA

Having determined that we do have jurisdiction under the UCA to specify the terms of a public utility's use of municipal land, subject to the limits of our Core Mandate, we now review the legal test to apply under the UCA in determining what terms are appropriate.

Both parties agree that the legal test to be applied by the BCUC in exercising its jurisdiction under section 32 of the UCA is to safeguard the public interest, which is the test that the BCUC articulated in the Surrey Decision:⁶⁷ "[it] is grounded upon the BCUC's duty to safeguard the public interest. This includes the public interest in the convenience and necessity of the delivery of the natural gas service in the community and the public interest in safeguarding the interest of the municipalities and their inhabitants to the extent they may be affected by the operations of public utilities." In addition, "the BCUC, in considering the public interest test under section 32 of the UCA, must decide how to balance the public interest in a public utility's authorization to use and occupy municipal public spaces pursuant to a CPCN or otherwise, with the competing interests of the municipality and its inhabitants in order to achieve a fair and balanced agreement."

In the Surrey Decision the BCUC also addressed FEI's position that "the test to be applied under section 32 of the UCA is whether the proposed manner and terms of use in the New Operating Agreement are commercially reasonable."⁶⁸ The BCUC disagreed that the public interest test is met by imposing commercially reasonable terms:

That approach to the test is too narrow and limiting. It fails to consider the gravity and scope of the BCUC's jurisdiction under Section 32 of the UCA to facilitate the imposition of a public utility's service in municipal public places. Such considerations are not limited to simply determining commercially reasonable terms. It would be impossible to set out the potential public interest matters BCUC may have to consider that are not purely commercial in nature. However, some clear examples are set out above in the City's submission which may include, but should not be understood as limited to, sharing of public spaces between the public utility, the municipality and others, the public's use and enjoyment of such spaces, transportation needs in the municipality and the protection of public safety and the environment in the municipality.⁶⁹

Positions of the Parties on the Application of the Public Interest Test Under the UCA

The parties do not dispute that at the public interest test applies to this matter. They disagree, however, on how the public interest test applies to the facts in this case.

⁶⁷ Decision and Order G-18-19 dated January 1, 2019, FortisBC Energy Inc. and City of Surrey Application for Approval of Terms for and Operating Agreement, pp. 13 -14.

⁶⁸ *Ibid.*, p. 11, PDF 18/87.

⁶⁹ *Ibid.*, p. 14.

Parties' Submissions

The City

The City points out that the BCUC in the Surrey Decision rejected FEI's position that the public interest test is met by imposing commercially reasonable terms, because that approach is too narrow and limiting. In the City's view, "[i]t's not about commercially reasonable terms, it's about those terms necessary to ensure the safe and reliable supply of gas to consumers, while also recognizing the imposition of FEI's service in municipal public places, and recognizing and protecting the interests of the municipality and its inhabitants."⁷⁰ Specifically, "[t]he terms and conditions that are within the jurisdiction of the BCUC, therefore, in the City's submission, are those that both recognize FEI's rights to use municipally owned highways, pursuant to the *Gas Utility Act*, to supply gas to consumers, and to the extent possible, cause the least diminishment or impairment of the City's rights, immunities, defences and protections."

FEI

FEI agrees with the City that the public interest test set out in the Surrey Decision applies here. It acknowledges that the BCUC in the Surrey Decision rejected the suggestion that commercial reasonableness was the appropriate test, however, FEI submits that the BCUC did not find that commercial considerations are irrelevant.⁷¹ It argues that the public interest can include consideration of the commercial reasonableness of terms, so long as that consideration is not applied to the exclusion of non-commercial considerations. The objective reasonableness of terms should be a factor in whether the terms help to achieve the "fair and balanced agreement". Indicia of reasonableness or fairness, FEI submits, could include the fact that (i) prior agreements between the City and FEI have included terms related to payment for relocation and allocation of risk or (ii) these types of terms have also been a part of dozens of operating agreements approved by the BCUC.⁷²

FEI submits that the BCUC has broad jurisdiction to impose terms in the public interest, which requires a balancing, and that "[t]he BCUC exercises this jurisdiction routinely when it approves operating agreements."⁷³ In cases where operating agreements have been brought forward for approval with the agreement of both parties, the BCUC has exercised its jurisdiction to approve them under its public interest power in section 23 of the UCA. Where there has been a dispute, the BCUC has exercised its public interest jurisdiction under section 32 of the UCA.⁷⁴

FEI submits that the legislature has "conferred upon the BCUC public interest jurisdiction to resolve disputes between municipalities and public utilities regarding the terms of use of municipal public places. And courts are not equipped with public interest jurisdiction. They simply determine after-the-fact allocation of liability based on legal principles. And the determination of the public interest, that legislative authority is being conferred on

⁷⁰ Transcript Volume2, pp. 84-85, PDF 48-49/125.

