



ORDER NUMBER
G-39-16

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

and

FortisBC Midstream Inc.
Application for Approval of the Acquisition of the Shares of Aitken Creek Gas Storage ULC

BEFORE:
N. E. MacMurchy, Panel Chair/Commissioner

on March 18, 2016

ORDER

WHEREAS:

- A. On December 3, 2015, FortisBC Midstream Inc. (FMI) and Chevron Canada Properties Limited (CCPL) entered into a share purchase and sale agreement under which all of the issued and outstanding shares of Aitken Creek Gas Storage ULC (ACGS) will be purchased by FMI (Agreement);
- B. On December 17, 2015, FMI applied to the British Columbia Utilities Commission (Commission) pursuant to section 54 of the *Utilities Commission Act* (UCA) for an order approving the acquisition of all of the issued and outstanding shares of ACGS, which would result in ACGS becoming a wholly owned direct subsidiary of FMI (Application);
- C. In the Application, FMI also applied on behalf of ACGS, pursuant to section 54(5) of the UCA, for an order approving the registration of the transfer of shares on the books of ACGS;
- D. ACGS as owner and/or operator of the Aitken Creek Storage Facility is regulated by the Commission pursuant to Order G-71-08 dated April 18, 2008;
- E. The Storage Facility refers to the underground reservoir and contained natural gas, wells, on-site equipment and other components of the natural gas storage facility at Aitken Creek, that ACGS owns or operates, as they may be modified or expanded from time to time and includes the North Aitken Creek gas storage site assets owned by ACGS;
- F. Subsequent to execution of the Agreement, existing ACGS customers were contacted to advise them of the Agreement, and provide them with contact information should they have any questions or concerns about the Agreement. FMI filed a summary of stakeholder consultation on January 15, 2016;
- G. FMI proposed a regulatory schedule for a written hearing process, including one round of information requests, followed by intervenor written submissions and FMI reply submissions;

- H. Order G-210-15 issued on December 18, 2015 directed the Application shall proceed by way of a written public hearing process according to the Regulatory Timetable attached as Appendix A to that Order. FMI was directed to publish the Public Notice, attached as Appendix B to that Order, in the Fort St. John local and community newspapers to provide adequate notice to those parties who may have an interest in or be affected by the Application. Order G-210-15 also advised Persons wishing to participate as interveners or as interested parties, as described in Appendix B of that Order, to register with the Commission via email or in writing by January 13, 2016;
- I. The Commission issued information requests to FMI on January 8, 2016. Interveners issued information requests to FMI on January 18, 2016. FMI responded to all information requests on January 29, 2016;
- J. Intervener written final submissions were filed with the Commission on February 10 and 11, 2016. The FMI written reply submission was filed with the Commission on February 18, 2016; and
- K. The Commission has reviewed the Application, information requests and responses, intervener written final submissions and the FMI written reply submission, and has determined the Application should be approved.

NOW THEREFORE the British Columbia Utilities Commission pursuant to section 54 of the *Utilities Commission Act* orders as follows:

1. The acquisition by FortisBC Midstream Inc. of all of the issued and outstanding shares of Aitken Creek Gas Storage ULC is approved.
2. The registration of the transfer of shares on the books of Aitken Creek Gas Storage is approved .
3. Aitken Creek Gas Storage must file with the Commission a Code of Conduct and a Transfer Pricing Policy which covers the interactions between Aitken Creek Gas Storage and its affiliated natural monopoly utilities, and interactions between Aitken Creek Gas Storage and its affiliated non-regulated businesses, and Aitken Creek Gas Storage and its affiliated regulated businesses operating in a non-natural monopoly environment as set out in the attached Reasons for Decision.
4. FortisBC Midstream Inc. must require all ACGS/FMI directors and executives who also have management roles with FEI to execute non-disclosure agreements.
5. FortisBC Midstream Inc. must file with the Commission an Action Plan, as described in the attached Reasons for Decision, within 30 days of the share acquisition date .
6. Aitken Creek Gas Storage is to file an Implementation Assessment Report, as described in the attached Reasons for Decision, within 60 days following the one year anniversary of the share acquisition date.

DATED at the City of Vancouver, in the Province of British Columbia, this 18th day of March 2016.

BY ORDER

Original signed by:

N. E. MacMurchy
Panel Chair/Commissioner

Attachment – Reasons for Decision



British Columbia
Utilities Commission

IN THE MATTER OF

**FortisBC Midstream Inc.
Application for Approval of the
Acquisition of the Shares of Aitken Creek Gas Storage ULC**

**REASONS FOR
DECISION**

March 18, 2016

**Before:
N. E. MacMurchy, Commissioner/Panel Chair**

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1.0 INTRODUCTION

1.1 Application and orders sought

1.1.1 Application

On December 17, 2015, FortisBC Midstream Inc. (FMI) applied to the British Columbia Utilities Commission (Commission) pursuant to section 54 of the *Utilities Commission Act* (UCA), for approval of the acquisition by FMI of the issued and outstanding shares of Aitken Creek Gas Storage ULC (ACGS) from Chevron Canada Properties Limited (CCPL). This will result in ACGS becoming a wholly owned direct subsidiary of FMI.

The terms and conditions of the purchase are reflected in the Share Sale and Purchase Agreement dated December 3, 2015 (Agreement), under which FMI agreed to purchase all of the issued and outstanding shares of ACGS (Transaction).

ACGS is an unlimited liability company organized and existing under the *Alberta Business Corporations Act*. FMI is a wholly owned subsidiary of FortisBC Holdings Inc. (FHI), which is a wholly owned subsidiary of Fortis Inc. (Fortis). ACGS owns a 93.8 percent interest in the underground reservoir and contained natural gas, wells, on-site equipment and other components of the natural gas storage facility at Aitken Creek, as they may be modified or expanded from time to time (as it is defined in paragraph B of the preamble to Order G-71-08) and owns 100 percent of the rights to the undeveloped North Aitken Creek gas storage site (North Aitken). ACGS' interest in these assets is referred to in this application as the "Storage Facility."

FMI is seeking the necessary approvals from the Commission to complete the transaction.

1.1.2 Orders sought

FMI is requesting, pursuant to section 54 of the UCA, for Commission approval of the acquisition by FMI of the issued and outstanding shares of ACGS.

In addition, Commission approval under section 54(5) of the UCA is requested for ACGS to register on its books the transfer of shares to FMI. ACGS has authorized FMI to request on its behalf that such an order be granted in respect of ACGS.

1.2 Regulatory process

Following the submission of the application on December 18, 2015, the following parties registered as interveners:

- Commercial Energy Consumers Association of British Columbia (CEC)
- British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens Organizations of BC, Disability Alliance BC, and the Tenant Resource and Advisory Centre (BCOAPO)
- FortisBC Energy Inc. (FEI)
- Nova Gas Transmission Ltd. (NGTL)
- BC Sustainable Energy Association and the Sierra Club of British Columbia (BCSEA)
- Tenaska Marketing Canada (TMC)
- TransCanada Gas Storage Partnership (TGSP)

- BP Canada Energy Group ULC (BPCEG)
- Pacific Northern Gas Ltd. (PNG)

Three parties – Powerex Corp. (Powerex), Chevron Canada Properties Limited (CCPL), and Westcoast Energy Inc. (Westcoast) – registered as interested parties.

