

## OPERATING AGREEMENT

**THIS OPERATING AGREEMENT** (the “Agreement”) made this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

**BETWEEN:**

**CITY OF KELOWNA**, a municipal corporation incorporated under the laws of the Province of British Columbia

(hereinafter called the “**Municipality**”)

OF THE FIRST PART

**AND:**

**FORTISBC ENERGY INC.**, a body corporate duly incorporated under the laws of the Province of British Columbia, formerly known as Terasen Gas Inc., and having its registered office in the City of Vancouver, in the Province of British Columbia

(hereinafter called “**FortisBC**”)

OF THE SECOND PART

**RECITALS:**

- A. Whereas by a certificate of public convenience and necessity (CPCN), FortisBC was granted the right to construct and operate gas distribution facilities within the Municipality;
- B. And whereas pursuant to the Community Charter, S.B.C. 2003, a Municipal council may, by resolution adopt and enter into a licensing and operating agreement;
- C. And whereas FortisBC and the Municipality are the parties to a Franchise or Operating Agreement dated the 2<sup>nd</sup> day of April, 1980 and subsequently renewed by various amending agreements, which will expire on October 18, 2018;
- D. And whereas FortisBC and the Municipality wish to enter into this Agreement to clarify and settle the terms and conditions under which FortisBC shall exercise its rights to use Public Places in conducting its business of distributing Gas within the Municipality.

**NOW THEREFORE THIS AGREEMENT WITNESSES** that the parties covenant and agree as follows:

## **1. DEFINITIONS**

For the purposes of this Agreement:

- (a) “Boundary Limits” means the boundary limits of the Municipality as they exist from time to time and that determine the area over which the Municipality has control and authority;
- (b) “BCUC” means the British Columbia Utilities Commission or successor having regulatory jurisdiction over natural gas distribution utilities in British Columbia;
- (c) “CPCN” means a Certificate of Public Convenience and Necessity granted by the BCUC which allows FortisBC to operate, maintain and install Company Facilities for the distribution of Gas within the Municipality;
- (d) “Company Facilities” means FortisBC’s facilities, including pipes, buildings, structures, valves, signage, storage facilities, machinery, vehicles and other equipment used to maintain, operate, renew, repair, construct and monitor a natural Gas Distribution and transmission system;
- (e) “Distribution Pipelines” means pipelines operating at a pressure less than 2071 kilopascals (300 psi);
- (f) “FortisBC Employees” means personnel employed by or engaged by FortisBC including officers, employees, directors, contractors, and agents;
- (g) “Gas” means natural gas, propane, methane, synthetic gas, liquefied petroleum in a gaseous form or any mixture thereof;
- (h) “Gas Distribution” means fixed equipment, structures, plastic and metal lines and pipe, valves, fittings, appliances and related facilities used or intended for the purpose of conveying, testing, monitoring, distributing, mixing, storing, measuring and delivering Gas and making it available for use within the Municipality;
- (i) “Highway” means street, road, lane, bridge or viaduct controlled by the Municipality or Provincial Government of British Columbia;
- (j) “Mains” means pipes used by FortisBC to carry gas for general or collective use for the purposes of Gas Distribution;
- (k) “Municipal Employees” means personnel employed by or engaged by the municipality, including officers, employees, directors, contractors and agents;

- (l) “Municipal Facilities” means any facilities, including highways, sidewalks, conduits, manholes, equipment, machinery, pipes, wires, valves, buildings, structures, signage, bridges, viaducts and other equipment within the Public Places used by the Municipality for the purposes of its public works or municipal operations;
- (m) “Municipal Supervisor” means the Municipal Engineer or other such person designated by the Municipality to receive notices and issue approval as set out in this Agreement;
- (n) “New Work” means any installation, construction, repair, maintenance, alteration, extension or removal work of the Company Facilities in Public Places except;
  - (i) routine maintenance and repair of the Company Facilities that does not involve any cutting of asphalted road surface;
  - (ii) installation or repair of Service Lines whether or not such installation or repair involves cutting of asphalted road surface; or
  - (iii) emergency work;but notwithstanding such exceptions, New Work shall include any installation, construction or removal of the Company Facilities in Public Places that are planned to disturb underground Municipal Facilities;
- (o) “Pipeline Markers” means post, signage or any similar means of identification used to show the general location of Transmission Pipelines and distribution pipelines or FortisBC Rights of Way;
- (p) “Planned Facilities” means those facilities not yet constructed but which have been identified by way of documented plans for the works of the Municipality, for works of third parties, where such works are identified by documented plans approved by the Municipality, or for works of FortisBC submitted to the Municipality subject to Municipal approval;
- (q) “Public Places” means any public thoroughfare, highway, road, street, lane, alley, trail, square, park, bridge, right of way, viaduct, subway, watercourse or other public place in the Municipality;
- (r) “Service Line” means that portion of FortisBC’s gas distribution system extending from a Main to the inlet of a meter set and, for the purposes of this Agreement, includes a service header and service stubs;
- (s) “Transmission Pipeline” means a pipeline of FortisBC having an operating pressure in excess of 2071 kilopascals (300 psi); and
- (t) “Utilities” means the facilities or operations of any water, waste water, sewer, telecommunications, energy, cable service or similar service provider located in Public Places within the Municipality.