⁷¹ Transcript Volume 2, p. 100, PDF 63/125.

⁷² Exhibit C1-5, PDF 7.

⁷³ Ibid., p. 3.

⁷⁴ Ibid., p. 11.

the BCUC because it is able then to balance a number of competing interests, whether they be commercial or otherwise.”⁷⁵

Panel Discussion on the Application of the Public Interest Test under the UCA

In exercising our jurisdiction under section 32 of the UCA, we have a duty to safeguard the public interest. We achieve this by balancing the interests that are reflected in the public interest test, namely the interests of the municipality and its inhabitants and the public interest in a public utility’s authorization to use and occupy municipal public spaces pursuant to a CPCN or otherwise. Balancing these interests is something the BCUC does routinely, by, for example, considering the public interest when it approves operating agreements between utilities and municipalities.

In our view, whereas the two provisions comprising the City Terms and Conditions might become part of an agreement, those two terms alone do not constitute an entire agreement, and certainly not a fair and balanced agreement. On the other hand, whereas commercially reasonable terms do not constitute an entire agreement, they may be part of a fair and balanced agreement.

We disagree with the City that, in exercising our jurisdiction, we must be mindful to cause the least diminishment or impairment of the City’s rights, immunities, defences and protections. In our view, while this is one aspect of balancing the public interest, minimizing the impact on the City is not the goal of utility regulation and nor does it necessarily bear greater weight than any other element of public interest.

2.3 Overall Determination

Panel Determination on the BCUC’s Jurisdiction

In summary, the Panel finds that:

1. **We have the jurisdiction pursuant to section 32 of the UCA to impose terms and conditions for the Offset Projects, including terms such as liability and indemnity, that impose positive obligations on the City;**
2. **Any terms and conditions that we impose must fit within the parameters of our Core Mandate, i.e. be related to either rate setting or protecting the supply system; and**
3. **Any terms and conditions that we impose must safeguard the public interest.**

In the next section we discuss what specific terms are appropriate for the Offset Projects, to meet the public interest test.

3.0 Terms and Conditions of the Work

We now consider specifically whether, or how, terms allocating risk should be included. As already stated, while we are satisfied that we do have jurisdiction to impose terms and conditions, we recognize that our jurisdiction

⁷⁵ Transcript Volume 2, p. 131, PDF 95/125.

is limited to functions within our Core Mandate, namely rate setting and protecting the integrity of the supply system.

We address the following issues:

1. What terms are in the public interest for the Offset Projects?
2. Does FEI Section 12 adequately allocate risk between the City and FEI? If not, then what is the appropriate allocation of risk between the City and FEI?
3. The City's request that we include in our order a term requiring it to pay to FEI the reasonable costs incurred by FEI to undertake and complete the Offset Projects.

In addressing the first two issues, we address the three key points that the City raises:

- Whether terms and conditions other than the City Terms and Conditions are necessary;
- Whether risk allocation should be part of the terms and conditions that the Panel orders, and
- The relevance, if any, of prior agreements between the City and FEI.

3.1 The Terms and Conditions for the Offset Projects

Parties' Submissions

The City

The City maintains that no additional terms beyond those in the draft order included with the Application, namely the City Terms and Conditions, are necessary, applicable or appropriate for the Offset Projects.⁷⁶ The City explains that the specific circumstances here need to be considered. The designs and locations for the Offset Projects are agreed as well as the June 2021 completion date. The order that the City asks the Panel to consider would require FEI to undertake and complete the agreed work and provide for the payment of reasonable costs.⁷⁷ The City notes that it has agreed to pay FEI's costs of the Offset Projects so long as the costs are reasonable and the work is completed by the end of June; FEI indicated it will or at least is able to complete the work by June 14, 2021.⁷⁸

The City's position is that we should "ensure only those terms that are really essential to accomplish the objective are included, nothing more."⁷⁹

The City submits that provisions to allocate risk between it and FEI for the Offset Projects are not necessary. It argues that not having such terms is nevertheless an allocation of risk, albeit a different risk allocation from the one that FEI is proposing, i.e. the allocation that the law defaults to in the absence of a contract.⁸⁰ It emphasizes

⁷⁶ Exhibit B-2, p. 5

⁷⁷ Transcript Volume. 2, p. 52. PDF p. 16/125.

⁷⁸ Exhibit B-2, p. 5.

⁷⁹ Transcript Volume 2, PDF 25/125.

