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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-17-06

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

and

**An Application by Terasen Gas Inc.
for Approval of Operating Terms for the Supply and Distribution of Natural Gas Service
within the District of Chetwynd**

BEFORE: L.F. Kelsey, Commissioner
L.A. Boychuk, Commissioner February 2, 2006

WHEREAS:

- A. On July 19, 2005, Terasen Gas Inc. ("Terasen") applied to the British Columbia Utilities Commission ("the Commission") pursuant to Section 32 of the Utilities Commission Act (the "Act") for approval of Operating Terms (the "Application") for the supply and distribution of natural gas service within the District of Chetwynd (the "District of Chetwynd", the "Municipality"); and
- B. The Operating Terms proposed in the Application replace the Operating Agreement that was approved by Commission Order No. C-20-80 and extended by various Orders until June 30, 2005; and
- C. On September 2, 2005 the District of Chetwynd filed a Reply to the Application and opposed, with reasons, the establishment of the new Operating Agreement; and
- D. Commission Letter No. L-82-05 established a written inquiry into the Terasen Application including a timetable for submissions pursuant to Section 32 of the Act. The deadline for submissions was extended by Letter No. L-86-05. By Letter No. L-6-06 the Commission required further submissions from Terasen and the District of Chetwynd regarding the proposed commencement date of any new Operating Agreement; and

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E. The Commission has reviewed the Application and the related submissions, which are discussed in the Reasons for Decision attached as Appendix A to this Order.

NOW THEREFORE pursuant to Section 32 of the Act, the Commission orders as follows:

1. The Operating Agreement proposed by Terasen on October 21, 2005, and amended as proposed by the District of Chetwynd on November 4, 2005, is approved, effective July 1, 2005, as set out in the attached Reasons for Decision.
2. The Operating Agreement between Terasen and the District of Chetwynd approved herein shall expire twenty-one years from the 1st day of July 2005.
3. Terasen and the District of Chetwynd are to file with the Commission an endorsed Operating Agreement in accordance with the terms approved by this Order and Reasons for Decision.
4. The terms of this Operating Agreement may be reviewed, upon application by Terasen or the District of Chetwynd, should the Commission determine that a significant revision is required.

DATED at the City of Vancouver, in the Province of British Columbia, this 28th of February 2006.

BY ORDER

Original signed by:

L.F. Kelsey
Commissioner

Attachment

TERASEN GAS INC.
Application for Approval of Operating Terms for the Supply and
Distribution of Natural Gas within the District of Chetwynd

REASONS FOR DECISION

1.0 BACKGROUND

Terasen Gas Inc. (“Terasen”) is the successor to BC Gas Utility Ltd. (“BC Gas”) and Inland Natural Gas Co. Ltd. (“Inland”). By Order No. C-20-80 dated June 17, 1980, the British Columbia Energy Commission granted a Certificate of Public Convenience and Necessity (“CPCN”) to Inland approving its Operating Agreement with the Village of Chetwynd (now the District of Chetwynd) (the “District of Chetwynd”, the “District”, the “Municipality”). In compensation for the use by Inland of the public places within the boundary limits of the Municipality, the CPCN required Inland to pay an annual franchise fee to the District of Chetwynd equivalent to 3 percent of the annual gross revenues that Inland derived from sales of natural gas within the area encompassed by the Operating Agreement. The CPCN had a term of 21 years that ended on June 30, 2001. By Orders No. C-5-01, C-8-02, C-5-03 and C-13-04, the British Columbia Utilities Commission (“the Commission”) approved one year extensions to the CPCN and the payment of the franchise fees until June 30, 2005.