## **2. INTERPRETATION**

For the purposes of interpreting this Agreement:

- (a) the headings are for convenience only and are not intended as a guide to interpretation of this Agreement;
- (b) words in the singular include the plural, words importing a corporate entity include individuals, and vice versa;
- (c) in calculating time where the agreement refers to “at least” or “not less than” a number of days, weeks, months or years, the first and last days must be excluded and where the agreement refers to “at least” or “not less than” a number of days, Saturdays, Sundays and holidays must be excluded;
- (d) the word “including”, when following any general term or statement, is not to be construed as limiting the general term or statement to the specific items or matters, but rather as permitting the general term or statement to refer to all other items or matters that could reasonably fall within the broadest possible scope of the general term or statement.

## **3. OBLIGATION TO ACT IN GOOD FAITH**

FortisBC and the Municipality acknowledge and agree that they will act in good faith, in carrying out the terms and conditions of this Agreement and within reasonable time frames, carry out the obligations under this Agreement.

FortisBC and the Municipality will at all times carry out all work and operations with the due care and attention that is necessary to safeguard the interests of the public, their own employees, and the other party’s employees.

## **4. FORTISBC RIGHTS TO ACCESS & USE PUBLIC PLACES**

The Municipality hereby acknowledges FortisBC’s rights to:

- (a) develop, construct, install, maintain or remove Company Facilities on, over, in and under Public Places in the Municipality;
- (b) enter on Public Places from time to time as may be reasonably necessary for the purpose of maintaining, repairing, or operating the Company’s Facilities;
- (c) place pipeline identification markers within Public Places where a Transmission Pipeline or Distribution Pipeline crosses or is otherwise within a Public Place;

subject to terms and conditions defined in this Agreement.

## **5. FORTISBC COMPLIANCE WITH STANDARDS FOR USE OF PUBLIC PLACES**

### **5.1 Non-discriminatory Standards for FortisBC**

In its use of Public Places, FortisBC shall comply with all Federal and Provincial laws, regulations and codes and shall comply with all Municipal bylaws, standards and policies except that FortisBC shall not have to comply with such Municipal bylaws, standards and policies that:

- (a) conflict with terms of this Agreement or limit any rights or concessions granted to FortisBC by the Municipality under this Agreement; or
- (b) conflict with other legislation governing FortisBC.

Further, where the Municipality has established requirements and standards for work in Public Places, the Municipality shall apply them in a fair, reasonable and non-discriminatory manner consistent with the manner that the Municipality establishes requirements on other Utilities.

### **5.2 Provide emergency contacts.**

FortisBC will provide the Municipality with a 24 hour emergency contact number which the Municipality will use to notify FortisBC of emergencies including; gas leaks, third party accidents around work sites, ruptures of gas lines, and other potentially hazardous situations.

### **5.3 Assist with facility locates**

FortisBC will, at no cost to the Municipality, provide locations of its Company Facilities within a time frame as may be reasonably requested by the Municipality unless the reason for the request is the result of an emergency; in which case the information shall be provided forthwith. FortisBC shall provide gas locations from FortisBC records. FortisBC shall perform on site facility locates in accordance with the *Safety Standards Act – Gas Safety Regulations* Section 39.

## **6. FORTISBC WORK OBLIGATIONS:**

### **6.1 Notices - General Requirements**

#### **6.1.1. Notice for New Work**

For New Work, FortisBC shall give notice to the Municipality or such officer or official thereof who has been designated from time to time by the Municipality that it intends to perform such New Work. The Notice shall include:

- (a) a plan and specifications showing the proposed location and dimensions of the New Work;

- (b) FortisBC's plans for the restoration of the Public Place affected by the New Work if FortisBC's restoration plans are different from those set out in Section 6.4.2 of this Agreement;
- (c) the name of a FortisBC representative who may be contacted for more information;
- (d) projected commencement and completion dates; and
- (e) such other information relevant to the New Work as the Municipality may reasonably request from time to time.

#### **6.1.2. Exception for Emergency**

Where FortisBC is required to carry out work urgently in the interests of public safety or health or to preserve the safety of property and Company Facilities, FortisBC shall not be required to give prior notice but shall do so as soon as possible thereafter.

#### **6.1.3. Municipal Approval for New Work**

The Municipality may object to the New Work on the following grounds:

- (a) the proposed location of the New Work conflicts with existing Municipal Facilities, existing third party facilities or Planned Facilities; or
- (b) the proposed location or design of the New Work is likely to compromise public safety or does not conform with Municipal bylaws, standards or policies; or
- (c) in instances where FortisBC can delay the New Work without compromising the supply, capacity or safety of its Gas Distribution System or its customers' need for gas service and the Municipality intends within the next 3 months to undertake work in the same location and wishes to co-ordinate both work;

by providing FortisBC with notice of its objections, provided such objections are reasonable, no more than 10 days after receiving FortisBC's notice of New Work. If the Municipality has not provided such notice of its objections to FortisBC, or in the case of large and complex New Work, the Municipality has not provided FortisBC with a notice to extend the time to reply to FortisBC until a stated time, the Municipality shall be deemed to have granted its approval of the New Work. The Municipality shall not otherwise withhold or delay its approval.