There was one round of information requests. The Commission, CEC, BCOAPO, NGTL and BCSEA submitted questions to FMI. The Commission also submitted a confidential information request to CCPL. Following the responses to the information requests BCOAPO, BCSEA, CEC, FEI and NGTL filed final submissions. FMI filed its reply submission on February 18, 2016.

1.2.1 Stated intervener positions

All of the interveners who provided written submissions appear to accept, either explicitly or implicitly, that FMI is committed to operating the Storage Facility safely and reliably. The interveners focus on the fact that ACGS and FEI will be under common ownership, and express concerns about how that might affect access and/or fair pricing on market terms negotiated at arm's length. However, the interveners approach this issue from two fundamentally different perspectives. NGTL is concerned that FMI will provide service to FEI on more favourable terms than NGTL or its customers. Conversely, interveners representing customers of FEI appear to be concerned that FMI will extract more onerous terms from FEI, and that FMI is not sufficiently committed to providing FEI with guaranteed or preferred access to storage. In response, FMI submits that, in the reporting or complaints-based regime applicable to ACGS, good faith negotiations between ACGS and customers in light of the information available to the parties at the time will yield fair terms and there is every reason to expect that ACGS will operate and transact business with all customers as before, despite common ownership.

FEI has no objection to the latest change in ownership of the Storage Facility contemplated by FMI's Application. FEI expects that it will continue to contract for storage services from ACGS for the foreseeable future based on pricing that is competitive to its other options.

BCOAPO submits that the Share Sale should not be approved because it cannot be shown that FEI's ratepayers will not be detrimentally affected by it. In the alternative, BCOAPO submits that if the Share Sale is approved, the approval should be subject to two conditions: 1) that FMI/ACGS file anonymized comparison contracts with the Commission on a confidential basis to enable the Commission to determine whether FEI is receiving discriminatory pricing; and 2) that FMI/ACGS provide storage and related services to FEI on a priority basis to the extent space is available at Aitken Creek and FEI requires the storage capacity and related services in order to serve its customers at a reasonable cost.

BCSEA-SCBC does not oppose Commission approval of the Transaction under section 54 of the UCA; however they do have concern that the avoidance of potential harm to FEI ratepayers depends crucially on the storage contracts between FEI and ACGS reflecting market terms negotiated on an arm's length basis. BCSEA-SCBC believes that the corporate affiliation between FEI, FMI and ACGS will increase the Commission's challenges in reviewing gas storage contracts between FEI and ACGS. BCSEA-SCBC would support measures aimed at providing the Commission with information to allow it to determine whether the natural gas storage contracts are indeed at market terms and negotiated at arm's length. BCSEA-SCBC would support reporting requirements regarding ACGS's continuing service quality, safety, accident prevention and asset maintenance. Further, in BCSEA-SCBC's view, consideration should be given to whether ACGS should have a code of conduct/transfer pricing policy.

CEC recommends that the Commission approve the proposed FMI sale/purchase of the shares. The CEC recommends that the Commission: (a) provide approval pursuant to section 54 of the UCA, for the acquisition by FMI of the issued and outstanding shares of ACGS; (b) provide approval, under section 54(5) of the UCA for ACGS to register on its books the transfer of shares to FMI; (c) consider the internal operating policies of FEI in its future review of the Code of Conduct and Transfer Pricing Policies to be filed by April 27, 2016 by FEI; and (d) require the development and filing of a Long Term Resource Plan by FMI.

NGTL is not opposed to the Application. However, NGTL is concerned that the change in the ownership of ACGS from an arm's length service provider to one that provides service to a regulated affiliate has the potential to negatively impact NGTL or its customers, absent appropriate safeguards. NGTL encourages the Commission to consider instituting additional requirements to govern the proposed inter-affiliate relationship and proposed activities and transactions.

1.3 Legislative framework

As described in the Application, the Aitken Creek storage facility was found by the Commission to be a public utility under the Utilities Commission Act in August 2006. In October 2006, Unocal, the owner/operator at the time, applied to be exempted from the UCA on the grounds it was not able to exercise market power in the provision of storage services at Aitken Creek.¹ In May 2007, the Commission found that active regulation of storage services at Aitken Creek was not warranted, but that there should be ongoing regulatory oversight on a reporting and complaint basis.

1.3.1 Exemption orders

By Order in Council 688 the Lieutenant Governor in Council (LGIC) granted approval for the Commission to issue an exemption order in accordance with the Commission's recommendations. Order G-135-07 was issued in final form in November 2007. It contained the following provisions:

2. Pursuant to Section 88(3) of the Act and subject to paragraphs 3, 4 and 6 of this Order, the Commission approves an exemption for Unocal from Section 3 of the Act, effective the date of this Order.

3. The exemption for Unocal from Part 3 of the Act does not include Sections 24, 25, 38, 39, 41, 42, 43 and 52 of the Act related to Unocal's gas storage operations, services and property at the Storage Facility, effective the date of this order.

4. The exemption for Unocal from Part 3 of the Act does not include Sections 53 and 54 of the Act to the extent that an action of Unocal would result in a change in the ownership or control of the Storage Facility, effective the date of this order.

.....

9. Unocal is directed to file an annual report for the Aitken Creek Storage Facility in the form set out in Appendix II, or as the Commission may otherwise require, and to distribute copies to the parties contracting for services at the facility.²

¹ Exhibit B-1, p. 7.

² Exhibit B-1, p. 6.

In November 2007, Unocal requested Commission approval to transfer Aitken Creek to its wholly owned subsidiary ACGS. The request asked for inclusion of an exemption order similar to the existing order. Following LGIC approval in April 2008 (Order in Council 192) the Commission issued Order G-71-08 with similar terms to the Unocal exemption order. A copy of the order is included as Appendix C of Exhibit B-1.

1.3.2 Criteria used by the Commission in previous section 54 reviews

FMI's application is made in compliance with section 54 of the UCA. As noted by FMI, Commission reviews of the acquisition of a public utility traditionally have focused on the following criteria:

- (a) the utility's current and future ability to raise equity and debt financing not be reduced or impaired;
- (b) there will be no violation of existing covenants that will be detrimental to the customers;
- (c) the conduct of the utility's business, including the level of service, either now or in the future, will be maintained or enhanced;
- (d) the application is in compliance with appropriate enactments and/or regulations;
- (e) the structural integrity of the assets will be maintained in such a manner as to not impair utility service; and
- (f) the public interest will be preserved.³

The Panel has reviewed the application with respect to these criteria and provides its findings in later sections of these Reasons. A major issue raised by this application, that has not always been present in other takeover applications, is the potential conflict of interest that could arise between the storage utility and its major customer, FortisBC Energy Inc. because of their common parent. FMI is wholly owned by FortisBC Holdings Inc. (FHI) which in turn is wholly owned by Fortis Inc. (Fortis).⁴ FortisBC Energy Inc. (FEI) is also wholly owned by FHI which is in turn wholly owned by Fortis.⁵ Hence FMI and FEI have the same common parent. A major focus of interveners in this proceeding and in the findings contained in this decision relates to how the public interest can be preserved when both the storage utility and major customer of the storage utility are owned by the same parent.

Under section 54(9) of the UCA the Commission can make its approval of FMI's requested acquisition of the issued and outstanding shares of ACGS subject to conditions. The Panel recognizes that following the takeover, after an implementation period, some of the obligations that the Panel requires will become the responsibility of ACGS. For this reason the Panel has made some of its directives explicitly to FMI while other directives that are expected to be implemented at a later period (i.e. beyond the 30 days set out by the Panel during which FMI is to prepare an action plan) are directed to ACGS.