2.0 TERASEN’S APPLICATION

On July 19, 2005, Terasen applied to the Commission pursuant to Section 32 of the Utilities Commission Act (“the Act”) for approval of the Operating Terms for the supply and distribution of natural gas within the boundaries of Chetwynd (“the Application”). Terasen stated that it was unable to agree on the terms of an Operating Agreement with the District of Chetwynd. The Operating Terms proposed in the Application were described as being substantially similar to the terms in the Operating Agreements between Terasen and the Corporation of the City of Penticton and Terasen and the Corporation of the City of Salmon Arm, which were approved by Orders No. C-8-03 and C-7-03, except that the Operating Terms in the Application did not contain a provision for the payment of franchise fees and did not have a fixed term. Terasen excluded a provision for franchise fees to reflect the statement made in a May 14, 2005 letter from the Mayor of the District of Chetwynd (the “Mayor”) to the Commission that the Mayor would recommend to Chetwynd Council that “we not collect franchise fees”.

The following are excerpts from Section 32 of the Act.

Use of municipal thoroughfares

32 (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.

The Application noted that pursuant to Section 45(2) of the Act, Terasen is deemed to have a CPCN to operate its system in the District of Chetwynd and to construct and operate extensions. The following are related excerpts from Section 45 of the Act.

Certificate of public convenience and necessity

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

(2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it

(a) to operate the plant or system, and

(b) subject to subsection (5), to construct and operate extensions to the plant or system.

(3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

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

(5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.

3.0 DISTRICT OF CHETWYND'S REPLY

On September 2, 2005 the District of Chetwynd filed a Reply to the Application and opposed the establishment of a new perpetual Operating Agreement on the following grounds:

- a) Terasen's right to enter the municipality pursuant to Section 32 of the Act expired with the expiry of the 1980 CPCN.
- b) It would be an error of jurisdiction for the Commission to approve an Operating Agreement for the use of municipal streets and other public property without considering, at the same time, the rates charged to consumers within the municipality. The municipality's position on appropriate compensation for use of municipal property may vary depending upon the rates to be charged to consumers within its municipal boundaries.
- c) Approving an Operating Agreement that did not include provision for reasonable payment to the municipality would be an unlawful grant of assistance to a business contrary to section 25 of the Community Charter.
- d) The terms of the Operating Agreement proposed by Terasen omits certain clauses that are critical to the District of Chetwynd.

The District of Chetwynd submitted that the Application should be brought under Section 36 of the Act and not Section 32. Section 36 of the Act provides as follows:

Use of municipal structures

36 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

- (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.

The District of Chetwynd submitted that the proposed Operating Agreement must be considered in light of the rate structure that is applicable within the District of Chetwynd and relied upon Sections 45(7) to 45(9) of the Act which state:

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

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

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service, as the public convenience and interest reasonably require.

The District of Chetwynd submitted that the removal of the 3 percent franchise fee would deprive the residents of Chetwynd of a reasonable fee for the use of publicly owned and maintained highways and other public places.

The District of Chetwynd also submitted that the Commission has no jurisdiction to impose a perpetual Operating Agreement. The District of Chetwynd noted that the Community Charter, section 22, imposes a 21 year limit on the term of Franchise Agreements. Section 22 of the Community Charter reads as follows:

Agreements granting exclusive or limited franchises

22 (1) A council may, by bylaw adopted with the approval of the electors, enter into an agreement that grants an exclusive or limited franchise for the provision of one or more of the following in accordance with the agreement:

(a) a public transportation system;

(b) water through a water supply system;

(c) sewage disposal through a sewage system;

(d) gas, electrical or other energy supply system.

(2) The maximum term of an initial agreement or a renewal agreement under this section is 21 years.

The District of Chetwynd submitted that if the Commission imposes the terms of an Operating Agreement on the District that the term be no more than a time sufficient to permit the review of the rate structure applicable to the District of Chetwynd at a Terasen Rate Design Hearing.