⁸⁰ Ibid., p. 144, PDF 108/125.

that a decision by the BCUC to refrain from imposing terms to allocate risk will not leave a vacuum because “in the absence of (audio drops) limitation of liability on the City, the otherwise applicable statutory and common law principles would apply.”⁸¹ The City submits that this body of law “represents the public interest. It is -- common law is judge-made law over many, many, many years. Statutory law is the law as prescribed by the legislature that represents the public interest.”⁸²

The City describes the FEI Terms and Conditions as those that FEI would like to have but does not need to have in order to undertake and complete the Offset Projects safely and efficiently.⁸³ The City is adamant that it does not agree to the FEI Terms and Conditions.⁸⁴ It points to an email dated April 1, 2021 confirming its non-agreement,⁸⁵ and the City said during the SRP that “no, the City hasn't agreed to any terms.... Despite any discussions that may have occurred, there are no terms that we're in agreement with.”⁸⁶ Further, the City also submitted during the SRP that “what may or may not have been agreed by the parties in the past ... is just simply not relevant to the application before the Commission now.”⁸⁷

The City also submits that it has little leverage when it comes to dealing with FEI because “unfortunately, unless a municipality is prepared to litigate, which is what is occurring right now, then municipalities are effectively at -- they have no leverage. Even though municipalities are owners of the highways, the reality is, unless you agree to the terms, the work does not get done. And so, then you have engineers, project managers, being confronted with deadlines to perform work, and the only option around the agreement is to simply litigate, and that comes at a cost. And it comes with time.”⁸⁸

The City explains that the six-month delay in responding to the Letter Agreements, in particular informing FEI about its objections to the FEI Terms and Conditions, was variously caused by the COVID 19 pandemic, to some extent the individuals involved, the lack of negotiation leverage and the fact that people are busy.⁸⁹

The City also rejects the assumption that its acceptance of costs for prior projects can be construed as an acknowledgement that such costs were reasonable.⁹⁰ According to the City, what “you can assume is that the municipality would not have had really any leverage or opportunity. Because no one in their right mind would agree to the indemnities that FEI has been proposing. I think that anyone reading that would come to that conclusion. So, then you're left with the only plausible reason and that being they had no choice. The project had to be built, timing was of the issue -- of the essence and otherwise you're in expensive litigation.”⁹¹

⁸¹ Ibid., p. 145, PDF 109/125.

⁸² Ibid., p. 144, PDF 108/125.

⁸³ Exhibit B-2, p. 6.

⁸⁴ Ibid., p. 4.

⁸⁵ Transcript Volume 1, p. 15, PDF 18/42.

⁸⁶ Transcript, Volume 2, p. 150, PDF 114/125.

⁸⁷ Ibid., p. 50, PDF 14/125.

⁸⁸ Transcript Volume 2, p. 77, PDF 41/125.

⁸⁹ Ibid., p. 89, PDF 53/125.

⁹⁰ Ibid., p. 77, PDF 41/125.

⁹¹ Ibid., p. 79, PDF 43/125.

FEI

FEI submits that it is wrong to start from the premise that only 'bare-bone' terms are required and then shift the onus to FEI to demonstrate that more terms are required. "There is no compelling reason, ... why when the City is the applicant and the party instigating the alteration of FEI's facilities and has accepted these terms for that matter in the past, the onus should reverse."⁹²

FEI disagrees with the City that the appropriate allocation of risk in this case is for the BCUC to refrain from imposing terms regarding liability so that statutory and common law can apply. FEI submits that "[t]he courts are not equipped to make public interest determinations in advance. They determine liability after the fact, applying the allocation of risk inherent in the common law." Instead, FEI submits that we should actively consider which risk allocation – the FEI Section 12, the default at common law, or some third option - is in the public interest in these circumstances.⁹³

FEI points out that terms related to payment for relocation and allocation of risk have been part of prior agreements between the City and FEI.⁹⁴ Similarly, the standard form operating agreement that the BCUC has approved for dozens of municipalities (Standard Municipal Operating Agreement) includes a third party risk indemnity, terms relating to damage to municipal facilities, and terms relating to municipality damage to FEI facilities and force majeure. All of these terms are concerned with the allocation of risk – risk of damage, risk of liability to third parties, risk of non-performance, risk of delay, etc.⁹⁵

FEI also points out that terms allocating risk in respect of infrastructure, just like terms addressing payment of costs or fees in respect of infrastructure, have a direct bearing on the BCUC's mandate because these terms affect the public utility's ability to provide cost-effective public utility service within municipalities over time. A risk allocation can affect a public utility's cost just as much or more than the amount charged for the work. And there is a close interrelationship between risk allocation and the cost and price, which is why, in FEI's submission, both types of terms are typically included in a construction contract, for example, where there might be unknown subsurface conditions or a risk of delay.⁹⁶

Finally, FEI submits that in any agreement, "the allocation of risk can be as important as the allocation of benefits. They are closely interrelated. Each has an impact on public utilities and their customers, and on municipalities and their constituents, making them appropriate matters for consideration under sections 32 and 36."⁹⁷

FEI submits that the FEI Terms and Conditions are reasonable. It notes that, despite the City's submissions to the contrary, in fact the City's legal department has actually stamped its versions of the prior agreements (of which the FEI Terms and Conditions were part) in several instances indicating that it had reviewed and signed off on

⁹² Ibid., p. 99, PDF 63/125.

