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CITY OF KELOWNA

MEMORANDUM

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**Date:** March 2, 2009  
**File No.:** 1824-02  
**To:** City Manager  
**From:** Electrical Administration Manager  
**Subject:** Signing Authority for License Agreement for Shared Use of FortisBC Structures

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**RECOMMENDATION:**

THAT Council approve the Licence Agreement for Shared Use of FortisBC Structures, in the form attached, with FortisBC Inc.;

AND THAT the Mayor and City Clerk be authorized to execute the licence;

AND THAT the Electrical Administration Manager be authorized to execute any amendments adding additional transmission poles to the licence, once executed.

**BACKGROUND:**

The City Electrical Department has attached distribution wires to Fortis transmission poles on Clement Ave, saving the cost of installing new poles. This is a common practice within the utilities. Currently the City has a shared agreement with Telus, as they have wire attached to City of Kelowna poles. In the Shared Use Agreement Fortis is requesting payment for the use of their structures. As this is a common practice, we are asking Council to give the Electrical Administration Manager authority to sign the various amendment contracts as they are presented for this application.

**FINANCIAL/BUDGETARY CONSIDERATIONS:**

Under the Electrical Operating Budget a final budget supplemental will be required to cover cost of this shared use agreement. In the future, additional funding will be required as more poles are added. The agreement indicates the connect fee for transmission poles are \$155.19, \$39.82 for distribution poles and includes a yearly price index calculation. Twenty three transmission poles are currently shared under this agreement.

**INTERNAL CIRCULATION TO:** N/A  
**LEGAL/STATUTORY AUTHORITY:** N/A  
**LEGAL/STATUTORY PROCEDURAL REQUIREMENTS:** N/A  
**EXISTING POLICY:** N/A  
**PERSONNEL IMPLICATIONS:** N/A  
**TECHNICAL REQUIREMENTS:** N/A





**EXTERNAL AGENCY/PUBLIC COMMENTS: N/A**  
**COMMUNICATIONS CONSIDERATIONS: N/A**  
**ALTERNATE RECOMMENDATION: N/A**

Submitted by:

C. McNeely  
Electrical Administration Manager



Approved for Inclusion:

John Vos

General Manager  
Citizens Services

Cc: Director Of Financial Services  
Financial Planning Manager



# **FORTISBC**

## **LICENCE AGREEMENT FOR SHARED USE OF FORTISBC STRUCTURES**

**Between**

**FortisBC Inc.  
Suite 100, 1975 Springfield Avenue  
Kelowna, BC V1Y7V7**

**and**

**The Corporation of the City of Kelowna  
1435 Water Street  
Kelowna, BC V1Y 1J4**

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**THIS AGREEMENT** made as of October 1, 2008,

BETWEEN:

**FORTISBC INC.**, a corporation established by a special Act of the Legislature of the Province of British Columbia, having its head office in the City of Kelowna, in the Province of British Columbia. ("FortisBC")

AND:

**THE CORPORATION OF THE CITY OF KELOWNA**, a corporation incorporated in the Province of British Columbia, having its head office in the City of Kelowna in the Province of British Columbia. (the "Licensee")

WITNESSES THAT WHEREAS:

A. The Licensee furnishes certain electricity distribution, traffic, lighting and other services to residents of the Licensee and has requested a licence to use part of a number of structures owned by FortisBC to facilitate the delivery of such services; and

B. FortisBC is willing to grant to the Licensee a non-exclusive license to attach the Licensee's facilities to certain structures owned by FortisBC, in accordance with the terms and conditions set forth in this Agreement;

**NOW THEREFORE** in consideration of the terms and conditions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby irrevocably acknowledged, the parties hereto agree as follows:

## **SECTION 1 DEFINITIONS AND APPLICATION**

### **1.1 Definitions and Application**

Where used in this Agreement or in any schedules hereto, the following terms shall have the following respective meanings:

**"Additional Work"** has the meaning ascribed to it in Section 4.5;

**"Application"** means a permit application for licensed attachment to, occupancy or use of, certain FortisBC Structures, properly completed by the Licensee and submitted to FortisBC in the form attached hereto as Schedule A;

**"Distribution Pole"** means a FortisBC-owned pole on which FortisBC supplies electricity at not more than 25,000 volts,–measured phase to phase, and specifically



excludes—a Transmission Pole on which a circuit energized at 25,000 volts or less, measured phase to phase, has been under built.

**“Distribution Pole Contact”** means a Distribution Pole which is attached or contacted by the City of Kelowna with the express written consent of FortisBC.

**“FortisBC Business”** means, collectively, all those business activities which FortisBC is required, permitted or authorized to carry out. Without limiting the generality of the foregoing, the FortisBC Business includes FortisBC’s service to its customers and in particular the generation, transmission and distribution of electricity and the construction and maintenance of power transmission and distribution lines;

**“FortisBC Structures”** means poles and other structures exclusively owned by FortisBC and operated and maintained primarily for the purpose of the transmission or distribution of electricity, and the singular **“FortisBC Structure”** means any one of the FortisBC Structures;

**“GDP Implicit Price Index”** means the prices index for Canada identified as CANSIM, Matrix 6544, published from time to time by Statistics Canada;

**“Good Utility Practice”** means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be acceptable practices, methods or acts generally accepted in the Western Electricity Coordinating Council (or its successor organization) region;

**“Governmental Authority”** means any federal, provincial, regional, municipal or other government, government body, authority or official, including any department, commission, bureau, board, administrative agency or regulatory body thereof, having jurisdiction over the FortisBC Business, the Licensee Facilities or any part thereof, or either of the parties hereto;

**“Licensee Facilities”** means any and all material, apparatus, equipment or facilities owned by the Licensee and proposed to be or actually attached to, occupying or using FortisBC Structures, but excluding any material, apparatus, equipment or facility for the provision of Telecommunication Services. Without limiting the generality of the foregoing, the Licensee Facilities may include any or all of:

- (a) brackets, insulators, transformers and their several attachments, and lines of wire for the distribution of electric energy;
- (b) mast arms, luminaries, supply conductors, relays and other equipment required to operate a street lighting system;

- (c) traffic signal, power and control cables, junction and splice boxes and any other equipment and/or devices normally required for the operation of traffic signals;
- (d) service attachments;
- (e) decorative lighting;
- (f) standards; and
- (g) seasonal decorations.