The District of Chetwynd also noted that the proposed Operating Agreement is deficient as it does not address the right of Terasen to maintain its works within the highways and other public places under the jurisdiction of the District of Chetwynd. It also proposed that the Operating Agreement should include an obligation on Terasen to maintain service levels within the boundary limits of the District of Chetwynd at least equivalent to those existing as of June 1, 2002 and to maintain other personnel and equipment sufficiently close to respond to emergency and other situations requiring prompt attention in accordance with any orders, standards, rules or practices established by the Commission.

The District of Chetwynd proposed that fees payable by Terasen under the Operating Agreement should include:

- a) A franchise fee equal to 3 percent of the amount received by Terasen for gas consumed within the District boundaries. This fee represents compensation for the right to operate a gas distribution system within the District of Chetwynd.
- b) A distribution margin fee equal to 6 percent of the revenue received by Terasen for the distribution of gas to residential and commercial gas customers and a fee of 3 percent of the distribution margin received to gas customers other than residential and commercial customers within the boundaries of the municipality. This fee is to pay for the use of municipal streets and other municipal property.
- c) A fee of 10 percent of the total sum of the franchise fee and the distribution margin fee for the use of public highways and other public places within the District to deliver natural gas to consumers who do not reside within the boundaries of the District of Chetwynd.

The District of Chetwynd also proposed that the Operating Agreement contain a clause providing that if Terasen enters into an agreement with another municipality that contains terms and conditions more favorable than this Operating Agreement, that upon notice from the Municipality, this Operating Agreement is deemed to be amended to include such terms and conditions. The District of Chetwynd also proposed that the Operating Agreement include provisions for Statutory Standards regarding the design, installation and maintenance of Terasen works; a provision to avoid damage to public works; to notify the Municipality before Terasen undertakes any construction or maintenance activity; to identify that the Municipality cannot act unlawfully; to require Terasen to obtain Municipal permits; and to repair damage to Municipal property.

The District of Chetwynd stated that it has offered to Terasen to extend the terms of the current Operating Agreement until the District has an opportunity to participate in the next Terasen rate structure hearing or, alternatively, on a year-to-year basis.

4.0 REGULATORY REVIEW PROCESS

By Letter No. L-82-05, the Commission informed Terasen and the District of Chetwynd that the Commission would conduct a written inquiry into the Terasen Application pursuant to Section 32 of the Act. The inquiry would consider the Terasen Application, the Chetwynd Reply dated September 2, 2005, the previous correspondence on file with the Commission regarding the Chetwynd Operating Agreement and natural gas rates charged in Chetwynd. Letter No. L-82-05 established a timetable for further submissions on the Terasen Application with a deadline for a Terasen response of October 14, 2005 and a Chetwynd reply of October 19, 2005.

By letters dated October 7 and October 11, 2005, respectively, the District of Chetwynd and Terasen requested that their respective deadlines for submissions be extended by two weeks. By Letter No. L-86-05, the Commission approved an extension to the timetable for further submissions on the Terasen Application with a deadline for a Terasen response of October 21, 2005 and a Chetwynd reply of November 4, 2005.

5.0 TERASEN'S RESPONSE

On October 21, 2005, Terasen filed its response (the "Terasen Response") to the District of Chetwynd's September 2, 2005 submission. The Terasen Response included a new version of the proposed Operating Agreement that included the provision of Operating Fees of 3 percent and a term of 21 years effective from January 1, 2006 to December 31, 2026 (the "Second Agreement"). These changes effectively removed the exclusions from the Application and Terasen requested approval of this Second Agreement pursuant to Section 32 of the Act.

The Terasen Response also addressed the following issues raised by the District of Chetwynd in its September 2, 2005 submission as follows:

- a) Terasen disagrees that Section 32 of the Act requires Terasen to have a separate right to use property owned or held by the Municipality in addition to Terasen's rights under Section 2 of the *Gas Utility Act* and its CPCN under Section 45(2) of the Act.
- b) Terasen noted that the Commission (Letter No. L-36-05) stated that "Chetwynd suggests that it may no longer wish to collect franchise fees. As these are fees that a public utility collects on behalf of municipalities, it is unlikely that either Terasen or the Commission would object to a proposal from a municipality to eliminate franchise fees from a future Franchise/Operating Agreement." Terasen does

not agree that the District of Chetwynd will be disadvantaged compared to other municipalities if were not to collect franchise fees. While municipalities in the Interior of British Columbia collect franchise or operating fees, municipalities in the Lower Mainland do not collect franchise or operating fees.