⁹³ Exhibit C1-5, para. 44, p. 27, Transcript Volume 2, p. 132, PDF 96/125.

⁹⁴ Transcript Volume 2, p. 100, PDF 64/125.

⁹⁵ Exhibit C1-5, para. 25, p. 11.

⁹⁶ Ibid., para. 21, p. 10.

⁹⁷ Exhibit C1-5, para. 31, p. 21.

the terms.⁹⁸ FEI also confirms it has agreed in principle to two of the City's three proposed changes to the FEI Terms and Conditions. The only outstanding issue that FEI was aware of, until the City filed the Application, was the indemnity provision in FEI Section 12.⁹⁹

Panel Determination

In our view, the public interest is not served by applying only the City Terms and Conditions to the Offset Projects. The public interest is better served if the parties' relationship is documented in a more comprehensive set of terms and conditions.

First and foremost, by insisting that only the skeletal terms it submits are necessary, the City is asking the Panel to leave to the parties the resolution of unforeseen issues, which means they could end up in court. This has the potential to unnecessarily increase FEI's costs for ratepayers, and the Panel does not consider this to be in the public interest. Having a comprehensive set of terms and conditions, on the other hand, promotes efficiency (for the utility as well as the municipality), reduces the risk of disputes and litigation, and therefore minimizes unnecessary costs for ratepayers, which is in the public interest.

In addition, accepting only the City Terms and Conditions overlooks the balancing of interests that we consider to be inherent in the public interest test. These interests, namely the interests of the municipality and its inhabitants and the public interest in a public utility's authorization to use and occupy municipal public spaces pursuant to a CPCN or otherwise, require us to consider what terms might be appropriate, not just the 'bare bones' requested by the City.

Furthermore, in our view, allocating risk is a necessary component of fixing just and reasonable rates; it would be difficult if not impossible for the BCUC to effectively set fair rates if we were precluded from allocating risk. Terms allocating risk have as much bearing on rate setting as terms dealing with payment of costs, for example, because both affect the ability of a utility to provide cost-effective service. Setting just and reasonable rates is one of the key functions in the BCUC's Core Mandate.

Establishing the terms and conditions for the Offset Projects defines the parties' obligations and responsibilities, and in that sense, is proactive. Relying on courts to settle a dispute, in this case to allocate risk once an event has occurred, is reactive. As the City itself observes, litigation comes with the added burdens of cost and time. Allocating risk proactively provides greater certainty for Fortis' ratepayers and the City's taxpayers and therefore serves the public interest.

Allocation of risk terms, whether dealing with indemnity, liability and limitations thereof, are typically included in operating agreements between FEI and municipalities, as well as in the terms and conditions for work previously undertaken by FEI for the City. Therefore, we find that allocating risk is within the scope of, and should be part of, a comprehensive set of terms and conditions for the Offset Projects.

⁹⁸ Transcript Volume 2, p. 100, PDF 64/125.

⁹⁹ Exhibit C1-1, p. 2.

Although the City argues that we cannot look to past practice, and that it has no leverage when it comes to dealing with FEI, the fact is that the City has, on numerous occasions, worked with FEI on projects where the working relationship was governed by the FEI Terms and Conditions. Moreover, when City staff replied to FEI staff on February 12, 2021 regarding the FEI Terms and Conditions, they voiced concern over three issues, two of which were relatively minor and easily resolved. It is difficult to deny that someone at the City took the time to review the FEI Terms and Conditions and concluded they were largely acceptable.

In our view, therefore, it is reasonable to consider the FEI Terms and Conditions as a starting point for a comprehensive set of terms and conditions for the Offset Projects. We recognize that the City at one point raised objections to three particular sections. FEI agreed to revise two of those terms in the manner suggested by the City, which left only one term, FEI Section 12, which FEI proposed as an indemnity clause, in dispute as of February 12, 2021.

In their exchange of emails on February 12 and 19, 2021,¹⁰⁰ the parties agreed to revise two sections of the FEI Terms and Conditions: to include a more specific site location in section 1.1, and to add a reference to information or data, which is required to be disclosed in accordance with applicable laws including the *Freedom of Information and Protection of Privacy Act* (British Columbia) in section 11.3. Thus, in Order G-170-21 dated May 31, 2021, we ordered that the FEI Terms and Conditions be modified to reflect these revisions, as follows:

Section 1.1 – the description of the location of the Work, currently shown as Burkeville area, shall be replaced with one that is more specific to the location, such change to be specific to the area on the applicable Letter Agreement.

