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March 14, 2019

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, B.C.
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Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Mr. Wruck:

Re: FortisBC Energy Inc. (FEI)

Project No. 1598974

Application for Approval of an Operating Agreement between the City of Kelowna and FEI (the Application)

Response to the British Columbia Utilities Commission (BCUC) Panel Information Request (IR) No. 2

On January 28, 2019, FEI filed its responses to BCUC Panel IR No. 1. On March 1, 2019, BCUC staff responded with BCUC Panel IR No. 2.

FEI respectfully submits the attached response to BCUC Panel IR No. 2, one day ahead of the filing deadline.

If further information is required, please contact Ilva Bevacqua, Manager of Regulatory Compliance and Administration at (604) 592-7664.

Sincerely,

FORTISBC ENERGY INC.

Original signed:

Doug Slater

Attachments

FortisBC Energy Inc. (FEI or the Company) Application for Approval of an Operating Agreement between the City of Kelowna (Kelowna) and FEI (the Application)	Submission Date: March 14, 2019
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1 **1.0 Reference: OPERATING AGREEMENT**

2 **Exhibit B-1, Appendix A, pp. 16–17**

3 **Start, Termination and Continuity**

4 Section 15.4 of the proposed operating agreement (Agreement) between FortisBC
5 Energy Inc. (FEI) and the City of Kelowna dated September 27, 2018 states:

6 This Agreement will have a term of 20 years from the date that it comes into
7 effect and after the initial term shall continue indefinitely unless terminated in
8 accordance with Section 15.5 below. [emphasis added]

9 Section 15.5.3 of the Agreement continues:

10 After the initial twenty (20) year term of this Agreement, either party may
11 terminate this Agreement by giving the other not less than one (1) year's notice of
12 termination.

13 FEI has applied for approval of the Agreement under section 23 (1) (g) (ii) of the Utilities
14 Commission Act, which states:

15 23 (1) The commission has general supervision of all public utilities and may
16 make orders about

17 ...

18 (g) other matters it considers necessary or advisable for

19 ...

20 (ii) the proper carrying out of this Act or of a contract, charter or franchise
21 involving use of public property or rights.

22 ...

23 For clarity, the Panel's following Information Requests (IRs) are not seeking responses
24 regarding the length of the initial term (20 years) of the Agreement. Rather the IRs are
25 seeking responses focusing on the provisions of sections 15.4 and 15.5.3 which have
26 the potential of continuing the Agreement in effect beyond 20 years and possibly
27 indefinitely (Evergreen Provision).

28 1.1 Please explain the reason for including the Evergreen Provision in the
29 Agreement.

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1 **Response:**

2 The intention of the Evergreen Provision is to provide stability and certainty to both FEI and the
3 City of Kelowna relating to FEI's use of public spaces within the City of Kelowna on terms and
4 conditions agreed to by both parties. These terms include the payment of an operating fee and
5 protocols to facilitate FEI's operations, and in both cases some predictability is advantageous.
6 The Evergreen Provision is convenient, efficient and cost-effective as it gives both parties the
7 ability to continue with the Agreement if it is working well and avoids the need for the parties to
8 track the expiry date of the Agreement and renegotiate the Agreement after twenty (20) years.
9 As a result, the City will continue to receive the negotiated operating fee without having to take
10 any positive action, and no administrative or regulatory process is required by FEI, the
11 municipality, or the BCUC.

12 Under the Evergreen Provision, the Agreement will continue in effect after the initial twenty (20)
13 year term on the same terms and conditions unless and until a party decides to terminate the
14 Agreement. If this occurs, the terminating party must give one year notice of the intent to
15 terminate and the parties have agreed to negotiate in good faith to enter into a new agreement
16 respecting the terms and conditions under which FEI may use public spaces within the City.
17 Section 15.7 of the Agreement reflects section 32 and 33 of the *Utilities Commission Act (UCA)*
18 and provides that should these negotiations break down or settlement is unlikely, either party
19 may apply to the BCUC to seek resolution of the terms and conditions applicable to FEI's
20 continued use of the public spaces.