Terasen noted that the District of Chetwynd has proposed fees of approximately 11 percent but also suggested that these fees should not be charged back to the residents of Chetwynd. Terasen objected to this suggestion as it would have the effect of Terasen either not recovering its cost of service or having to recover this cost from all customers served by Terasen.

- c) Terasen had not proposed a termination date in its July 19, 2005 Application as it believed there was no exclusivity and therefore no franchise was offered. The proposed new Operating Terms contain a term of 21 years.
- d) Terasen noted that it previously sent two versions of operating agreements to the District of Chetwynd for review and comment. The first version is the agreement that was signed by Penticton and Salmon Arm and approved by the Commission. The second version was a draft of the agreement that Terasen has been negotiating with the Union of British Columbia Municipalities (“UBCM”) over the last three years.

As the District of Chetwynd had not indicated to Terasen that it would like to sign the draft UBCM agreement, and pay the UBCM a fee, Terasen repeated its offer to base the new Operating Agreement on the document that was filed in the July 19, 2005 Application except that revisions were made to include a 3 percent franchise fee and a term of 21 years. Terasen stated that it would not accept any other changes proposed by the District of Chetwynd.

- e) Terasen referred to its April 29, 2005 response to the District of Chetwynd where Terasen submitted that “the issue of rates is not linked to that of franchise/operating agreements”. Terasen also noted that Letter No. L-36-05 stated that:

“The Commission concludes a municipal Franchise/Operating Agreement with the public utility that owns and operates the distribution system, and gas rates for customers served by the utility, raise issues that largely need to be resolved separately. To put it another way, the form and terms of a Franchise/Operating Agreement do not impact the Commission’s conclusions on the appropriate allocation of gas rates to Terasen customers in Chetwynd.”

6.0 CHETWYND’S RESPONSE

On November 4, 2005 the District of Chetwynd filed its response (“Chetwynd’s Response”) to Terasen’s October 21, 2005 submission and addressed the following issues:

- a) The District of Chetwynd was prepared to address the issue of new Operating Terms and by letter dated September 18, 2002 provided BC Gas with a copy of Terms and Conditions for a new Operating Agreement. BC Gas replied by letter dated November 7, 2002 and rejected the District of Chetwynd’s proposed new Operating Agreement primarily due to the Municipality including a right to purchase the

BC Gas distribution system that was not a feature of the existing Chetwynd Operating Agreement nor a feature that BC Gas would include in other municipal Operating Agreements.

- b) The District of Chetwynd did not choose to participate in the UBCM negotiations with Terasen since Chetwynd had already expended considerable time, effort and resources on negotiating its own new Operating Agreement. Chetwynd would prefer a short term extension to the 1980 Franchise Agreement or a new short term Operating Agreement so that it may review the UBCM-negotiated Operating Agreement.
- c) The District of Chetwynd provided a copy of its proposed new Operating Agreement that is substantially similar in content to the Second Agreement that Terasen filed on October 21, 2005, but which the District revised to include its proposed revisions described in Section 3.0 of these Reasons.
- d) The District of Chetwynd does not agree to a 21 year term and continues to be of the view that it would be appropriate to review the Operating Terms at the time of the next rate review hearing, which would be Chetwynd's opportunity to raise the issue of the rates charged to consumers within the boundaries of Chetwynd.
- e) The District of Chetwynd notes that the proposed Operating Term runs from January 1, 2006 and proposed that if the Commission approves new operating terms, it should also extend the expired Operating Agreement to the end of 2005.