Section 11.3 – after the words “right to disclose the same” the following words shall be inserted such that section 11.3 shall read as follows “or which is required to be disclosed in accordance with applicable laws (including without limitation, the Freedom of Information and Protection of Privacy Act (British Columbia))”:

OLD 11.3 The obligation of confidentiality set out above shall not apply to material, data or information which is known to the Customer prior to their receipt thereof, which is generally available to the public or which has been obtained from a third party which has the right to disclose the same. The confidentiality covenants of the Customer herein shall survive the termination of this Letter Agreement.

NEW 11.3. The obligation of confidentiality set out above shall not apply to material, data or information which is known to the Customer prior to their receipt thereof, which is generally available to the public or which has been obtained from a third party which has the right to disclose the same, or which is required to be disclosed in accordance with applicable laws (including without limitation, the Freedom of Information and Protection of Privacy Act (British Columbia)). The confidentiality covenants of the Customer herein shall survive the termination of this Letter Agreement.

Although the City argues that it has little negotiation leverage and that its acceptance in the past of the FEI Terms and Conditions is irrelevant, in our view, with the exception of FEI Section 12, there is no compelling reason to revise them. The City has not demonstrated that any of the provisions other than FEI Section 12 are objectionable, only that it says some terms are unnecessary or inapplicable.

¹⁰⁰ Exhibit C1-1, PDF 50 and 51.

We consider that the standard form operating agreement used by FEI in many municipalities¹⁰¹ and which addresses the topics covered by the FEI Terms and Conditions, such as liability arising from work done by utilities at the request of municipalities, offers useful guidance. We recognize, however, that this *pro forma* agreement is less applicable to the Offset Projects because it has been the product of negotiation between FEI and various municipalities over time.

Therefore, we find that:

- 1. It is in the public interest that the parties' relationship is documented in a comprehensive set of terms and conditions for the Offset Projects;**
- 2. The allocation of risk for the Offset Projects should be part of a comprehensive set of terms and conditions, and**
- 3. It is reasonable to look to the FEI Terms and Conditions as representative of what a comprehensive set of terms for the Offset Projects should include.**

Accordingly, pursuant to section 32 of the UCA, we specify that the FEI Terms and Conditions, as revised above regarding Sections 1 and 11, and as further revised regarding FEI Section 12, as discussed in subsection 3.2 below, apply to the Offset Projects.

3.2 Does FEI Section 12 in the FEI Terms and Conditions Allocate Risk Adequately between the City and FEI?

In this section we examine whether FEI Section 12 adequately allocates risk between the parties for the Offset Projects. We consider that section in detail, and conclude that it does not. Therefore, we compare FEI Section 12 with the risk allocation provisions in the Standard Municipal Operating Agreement. We use this comparison as the basis of our development of a new allocation of risk provision for the Offset Projects terms and conditions.

FEI Section 12 of the FEI Terms and Conditions attached to each Letter Agreement states:¹⁰²

12. Limitation of Liability and Indemnity

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 or any third party caused by or resulting directly or indirectly from the Work, unless the claim, expense, loss, cost or other liability is directly attributable to the gross negligence or wilful misconduct of FortisBC, its employees, contractors, subcontractors or agents. Notwithstanding the foregoing FortisBC, its employees, contractors, subcontractors and agents are in no event 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), even if the loss is directly attributable to the gross negligence or wilful misconduct of FortisBC, its employees, contractors, subcontractor or agents. In no event shall FortisBC's aggregate liability to pay for any claim, expense, loss, cost, or other liability incurred by the Customer resulting from the Work exceed the total amount paid to FortisBC by the Customer for the Work. The Customer shall indemnify

¹⁰¹ See for example the Coldstream and Kelowna Agreements provided in Exhibit C1-3, Attachment 2; Attachment 4.

¹⁰² Exhibit B-1, Appendix C, Schedule A, pp. 4-5.

FortisBC and save it harmless from any claim, expense, loss, cost or other liability of any third parties arising out of Work, unless such claim, expense, loss, cost or other liability is directly attributable to the gross negligence or wilful misconduct of FortisBC, its employees, contractors, subcontractor or agents.

Parties' Submissions

The City

The City maintains “it is not commercially reasonable to expect the City to indemnify FEI for damages that might be caused by FEI’s work on FEI’s own equipment. The Offset Projects do not require FEI to do any work on City infrastructure, nor the City to do any work on FEI’s equipment; FEI will be doing work on its own infrastructure only.”¹⁰³

According to the City, FEI is “asking the BCUC to by order give them special protections that they don't have under statutory and common law.”¹⁰⁴ “FEI's proposed indemnity seeks to unfairly shift responsibility for FEI's negligence, if any, to the City, and have the City effectively be FEI's insurer, protecting FEI from loss caused by itself, its staff, or its contractor.”¹⁰⁵ Further, the City submits, it is FEI “that is doing the work on its own equipment and it should be responsible for any negligence in connection with that work.”¹⁰⁶