In addition, the Municipality may request FortisBC to provide the public with notice of the New Work.

#### **6.1.4. Work Not to Proceed**

If the Municipality has notified FortisBC of its objections or has requested a time extension, no more than 10 days after receiving FortisBC's notice of New Work, FortisBC shall not proceed with the New Work until FortisBC and the Municipality have agreed upon a resolution to the Municipality's objections. If the Municipality and FortisBC are unable to agree, then the matter shall be resolved in accordance with Section 17 (Resolution of Disputes).

## **6.2 Notice of Service Lines**

FortisBC shall provide the Municipality with notice of its intent to install, remove or repair Service Lines no less than three (3) days prior to commencement of such work. FortisBC's request for the location of the Municipality's utilities shall be deemed to be a notice of FortisBC's intent to install, remove or repair Service Lines. The Municipality may object to such work on the same grounds as set out in Subsection 6.1.3 (a) and (b) above by providing FortisBC with notice of its objections within two (2) days of receiving FortisBC's notice. If the Municipality has not provided such notice of its objections to FortisBC, the Municipality shall be deemed to have granted its approval of the installation, removal or repair of the Service Lines. The Municipality shall not otherwise withhold or delay its approval.

## **6.3 FortisBC to Obtain Locate Information**

Prior to conducting any New Work, FortisBC shall locate other Utilities and satisfy itself that it is clear to proceed.

## **6.4 Work Standards**

All work carried out by FortisBC shall be carried out in accordance with sound engineering practices.

### **6.4.1. Specific Work Requirements Remove Materials**

FortisBC shall keep its work sites clean and tidy. FortisBC shall remove all rubbish and surplus material from Public Places upon completion of its work.

The Company shall not leave any part of its gas system in such a state as to constitute a nuisance or a danger to the public through neglect, non-use and want or repair.

### **6.4.2. Restore Surface and Subsurface**

Where FortisBC has performed any operations or New Work in a Public Place, FortisBC shall restore without unreasonable delay and return such Public Place, as much as reasonably practical, to the condition and use which existed prior to such activity. The restoration will be in accordance with the specifications set out by the Municipality. Such specifications may include the degree and nature of compaction, subsurface structure, surface finish and landscaping required.

Without limiting the generality of this section and by way of example only, the Municipality may require FortisBC to restore asphalt and concrete surfaces with a permanent repair or a temporary repair. Should a temporary repair be directed, FortisBC or the Municipality at its discretion will subsequently construct a permanent repair in accordance to its usual maintenance/replacement schedule for that area. The cost of permanent and temporary repairs to remediate Highway surfaces will be at the expense of FortisBC proportional to the surface area affected by the New Work.

Where FortisBC is required to cut pavement on a Public Place such cuts and restoration will be limited to less than 1.5 meters unless at the discretion of FortisBC a larger excavation is warranted due to the depth or size of the pipe or requirements of the Workers' Compensation Board or other relevant Provincial or Federal regulations. FortisBC will be responsible for any repairs and maintenance of the surface repair for a period of three (3) years. However, where pavement restoration has been conducted by the Municipality, whether or not such work was undertaken to repair cuts on FortisBC's behalf, FortisBC shall not be responsible for the repairs or maintenance of the surface repair.

#### **6.4.3. Repair Damage to Municipal Facilities**

To the extent that any of the work being done by FortisBC results in damage to Municipal Facilities or Public Places, other than the usual physical disruption to Public Places caused by the installation of Company Facilities that FortisBC shall restore in accordance with Section 6.4.2 above, FortisBC will, as soon as reasonably possible, report such damage and reimburse the Municipality for its costs arising from such damage calculated in accordance with Section 14.1 below. Where such damage results directly from inaccurate or incomplete information supplied by Municipality, and FortisBC has complied with all applicable laws and regulations, and with instructions supplied by the Municipality, then the cost of repairing damaged Municipal Facilities or Public Places will be at the expense of the Municipality.

#### **6.5 Conformity Requirement**

The New Work must be carried out in conformity with FortisBC's notice of New Work except that FortisBC may make in-field design changes when carrying out the New Work to accommodate field conditions which could not have been reasonably foreseen by FortisBC. If such in-field conditions materially impact FortisBC's plans for restoration or materially change the impact of FortisBC's work on Municipal Facilities, other than in respect of projected commencement and completion dates, FortisBC shall notify the Municipality of the changes and the reasons for them as soon as reasonably possible.

#### **6.6 Non-Compliance**

If Company Facilities located in Public Places are later found not to be located in compliance with FortisBC's notice of New Work provided in accordance with Section



6.1 and 6.5, then any alteration or upgrading required to bring them into compliance with such notice will be at the expense of FortisBC provided that the work has not been altered, damaged or modified by the Municipality or a third party.