“**Make Ready Work**” has the meaning ascribed to it in Section 4.2;

“**Notices**” has the meaning ascribed to it in Section 13.8;

“**Permit**” has the meaning ascribed to it in Section 3.3;

“**Prior Rights**” means the rights in relation to FortisBC Structures previously granted or allowed by FortisBC, by contract or otherwise, to persons not party to this Agreement;

“**Standards**” has the meaning ascribed to it in Section 4.1;

“**Structure Rental Fees**” has the meaning ascribed to it in Section 5.2;

“**Structure Rental Rate Multiplier**” means, for any year of the Term, (a) one plus (b) the GDP Implicit Price Index for the year preceding such year minus the GDP Implicit Price Index for the year that is two years prior to such year, such difference being divided by the GDP Implicit Price Index for the year that is two years prior to such year, as set out in the following formula.

$$SRRM = 1 + \frac{(IPI_p - IPI_{2p})}{IPI_{2p}}$$

Where:

SRRM = Structure Rental Rate Multiplier

IPI<sub>p</sub> = GDP Implicit Price Index (preceding year)

IPI<sub>2p</sub> = GDP implicit Price Index (2 year prior)

“**Transmission Pole**” means a FortisBC-owned pole on which FortisBC supplies electricity at greater than 35,000 volts measured phase to phase.

“**Transmission Pole Contact**” means a Transmission Pole which is attached or contacted by the City of Kelowna with the express written consent of FortisBC.

“**Telecommunications Services**” is as defined in the *Telecommunications Act* S.C. 1993, c.38; and

“Term” has the meaning ascribed to it in Section 2.1.

## SECTION 2 TERM

### 2.1 Term

The term of this Agreement will be 5 years (the “Term”), commencing on October 1, 2008 and ending on September 30, 2013, unless terminated sooner in accordance with the provisions of this Agreement.

### 2.2 Renewal

- (a) If throughout the Term the Licensee has fully complied with all of the terms and conditions of this Agreement, the Licensee shall have the option to extend the Term for further and consecutive periods of 5 years each. All renewals shall be on the same terms and conditions as the Term, except that the Structure Rental Fees for any subsequent renewal terms shall be adjusted to correspond with FortisBC’s standard rates as established at least 120 days prior to the expiration of the Term or the then-current renewal term, as the case may be. FortisBC will provide to the Licensee the revised Structure Rental Fees within 30 days of a written request therefore from the Licensee. If the Licensee accepts the revised Structure Rental Fees, it may exercise its option(s) to extend the Term by notice in writing to FortisBC given not more than 90 days and not less than 60 days prior to expiry of the Term or the then-current renewal term, as the case may be. Failing such notice this Agreement will terminate upon the expiration of the Term or the then current renewal term, as the case may be. A renewal term shall commence on the expiry of the Term or the expiry of the immediately preceding renewal term and end on the expiry of the Term or the expiry of the then current renewal term unless terminated sooner in accordance with the provisions of this Agreement.
- (b) Where, in the opinion of FortisBC, reasonably formed, the Licensee has not fully complied and remediated such compliance after notice thereof with all material terms and conditions of this Agreement, FortisBC may refuse to renew this Agreement and shall give timely written notice to the Licensee in this regard.

## SECTION 3 APPLICATIONS AND PERMITS

### 3.1 Application by the Licensee for New Use of FortisBC Structures

Where the Licensee wishes to attach Licensee Facilities to FortisBC Structures it shall complete and submit to FortisBC an Application, enclosing therewith:

- (a) complete design drawings for each proposed attachment of Licensee Facilities to a FortisBC Structure;

- (b) calculations, worksheets or other documentation satisfactory to FortisBC (acting reasonably), showing that the applicable Licensee Facilities, and their proposed attachment to FortisBC Structures as contemplated in the Application, comply with the Standards (or, to the extent that there is no applicable Standard in any particular circumstance, then with such technical, engineering, safety or other standards, as applicable, as FortisBC may determine, in its reasonable discretion, are appropriate); and
- (c) such additional information or material as required by FortisBC;

all for the purpose of assessing the feasibility and desirability of the attachment of Licensee Facilities to FortisBC Structures, including the ability of FortisBC to maintain compliance with all applicable laws, statutes, regulations, by-laws, standards, and codes in respect of FortisBC Structures or their use. An Application may combine as one item several Licensee Facilities to be attached to FortisBC Structures.

### **3.2 Site Visits**

Where FortisBC deems it necessary, FortisBC may arrange for a joint site visit with the Licensee to form FortisBC's opinion as to the feasibility and desirability of the attachment of Licensee Facilities to FortisBC Structures as contemplated in an Application.