21 The Evergreen Provision has been included in operating agreement terms with municipalities
22 since 2006 when the BCUC issued Orders C-7-06 through C-16-06, and those operating
23 agreement terms then formed the basis of the Interior Standard form Operating Agreement
24 terms, later amended by Order G-113-12, and further by Order C-8-14. Municipalities have not
25 previously requested revisions to or expressed concerns with the intent or use of the Evergreen
26 Provision, and it has been acceptable to FEI as well.

27
28

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30 1.2 Please explain whether the inclusion of the Evergreen Provision could adversely
31 affect the ability of the British Columbia Utilities Commission (BCUC) to provide
32 continued regulatory oversight over the relationship between FEI and the City of
33 Kelowna in the event the Agreement continues in effect beyond 20 years.

34

35 **Response:**

36 The inclusion of the Evergreen Provision does change the BCUC's role after year 20, but
37 whether or not that change is characterized as increasing or decreasing the BCUC's oversight
38 depends on the point of reference.



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1 The BCUC's role changes if the BCUC approves the Agreement with the Evergreen Provision
2 because it means the Agreement will continue without regulatory intervention beyond the initial
3 twenty (20) year term on the same terms and conditions approved by the BCUC now, unless
4 and until one party gives the other party one (1) year's notice of termination. From that
5 perspective, one might reasonably say that there is less BCUC oversight.

6 However, the one-year notice provision in the Evergreen Provision increases the potential for
7 the BCUC to influence the FEI-Kelowna relationship between the years 21 to 40, relative to
8 what would be the case if the parties were to enter another 20-year agreement. Another 20-
9 year agreement would mean that the terms were set for the next 20 years. By contrast, with the
10 Evergreen Provision, in the event that the BCUC were to express to FEI its view (e.g., in year
11 25) that the operating agreement was no longer serving customers as it should, there would be
12 a mechanism whereby FEI could terminate on one year's notice.

13 Some aspects of the BCUC's oversight do not change with the Evergreen Provision. Under
14 section 32 and 33 of the UCA, the BCUC has the jurisdiction to resolve disputes between FEI
15 and the City of Kelowna regarding the use of public spaces. The Agreement sets out the
16 agreed terms and conditions for the use of public places within the City of Kelowna and includes
17 a provision that acknowledges the jurisdiction of the BCUC to resolve disputes between FEI and
18 the municipality (section 17.2). Further, if a municipality acts contrary to the Agreement it may
19 be in contravention of section 121 of the UCA.

20 In short, we believe that an initial 20-year term followed by a one-year notice provision provides
21 an appropriate period of stability and consistency in the relationship, while still providing a basis
22 for the BCUC to exert some influence in the event the terms are no longer working.

23
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26 1.3 Please explain the implications, if any, of amending the Agreement to eliminate
27 the Evergreen Provision and replace it with a fixed term ending after 20 years.

28

29 **Response:**

30 As discussed in the response to BCUC Panel IR 2.1.1, amending the Agreement to eliminate
31 the Evergreen Provision and replacing it with a fixed term would necessitate having to enter into
32 new negotiations even if both parties find the Agreement continues to work well. (If it wasn't
33 working for one or both parties, presumably one or both parties would have the right to
34 termination, triggering negotiations by the parties anyway.) The new agreement would be
35 submitted to the BCUC for approval, which would otherwise be unnecessary.

36 Further, amending the Agreement in this way would mean that it would differ from the terms of
37 the other operating agreements approved by the BCUC since 2006 which also contain the
38 Evergreen Provision. From FEI's perspective, consistency among all agreements is not an
39 objective in and of itself, but our experience has been that municipalities do take note of what



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1 other municipal operating agreements provide. It assists to have transparency around the
2 reason for any differences.

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6 1.4 Please provide this IR to the City of Kelowna and request it (if willing) to provide
7 a response to you for submission to the BCUC.

8

9 **Response:**

10 FEI provided a copy of its responses to BCUC Panel IRs 2.1.1 to 2.1.3 to the City of Kelowna
11 and the City has confirmed that they are in full agreement with FEI's responses and have asked
12 FEI to advise the BCUC of that view.

13