## **7. COMPANY FACILITY CHANGES REQUIRED BY THE MUNICIPALITY**

### **7.1 Notice of Closure of Public Places**

Before any Public Places containing Company Facilities may be legally closed or alienated by the Municipality, the Municipality shall as soon as reasonably possible notify FortisBC of its intent to close or alienate such Public Places and either:

- (a) grant FortisBC a registered statutory right of way in a form satisfactory to FortisBC so as to maintain FortisBC's right to use the land; or
- (b) request FortisBC to remove and (if possible and practicable) relocate those Company Facilities affected by such closure or alienation at the sole cost of the Municipality.

If the Public Places are expropriated by an expropriating authority and FortisBC is required to remove the Company Facilities then the Municipality shall as soon as reasonably possible notify FortisBC of the expropriation. This provision is applicable when the Municipality receives official notice of expropriation or otherwise becomes aware of expropriation through communications with the expropriating authority.

## **8. FACILITY CHANGES REQUIRED**

### **8.1 By FortisBC**

FortisBC may provide Notice to the Municipality that it requires Municipal Facilities to be altered, changed, temporarily shut-down, temporarily by-passed, or relocated to accommodate its requirements. The Municipality will comply with FortisBC's requests to the extent it is reasonably able to do so and with reasonable speed and dispatch after receipt of written request. FortisBC agrees to pay for all of the costs for changes to the affected Municipal Facilities.

### **8.2 By the Municipality**

The Municipality may provide Notice to FortisBC that it requires Company Facilities to be altered, changed or relocated to accommodate its requirements. FortisBC will comply with the Municipality's requests to the extent it is reasonably able to do so and with reasonable speed and dispatch after receipt of written request. The Municipality agrees to pay for all of the costs for changes to the affected Company Facilities. This section 8.2 is an agreement between the Municipality and FortisBC for the purpose of section 76(1)(c) of the *Oil and Gas Activities Act*.

## **9. JOINT PLANNING, COOPERATION AND COORDINATION**

### **9.1 Conduct of Construction and Maintenance Activities**

The Municipality and FortisBC agree to use reasonable efforts in carrying out their construction and maintenance activities in a manner that is responsive to the effect that it may have on the other party, as well as other users of Public Places. Such reasonable efforts include attending the planning meetings described in Section 9.2 below and reducing as much as is practical, the obstruction of access to Public Places, and interference with the facilities and activities of others in Public Places.

### **9.2 Communication and Coordination Activities**

At the initiation of the Municipality, representatives of the Municipality, FortisBC and other affected Utilities and third parties will meet each year, prior to the construction season, to discuss the parties' anticipated construction activities for that year. Such discussions will include

- (a) the use of common trenching, common utility access facilities and such other common facilities as may be commercially reasonable and comply with operating and safety standards; and
- (b) the consolidation of planned maintenance work where pavement must be cut in order to avoid multiple excavations.

### **9.3 Municipal Planning Lead**

During such annual planning meetings, the Municipality shall lead the planning process for all Utilities and third parties with Planned Facilities in Public Places.

## **10. MUTUAL INDEMNITY**

### **10.1 Indemnity by FortisBC**

**10.1.1.** FortisBC indemnifies and protects and saves the Municipality harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal discomfort and illness), loss or damage to property caused by FortisBC in:

- (a) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Company's Facilities on or under any Public Places;
  - (b) any breach of this Agreement by FortisBC;
- except to the extent contributed by negligence or default of the Municipality or the Municipal Employees.

**10.1.2.** This indemnity expressly extends to all acts and omissions of FortisBC Employees.

## **10.2 Indemnity by the Municipality**

**10.2.1.** The Municipality indemnifies and protects and saves FortisBC harmless from and against all claims by third parties in respect to loss of life, personal injury (including, in all cases, personal discomfort and illness), loss or damage to property to the extent caused by the Municipality in:

- (a) placing, constructing, renewing, altering, repairing, maintaining, removing, extending, operating or using the Municipal Facilities on or under any Public Places;
  - (b) any breach of this Agreement by the Municipality;
- except to the extent contributed by the negligence or default of FortisBC or FortisBC Employees.

**10.2.2.** This indemnity expressly extends to all acts and omissions of Municipal Employees.

## **10.3 Limitations on Municipality's Liability**

All property of FortisBC kept or stored on the Public Places will be kept or stored at the risk of FortisBC. For further certainty, FortisBC acknowledges that the Municipality has made no representations or warranties as to the state of repair or the suitability of the Public Places for any business, activity or purpose whatsoever. FortisBC accepts its use of Public Places on an "as is" basis.

# **11. OPERATING FEE**

## **11.1 Fee Calculation**

**11.1.1.** FortisBC agrees to pay to the Municipality a fee of three percent (3%) of the gross revenues (excluding taxes) received by FortisBC for provision and distribution of all gas consumed within the Boundary Limits of the Municipality provided that the Municipality is permitted by law to charge such a fee. Such amount will not include any amount received by FortisBC for gas supplied or sold for resale.