The City describes the special protection that FEI seeks as follows: “if Fortis or its staff or contractors are negligent in doing the offset project work, it results in a leak or it results in an accident of some kind, their argument is the City should be responsible for those damages because the City asked for the offset work. That's their connection to suggest that the City in fairness and in the public interest ought to be responsible, they asked for the offset work to accommodate their sewer.”¹⁰⁷

The City acknowledges that liability and indemnity are indeed addressed in the numerous precedents to which FEI refers. None of those precedents, however, impose liability on a municipality in the way that FEI Section 12 does. The City explains that those precedents do not “impose liability and responsibility on the City for Fortis' negligence. What those provisions do is say that each party indemnifies the other for damages caused by the first party's negligence. So the City indemnifies Fortis for damaged Fortis' equipment caused by the city, not indemnifies Fortis for damage caused by Fortis' work on its own equipment. None of those other precedents do that.”¹⁰⁸

Essentially, the City argues, FEI Section 12 seeks to make the City become FEI’s insurer, protecting FEI from loss caused by itself, its staff, or its contractor.¹⁰⁹

¹⁰³ Exhibit B-2, p. 5

¹⁰⁴ Transcript Volume2, p. 145, PDF 109/125.

¹⁰⁵ Transcript Volume 2, p. 85, PDF 49/125.

¹⁰⁶ Ibid., p. 146, PDF. 110/125.

¹⁰⁷ Ibid., p. 146, PDF 110/125.

¹⁰⁸ Ibid, p. 147, PDF 111/125.

¹⁰⁹ Ibid, p. 85, PDF 49/125.

FEI

FEI argues that FEI Section 12, which it acknowledges appears only where FEI does not have an operating agreement, imposes a different test that is reasonable in such a case. Consequently, any liability provisions that are in place should reflect that ‘but for’ principle.¹¹⁰ FEI points to what it considers a comparable use of the ‘but for’ test, in the Surrey Decision:¹¹¹ If one party asks the other party to do certain work that the other party would not otherwise undertake, the requesting party is responsible for payment, because ‘but for’ its request, the other party would not do the work.

Finally, FEI explains that operating agreements encompass a broad number of issues and projects, whereas in this particular case, the work is not being done but for the request to relocate by the City. The potential exposure to liability associated with construction is not being incurred by FEI, but for the City’s decision to move the facilities.¹¹²

Panel Discussion

Having found in subsection 3.1 that allocating risk is within the scope of a comprehensive set of terms and conditions for the Offset Projects, we nevertheless agree with the City that previous acceptance of FEI Section 12 should not dictate its continued acceptance.

We find it helpful to compare the relevant provisions from FEI Section 12 and the risk allocation sections in the Standard Municipal Operating Agreement. FEI Section 12:

1. Limits FEI’s aggregate liability to the total amount paid for the work, except for wilful misconduct. No such limitation of aggregate liability appears in the Standard Municipal Operating Agreement.
2. Limits FEI’s liability for claims by the City or third parties arising from the work to that liability which is directly attributable to FEI’s gross negligence or wilful misconduct. The Standard Municipal Operating Agreement, on the other hand, does not limit FEI’s liability. In fact, s. 10.3 of the Standard Municipal Operating Agreement sets out a limitation on the *municipality’s* liability.
3. Requires the City to indemnify FEI for third party claims arising from the work, except to the extent that is directly attributable to FEI’s gross negligence or wilful misconduct. The Standard Municipal Operating Agreement, on the other hand, sets out the municipality’s indemnity of FEI in respect of third party claims arising from the municipality’s work on its facilities and from the municipality’s breach of the agreement. Further, the Standard Municipal Operating Agreement sets out FEI’s indemnity of the municipality in respect of third party claims arising from FEI’s work on its facilities and from FEI’s breach of the agreement.

Referring to particular parts of FEI Section 12, we do not agree with FEI that simply because the City has asked FEI to relocate gas lines, FEI’s aggregate liability should be limited to the amount paid for the work, except for wilful misconduct. This would mean, for example, if FEI’s gross negligence or wilful misconduct caused damage in excess of the cost of the project at one of the three locations, the City could not recover the difference. Or, as

¹¹⁰ Ibid, p. 113, PDF 77/125.

¹¹¹ Ibid., p. 115, PDF 79/125.

¹¹² Ibid. p. 113, PDF 77/125.

the City points out, the City would have to indemnify FEI for a third-party claim arising from FEI's work, even though the City had absolutely no connection to the damage.

Certainly, FEI's 'but for' test has been applied by the BCUC when deciding who should pay for work requested. That is consistent with the principle of cost causation. We are not persuaded, however, that this same logic extends to allocation of risk. Simply because the City asks FEI to perform work should not, in our view, shift the burden to the City for damage that FEI causes in performing the work.