2.0 ISSUES ARISING FROM THE APPLICATION

2.1 Ensuring storage costs remain determined by market forces

BCSEA-SCBC noted that one of the main issues in the proceeding is the possibility of completion of the transaction resulting in higher gas storage costs to FEI that would be borne by FEI ratepayers. FEI's costs of gas storage, whether at the Aitken Creek Storage Facility or other storage facilities in the region, are reflected in

³ Exhibit B-1, p. 11.

⁴ Exhibit B-1, p. 1.

⁵ Exhibit B-1, p. 5.

FEI's midstream costs and are recovered from customers through the "Storage and Transport" charge on customers' invoices. FMI maintains that the Transaction will not affect FEI's cost of gas storage.⁶ For example, FMI states: "FEI's net cost of using ACGS will not increase or decrease as a result of FMI's acquisition of ACGS. FEI's storage contracts with ACGS are based on negotiated rates that are reflective of prevailing market conditions regardless of whether ACGS is owned by CCPL or FMI."⁷ BCSEA-SCBC accepts that this is FMI's intention. However, a key factor is whether the terms of FEI's storage contracts with ACGS are indeed reflective of market conditions negotiated on an arm's length basis.⁸

BCOAPO submitted that FMI was not able to provide an adequate response to Commission IR 1.13.1 regarding how the Commission could determine whether ACGS is entering into discriminatory priced contracts with FEI. FMI expressly states in its response that it is not willing to provide comparison contracts (even anonymized) for the Aitken Creek storage facility on a confidential basis to allow the Commission to evaluate whether FEI is receiving discriminatory pricing. Given the inherent conflict of interest in the relationship, BCOAPO submits that the Commission should require FMI/ACGS to provide anonymized comparison contracts to the Commission on a confidential basis to enable the Commission to determine whether FEI is receiving discriminatory pricing. Although comparative contract information is not currently available to the Commission (i.e., while Aitken Creek is under the control of CCPL), the same inherent conflict of interest does not exist in that relationship. Consequently, BCOAPO submits that the provision of such information should be a requirement of approving the Share Sale and Purchase Agreement.⁹

CEC recommends that the Commission review the potential risks for conflicts and/or inappropriate pricing between FEI and FMI at the time of consideration of the Code of Conduct/Transfer Pricing Policy filing required pursuant to L-19-15 and ensure all agreements are filed as a compliance condition pursuant to the decision regarding approval of the sale/purchase of shares.¹⁰ CEC does not understand how a complaints-based process can be effective in the absence of information.¹¹

NGTL notes that FMI has stated in this proceeding that it does not see additional reporting requirements as necessary. However, in light of the change in ownership of ACGS, from an operator at arm's length to its customers, to an operator affiliated with a regulated LDC that is a significant customer, greater public disclosure may be warranted. NGTL encourages the Commission to consider rules similar to the Ontario Energy Board (OEB) Storage and Transportation Access Rule (STAR) requirements in Ontario. NGTL's view is that they may be appropriate as a result of the proposed change in ownership.¹²

In their reply submission, FMI summarizes that BCOAPO, BCSEA and CEC assert ACGS should be required to provide varying degrees of additional reporting to the Commission regarding its customer contracts so as to ensure that contracts are fair, just and reasonable and not unduly discriminatory; NGTL goes further, suggesting that the Commission should require public disclosure of contract information as has been done in Ontario. FMI submits that the Commission should reject suggestions for conditions that would effectively modify the current mode of regulation. FMI's position is the existing approach is appropriate under a market based regime.¹³ The additional mechanisms and conditions advanced by interveners, which go beyond FMI's commitments, are

⁶ BCSEA-SCBC Reply Submission, p. 2.

⁷ Exhibit B-6, BCSEA IR 1.1.3.

⁸ BCSEA-SCBC Reply Submission, p. 2.

⁹ BCOAPO Reply Submission, para. 10.

¹⁰ CEC Reply Submission, para. 57.

¹¹ CEC Reply Submission, para. 43.

¹² NGTL Reply Submission, Sec. 3.3.

¹³ FMI Reply Submission, para. 81.

unnecessary and inconsistent with the market based approach previously approved by the Commission and reflected in the exemption from traditional regulation.¹⁴

From a financial perspective, FMI and FEI's shareholder would not be indifferent to the business terms of contracts between FEI and ACGS. FMI bears all risks and benefits from its operations at ACGS, so any profits or losses at ACGS will directly impact FMI's shareholder. FMI understands that in the case of FEI, the business terms of storage contracts directly affect FEI's customers through the Storage and Transport rates that they pay. To the extent that FEI is not able to demonstrate that arm's length negotiations have occurred and subsequently, the Commission determines that FEI did not act prudently, FEI's shareholder will be at risk for any costs deemed to be unrecoverable. Thus, it is in the best interests of both parties to negotiate market reflective terms on an arm's length basis.¹⁵

In past decisions under section 54 of the UCA, the Commission has considered a number of factors, including that the public interest will be preserved.¹⁶ In this Application, the public interest is best served by ensuring the existence of a functioning market.

FMI notes that in the period since the Commission issued its May 14, 2007 decision regarding the Storage Facility, the Commission has expressed a clear preference for market forces versus active regulation. In the AES Inquiry Report, the Commission addressed the fundamental rationale for regulation, and its role in protecting the public interest. The Commission articulated the following key principles that speak directly to the appropriateness of continuing the long-standing market-based regime for ACGS:

Key Principles:

- (i) Only regulate where required;
- (ii) Regulation should not impede competitive markets.¹⁷

FMI also notes the Report on the Independent Review of the Commission, released last year, made the point that reporting should not be required unless it adds value.¹⁸

FMI notes that, with respect to regulation, the Commission in Order G-135-07 for the exemption of Unocal concluded that: "... the Commission Panel therefore finds that active regulation of Unocal in its operation of the Storage Facility is not warranted at this time. Rather, regulation on a reporting or complaints basis is the appropriate method of regulation."¹⁹

FMI outlines the complexity of information which would need to be presented as part of a complete analysis in order to verify non-discrimination:

The evidence is that FEI negotiates storage agreements with ACGS having regard to the summer to winter differential as projected in the forward gas markets. FEI uses its storage resources to balance system loads on a daily basis, particularly during cold periods in the winter months when intraday fluctuations can be severe. Seasonal storage facilities such as ACGS provide term

¹⁴ FMI Reply Submission, para. 44.

¹⁵ Exhibit B-6, BCSEA IR 1.1.5.

¹⁶ FMI Reply Submission, para. 17.

¹⁷ FMI Reply Submission, para. 76.

¹⁸ FMI Reply Submission, para. 41.

¹⁹ FMI Reply Submission, para. 75.

supply in the winter months and assist in load balancing during normal winter weather. There are several other factors that would be expected to affect the total pricing of any storage contract when compared to any other storage contract, even if both contracts are negotiated around the same time with ACGS. Examples of such features include items such as the injection and withdrawal profile of a contract, cycling provisions for taking gas in and out of the facility over a season, number of effective days in the winter months for allowing withdrawals, late night nomination abilities, balancing requirements and other elements such as the length of each agreement. Furthermore, different customers may place different values on individual elements or terms of a storage contract due to the varying business fundamentals of each party.²⁰

The Panel concurs with the position that the Commission should regulate only where necessary, should not impede competitive markets and should only require reporting that adds value. To this end, the regulation of ACGS is on a complaints basis due to the expectation of a free market for the services of the Storage Facility. To ensure the expectation of an effective free market for storage services exists, it is appropriate for FMI to demonstrate to the Commission, on a confidential basis if necessary, the ongoing contractual arrangements for the Storage Facility are based on market prices and arm's length negotiation.