**11.1.2.** The Municipality will provide FortisBC with thirty (30) days prior written notice of any boundary expansion so that existing and new customers in the expanded area can be included as a part of the annual payment fee.

**11.1.3.** FortisBC will be responsible for adding those existing and new customers within the new Municipal boundary upon receipt of such notice from the Municipality and the revised calculation of the fee will commence

effective the date that is the later of the date of actual boundary change or thirty (30) days after the notification under section 11.1.2.

## **11.2 Payment Date and Period**

Payments by FortisBC to the Municipality will be made on the first day of March of each year of the Agreement in respect of the amount received by FortisBC during that portion of the term of this Agreement which is in the immediately preceding calendar year. By way of example only, payment made on March 1, 2018 will be the amount received during the 2017 calendar year.

## **11.3 BCUC Decision or Provincial Legislation**

In the event that a decision by the BCUC, other than periodic rate changes as a result of commodity, delivery or margin increases or decreases, or new legislation by the Provincial Government, impacts the operating fee being paid to the Municipality so as to increase it or decrease it by more than 5% annually at the time of the decision or in subsequent years, the parties shall negotiate a new operating fee formula which best reflects the revenue stream received by the Municipality under this Agreement. For greater certainty, the parties acknowledge that a change to the BCUC's decision that FortisBC shall provide the agency billing and collections service for marketers on a mandatory basis, as set out in the "Business Rules for Commodity Unbundling dated June 5, 2003 as set out in Appendix A to Letter No. L-25-03, may impact the operating fee being paid to the Municipality.

## **12. OTHER APPROVALS, PERMITS OR LICENSES**

Except as specifically provided in this Agreement, the Municipality will not require FortisBC to seek or obtain approvals, permits or licenses. The Municipality will not charge or levy against FortisBC any approval, license, inspection or permit fee, or charge of any other type, that in any manner is related to or associated with FortisBC constructing, installing, renewing, altering, repairing, maintaining or operating Company Facilities on any Public Places or in any manner related to or associated with FortisBC exercising the powers and rights granted to it by this Agreement (other than for repair of damage to the Municipal Facilities or Public Places in accordance with Section 14).

If the Municipality does charge or levy fees or costs against FortisBC (other than for repair of damage to the Municipal Facilities or Public Places in accordance with Section 14) then FortisBC may reduce the annual operating fee payable to the Municipality under Section 11 by an amount equal to such charges, fees or costs or in the event no annual operating fee is payable, FortisBC will not be required to pay such charges or fees or costs.

## 13. MUNICIPAL OBLIGATIONS

### 13.1 Municipal Work

**13.1.1.** Before the Municipality undertakes any construction or maintenance activity which is likely to affect a part of the Company Facilities, excluding routine maintenance and repair that does not involve any cutting of asphalted road surface, it must give FortisBC notice not less than 10 days before commencing such construction or maintenance activity.

Before the Municipality undertakes routine maintenance and repair that does not involve any cutting of asphalted road surface and is likely to affect Company Facilities, it must give FortisBC notice not less than 3 days before commencing such construction or maintenance activity.

**13.1.2.** Where the Municipality is required to carry out work urgently in the interests of public safety or health or to preserve the safety of property and Municipal Facilities, the Municipality shall not be required to give prior notice but shall do so as soon as possible thereafter.

**13.1.3.** FortisBC will be entitled to appoint at its cost a representative to inspect any construction or maintenance activity undertaken by the Municipality. The provisions of this section do not relieve the Municipality of its responsibilities under the *Gas Safety Act*, *Oil and Gas Activities Act*, and successor legislation, regulations thereunder, or the requirements of the BC Workers' Compensation Board.

**13.1.4.** In addition, the Municipality shall provide Notice to FortisBC of any work planned that will be adjacent to, across, over or under a Transmission Pipeline or within a right-of-way for a Transmission Pipeline. To the extent that FortisBC requires that permit be issued for construction or other activities within a Transmission Pipeline right-of-way, the Municipality will submit an application for such a permit in sufficient time for the application to be reviewed and approved by FortisBC prior to the commencement of the construction or other activity.

**13.1.5.** The Municipality shall assist FortisBC in FortisBC's efforts to reduce instances of residences being built over gas lines and other similarly unsafe building practices by third parties.

**13.1.6.** The Municipality shall not interfere with Transmission Pipeline markers.

**13.1.7.** The Municipality shall provide notice to FortisBC of any damage caused by the Municipality to Company Facilities or Transmission Pipeline Markers as soon as reasonably possible. To the extent that any of the work being done by the Municipality results in damage to the Company Facilities, the Municipality will report such damage and pay FortisBC its costs arising from such damage in accordance with Section 14.1 below.

Where such damage results directly from inaccurate or incomplete information supplied by FortisBC, and the Municipality has complied with all applicable laws and regulations, and with instructions supplied by FortisBC, then the cost of repairing the damaged Company Facilities will be at the expense of FortisBC.

**13.1.8.** The Municipality shall notify FortisBC of any new bylaws, standards or policies adopted or passed by the Municipality that are likely to affect FortisBC's operations in Public Places.