7.0 COMMENCEMENT DATE OF THE NEW OPERATING AGREEMENT

By Letter No. L-6-06 the Commission required submissions from Terasen and Chetwynd regarding the proposed commencement date of a new Operating Agreement, i.e. should the commencement date of a new Operating Agreement be July 19, 2005 (the date of the Terasen Application), January 1, 2006 (the date proposed in Terasen's Revised Application) or some other date? A response from Terasen was required by January 31, 2006 and from Chetwynd by February 7, 2006.

By letter dated January 27, 2006, Terasen proposed a commencement date of July 1, 2005 for the new Operating Agreement. By letter dated February 7, 2006, the District of Chetwynd also proposed a commencement date of July 1, 2005 for the new Operating Agreement.

8.0 COMMISSION DETERMINATION

Applicability of Sections 32, 36 and 45 of the Act to the Application

The Commission agrees with Terasen that Section 32 of the Act is applicable for the review of this Application. Terasen, by virtue of Section 45(2) of the Act, is deemed to have a CPCN that does not expire. Terasen has the authority under Section 45(2) to operate the plant or system and to construct and operate extensions to the system; therefore it meets the requirements of Section 32 of the Act for review of the Application.

Franchise Fee or Operating Fee

In Section 5.0 of these Reasons, an excerpt from Commission Letter No. L-36-05 is provided wherein the Commission observed that franchise fees are collected by a public utility on behalf of municipalities. Terasen estimates that the fees proposed by the District of Chetwynd total approximately 11 percent. Terasen objects to the suggestion by Chetwynd that these fees should not be charged back to the residents of Chetwynd as Terasen would either not be able to recover its cost of service or would have to recover these costs from all customers served by Terasen.

In the Commission's view, a franchise fee or operating fee arrangement that does not allow Terasen to recover its cost of service would represent an unjust or unreasonable rate under Sections 59 and 60 of the Act. The Commission notes that the Operating Fee under the expired agreement was 3 percent. The District of Chetwynd has proposed additional fees related to Terasen operations in the area. The Commission has not previously approved operating agreements that contain operating fees greater than 3 percent and is not persuaded to do so in this instance. **Accordingly, the Commission approves an operating fee of 3 percent in the new Operating Agreement.**

Term of the new Operating Agreement

In Section 6.0 of these Reasons, the District of Chetwynd states that it does not agree with a 21 year term and submitted that if the Commission imposes the terms of an Operating Agreement on the District, the term be no more than for a period of time sufficient to permit the review of the rate structure applicable to the District of Chetwynd at a Terasen Rate Design Hearing.

The Commission continues to hold the view expressed in Letter No. L-36-05 that franchise/operating agreements and gas rates for customer are issues that largely need to be resolved separately and, therefore, finds no compelling reason for a new short-term Operating Agreement given that rate matters are determined and set by the Commission from time to time in the duration of any operating agreement.

In response to Commission Letter No. L-6-06, both Terasen and the District of Chetwynd proposed that the term of the new Operating Agreement commence on July 1, 2005. **The Commission considers that a term of 21 years is appropriate for the new Operating Agreement and it should be effective July 1, 2005.**

Form of the new Operating Agreement

The Commission has reviewed the Second Agreement submitted by Terasen on October 21, 2005 and the proposed revisions thereto submitted by the District of Chetwynd on November 4, 2005. The Commission notes that the District of Chetwynd's proposed new Operating Agreement is substantially similar in content to the Operating Agreement that Terasen filed on October 21, 2005 before the agreement was revised to include the District's proposed revisions.

The Commission approves the Second Agreement proposed by Terasen on October 21, 2005 as amended by the following approved revisions proposed by the District of Chetwynd. The following table summaries the revisions proposed by the District of Chetwynd and the Commission's determinations.