2.2 Need for effective separation of staff and services between FEI and FMI

FMI has committed to measures that will ensure that the commercial team responsible for negotiating third party storage lease contracts and optimizing the Storage Facility for ACGS is independent from FEI's gas supply planning and operations teams. The parties will be able to negotiate fair market-based pricing on an arm's length basis. The integrity of the negotiations is maintained by way of the following separation:

- Functional separation: FMI employees will reside under the FortisBC Midstream Inc. legal entity and not FortisBC Energy Inc. FMI will limit the sharing of resources to corporate services including senior management and operating personnel. FMI will not share those FEI employees that reside in FEI's gas supply planning and operations (the "FEI Midstream Group"). The sharing of resources between FEI and FMI will be primarily for corporate services (i.e. information technology, accounting, human resources), where the nature of the work performed does not lend itself to a situation where a conflict of interest exists between FMI and FEI.
- Physical separation: FMI and any ACGS employees involved in negotiating third party storage lease contracts and optimizing the Storage Facility will not be located in the Surrey facility where the FEI Midstream Group employees currently work. They will be physically separated.
- Technological and operational separation: There will be system access and information restrictions. FMI/ACGS employees responsible for negotiating third party storage lease contracts and optimizing the Storage Facility will not have access to confidential information used by FEI employees for portfolio planning and mitigation and related contract negotiation activities.²¹

²⁰ FMI Reply Submission, para. 84.

²¹ FMI Reply Submission, para. 57.

In order to create an appropriate separation of activities between FMI and FEI employees, FMI employees will reside at a physical location other than the Surrey facility where the FEI employees responsible for portfolio planning, mitigation and related contract negotiation activities currently reside.²² FMI will not be utilizing the services of any FEI staff currently responsible for performing commercial services activities related to mitigation, trading and contract negotiation.²³

While recognizing the commitments of FMI as to physical and logical separation, the Panel is concerned there are no proposed limits on swapping employees between FMI/FEI, or similar inter-affiliate transfers, temporary or not, which could result in the “leakage” of confidential information between the FEI Core Market Administration (CMAE) group responsible for commercial or trading activities (i.e. portfolio planning and mitigation and related contract negotiation activities at FEI) and FMI.

2.3 Separation of executive control

BCOAPO believes that because FEI and FMI have a common parent, the proposed share transaction raises significant conflict of interest concerns.²⁴

The current officers of various Fortis entities shown in Figure 1 of the Application indicate:

FortisBC Energy Inc. – Vice President, Energy Supply and Resource Development – Cynthia Des Brisay
FortisBC Midstream Inc. – President – Cynthia Des Brisay²⁵

NGTL note that in their experience, where a regulated and unregulated company are affiliates, there is often an inter-affiliate code of conduct that expressly and substantively regulates inter-affiliate conduct. Such rules may be especially important where there is not a separation of commercial decision making between the regulated and un-regulated businesses.²⁶

Although FMI has stated that it intends to maintain separation of employees where potential conflicts of interest exist, NGTL observes that at present the same person is proposed to occupy the positions of FEI Vice - President of Energy Supply and Resource Development, and President of FMI. Under this structure, the position that is responsible for commercial decisions related to purchasing gas storage for the regulated LDC will also be responsible for commercial decisions related to selling that service on behalf of the affiliate. This structure appears to create an inherent conflict and may create structural pressure for FMI to offer or withhold storage services on terms and conditions that further the interests of its affiliate. These concerns may be addressed, in whole or in part, by safeguards such as: an applicable code of conduct containing relevant prohibitions and requiring separation of commercial decision-making roles; and, public disclosure requirements sufficient for an objective assessment of fairness to be made by arm’s length commercially interested parties.²⁷

FMI identifies the FortisBC Energy Inc. Code of Business Conduct and Ethics Policy which provides guidance to FortisBC and its employees on how to conduct its affairs. The FortisBC Code of Business Conduct and Ethics describes the specific standards of ethical business practice and conduct expected of employees. Specifically, section 5.0 Proprietary and Confidential Information of the Code of Business Conduct and Ethics Policy states:

²² Exhibit B-3, BCUC IR 1.15.2.

²³ Exhibit B-3, BCUC IR 1.15.3.

²⁴ BCOAPO Reply Submission, para. 5.

²⁵ Exhibit B-8, NGTL IR 1.1.1a.

²⁶ NGTL Reply Submission, Sec. 3.1.

²⁷ NGTL Reply Submission, Sec. 3.2.

- 5.1 Employees shall not disclose any confidential or proprietary information about the Corporation, or any person or organization with which the Corporation has a current or potential business relationship, to any person or entity, either during or after service with the Corporation, except **(i) in furtherance of the business of FortisBC, (ii) with the written authorization of a member of senior management** or (iii) as may be required by law.²⁸

FMI notes that only NGTL has articulated a specific gap in the existing mechanisms, expressing concern with respect to shared executives and suggests that the FortisBC Code of Business Conduct and Ethics Policy permits internal sharing of information. FMI submits that there is no gap. Contrary to NGTL's interpretation, the FortisBC Code of Business Conduct Ethics would prevent the type of behaviour about which NGTL has expressed concern. For example, it would be contrary to the requirement that relationships be honest, fair and conducted with integrity and due regard for the protection of the interests involved.²⁹

FMI submits that additional code of conduct requirements is not necessary and that sufficient protection is provided by the mechanisms described above, which are buttressed by the existing regulatory safe guards. However, in the alternative, the issue identified by NGTL is addressed by a condition that ACGS/FMI directors and executives that also have management roles with FEI be required to execute non-disclosure agreements (as is done by FEI's executives that also have an executive position with FortisBC Alternative Energy Services Inc.).³⁰

The Panel finds that the combined effect of FMI having a common senior executive with FMI and a Code of Conduct that permits the sharing of information where it is "in furtherance of the business of FortisBC" or "with the written authorization of a member of senior management" raises the possibility or appearance that information could be shared that would not be in the public interest. **To ensure inappropriate information sharing does not occur, the Panel directs FMI to require all ACGS/FMI directors and executives that also have management roles with FEI to execute non-disclosure agreements.**

2.4 Role of codes of conduct/transfer pricing policy

FMI acknowledges that while it is recognized that Fortis' ownership of ACGS increases concerns regarding the potential for a conflict of interest as a common owner of FMI and FEI, this should not occur as the potential for a conflict of interest will be mitigated through appropriate segregation of duties, codes of conduct and ethics policies, transfer pricing policies and service agreements.³¹

FMI's position is that its evidence should be accepted at face value in the absence of compelling reasons to the contrary. FMI states that contrary evidence is absent in this case. For instance, there is no evidence of conflicts of interest ever manifesting themselves or causing harm in dealings among existing Fortis affiliates in BC. Moreover, although ACGS is regulated on a reporting or complaints basis, FMI is fully cognizant that one of ACGS' customers, FEI, is subject to full and active Commission regulation.³²

NGTL observes that the FEI Code of Conduct does not directly and substantively address FEI transacting with a non-regulated affiliate. FMI notes the Commission's direction to FEI to file for approval, by April 27, 2016, a new

²⁸ Exhibit B-3, BCUC IR 1.16.5. Emphasis added.