## **14. COSTS AND PAYMENT PROCEDURES**

### **14.1 Definition of Costs**

Wherever one party is required to pay the other party Costs as a result of damage caused by one party to the other's property, the Costs shall be:

- (a) all direct expenses and disbursements incurred to restore such property to as good a state of repair as had existed prior to the damage;
- (b) reasonable administration and overhead charges on labour, equipment and materials;
- (c) such taxes as may be required in the appropriate jurisdiction;
- (d) in the case of loss of gas or re-lights, the cost of the commodity as determined by the length of time that the gas is leaking, size of pipe and hole and the pressure; and
- (e) in the case of water, electrical or sewer, cost of supplying alternate service.

### **14.2 Cost Claim Procedures**

**14.2.1.** Wherever one party is claiming Costs of the other party in regard to any work or issue arising under this Agreement the claiming party shall:

- (a) provide an invoice to the other party no later than one year after incurring Costs;
- (b) provide detailed descriptions of the cost items;
- (c) provide the time period the invoice covers;
- (d) provide a minimum of 21 day terms for payment of the invoice; and
- (e) provide for late payment interest at the rate consistent with the party's policy for charging for late payments, which rate must be reasonable;

**14.2.2.** The party claiming Costs shall have no right of set off for these invoices against any amounts otherwise payable to the other party, except to the extent so approved in writing by the other party.

### **14.3 Cost Verification Procedures**

**14.3.1.** Wherever either party is the recipient of or is claiming Costs and or fees that party may at its own discretion request from the other party:

- (a) Certification by an officer or designated representative verifying the calculations and computations of the Costs and or fees, or
- (b) An internal review or audit of the calculations and computations of the Costs and or fees, with the internal review or audit to be carried out by a person appointed by the party being asked to provide the review; or
- (c) An independent external audit of the calculations and computations of the costs and fees, with the independent external auditor being a Chartered or a Certified General Accountant in British Columbia appointed by the party requesting the external audit;

**14.3.2.** The costs of this cost verification process shall be borne by the party who is required to supply the information except as otherwise specified providing the frequency of such requests does not exceed once per calendar year. For all future cases which occur in that calendar year, the costs of such further verifications shall be at the expense of the requester.

Where the independent external audit finds and establishes errors representing a variance greater than 2% of the originally calculated value in favour of the party claiming Costs, the costs shall be at the expense of the party supplying the information. Once an error has been verified, payment or refund of the amount found to be in error will be made within 21 days.

## **15. START, TERMINATION AND CONTINUITY**

### **15.1 Municipal Authority to Enter into Agreement**

Prior to entering into this Agreement the Municipality will complete all procedures, obtain all consents and enact and bring into force all resolutions required under the *Community Charter*, and amendments thereto, and all other applicable legislation, to approve and authorize this Agreement.

### **15.2 Agreement Not Binding Until Approved by BCUC**

**15.2.1.** This Agreement will not come into effect and does not bind the parties until FortisBC has obtained such approvals of this Agreement, or its terms, as may be required under the *Utilities Commission Act*. Upon executing this Agreement FortisBC shall make reasonable efforts to fulfill this

condition. If this condition is not fulfilled or waived within one (1) year of the date of execution of this Agreement, then the obligation on FortisBC to make reasonable efforts to fulfill this condition will terminate, and neither party will have any further obligation to the other under this Agreement.

### **15.3 Termination of Franchise Agreement**

If not already terminated or expired, any franchise and operating agreement between the Municipality and FortisBC is terminated upon the effective date of this Agreement as referred to in section 15.2 of this Agreement.

### **15.4 Term of Agreement**

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

### **15.5 Termination of Agreement**

**15.5.1.** This Agreement may be terminated by the Municipality upon the occurrence of any of the following events:

- (a) FortisBC admits its inability to pay its debts generally as they become due or otherwise acknowledges its insolvency;
- (b) FortisBC starts proceedings or takes any action to commence or executes an agreement to authorize its participation in any proceeding:
  - (i) seeking to adjudicate it bankrupt or insolvent;
  - (ii) seeking liquidation, reorganization, arrangement, protection, relief or composition of it or any of its property or debt or making a proposal with respect to it under any law relating to bankruptcy, insolvency, reorganization or compromise of debts or other similar laws; or
  - (iii) seeking the appointment of a receiver, trustee, agent, custodian or other similar official for it or for any substantial part of its assets or if a creditor seeks the appointment of a receiver, trustee, agent, custodian or other similar official for any substantial part of its assets; and such proceeding is not dismissed, discharged, stayed or restrained within 20 days of the Municipality becoming aware of it.

**15.5.2.** Either party may terminate if other breaches any term, provision, obligation hereunder and such breach, is a material major breach, and has not been cured within sixty (60) days of receipt of Notice of such breach. A Party will not be considered to be in default if such matter is in dispute



or has been referred to commercial arbitration, the outcome of which is pending, or is being resolved in good faith compliance with the dispute resolution and arbitration processes of this Agreement.