Therefore, we find that FEI Section 12 is not an appropriate allocation of risk between the City and FEI.

Having concluded that the terms and conditions for the Offset Projects should include provisions that allocate risk between the City and FEI, but that FEI Section 12 is not the appropriate allocation of risk, the question of the appropriate allocation of risk for the Offset Projects arises.

We recognize that the liability and indemnity provisions set out in contractual relationships are often complex and nuanced and are typically negotiated between parties, relying on legal counsel. It would be unreasonable of the Panel to purport to 'draft from scratch' such terms. The BCUC has approved many operating agreements between FEI and municipalities over the years, that include terms and conditions regarding allocation of risk. In so doing, it has applied the public interest test. Therefore, we consider these agreements to be a good reference point. On the other hand, we acknowledge that the City and FEI have not negotiated an overall operating agreement. Therefore, we are cautious about importing all of the sections regarding allocation of risk from the Standard Municipal Operating Agreement (referred to above in subsection 3.1) such as third party risk indemnity, terms relating to damage to municipal facilities, and terms relating to municipality-caused damage to FEI facilities.

In our view we have two choices for creating an appropriate risk allocation provision to include in the FEI Terms and Conditions. We can revise either FEI Section 12 or adopt the risk allocation sections from the Standard Municipal Operating Agreement. Our preference is the former, because it is concise and because the Standard Municipal Operating Agreement contains a suite of provisions, not all of which are applicable to this situation, but which should be considered together as a negotiated package.

In correspondence with FEI the City objected to the 'gross' negligence standard and the lack of mutual indemnity in FEI Section 12.¹¹³ In the SRP the City emphasised that it should not have to indemnify FEI for work that FEI does to its own FEI facilities. We are mindful of the City's comments as we consider what are appropriate revisions to FEI Section 12.

By comparing the allocation of risk between FEI Section 12 and the Standard Municipal Operating Agreement, we believe the following adjustments to FEI Section 12 are appropriate in the current circumstances:

¹¹³ Exhibit C1-2, p. 5.

- a. We have deleted the 'aggregate liability' portion of FEI Section 12, because in our view it is not in the public interest to impose on the City's residents damages in the event FEI causes a loss in excess of the project value.
- b. There is no provision in the Standard Municipal Operating Agreement for a municipality to indemnify FEI for FEI's work on FEI's facilities, such as FEI seeks in FEI Section 12, and therefore we have deleted that from FEI Section 12.
- c. There is no provision in the Standard Municipal Operating Agreement limiting FEI's liability except for gross negligence and wilful misconduct, and in any event FEI offered to the City to delete 'gross' negligence from the FEI Terms and Conditions.

In addition, even though there is a mutual indemnity in the Standard Municipal Operating Agreement, that is actually each party indemnifying the other for work it does on its own facilities which causes damage to the other party's facilities. That is not the case here, where FEI is doing work on FEI's facilities and therefore a mutual indemnity such as appears in the Standard Municipal Operating Agreement is inapplicable. Further, although the City objected to the lack of a mutual indemnity, we see no reason to include one at this time. 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. **We specify, pursuant to section 32 of the UCA, that the following modified FEI Section 12 replace FEI Section 12 in the FEI Terms and Conditions.**

FortisBC, its employees, contractors, subcontractors or agents are not responsible or liable for any claim, expense, loss, cost, or other liability incurred by the Municipality 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.

3.3 Payment of Costs

In this section we address the City's request for two terms in its draft order, related to the costs of the Offset Projects:

3. The City is directed to pay to FEI the reasonable costs incurred by FEI to undertake and complete the Offset Projects.
5. If the City and FEI are unable to reach agreement on the amount of reasonable costs payable pursuant to directive 3 or ... of this order, the City and FEI or either of them may apply to the BCUC for determination of the amount(s) payable.

Parties' Submissions

The City

The City acknowledges that if the Offset Projects were being completed pursuant to an agreement with FEI then

there would be payment terms, for example, payment in advance or payment after completion. Because the City is requesting that the order require the payment of costs, however, it submits that ancillary terms are therefore not required, and “potentially just confuse things because the order requires it.” Moreover, if there is an issue of compliance with the order, such as a complaint that the party obliged to follow through on the terms of the order is refusing to do so, that would go back to the BCUC because of the mechanism it requests in #5 of the draft order.¹¹⁴

The City confirms that it does not take issue with the estimated costs, and that “there is not necessarily a presumption of unreasonableness of the costs.” Nevertheless, the City asks that “there be a mechanism, if needed, and the existence of the mechanism itself ought to avoid the need to use it, the reasonableness of costs could be assessed. But we're not assuming that that will need to be done, just want it to be available. And that should the prospect of review of the reasonableness of costs should provide some incentive to be diligent in that respect.”¹¹⁵