²⁹ FMI Reply Submission, para. 60.

³⁰ FMI Reply Submission, para. 61.

³¹ Exhibit B-3, BCUC IR 1.12.1.1.1.

³² FMI Reply Submission, para. 47.

Code of Conduct and Transfer Pricing Policy, but the substance of this Code is not on record in this proceeding. While FEI and FMI are guided by the FortisBC Code of Business Conduct and Ethics Policy, NGTL notes that this code in fact permits proprietary information sharing between FMI and FEI, if for the benefit of the business of their common parent, or internally permitted.³³

BCOAPO makes the point that, in response to BCUC IR 1.12, FMI acknowledged that there is a potential for a conflict of interest due to the common ownership of FMI and FEI. However, it indicates that this will be mitigated through segregation of duties, codes of conduct and ethics policies, transfer pricing policies and service agreements.³⁴

BCOAPO notes that FMI appears to have taken reasonable precautions to limit the creation of active conflicts of interest (e.g., by having commercial teams for the different companies working in different locations). However, there remains a conflict of interest inherent in the common owner relationship between FMI and FEI. The nature of this conflict is expressed in the response to BCSEA-SCBC IR 1.5, which acknowledges that the financial benefits of contracts favourable to FMI accrue to the FMI shareholder, whereas the financial benefits of contract favourable to FEI accrue to FEI's ratepayers.³⁵

BCSEA-SCBC notes that while FMI is not a regulated entity, ACGS is a 'lightly regulated' entity, and the proposal is that FMI will be an intermediary in the provision of services by FEI (a regulated entity) for the benefit of ACGS (a corporate affiliate of FEI and a 'lightly regulated' entity). In BCSEA-SCBC's view, consideration should be given to whether ACGS should have a code of conduct/transfer pricing policy.³⁶

CEC recommends that the Commission consider the internal operating policies of FEI in its future review of the Code of Conduct and Transfer Pricing Policies to be filed by April 27, 2016 by FEI.³⁷

In Order G-31-15 issued February 27, 2015, FEI was directed to file for approval a draft all-inclusive Code of Conduct and Transfer Pricing Policy within one year of final approval of the Code of Conduct and Transfer Pricing Policy for Affiliated Regulated Businesses Operating in a Non-Natural Monopoly Environment that covers the interactions between FEI and its affiliated natural monopoly utilities, FEI and its affiliated non-regulated businesses, and FEI and its affiliated regulated businesses operating in a non-natural monopoly environment.

The Panel directs ACGS to institute a Code of Conduct and Transfer Pricing Policy (COC/TPP) which covers the interactions between ACGS and its affiliated natural monopoly utilities, ACGS and its affiliated non-regulated businesses, and ACGS and its affiliated regulated businesses operating in a non-natural monopoly environment. The ACGS COC/TPP must be filed for approval by the Commission no later than the time FEI files its all-inclusive Code of Conduct and Transfer Pricing Policy.

2.5 Potential conflict related to FEI gas supply mitigation activities

BCOAPO raises concerns regarding an additional potential conflict of interest with respect to the activities FEI undertakes as part of the mitigation of its contracted gas supply portfolio which may arise if there is not sufficient separation between FMI and FEI.

³³ NGTL Reply Submission, Sec. 3.1.

³⁴ BCOAPO Reply Submission, para. 7.

³⁵ BCOAPO Reply Submission, para. 9.

³⁶ BCSEA-SCBC Reply Submission, p. 3.

³⁷ CEC Reply Submission, para. 2.

As noted by FMI's reference to FEI's 2015/16 Annual Contracting Plan and the 2015 FortisBC Energy Utilities Long Term Resource Plan, the storage contracts between FEI and ACGS form a key component of FEI's overall portfolio of gas resources that FEI contracts to meet the peak day, seasonal and annual load requirements of its customers. FEI aggregates its supply from its various purchase contracts and gas that is withdrawn from ACGS at Station 2 and uses this gas supply to meet its core customer load requirements.³⁸

As described by FMI in reference to the Gas Supply Mitigation Incentive Program (GSMIP) Term Sheet attached as Appendix A to Commission letter L-15-15 dated April 2, 2015, FEI actively mitigates its contracted gas supply resources on a day-to-day or period-to-period basis to the extent they are not required to meet customer load, but FEI's primary responsibility is to meet customer requirements while maintaining reliability and security of supply for its customers. These FEI mitigation activities include period-to-period transactions such as the storage Park and Loan Transactions contemplated in the GSMIP Term Sheet. As understood by FMI, all mitigation revenues realized by FEI net of the GSMIP incentive payment flow back to customers.³⁹ FEI shareholders have the opportunity to earn an incentive payment based on certain mitigation performance measures set out in the Term Sheet.⁴⁰

The majority of ACGS's trading activities are focused on generating revenue on a portion of the capacity that is not subleased to third parties. ACGS is typically a reseller of gas at Station 2 through its trading activities, mainly in the winter, for supply withdrawn from the ACGS facility.⁴¹ Since FMI bears all risks and benefits from its operations at ACGS, all profits or losses from ACGS trading activities will directly impact the FMI shareholder.⁴²

BCOAPO express concerns that following the share sale, FMI and FEI will be in competition with respect to their gas supply mitigation activities. BCOAPO submits that FEI's primary objective is to also generate revenue through proprietary trading activities and while it may be fair to say that direct competition is limited because the companies are engaged in different businesses, as FMI responds in BCUC 1.16.1, it is not fair to say this within the context of FEI's gas supply mitigation activities. BCOAPO submits that it is not aware of any filings that enable the Commission to ensure that ratepayer interests in mitigation activities revenues are being protected and therefore submits that the Commission cannot find that FEI and its customers would not be detrimentally affected by the share sale.⁴³

CEC accepts that there will be no significant risk relating to FEI's mitigation activities and that any such risks would also occur under another owner.⁴⁴ NGTL and BCSEA do not raise any issues in regard to the potential for conflict of interest in regard to mitigation activities. FEI does not make any submissions on the subject.

FMI submits in reply that BCOAPO fails to distinguish between the different drivers of the mitigation activities that are undertaken by ACGS and FEI. FMI submits that the majority of any day-to-day mitigation undertaken by FEI would be based on the overall supply position in its portfolio of resources versus customer requirements and not specifically to its ACGS storage contracts. On the other hand, the majority of ACGS' trading activities are focused on generating revenue on the portion of capacity that is not subleased to third parties.⁴⁵

³⁸ Exhibit B-3, BCUC 1.16.1, p. 46.

³⁹ Exhibit B-3, BCUC 1.16.4.

⁴⁰ Commission Letter L-15-15 dated April 2, 2015, Appendix A – 2013-2016 GSMIP Term Sheet, p. 2.

⁴¹ Exhibit B-3, BCUC 1.16.1, p. 46.

⁴² Exhibit B-6, BCSEA 1.1.5.

⁴³ BCOAPO Final Submission, p. 3.

⁴⁴ CEC Final Submission, p. 10.

⁴⁵ FMI Reply Submission, p. 20.