Revisions Proposed by the District of Chetwynd

Section of Operating Agreement	Proposed Revision	Commission Determination
5.1 Company to Indemnify Municipality	Insert “or claims made by” Delete “execution” Insert “exercise”	Revision not approved. The proposed changes do not seem necessary since “claims” already appears on line 2 and “execution” appears on line 5 of this Section.
5.2 Company to Indemnify Municipality	Insert paragraph on removal of liens on Public Places	Revision approved.
7.1 Notice Except in Emergencies	Delete “As and when required by the Municipality”	Revision approved.
10.1 Other Approvals, Permits or Licences	Insert “and insofar as it lawfully can” Insert description of other fees for water, sewer, garbage etc. and types of fees	Revisions approved.
10.2 Other Approvals, Permits or Licences	Insert paragraph on payments for any rates, taxes or assessments; bylaws and legislation	This Section is not required since it deals with “any” rates etc. while Section 10.1 deals with identified rates etc. or types of fees. Revision is not approved.
15.1 Damage to Municipal Facilities	Insert “works or” Insert sentence on Company obtaining written consent before proceeding with repairs	Inserting “works or” is approved. Requiring written consent before commencing repairs could result in delays. Revision is not approved.
15.2 Damage to Municipal Facilities	Insert paragraphs that deal with carrying out remedial work within 10 days, remedy any defects at Terasen’s cost for 3 years from completion or reimburse Municipality	15.2(a) is approved. The 10 day deadline however, may not be appropriate for all situations and weather conditions. No evidence that required repairs had been unnecessarily delayed by Terasen. Revision 15.2(b) is not approved.
16.5-16.10 Fee to be Paid to Municipality	Inserts paragraphs for the 6 percent fee on residential and commercial revenue within Municipal boundaries, the 3 percent distribution fees for sales outside Municipal boundaries and additional 10 percent Operating fee for sales outside Municipal boundaries	The Commission has not approved operating agreements that contain franchise fees greater than 3 percent and the Commission approves an operating fee of 3 percent in the new Operating Agreement. Sections 16.5 to 16.10 are not approved.
17.1 Term of Operating Terms	Term starts on January 1, 2006 with end date removed.	A term of 21 years is appropriate for the new Operating Agreement effective July 1, 2005.

Section of Operating Agreement	Proposed Revision	Commission Determination
18.1 Maintaining Company Presence	Terasen to maintain June 1, 2002 service levels. Terasen to maintain personnel and facilities to respond to emergency and other circumstances within reasonable time	Terasen's Oct. 21, 2005 response did not address this specific revision but did not accept any proposed changes other than Operating Fees and term. The first revision restricts Terasen's business operations. The second revision does not consider Terasen's requirements to meet standards of Gas Safety and Service Quality Measures from approved Settlement Agreements and Commission Decisions. Revision is not approved.
19.1 Ownership and Continued Operation of the Company Facilities	Delete "continue to ...used by the Company for the purpose of its business, or" Insert "or may continue to be used by the Company in accordance with an agreement negotiated under section 19.2" Delete remainder of paragraph	The revision is inconsistent with Section 45(2) of the Act. The revision places excessive restrictions on the continued operation of Terasen's facilities. Revision is not approved.
19.2 Ownership and Continued Operation of the Company Facilities	Insert paragraph about negotiations at expiry or set by BCUC if unsuccessful	Revision is not required and not approved. Negotiations should begin prior to expiry. Already under BCUC jurisdiction
19.3 Ownership and Continued Operation of the Company Facilities	Insert paragraph on repair and restoration of Public Places if Terasen facilities are removed	Revision is not required. Section 3.0 or Section 3.1 is to be amended to specifically identify removal of Company Facilities and restoration of Public Places. Revision not approved.
25.1 Consistency of Terms	Insert Section to allow the Municipality to request and obtain any more favorable terms that Terasen agrees to with another municipality	The terms of this Operating Agreement may be reviewed, on application by Terasen or the District of Chetwynd, should the Commission determine that a significant revision is required. Revision is not approved.