### **3.3 Permits**

- (a) FortisBC shall not unreasonably refuse to accept the Licensee's Application, and subject to the prior payment by the Licensee of all costs associated with Make Ready Work, FortisBC will complete and execute the bottom portion of the Application, thus authorizing the attachment of the Licensee Facilities to FortisBC Structures (the "Permit") and FortisBC will provide to the Licensee a copy of such Permit.
- (b) Each Permit by its issuance shall:
  - (i) constitute the express permission of FortisBC required for the Licensee to attach specific Licensee Facilities, as described in the Permit, to specific FortisBC Structures, as described in the Permit;
  - (ii) be in effect from the date of issuance to the last day of the Term, or any renewal thereof, unless terminated sooner in accordance with the provisions of this Agreement; and
  - (iii) be subject always to all of the provisions of this Agreement.

### **3.4 Superseding Permits**

For changes in the number or nature of the Licensee Facilities attached to FortisBC Structures pursuant to a Permit, a superseding Permit must be approved and issued by FortisBC before the changes can be made. A revised Application shall be prepared by the Licensee and

the Licensee shall disclose all details of the proposed changes in the number or nature of the Licensee Facilities and submit therewith such additional information or material as required by FortisBC.

### **3.5 Refusal of Permit**

Notwithstanding any provision herein FortisBC may, in its reasonable discretion, refuse to grant a Permit to the Licensee and in such an instance, FortisBC will state in writing its reasons for refusing to grant the Permit. If the Licensee can satisfy FortisBC's concerns, then the Licensee may make a new Application and re-submit such Application for approval by FortisBC.

## **SECTION 4 TECHNICAL, MAKE READY WORK, INSTALLATION, AND OPERATING REQUIREMENTS**

### **4.1 Compliance with Standards**

The Licensee will attach Licensee Facilities, and occupy and use the FortisBC Structures, only in accordance with Good Utility Practice and in such a manner as to meet or exceed the aggregate of technical requirements for use of FortisBC Structures and, in particular all technical, engineering and safety standards and rules, including those in connection with installation and operating work practices and procedures, established from time to time by FortisBC, or any lawful authority having jurisdiction over FortisBC, the FortisBC Business or the Licensee (the "**Standards**"). FortisBC may revise from time to time, in its sole discretion, any Standards so established by it, and may establish new Standards where deemed necessary or desirable by FortisBC. In any event whatsoever, the Licensee will not attach Licensee Facilities to, or occupy or use FortisBC Structures with Licensee Facilities if such Licensee Facilities are energized or have the potential to be energized in excess of 25 kV to ground.

### **4.2 Make Ready Work**

- (a) If any proposed attachment to, or occupation or use of, FortisBC Structures by the Licensee Facilities requires, in the judgment of FortisBC, the construction or alteration of, additions to, or replacement or relocation of any of the FortisBC Structures, or the relocation or rearrangement of facilities belonging to a holder of Prior Rights, to accommodate the Licensee Facilities (the "**Make Ready Work**") then FortisBC may cause such Make Ready Work to be conducted prior to issuance of, or as a condition to the exercise of rights under, a Permit.
- (b) The Licensee will promptly reimburse FortisBC for all costs and expenses incurred by FortisBC in connection with the Make Ready Work (which costs and expenses shall include, without limitation, all costs and expenses incurred by FortisBC in connection with any analytical, planning, design, inspection, construction or other work considered necessary by FortisBC to replace, rearrange or relocate any FortisBC Structures or facilities).
- (c) FortisBC will prepare an estimate of Make Ready Work costs to be paid by the Licensee to accommodate any proposed Licensee Facilities, and deliver same to

the Licensee. The Licensee may, provided that the Make Ready Work has not commenced, promptly notify FortisBC that it wishes to redesign or otherwise change the Licensee Facilities in an effort to reduce any costs and expenses to be incurred for Make Ready Work, or that it wishes to terminate all or part of an Application.

#### **4.3 Supply of Labour for Installation**

Except as expressly provided in this Agreement, the Licensee will supply or cause the supply of all of the fully and properly qualified labour required to install, operate, splice, maintain, repair or remove the Licensee Facilities, and will supply or cause the supply of all materials and equipment in connection with the Licensee Facilities. The Licensee will cause such labour and supply to be performed in accordance with the Standards, Good Utility Practice and in a good and workmanlike manner with due care and without negligent acts or omissions.

#### **4.4 Other Licences and Approvals**

The acquisition of any required licences and approvals by the Licensee, including regulatory and environmental approvals, and any financing, design, supply, construction, operation, maintenance and repairs carried out by the Licensee in respect of the Licensee Facilities shall be at the Licensee's own risk and cost, subject always to the Standards and to any other provision of this Agreement.

#### **4.5 Additional Work Required**

- (a) If the attachment to, occupation or use of, FortisBC Structures by the Licensee Facilities at any time creates an actual or reasonably apprehended situation that is not an emergency but which requires, in the sole judgment of FortisBC, construction or alteration of, additions to, replacement or relocation of any of the FortisBC Structures, in addition to the Make Ready Work completed pursuant to Section 4.2, and that situation was previously unforeseen by FortisBC, acting reasonably, then FortisBC will promptly give notice to the Licensee of the situation and the nature, extent and likely cost of such construction, alteration, addition, replacement or relocation work (the "**Additional Work**").
- (b) The Licensee may, provided that the Additional Work has not commenced, promptly notify FortisBC that it wishes to redesign or otherwise change the Licensee Facilities in order to reduce the cost of such Additional Work, or that it wishes to terminate all or part of a Permit. If such redesign, other change or termination, as the case may be, does not relieve the actual or reasonably apprehended situation then FortisBC may, to the extent reasonably required by the situation, cause such Additional Work to be done.
- (c) The Licensee will promptly reimburse FortisBC for any costs and expenses incurred by FortisBC in connection with such Additional Work, whether completed pursuant to Section 4.5(a) or 4.5(b).