FMI submits that “[a]ny potential competition with FEI’s gas portfolio mitigation activities, which is indirect and very limited in any event, exists regardless who owns ACGS” and that the separation and segregation of FEI and FMI/ACGS’ respective commercial teams removes the risk of a detrimental impact on FEI’s mitigation activities arising from the share sale. FMI submits there is no evidentiary basis upon which to find that FEI would be detrimentally affected in its mitigation activities as a result of FMI ownership of ACGS and submits that BCOAPO’s speculation should be rejected by the Commission.⁴⁶

Assuming adequate separation exists, the Panel has no concerns regarding the competition between FMI and FEI in day-to-day commercial trading activities. The Panel agrees with BCOAPO that if there is not adequate separation that there may be a potential conflict of interest with respect to the activities FEI undertakes as part of the mitigation of its contracted gas supply portfolio.

The Panel acknowledges FMI’s argument that the differing nature and focus of the activities of the two entities will tend to mitigate the conflict of interest. The Panel also observes that while FEI ratepayers are the primary beneficiaries of FEI’s mitigation activities and the common shareholder of FMI and FEI is the sole beneficiary of ACGS’ trading activities, the common shareholder is also the beneficiary of the GSMIP incentive payment which is a percentage of the mitigation revenue provided to the ratepayer. Thus there is an incentive for FEI to maximize mitigation revenue on behalf of the shareholder.

With regard to BCOAPO’s concern that the Commission may not have any filings that enable it to ensure that ratepayer interests in mitigation activities revenues are being protected, the Panel observes that FEI makes a number of filings to the Commission that provide the Commission some oversight regarding mitigation activities including but not limited to:

1. The annual contracting plan which sets out the gas portfolio that will reliably meet FEI’s customer load requirements as required under Rule 14.0 of the Commission’s Rules for Natural Gas Energy Supply Contracts.⁴⁷
2. Reports FEI must file each year detailing all of FEI’s mitigation transactions and the mitigation revenue from the various types of mitigation activities as set out in section K of the 2013–2016 GSMIP Term Sheet.⁴⁸

2.6 Implications if storage costs are found to not reflect market forces

The original exemption application put forward by Unocal was premised on the basis that regulation was not required as Unocal was unable to exercise market power in its marketing of storage services. The Commission accepted that argument and since that time has repeated that it is appropriate to regulate only when it is necessary and that where market forces exist regulation should not be allowed to be an impediment to efficient markets.⁴⁹

⁴⁶ FMI Reply Submission, p. 21.

⁴⁷ Order G-130-06 dated October 27, 2006, Appendix A, Rules for Natural Gas Energy Supply Contracts, p. 3.
http://www.bcuc.com/Documents/Guidelines/2012/DOC_4236_DOC_4236_G-130-06%20Rules%20for%20Natural%20Gas%20Energy%20Supply%20Contracts.pdf

⁴⁸ Commission Letter L-15-15 dated April 2, 2015, Appendix A – 2013-2016 GSMIP Term Sheet, p. 16.

⁴⁹ Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives Report, also explained in detail in FMI Reply Submission, p. 31.

The Panel agrees with the premise that the Commission should only regulate when necessary and that market forces, if allowed to operate freely, provide the best protection to consumers. The issue in this proceeding is not to dispute this premise, but to determine if after the takeover the circumstances that exist will allow market forces to operate freely or will incentives exist that would distort free market forces to the potential detriment of the public. Specifically, will FMI have an incentive and be able to distort market forces to the overall benefit of its parent, Fortis, and to the detriment of FEI ratepayers and other customers?

As outlined elsewhere in these Reasons, the Panel has determined the steps that FEI must take to provide the necessary separation between FMI and FEI to prevent a potential distortion of market forces. The Panel further finds that the continuation of the requirement for regulatory oversight on a reporting and complaint basis provides an additional mechanism to detect such distortions.

In the event that at some future time the Commission was to find that storage costs were not being determined by freely operating market forces, the Commission may assess the merits of going to cost based rates and could decide that if a return to market based rates is not appropriate that the exemption order would be revoked and that costs would be determined by other means such as cost of service regulation.

In such an event, the Panel notes that past practice of the Commission, where one public utility takes over another public utility, is that the cost base for the combined utility used to determine rates is calculated on the basis of historical costs. Any premium paid to acquire the utility or transaction costs related to the purchase have generally not been recoverable from customers.

In the application FMI states that consistent with Order G-167-07, FMI will track the historical cost net book value of the storage facility assets and will make this information available to the Commission on request.⁵⁰

The Panel finds that the continued tracking of the historical cost net book value of the storage facility is appropriate. This will ensure that a future panel is not impaired in its ability to determine an appropriate rate base for cost of service purposes.

2.7 Issues traditionally considered by the Commission in assessing takeovers of a public utility

As noted in section 1.2 of this decision the following criteria are generally examined when assessing the takeover of a public utility:

- (a) the utility's current and future ability to raise equity and debt financing not be reduced or impaired;
- (b) there will be no violation of existing covenants that will be detrimental to the customers;
- (c) the conduct of the utility's business, including the level of service, either now or in the future, will be maintained or enhanced;
- (d) the application is in compliance with appropriate enactments and/or regulations;
- (e) the structural integrity of the assets will be maintained in such a manner as to not impair utility service; and
- (f) the public interest will be preserved.⁵¹

The issues discussed in the preceding sections of this decision deal with the central point of contention in this proceeding – namely whether the conditions will exist that allow market forces to operate freely without

⁵⁰ Exhibit B-1, p. 13.

⁵¹ Exhibit B-1, p. 11.

detrimental impact to the public. This market power issue relates to item (f). The following sections deal with criteria (a) through (e).

2.7.1 Impairment of the utility's ability to raise capital or obtain and service debt (criteria a)

FMI states that the transaction will not reduce or impair the ability of ACGS to finance its operations or raise capital. FMI's parent, FHI, will ensure that ACGS is adequately funded in accordance with applicable Commission regulations. FHI, through its parent Fortis, has a significant capability to finance any funding requirements.⁵² FMI further confirms that funding of ACGS will not have any impact on the ability of other Fortis affiliates, such as FEI, to obtain capital or on the cost of capital that is to be recovered from regulated utility ratepayers.⁵³

No intervenor contested this evidence. CEC stated it agrees that ACGS can be adequately funded.⁵⁴

The Panel finds that based on the evidence provided that FMI has the ability to adequately finance ACGS and that in so doing there will not be any negative impact on the ability of other Fortis affiliates to obtain capital or on the cost of capital to be recovered from ratepayers.

2.7.2 Violation of existing covenants (criteria b)

FMI states that the transaction will not affect any existing covenants of ACGS whether financial, commercial or otherwise. FMI will ensure that ACGS is in a position to meet its capital investment obligations.⁵⁵ No intervenor disputed FMI's evidence.

The Panel finds there is no impairment or violation of existing covenants.

2.7.3 Maintenance of level of service (criteria c)

FMI's evidence is that the transaction will have no adverse impact on the type or level of service ACGS provides to its customers. Specifically:

- Existing storage agreements will remain in place;
- ACGS' assets will not be impacted;
- The office in Fort St. John will not change and existing ACGS operational staff are expected to remain;
- Commercial services including storage leasing and trading and optimization activities currently provided by CCPL will be provided directly by FMI;
- Current technical and administrative services provided by other employees of CCPL (or affiliates) will be replaced by services provided by FMI (either directly or through affiliates) which will allow for the current level of service to be maintained.⁵⁶

No intervenor raised concerns about FMI's capability or intentions to maintain service quality.

⁵² Exhibit B-1, p. 12.