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

## **15.6 Amendments and Waivers**

This Agreement may be amended only by an agreement in writing signed by the parties. No waiver of any provision nor consent to any exception to the terms of this Agreement shall be effective unless in writing and signed by the parties to be bound, and then only to the specific purpose, extent and instance so provided. No waiver, delay or failure to exercise any rights under this Agreement shall be construed as a continuing waiver of such right or as a waiver of any other right under this Agreement.

The parties agree to meet to discuss the operations of the Agreement within thirty (30) days of either party making the request. Such a meeting will determine whether any amendments are required to this Agreement and the parties shall discuss any proposed amendments with a view to maximizing the benefit of the relationship.

## **15.7 Negotiations on Termination or Expiry of this Agreement**

Upon one party giving Notice to the other of termination of this Agreement, the parties shall negotiate in good faith to enter into a new agreement with respect to the terms and conditions under which FortisBC may use the Public Places. In the event that such negotiations break down and in the opinion of one or other of the parties acting in good faith that settlement is unlikely, either party may give Notice to the other of its intention to apply to the BCUC to seek resolution of the terms and conditions applicable to FortisBC's continued operations and construction activities within the Municipality.

## **15.8 Continuity In The Event No Agreement Is Settled**

Upon termination of this Agreement, if a new agreement has not been ratified or if the BCUC has not imposed the terms and conditions under which FortisBC may use the Public Places, the following provisions will apply:

- (a) The Company Facilities within the boundary limits of the Municipality both before and after the date of this Agreement, shall remain FortisBC's property and shall remain in the Public Places.
- (b) The Company Facilities may continue to be used by FortisBC for the purposes of its business, or removed from Public Places in whole or in part at FortisBC's sole discretion.
- (c) FortisBC may continue to use Public Places within the Municipality for the purposes of its business. FortisBC's employees, may enter upon all the Public Places within the Boundary Limits of the Municipality to maintain,

operate, install, construct, renew, alter, or place Company Facilities; provided that FortisBC continues to operate in a manner consistent with the terms and conditions of this Agreement as if the term had been extended except with respect to the payment of the operating fee.

- (d) FortisBC will with the support of the Municipality take such steps necessary to seek BCUC approvals of the extension of terms and conditions including payment of the operating fee under the terminated agreement during negotiations of a new agreement.
- (e) Should FortisBC no longer be authorized or required to pay the operating fee under any Agreement between it and the Municipality or by any order of the BCUC, the Municipality shall be free to apply such approval, permit and licence fees, charges and levies it is legally entitled to collect.

## **16. ACCOMMODATION OF FUTURE CHANGES**

### **16.1 Outsourcing of Infrastructure Management**

In the event that the Municipality assigns the task of infrastructure management to a third party the Municipality will ensure that:

- (a) its contracts for such infrastructure management contain provisions that will allow the Municipality to meet its obligations under and to comply with the terms and conditions of, this Agreement, and
- (b) FortisBC will accept the appointment of such third party as the Municipality's agent or subcontractor to enable such third party to deal directly with FortisBC so as to enable the Municipality to comply with the terms, obligations and conditions of this Agreement.

### **16.2 Changes to the Community Charter**

In the event that the provisions of the *Community Charter* or other legislation affecting the rights and powers of municipalities change in such a way as to materially, in the opinion of the Municipality, affect municipal powers in respect to matters dealt with in this Agreement,

- (a) the Municipality may within one year of the change coming into effect propose new agreement terms with respect to only those specific changes and FortisBC agrees to negotiate such terms; and
- (b) failing satisfactory resolution of the terms of the Agreement either of the parties may seek resolution through the Dispute Resolution Process, Section 17.

### **16.3 Changes to the Utilities Commission Act**

In the event that the provisions of the *Utilities Commission Act* or other legislation affecting the rights and powers of regulated Utilities change in such a way as to materially, in FortisBC's opinion, affect FortisBC's powers in respect to matters dealt with in this Agreement,

- (a) FortisBC may within one year of the change coming into effect propose new agreement terms with respect to only those specific changes and the Municipality agrees to negotiate such terms; and
- (b) failing satisfactory resolution either of the parties will seek resolution through the Dispute Resolution Process, Section 17.

## **17. DISPUTE RESOLUTION**

### **17.1 Mediation**

Where any dispute arises out of or in connection with this Agreement, including failure of the parties to reach agreement on any matter arising in connection with this Agreement, the parties agree to try to resolve the dispute by participating in a structured mediation conference with a mediator under the Rules of Procedure for Commercial Mediation of The Canadian Foundation for Dispute Resolution.

### **17.2 Referral to the BCUC or Arbitration**

If the parties fail to resolve the dispute through mediation, the unresolved dispute shall be referred to the BCUC if within its jurisdiction. If the matter is not within the jurisdiction of the BCUC, such unresolved dispute shall be referred to, and finally resolved or determined by arbitration under the Rules of Procedure for Commercial Arbitration of The Canadian Foundation for Dispute Resolution. Unless the parties agree otherwise the arbitration will be conducted by a single arbitrator.