#### **4.6 Emergencies and Hazardous Conditions**

If at any time FortisBC reasonably determines that the attachment to, occupation or use of, FortisBC Structures by any Licensee Facilities causes or contributes to an imminent or immediate emergency such as a substantial threat or danger to human life, the environment or to real or personal property of FortisBC or others, including those emergencies which arise from one or more breaches of the Standards, then FortisBC may, in its sole discretion, in writing or otherwise, do any or all of the following:

- (a) direct the Licensee immediately to remove or cause the removal of all or part of such Licensee Facilities;
- (b) direct the Licensee immediately to cease all or part of any activity or work being undertaken by the Licensee; or
- (c) without notice to the Licensee, relocate or remove all or part of any Licensee Facilities attached to FortisBC Structures or cause such other work to be done to the extent necessary to deal with such emergency, provided that FortisBC will promptly give notice to the Licensee after such relocation, removal or other work is completed.

The Licensee will promptly reimburse FortisBC for any costs and expenses incurred by FortisBC with respect to such relocation, removal or other work.

#### **4.7 FortisBC Right to Require Work**

If FortisBC, acting reasonably, considers it necessary for the performance of any:

- (a) Make Ready Work;
- (b) Additional Work; or
- (c) construction, maintenance, operation, repair, replacement, removal, investigation or inspection work on any FortisBC Structures or any portion of FortisBC's transmission, distribution, protection, control or communication facilities attached to, adjacent to or in the immediate vicinity of, any such FortisBC Structures,

in accordance with the Standards or Good Utility Practice, it may do any of the following:

- (a) by written notice to the Licensee, direct the Licensee, at the Licensee's own cost, to perform certain work on the Licensee Facilities;
- (b) upon giving reasonable notice to the Licensee, temporarily cover up the Licensee Facilities.

**SECTION 5**  
**INVENTORY, STRUCTURE RENTAL FEES AND COSTS FOR REPAIR**

**5.1 Inventory**

- (a) Attached as Schedule “B” to this Agreement is an inventory (the “**Initial Contact Inventory**”) of each separate point (a “**Contact**”) of attachment to, occupation or use of, the FortisBC Structures by the Licensee Facilities existing as at the commencement of the Term, together with such maps and drawings as may be sufficient, in FortisBC’s opinion, to locate each such Contact.
- (b) On or before January 30<sup>th</sup> of each year during the Term and any subsequent renewal thereof, FortisBC will provide the Licensee with an inventory of each Contact as of December 31<sup>st</sup> of the immediately preceding year (the “**Adjusted Contact Inventory**”) reflecting any changes in the number of Contacts during the immediately preceding year.
- (c) If the Licensee disputes FortisBC’s Adjusted Contact Inventory as set out in the January 30<sup>th</sup> statement, the parties will jointly perform an inventory (a “**Joint Inventory**”) of the Contacts by June 30<sup>th</sup> of the year following the year in question. If the results of such Joint Inventory are the same as those of FortisBC’s Adjusted Contact Inventory, the Licensee will bear the costs of conducting the Joint Inventory. Otherwise, –FortisBC shall bear all costs associated with conducting the Joint Inventory. The results of the Joint Inventory shall determine the Adjusted Contact Inventory as of December 31<sup>st</sup> of the previous year and shall be binding on the parties hereto.
- (d) The parties agree that they will perform a joint inventory of Contacts (a “**Five-Year Inventory**”) at the end of each five-year period during the Term and any renewal thereof (the first such period commencing on the day this Agreement becomes effective) unless, in the year immediately following the end of any such five-year period the Licensee has disputed the Adjustment Contact Inventory for such year delivered by FortisBC pursuant to Section 5.1(b), in which case the provisions of Section 5.1(c) will apply. In the absence of any such dispute, FortisBC and the Licensee will, within 180 days after:
- (i) September 30, 2012; and
- (ii) the end of each 5-year period thereafter during the Term and any renewal thereof;
- jointly perform a Five-Year Inventory of the Contacts as at December 31 of the year then most recently ended. Each party will bear each its own cost of conducting such Five-Year Inventory.
- (e) Preparation, delivery, acceptance or use by FortisBC of any of the Initial Contact Inventory, an Adjusted Contact Inventory or a Five-Year Contact Inventory shall be without prejudice to its rights under Section 6.2.