⁵³ Exhibit B-3, BCUC IR 1.7.1.

⁵⁴ CEC Final Submission, p. 12.

⁵⁵ Exhibit B-1, p. 12.

⁵⁶ Exhibit B-1, p. 12.

The Panel finds that based on FMI's plans for the takeover, the transaction will have no detrimental impact on service quality.

2.7.4 Compliance with appropriate enactments and/or regulations (criteria d)

FMI sets out the following programs, enactments and regulations that are currently in effect for ACGS and that FMI will continue to maintain once it takes over the assets.

- ACGS asset integrity and maintenance program. FMI will maintain the current program. Any future changes to the program will only be made if justified from a safety, reliability or efficiency standpoint, and only if in compliance with existing statutes and regulations;
- ACGS will continue to be regulated by the Commission under the terms set out in Order G-71-08. This includes Commission jurisdiction over disposition of utility property (section 52); amalgamation, merger or consolidation that would result in a change in ownership or control of the storage facility (section 53); and subsequent acquisition by any person of a reviewable interest in any of the public utilities (section 54);
- ACGS will also continue to meet annual reporting requirements to the Commission and other parties consistent with Order G-71-08; and
- FMI will continue to track historical cost net book value of the storage facility assets and make this information available consistent with Order G-167-07.⁵⁷

No intervener disputed FMI's evidence that it would continue to meet the regulatory provisions currently applicable to ACGS.

The Panel agrees with FMI that the transaction preserves the Commission's ongoing regulatory jurisdiction over ACGS.

2.7.5 Maintenance of the structural integrity of the assets (criteria e)

FMI states that its takeover will not involve any change to the operations of the assets and hence the integrity of the assets will be maintained. FMI recognizes that ACGS has an obligation to provide to provide safe, reliable and secure service under the jurisdiction of the Commission. The operations of ACGS will remain subject to regulatory oversight, including meeting requirements of the BC Safety Authority, the BC Oil and Gas Commission and WorkSafe BC.⁵⁸

FMI will maintain asset integrity programs at ACGS similar to current programs over the next three years and beyond. While FMI or Fortis affiliates do not have the geological, geophysical, reservoir engineering or other technical expertise that is currently provided by CCPL employees, FMI is planning an organizational structure that will ensure that reservoir and well integrity related tasks that were previously undertaken by ACGS or CCPL continue to be completed under the oversight of FMI.⁵⁹

No intervener raised concerns over FMI's capability to maintain the structural integrity of the assets.

⁵⁷ Exhibit B-1, p. 13.

⁵⁸ Exhibit B-1 pp. 15, 16.

⁵⁹ Exhibit B-3, BCUC IR 1.10.3, BCUC IR 1.11.3.

The Panel finds that the planning FMI has undertaken represents an appropriate approach to ensuring the storage facility's structural integrity is maintained.

2.8 Other issues

In argument BCOAPO, CEC and NGTL each made specific unique recommendations. The following sections deal with the issues they have raised.

2.8.1 Need for a long term resource plan

In its final submission CEC recommends that FMI be required to file a long term resource plan (LTRP).

In CEC's view benefits of filing such a plan are:

- By elaborating on the relationship between FMI and its customers, particularly FEI, it would provide comfort that storage facilities will not be repurposed and will remain available to FEI;⁶⁰
- Following the filing of an LTRP the Commission may be in a position to redefine how it regulates FMI;⁶¹
- In reviewing a FMI LTRP the Commission would be able to explore where FMI exerts market power in terms of setting storage rates;⁶²
- There are proposed projects that could increase AGCS's competition for storage services. While the outcome of such projects are uncertain, an FMI LTRP could help the Commission determine the long term role of the regulator in relation to this asset;⁶³ and
- An LTRP could cover a range of issues including the potential forms of relationships with customers including with respect to trading.⁶⁴

FMI in its reply submission argues that the proposal that FMI prepare and file a LTRP should be rejected for the following reasons:

1. The requirement in the *Utilities Commission Act* to file an LTRP is one of the sections for which AGCS has an exemption;
2. The existing exemption is appropriate because AGCS does not operate in the same manner and environment as a traditional utility. AGCS does not have a firm load or captive customer base and its customers will enter into a contract after having the ability to consider a variety of supply options; and
3. The LTRP would serve no practical use and be of no benefit to AGCS or its customers. AGCS is normally not fully leased. FMI plans to continue to offer gas storage services based on negotiated contracts, but they will necessarily reflect market conditions, obviating the need for an LTRP. AGCS will provide service and conduct its planning based on needs that can be expected to change over time depending on the overall market conditions and requirements.

The Panel concurs with FMI that the AGCS differs from a traditional utility in that it does not have a captive customer base and hence does not have an obligation to serve beyond the obligations set out in its negotiated contracts. The Panel notes that the exemption order does not include exemption from sections 24, 25, 38, 39, 41, 42 and 52 (as well as 53 and 54).⁶⁵ These sections provide protection for FMI customers in that, among other

⁶⁰ CEC Final Submission, p. 7.

⁶¹ CEC Final Submission, p. 9.

⁶² CEC Final Submission, p. 10.

⁶³ CEC Final Submission, p. 11.

⁶⁴ CEC Final Submission, p. 15.

⁶⁵ Exhibit B-1, Appendix C.

things, they deal with the provision of adequate service, prevention of discrimination or delay in the provision of service, the need for approval to discontinue service and the requirement to obey orders of the Commission.

Given that ACGS customers are not captive and could decide to opt for alternative supply or storage services, the Panel is not persuaded of the efficacy of the CEC assertion that the LTRP would clarify relationships with customers. The Panel is not convinced such a process would provide meaningful insight or impact on future ACGS/customer relationships. The market power issue that is raised by CEC is insight into future ACGS – customer relationships. The market power issue CEC proposes to deal with in an LTRP review is dealt with in section 2.1 of this decision. The Panel does not see an LTRP process as necessary in dealing with this issue given this decision and the ability of parties to address this issue through a complaint to the Commission if there is a perceived abuse of market power.

The Panel determines that the exemption of ACGS from the requirement to file a LTRP remains appropriate and the exemption order should remain as currently specified in this regard.

2.8.2 Provision of priority access by FEI to ACGS storage services

BCOAPO in final submission recommends that ACGS be required to provide priority access for FEI to ACGS storage at market rates provided space is available in the Aitken Creek facility and is required by FEI to meet its needs in a cost effective manner. BCOAPO argues that this is warranted because although FMI indicates it intends to continue to offer third party storage services through negotiated contracts, corporate plans could change based on such factors as changing market forces and changes in management. BCOAPO acknowledges that if the share sale is rejected FEI would not have priority access to ACGS storage services, but sees the provision of priority access as condition of sale as going “some small difference toward offsetting the disadvantage (conflict of interest) to FEI that is inherent in the sale.”⁶⁶

FMI urges the Commission to reject the BCOAPO proposal to provide FEI priority access to ACGS storage services. FMI argues this is not appropriate for the following reasons:

1. It is inconsistent with the current exemption. The market based framework that the exemption is premised upon suggests FEI can negotiate the access it needs to meet its requirements;⁶⁷
2. There is no evidence FEI requires priority access. ACGS historically has unleased capacity available and there is no evidence that FEI has ever had any difficulty in obtaining the capacity it requires. FMI expect to continue to have surplus storage capacity. FEI has other market options that make paying for priority access unnecessary. FEI is also ACGS’s largest customer leasing about one-third of the available working gas capacity. This makes FEI an important customer providing stable base revenue. ACGS has every incentive to continue to retain such a customer;
3. The test under the UCA requires the Commission to assess whether the transaction would harm customers, not whether the transaction would provide an opportunity to extract value from the new owner for the benefit of one customer at the expense of ACGS, its shareholder, or other customers of ACGS. FMI’s plans to continue to offer third party storage services to new and existing customers based on negotiated rates that are reflective of prevailing market conditions is fair, and consistent with the Act.⁶⁸

⁶⁶ BCOAPO Final Submission, pp. 3, 4.