### **17.3 Additional Rules of Arbitration**

The arbitrator shall issue a written award that sets forth the essential findings and conclusions on which the award is based. The arbitrator will allow discovery as required by the *Commercial Arbitration Act* of British Columbia in arbitration proceedings.

### **17.4 Appointment of Arbitrator**

If the arbitrator fails to render a decision within thirty (30) days following the final hearing of the arbitration, any party to the arbitration may terminate the appointment of the arbitrator and a new arbitrator shall be appointed in accordance with these provisions. If the parties are unable to agree on an arbitrator or if the appointment of an arbitrator is terminated in the manner provided for above, then any party to Agreement shall be entitled to apply to a judge of the British Columbia Supreme Court to appoint an arbitrator and the arbitrator so appointed shall proceed to determine the matter *mutatis mutandis* in accordance with the provisions of this Section.

### **17.5 Award of Arbitrator**

The arbitrator shall have the authority to award:

- (a) money damages;
- (b) interest on unpaid amounts from the date due;
- (c) specific performance; and
- (d) permanent relief.

### **17.6 Cost of Arbitration**

The costs and expenses of the arbitration, but not those incurred by the parties, shall be shared equally, unless the arbitrator determines that a specific party prevailed. In such a case, the non-prevailing party shall pay all costs and expenses of the arbitration, but not those of the prevailing party.

### **17.7 Continuation of Obligations**

The parties will continue to fulfill their respective obligations pursuant to this Agreement during the resolution of any dispute in accordance with this Section 17, provided that, neither party shall proceed with any work or activity or take any further action which is the subject matter of the dispute.

## **18. GENERAL TERMS & CONDITIONS**

### **18.1 No Liens**

FortisBC will do its best to not allow, suffer or permit any liens to be registered against the Company Facilities located in Public Places as a result of the conduct of FortisBC. If any such liens are registered, FortisBC will start action to clear any lien so registered to the Public Place within ten (10) days of being made aware such lien has been registered. FortisBC will keep the Municipality advised as to the status of the lien on a regular basis. In the event that such liens are not removed within ninety (90) days of the registration of such lien, FortisBC will pay them in full or post sufficient security to ensure they are discharged from title.

### **18.2 Corporate Authority**

FortisBC now warrants, represents and acknowledges that:

- (a) it has the full right, power and authority to enter into this Agreement;
- (b) it is a corporation, duly organized, legally existing and in good standing under the laws of its jurisdiction of incorporation or continuance and is lawfully registered and licensed to do business in British Columbia.

### **18.3 Representations**

Nothing in this Agreement shall be deemed in any way or for any purpose to constitute either party as the legal representative, agent, partner or joint venturer of the other, nor shall either party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against, in the name of, or on behalf of the other party.

### **18.4 Assignments and Enurement**

This Agreement and any rights or obligations under it are not assignable by either party, without the prior written consent of the other party hereto, such consent not to be unreasonably withheld. This Agreement shall be binding upon, enure to the benefit of, and be enforceable by, the successors and permitted assigns of the parties hereto.

### **18.5 Governing Law**

This Agreement shall be governed by and construed in accordance with the laws of the Province of British Columbia.

### **18.6 General**

This Agreement is subject to the laws of Province of British Columbia and the applicable laws of Canada, and nothing in this Agreement will be deemed to exclude the application of the provisions of such laws, or regulations thereunder.

### **18.7 Entire Agreement**

This Agreement constitutes the entire agreement and understanding of the parties with respect to the subject matter herein contained and supersedes all prior agreements and undertakings with respect thereto.

### **18.8 Severability**

If any provision of this Agreement is held invalid by any court, governmental agency or regulatory body, the other provisions to the extent permitted by law shall remain in full force and effect. To the extent permitted by applicable law, the parties hereby waive any provision of law that renders any provision hereof prohibitive or unenforceable in any respect.

### **18.9 Force Majeure**

Neither party shall be liable to the other for temporary failure to perform hereunder, if such failure is caused by reason of an Act of God, labour dispute, strike, temporary breakdown of facilities, fire, flood, government order or regulations, civil disturbance, non-delivery by program suppliers or others, or any other cause beyond the parties' respective control.

**18.10 Notice**

Any notice or other written communication required, or permitted to be made or given pursuant to this Agreement (the “Notice”) shall be in writing and shall be deemed to have been validly given if delivered in person or transmitted electronically and acknowledged by the respective parties as follows:

A) if to the Municipality:

CITY OF KELOWNA  
1991 Bernard Avenue  
Kelowna, BC V1Y 9V7

(B) If to FortisBC:

FORTISBC ENERGY INC.  
16705 Fraser Highway  
Surrey, B.C. V4N 0E8  
Attention: Vice President, Regulatory Affairs

**CITY OF KELOWNA**  
by its authorized signatories

\_\_\_\_\_  
Authorized Signatory

\_\_\_\_\_  
Authorized Signatory

**FORTISBC ENERGY INC.**  
by its authorized signatories

\_\_\_\_\_  
Authorized Signatory

\_\_\_\_\_  
Authorized Signatory