## 5.2 Structure Rental Fees

- (a) The Licensee will pay to FortisBC an annual structure rental based on a rate (the “**Structure Rental Rate**”) of \$155.19 for each Transmission Pole and \$39.82 for each Distribution Pole Contact which Structure Rental Rate will be adjusted annually thereafter by multiplying the Structure Rental Rate for the preceding year by the Structure Rental Rate Multiplier.
- (b) The Licensee will pay an aggregate structure rental charge (the “**Structure Rental Fees**”) to FortisBC which shall be an amount equal to the product of:
  - (i) the applicable Structure Rental Rate for the then-current year determined in accordance with Section 5.2(a) above; and
  - (ii) the average of:
    - (A) the number of Contacts established by the Adjusted Contact Inventory as of December 31<sup>st</sup> of the immediately preceding year of the Term; and
    - (B) the Adjusted Contact Inventory as of December 31<sup>st</sup> of the then-current year of the Term.
- (c) The Structure Rental Fees shall be calculated and invoiced by FortisBC in the following manner:
  - (i) the estimated Structure Rental Fees for each year of the Term and any renewal thereof shall be calculated by FortisBC in January and invoiced as of January 30<sup>th</sup> of each year by multiplying the Structure Rental Rate for that year by the average of
    - (A) the Adjusted Contact Inventory on December 31<sup>st</sup> of the immediately preceding year; and
    - (B) the estimated number of Contacts as at December 31<sup>st</sup> of the then-current year; and
  - (ii) the actual Structure Rental Fees for each year of the Term and any renewal thereof shall be invoiced by FortisBC on or before January 30<sup>th</sup> of the following year and shall be calculated pursuant to Section 5.2(b), using the average number of Contacts as determined by the Adjusted Contact Inventory for such year and the Adjusted Contact Inventory for the previous year. The amount invoiced by FortisBC pursuant to Section 5.2(c)(i) above shall be deducted from the actual Structure Rental Fees for the year determined in accordance with this Section 5.2(c)(ii) and the resulting difference, where it represents an amount owing by the Licensee, shall be the balance owing for the Structure Rental Fees for the previous year and shall be paid by the Licensee on or before 30 days from the date

of delivery of the FortisBC invoice. Where the resulting difference represents an amount owing to the Licensee, FortisBC shall pay to the Licensee the difference on or before 30 days from the date of delivery of the FortisBC invoice.

### **5.3 Invoices**

All invoices for Structure Rental Fees for each year of the Term and any renewal thereof, issued on or about January 30<sup>th</sup> of each year, shall be paid by the Licensee, without deduction or set-off, within 30 days of the date of delivery of the invoice. If the Licensee, in good faith and acting reasonably, disagrees with any portion of an invoice submitted by FortisBC, the Licensee shall pay the undisputed portion of the invoice, in accordance with this Section 5.3 and the Licensee shall then promptly begin the dispute resolution process set forth in Section 13.9 to resolve the disagreement on the balance of the invoice by, among other things, advising FortisBC in writing of the reason for such disagreement.

### **5.4 Interest for Structure Rental Fees in Arrears**

Any Structure Rental Fees required to be paid which are not paid within the time required shall be deemed to be in arrears and shall bear interest at the rate of 2% above the prime rate set by the Bank of Montreal from the date payment was due to the date of payment in full.

### **5.5 Costs to Repair**

- (a) If the Licensee damages any FortisBC Structures by an act or omission of one of its employees, contractors or agents, the Licensee will reimburse FortisBC for the cost of repair or replacement reasonably incurred by FortisBC within 30 days of the date of delivery of an invoice by FortisBC to the Licensee but the Licensee will not be responsible for lost revenue or any other indirect losses that may be incurred by FortisBC.
- (b) If FortisBC damages the Licensee Facilities by an act or omission of one of its employees, contractors or agents, FortisBC will reimburse the Licensee for the cost of repair or replacement reasonably incurred by the Licensee, but FortisBC shall not be responsible for lost revenue or any other indirect losses that may be incurred by the Licensee.

## **SECTION 6**

### **ARREARS AND INDEMNITY FOR UNAUTHORIZED ATTACHMENT**

#### **6.1 Right to Verify**

FortisBC may at any time, at its own cost, conduct an in-the-field verification of any attachment to, occupation or use of FortisBC Structures by any Licensee Facilities.

**6.2 Arrears for Unauthorized Attachment, Termination**

- (a) If at any time during the Term or any renewal thereof FortisBC finds Licensee Facilities attached to, occupying or using FortisBC Structures, and such attachment, occupation or use is not authorized by a Permit issued pursuant to Section 3.3, then the Licensee will promptly pay all Structure Rental Fees then in arrears with respect to such Licensee Facilities, calculated in accordance with Section 5 for each such attachment, occupation or use found, which calculation shall, in each such case, reflect a deemed duration of attachment to, occupation or use of the FortisBC Structures equal to the period from the date of the then most recently completed Joint Inventory to the date the Licensee obtains a Permit for such Licensee Facilities. The Licensee will also promptly submit an Application in respect of the unauthorized Licensee Facilities pursuant to Section 3.1 and will be bound by and comply with all provisions of this Agreement with respect thereto.
- (b) If within 60 days of receipt by the Licensee of FortisBC's calculation of arrears owing, prepared in accordance with Section 6.2(a), the Licensee fails to submit to FortisBC payment of such arrears owing, then the Licensee will, at its cost, immediately remove the unauthorized Licensee Facilities, and if the Licensee fails to do so then FortisBC may exercise the rights provided by Sections 11.3 and 11.4.

**6.3 Indemnity for Unauthorized Attachment**

In the event of the unauthorized attachment to, occupation or use of, FortisBC Structures by any Licensee Facilities, the Licensee will indemnify FortisBC, its directors, officers, employees or agents and hold such indemnitees harmless from all loss or damage, all fines or penalties and all claims, demands, actions, suits or other proceedings by whomever made, regardless of fault or cause, and however arising out of such unauthorized Licensee Facilities.

**SECTION 7  
RISK, INDEMNITY, INSURANCE****7.1 No Assumption of Risk**

Except as provided expressly in Section 5.5(b), and notwithstanding any other provision in this Agreement, FortisBC assumes no risk of direct or indirect loss or damage to any property or any person (and for greater certainty, person includes the Licensee, its directors, officers, employees and/or agents) arising in connection with any event or situation as a result of the attachment to, occupation or use of, FortisBC Structures by the Licensee Facilities, any act or omission by the Licensee's employees or agents in connection with the Licensee Facilities, including the maintenance or repair or lack of repair of the Licensee Facilities, regardless of fault or cause. The Licensee agrees at its expense to defend, or provide such assistance to FortisBC as may be required to defend, any claim, suit or other proceeding and to promptly pay any and all costs, charges, legal fees and other expenses incurred by FortisBC relating thereto.