⁶⁷ FMI Reply Submission, p. 36.

⁶⁸ FMI Reply Submission, p. 37.

The Panel agrees with FMI that requirement for ACGS to provide priority service to FEI is inconsistent with a system predicated upon relying on market forces. With respect to the conflict of interest issue, this has been dealt with in sections 2.1 through 2.6. As pointed out in section 2.7.1 ACGS remains subject to a number of provisions of the UCA including provisions that prohibit the providing of service on a discriminatory basis.

The Panel finds that the providing of priority access by FEI (or any other customer) to ACGS would be discriminatory and contrary to section 39 of the UCA and is inconsistent with the provision of service in a market driven by market forces.

2.8.3 The provision of information on storage service contracts and prices

NGTL encourages the Commission to consider requiring ACGS to provide additional information similar to that required under the Ontario Storage and Transportation Access Rule (STAR).⁶⁹ NGTL argues that the OEB de-regulated market storage services for the LDC's ex-franchise customers representing about one-third of the Ontario storage market. To ensure non-discrimination the OEB requires among other things that storage operators post on their website the standard form of contract and twice a year post on their websites for all contracts of one year duration or longer, the identity of the shipper, the unit charge which is the annual cost per GJ of storage capacity received from each shipper, and the total revenue from each shipper for the previous six month period.⁷⁰

NGTL in argument states that it does not oppose the application, but believes that the change in ownership of ACGS from an arms-length service provider to one that provides service to a regulated affiliate has the potential to negatively affect NGTL, or its customers, absent appropriate safeguards.⁷¹

FMI opposes the NGTL proposal to provide contract information along the model used by the Ontario Energy Board and recommended by NGTL. FMI bases its opposition on the following:

1. The public filing of contracts as proposed by NGTL would be contrary to the exemption order and harmful to ACGS. Exemptions from the Act reflect that storage services are provided in a competitive market place in which parties entering into bilateral negotiations have at their disposal price information on substitutes or alternatives, and make their decisions whether or not to contract for service based on their analysis of this information;
2. Publication of storage contracts would tip the existing balance of negotiating power significantly in favour of customers and other parties that provide storage services to these customers;
3. While NGTL is recommending the Ontario model, in Alberta in which NGTL's own affiliates operates storage facilities, the system is akin to the system ACGS currently operates. The Alberta facilities are not regulated and storage contracts and prices are not required to be disclosed.

The Panel notes the NGTL concern about potential discriminatory treatment between ACGS and its regulated affiliate. However this decision has addressed this issue and does not find that the disclosure proposed by NGTL is necessary.

The Panel finds that given the practice of storage facilities in Alberta, that unlike Ontario storage facilities, are potential competitors to ACGS, the requirement to post contract information along the lines of the Ontario Storage and Transportation Access Rule model would be potentially disruptive of the ability of ACGS to compete

⁶⁹ NGTL Final Submission, p. 4.

⁷⁰ NGTL Final Submission, Attachment 1, p. xii.

⁷¹ NGTL Final Submission, p. 4.

in the attraction of storage service customers and in the negotiation of competitive contracts. The Panel therefore does not require posting of contract information as proposed by NGTL.

3.0 IMPLEMENTATION ISSUES

3.1 Action Plan within first 30 days

FMI acknowledges that while it is recognized that the common ownership by Fortis of FMI and FEIs increases concerns that the acquisition of ACGS by FMI raises the potential for a conflict of interest; this should not occur as the potential for a conflict of interest will be mitigated through appropriate segregation of duties, codes of conduct and ethics policies, transfer pricing policies and service agreements.

The Panel has set out some additional actions which FMI must undertake in order to protect the public interest by ensuring the potential for a conflict of interest will be mitigated.

Therefore the Panel directs FMI to file an Action Plan within 30 days after the transaction to acquire the shares in the Aitken Creek storage facility has closed which details how and when FMI or ACGS will:

- **Implement personnel rules proposed limits on swapping employees between FMI/FEI, or similar inter-affiliate transfers, temporary or not, which could result in the “leakage” of confidential information;**
- **Ensure ACGS/FMI directors and executives that also have management roles with FEI execute non-disclosure agreements; and**
- **File with the Commission a draft COC/TPP which covers the interactions between ACGS and its affiliated natural monopoly utilities, ACGS and its affiliated non-regulated businesses, and ACGS and its affiliated regulated businesses operating in a non-natural monopoly environment.**

3.2 Implementation Assessment Report on ACGS Operations under FMI

In the application FMI has set out a number of steps it intends to take following takeover of the Aitken’s Creek storage facility. In approving the share purchase the Panel has set out some additional actions that FMI must undertake in order to protect the public interest. Once FMI has completed its share purchase and had time to implement the measures set out in the application, the Panel finds it appropriate that it provide a report on the results of the measures put in place.

Therefore, the Panel directs ACGS to file an Implementation Assessment Report covering the first year of operations under FMI. The report should be filed with 60 days following the one year anniversary date of the closing of the transaction date to acquire the shares in the Aitken Creek storage facility. The Report is to provide an overview of how the facility is being managed by ACGS and must contain the following information:

- **The management structure of ACGS;**
- **The staffing that ACGS has undertaken under FMI’s ownership;**
- **The steps that have been taken to implement the directions given in this decision;**
- **The staff or expertise that has been acquired by FMI or ACGS, including the geological, geophysical, reservoir engineering or other technical expertise necessary to ensure the maintenance of service quality and the structural integrity of the asset;**
- **All staffing and services that are being provided by Fortis affiliates other than FMI itself;**
- **Any problems ACGS has experienced in maintaining service quality or structural integrity; and**

- **An assessment of the extent to which ACGS has been able to provide storage services to customers based prices reflective of prevailing market conditions, including the extent to which it has added new customers and retained or lost existing customers.** To the extent this assessment contains commercially sensitive information, ACGS may file such information on a confidential basis.

4.0 SUMMARY

The following list summarizes the major findings of the Panel. The complete details of the findings are in the individual sections preceding this summary.

After assessing the evidence provided the Panel has made the following determinations:

- 1. The Panel approves the acquisition by FMI of all of the issued and outstanding shares of ACGS;**
- 2. The Panel approves registration of the transfer of shares on the books of ACGS;**
- 3. The Panel requires ACGS to file with the Commission a Code of Conduct and a Transfer Pricing Policy which covers the interactions between ACGS and its affiliated natural monopoly utilities, interactions between ACGS and its affiliated non-regulated businesses, and ACGS and its affiliated regulated businesses operating in a non-natural monopoly environment;**
- 4. The Panel directs;**
 - a. Within 30 days of the closing of the transaction FMI is to file an Action Plan as set out in these reasons; and**
 - b. Following one year of operation of ACGS by FMI, ACGS is to file an Implementation Assessment Report as specified in these reasons.**