The City does not concede that its past acceptance of costs can be construed as the acceptance that such costs were reasonable.¹¹⁶

FEI

FEI submits that although the City is prepared to pay reasonable costs for relocations, the City has not explained what that means in practice. It is concerned that City is trying to, inappropriately, turn a preliminary estimate into a fixed fee contract, noting that while FEI would not charge the City for wasted or inefficient work, “there shouldn't be any ambiguity that as to whether the estimate is an estimate or a binding fixed fee amount.”¹¹⁷ FEI explains that its agreements are structured as providing an estimate, based on past practice, and that an estimate is, “by its explicit terms in the agreement, an estimate and it's effectively a cost-plus work.”¹¹⁸

Panel Determination

For the reasons set out below, we direct the City to pay FEI for the Offset Projects in accordance with the Letter Agreements.

The City agrees that it will pay “reasonable costs”. FEI in its Letter Agreement provides an estimate of the costs, but submits that the City should pay the actual costs incurred.

In our view, it is reasonable that the City pay the actual costs as the work is required for the City to complete its sewer project. In the absence of this motivation, there would be no reason for the Offset Projects to proceed. Therefore, the principle of cost causation supports the allocation of all of the Offset Project costs to the City.

¹¹⁴ Transcript Volume. 2, p. 152, PDF 116/125.

¹¹⁵ Ibid., p. 80, PDF 44/125.

¹¹⁶ Ibid., p. 77, PDF 41/125.

¹¹⁷ Transcript Volume 2, p. 126, PDF 90/125.

¹¹⁸ Ibid., p. 128, PDF 92/125.

This allocation is just and reasonable for FEI's ratepayers and does not impose any undue obligations on the taxpayers of the City of Richmond. Therefore, requiring the City to pay the actual costs is in the public interest.

If there is any disagreement as to the reasonableness of the actual costs incurred, the parties have the remedy of section 32 of the UCA.

3.4 Approved Terms and Conditions

In accordance with sections 32, or in the alternative section 36 of the UCA, the Panel specifies that the FEI Terms and Conditions, as revised herein, shall be the Approved Terms and Conditions for the Offset Projects.

The Panel directs FEI to undertake the Offset Projects and further directs that the Approved Terms and Conditions specified herein apply.

NOW THEREFORE, whether pursuant to section 32 or section 36 of the UCA, the BCUC orders as follows:

1. FortisBC Energy Inc. (FEI) is directed to undertake the Offset Projects as specified on the design drawings prepared by FEI and approved by the City's Engineering Planning Department, as provided in Appendix "D" of the Application.
2. FEI is directed to complete the Offset Projects in accordance with all applicable regulations, as well as in accordance with the Letter Agreement applicable to each Work and the Terms and Conditions of Order – Construction, attached to each Letter Agreement, being the Terms and Conditions attached to the applicable Letter Agreement dated August 31, 2020 or September 4, 2020 (collectively, the Agreements). Such Terms and Conditions shall be modified as set out below:

Section 1.1 – the description of the location of the Work, currently shown as Burkeville area, shall be replaced with one that is more specific to the location, such change to be specific to the area on the applicable Letter Agreement.

Section 11.3 – after the words "right to disclose the same" the following words shall be inserted such that section 11.3 shall read as follows "or which is required to be disclosed in accordance with applicable laws (including without limitation, the Freedom of Information and Protection of Privacy Act (British Columbia))":

OLD 11.3 The obligation of confidentiality set out above shall not apply to material, data or information which is known to the Customer prior to their receipt thereof, which is generally available to the public or which has been obtained from a third party which has the right to disclose the same. The confidentiality covenants of the Customer herein shall survive the termination of this Letter Agreement.

NEW 11.3. The obligation of confidentiality set out above shall not apply to material, data or information which is known to the Customer prior to their receipt thereof, which is generally available to the public or which has been obtained from a third party which has the right to disclose the same, or which is required to be disclosed in accordance with applicable laws (including without limitation, the Freedom of Information and Protection of Privacy Act (British Columbia)). The confidentiality covenants of the Customer herein shall survive the termination of this Letter Agreement.

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

NEW 12. Limitation of Liability

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

3. The parties are at liberty, but not required, to mutually agree on further revisions to the Terms and Conditions, for example, to change "Customer" to "Municipality" or as otherwise set out in FEI's email to the City dated April 27, 2021.
4. FEI is directed to complete the Offset Projects by June 30, 2021, or such later date as may be agreed to between FEI and the City.
5. The City is directed to pay FEI for the Offset Projects in accordance with the Letter Agreements.

DATED at the City of Vancouver, in the Province of British Columbia, this 23rd day of July 2021.

Original signed by:

D. M. Morton
Panel Chair / Commissioner

Original signed by:

E. B. Lockhart
Commissioner

Original signed by:

R. I. Mason
Commissioner