## **7.2 Indemnification of FortisBC**

Subject to Section 7.3, and in addition to the indemnity provided to FortisBC pursuant to Section 6.3, the Licensee assumes all risk of, and will indemnify FortisBC, its directors, officers, employees and/or agents from and against, any and all direct or indirect loss or damage to any property or any person, (and for greater certainty, person includes FortisBC, its directors, officers, employees or agents) arising in connection with any event or situation as a result of the attachment to, occupation or use of FortisBC Structures by the Licensee Facilities, any act or omission by the Licensee's employees or agents in connection with the Licensee Facilities, including the maintenance or repair or lack of repair of the Licensee Facilities, and all fines or penalties and all claims, demands, actions, suits or other proceedings by whomever made, except to the extent arising as a result of the negligence or intentional wrongdoing of FortisBC or any of its directors, officers, employees or agents.

## **7.3 Limited Liability of FortisBC**

FortisBC shall indemnify the Licensee for direct or indirect loss or damage to the Licensee Facilities attached to, occupying or using FortisBC Structures when such loss or damage is or was incurred as a consequence of any negligent act or omission of FortisBC.

## **7.4 Insurance**

To protect FortisBC from claims and legal defence costs, the Licensee at its own cost shall establish and maintain for the Term of this Agreement and any renewal thereof a policy of general liability insurance in an amount of not less than \$5 million per occurrence, all inclusive. The Licensee shall cause a certificate of insurance, showing evidence of such insurance, to be furnished to FortisBC for review and approval not less than 30 days subsequent to the submission by the Licensee of any Application and prior to the issuance of any Permits pursuant to this Agreement. The policy shall name FortisBC, its directors, officers, employees and agents as "additional insureds", contain a "cross-liability" clause and shall provide that the insurance shall not be cancelled, reduced, or restricted in a manner that affects coverage without the insurer giving at least 30 days' prior notice to FortisBC.

# **SECTION 8 RIGHTS OF WAY**

## **8.1 Rights of Way**

- (a) If FortisBC holds title in fee simple to the site of land upon which any FortisBC Structures are situate, and for which the Licensee proposes to obtain a Permit, then upon the request of the Licensee, FortisBC shall provide the right, licence, consent, authorization or interest in land which will permit the Licensee, by its employees or agents, to access, occupy, and use the land for the purposes of attaching the Licensee Facilities and for the maintenance and repair of the Licensee Facilities, all as contemplated herein.
- (b) If FortisBC does not hold title in fee simple to the site of land upon which any FortisBC Structures are situate, and for which the Licensee proposes to obtain a

Permit, then upon the request of the Licensee, FortisBC shall extend to the Licensee the benefit of any right of way held by FortisBC where and to the extent that the provisions of such right of way authorizes or otherwise entitles FortisBC to do so. If not authorized, FortisBC shall use its reasonable efforts to obtain for the Licensee rights that will permit the Licensee, by its employees or agents, to access, occupy and use the land for the purposes of attaching the Licensee Facilities and for the maintenance and repair of the Licensee Facilities. Any costs reasonably incurred by FortisBC outside the ordinary course of its business to obtain such rights in favour of the Licensee shall promptly be reimbursed to FortisBC by the Licensee.

- (c) If FortisBC is unable to obtain for the Licensee the necessary rights as contemplated by Section 8.1(b), the Licensee shall be responsible for obtaining its own rights of access to the applicable property. In such cases, FortisBC shall cooperate with the Licensee in good faith and provide the Licensee with reasonable assistance in obtaining the Licensee's own rights and hereby consents to the Licensee's use of such rights for the purposes set out in this Agreement.
- (d) The Licensee grants to FortisBC, for the term of this Agreement, an easement and license of occupation for any and all FortisBC Structures located on any public space or other Licensee-owned property (other than "streets" or "lanes" as contemplated in Section 6.14 of the Agreement for the Supply of Electricity Wholesale Service between the Licensee and FortisBC made as of the 1<sup>st</sup> day of November, 2004) within the Licensee's municipal boundaries..

## SECTION 9 PROPERTY RIGHTS UNAFFECTED

### 9.1 Property Rights of FortisBC

- (a) No provision of this Agreement, and no attachment to, occupation or use, however extended, of any part of any FortisBC Structures pursuant to this Agreement shall create or vest in the Licensee or dispose of to the Licensee:
  - (i) any property right or title to, or interest in, any of the FortisBC Structures;
  - (ii) any right or title to, or interest in, any right of way or other interest owned by FortisBC or issued or otherwise granted by any person to FortisBC, for the location, use, maintenance or repair of FortisBC Structures, except as provided expressly in Section 8.
- (b) Care, maintenance, repair, custody and control of the FortisBC Structures shall at all times remain with FortisBC.

## 9.2 Property Rights of the Licensee

Any and all of the Licensee Facilities attached to, occupying or using FortisBC Structures shall be deemed not to be a fixture and the Licensee Facilities shall remain at all times the property of the Licensee notwithstanding any attachment or affixation to a FortisBC Structure. FortisBC shall have no liability whatsoever to pay or contribute any amount toward any costs, expenses or liabilities with respect to ownership or use of the Licensee Facilities.

## SECTION 10 FORTISBC STRUCTURES, FORTISBC BUSINESS AND OBLIGATIONS UNAFFECTED

### 10.1 Right to Relocate, Remove or Abandon FortisBC Structures

- (a) Subject to paragraph (b), FortisBC exclusively reserves to itself, its successors and assigns, all rights to locate, relocate, construct, modify, operate, use, maintain, repair, remove and abandon FortisBC Structures in such manner as will, in the judgment of FortisBC, best enable it to further FortisBC Business interests. Any new installation or relocation of FortisBC Structures made pursuant to this Section 10.1(a) will be subject to the Licensee's normal permitting requirements.
- (b) If FortisBC wishes to remove any of the FortisBC Structures which it considers no longer necessary for the conduct of the FortisBC Business, it will give to the Licensee no less than 365 days' prior written notice (the "**Removal Notice**") of the proposed removal. If the Licensee desires to purchase from FortisBC any such FortisBC Structures, it will, no less than 90 days prior to the date specified in the Removal Notice for removal of the relevant FortisBC Structures (the "**Proposed Removal Date**") give FortisBC notice of such desire, identifying in the notice the relevant FortisBC Structures. FortisBC will transfer to the Licensee the identified FortisBC Structures on such terms as the parties may agree. If, prior to the Proposed Removal Date, the parties cannot agree on the terms on which FortisBC will transfer to the Licensee the identified FortisBC Structures, then FortisBC may remove such FortisBC Structures at any time after the Proposed Removal Date.

### 10.2 Condition of Poles

- (a) All Transmission Poles and Distribution Poles shall conform to the minimum standards set by the Canadian Standards Association.
- (b) FortisBC will correct the condition of any Transmission Poles or Distribution Poles which do not meet the standards provided for in Section 10.2(a) at the time of replacement of such poles, or earlier if the parties agree that the conditions create a safety hazard for either party or the public.

### **10.3 No Interference**

The Licensee will use its best efforts to keep its employees and agents, the Licensee Facilities and other equipment from unduly interfering with FortisBC employees or agents, the FortisBC Structures, and other equipment owned by FortisBC.

#### **Removal of Licensee Facilities Pursuant to Standards or Law**

- (a) In addition to the rights of removal provided to FortisBC pursuant to Sections 4.6, 6.2 and 11.4, FortisBC may instruct the Licensee to remove or cause the removal of all or part of the Licensee Facilities pursuant to a requirement of the Standards or of law, or an instruction, order or other act of a Governmental Authority. The period of notice that FortisBC will give the Licensee shall be reasonable in the circumstances but in any event shall be not more than that available under any such requirements. FortisBC will not contribute to the costs incurred by the Licensee as a result of the removal unless FortisBC is entitled to recover such contribution from the Governmental Authority issuing the instruction or order.
- (b) If the Licensee does not remove or cause the removal required by this section then upon the expiry of the applicable period of notice FortisBC shall have the right to do so and recover from the Licensee all costs and expenses incurred by FortisBC.

## **SECTION 11 TERMINATION**

### **11.1 Termination of Permits by Licensee**

If the Licensee decides at any time in the Term or any renewal thereof that it no longer requires that all or a part of the Licensee Facilities attach to, occupy or use the FortisBC Structures, then the Licensee may provide 6 months' written notice to FortisBC that it intends to terminate all or part of any Permit. The termination shall be effective on the date of removal of all relevant parts of the Licensee Facilities or upon the expiry of the 6 months' notice period, whichever is later.

### **11.2 Termination of Agreement by Written Notice**

Either party may terminate this Agreement and the Permits issued pursuant hereto at any time during the Term or renewal thereof by providing to the other party 2 years written notice of termination.

### **11.3 Termination of Agreement by FortisBC for Non-Compliance**

If the Licensee defaults at any time in the payment of the Structure Rental Fee or fails to or neglects at any time to fully perform, observe and comply with all the terms, conditions and covenants herein, then FortisBC shall as soon as practicable, notify the Licensee in writing of such default and the Licensee will correct such default to the satisfaction of FortisBC within 30 days of the delivery of such notice, or written a longer time period if agreeable to FortisBC, failing which FortisBC may forthwith terminate this Agreement and the permits herein granted.

#### **11.4 Removal of Licensee Facilities**

Upon termination of all or part of this Agreement, or any Permit issued pursuant hereto, for any reason, or upon the exercise of FortisBC's rights pursuant to Sections 4.6, 6.2 or 10.4 to have the Licensee Facilities removed, the Licensee must promptly and, in any event, within one year of the date of termination or exercise of rights by FortisBC, as the case may be, remove the relevant Licensee Facilities and restore the FortisBC Structures to a condition that is satisfactory to FortisBC, acting reasonably. If the Licensee does not promptly remove the relevant Licensee Facilities and restore the FortisBC Structures to a condition that is satisfactory to FortisBC, acting reasonably, then FortisBC may remove or cause the removal of all or part of such relevant Licensee Facilities, undertake the restoration, or both, and the Licensee will promptly reimburse FortisBC for any costs and expenses incurred by FortisBC in this regard. In the alternative, if the Licensee decides to abandon all or part of the Licensee Facilities and so informs FortisBC, then FortisBC may, at its sole discretion, take ownership, possession and use of such of the Licensee Facilities to the exclusion of all others.

#### **11.5 Survival**

Any termination of this Agreement shall not relieve the Licensee of obligations that by their nature survive such termination including, without limitation, warranties, remedies and indemnities.

### **SECTION 12 PRIOR RIGHTS**

#### **12.1 Prior Rights Not Affected**

- (a) Nothing in this Agreement shall be construed as affecting Prior Rights irrespective of whether such Prior Rights have been exercised by their holder and FortisBC shall have the right to continue, reasonably extend, vary or renew Prior Rights, provided that any such extension, variation or renewal of such Prior Rights shall not unduly interfere, conflict with or affect the intended use, purpose or the functionality of the Licensee Facilities for which a Permit was issued by FortisBC to the Licensee.
- (b) If any relocation of the Licensee Facilities is required by any holder of Prior Rights, FortisBC shall use all commercially reasonable efforts to ensure that such holder pays to the Licensee all costs incurred by it in carrying out such relocation and FortisBC shall reimburse the Licensee for any and all costs of relocating the Licensee Facilities which FortisBC recovers from such holder of Prior Rights.

### **SECTION 13 GENERAL PROVISIONS**

#### **13.1 Expropriation or Prevention By Governmental Authority**

If any FortisBC Structures or any Licensee Facilities are expropriated or if through any act or omission of a Governmental Authority or if because of an order of a court of competent



jurisdiction either party is prevented from using any FortisBC Structures or Licensee Facilities, as applicable, as contemplated by this Agreement, each party shall bear its own losses and costs which result from such expropriation or prevention.

### **13.2 Labour Disputes**

If either party becomes involved in a strike, lockout or other labour dispute which affects the use by the other party of FortisBC Structures or Licensee Facilities, as applicable, the party involved in the labour dispute will use all commercially reasonable efforts to ensure that the other party's access to the FortisBC Structures or Licensee Facilities, as applicable and to the equipment attached to them is not unduly impeded, and the normal business operations of the other party are not materially interrupted.

### **13.3 Failure to Act Not to Affect Rights**

No failure by FortisBC or the Licensee at any time or from time to time to enforce or require a strict observance and performance of any of the provisions of this Agreement shall constitute a waiver of such provisions or affect or impair such provisions or the right of a party at any time to enforce such provisions or to take advantage of any remedy that a party may have.

### **13.4 Binding Agreement**

All provisions of this Agreement shall enure to the benefit of and be binding on the parties and their respective successors or permitted assigns.

### **13.5 Entire Agreement**

This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements and understandings between the parties in any way relating to the subject matter hereof. It is expressly understood and agreed that FortisBC has made no representations, inducements, warranties or promises, whether direct, indirect or collateral, express or implied, oral or otherwise, concerning this Agreement or concerning any other matter, which is not embodied herein.

### **13.6 Assignment**

- (a) The Licensee will not assign or otherwise dispose of all or any part of the rights granted to it by FortisBC pursuant to this Agreement, including any rights granted by a Permit issued pursuant hereto, without providing prior notice to and receiving the prior written consent of FortisBC, such consent not to be unreasonably withheld or delayed following the delivery from the Licensee to FortisBC of all such information that it may reasonably require to consider the request.
- (b) The Licensee or any subsequent assignee shall pay to FortisBC all reasonable and proper costs, including legal costs, incurred by FortisBC in connection with all assignments or dispositions permitted pursuant to this section.

**13.7 Amendment to the Agreement**

This Agreement shall not be amended except by agreement in writing executed by both parties.

**13.8 Notices**

Unless otherwise provided for by this Agreement, any Application or notice, request, consent, declaration, acknowledgement, payment or invoice (a “**Notice**”) required to be given by the Licensee to FortisBC shall be given in writing to the designate of FortisBC addressed as follows:

FortisBC Inc.  
Suite 100 - 1975 Springfield Avenue  
Kelowna, B.C V1Y 7V7

Attention: Charlotte Greenham

and unless otherwise provided for by this Agreement, any Permit, and any other Notice required to be given by FortisBC to the Licensee shall be given in writing to the designate of the Licensee addressed as follows:

The Corporation of the City of Kelowna  
1435 Water Street  
Kelowna, B.C. V1Y 1J4

Attention: City Clerk

and any such Application, Permit, or other Notice may be delivered by hand, facsimile or mail and shall be deemed to have been given when received by the addressee. Either party may from time to time, by notice in writing to the other party, change its above noted designation or address or may establish one or more delegates of the designate.

**13.9 Arbitration**

Any dispute arising under this Agreement shall be resolved through a mediation - arbitration approach. The parties agree to select a mutually agreeable, neutral third party to help them mediate any dispute that arises under the terms of this Agreement. If the mediation is unsuccessful, the parties agree that the dispute will be decided by binding arbitration under the *Commercial Arbitration Act* (British Columbia). The decision of the arbitrators shall be final and binding on the parties and may be entered and enforced in any court of competent jurisdiction by any party thereto. The costs of arbitration shall be at the discretion of the arbitrator(s), who may direct to and by whom and in what manner costs for the arbitration or any part thereof shall be paid.

**13.10 Taxes**

The Licensee shall pay any taxes assessed on the Licensee Facilities by any Governmental Authority or other lawful authority having jurisdiction over it. If FortisBC for any reason whatsoever is required to pay all or part of the taxes due on Licensee Facilities then the Licensee shall promptly reimburse FortisBC for such amount paid by FortisBC.

**13.11 Further Assurances**

Each of the parties hereby covenants and agrees to execute and deliver such further and other agreements, assurances, undertakings, acknowledgements or documents, cause such meetings to be held, resolutions passed and by-laws enacted, exercise their influence and do and perform and cause to be done and performed any further and other acts and things as may be necessary or desirable in order to give full effect to this Agreement and every part hereof.

**13.12 Applicable Law**

This Agreement shall be governed by and construed in accordance with the laws of the Province of British Columbia and the parties hereto submit and attorn to the jurisdiction of the courts of British Columbia.

**13.13 No Representation or Warranties as to Fitness**

Nothing contained in this Agreement or in any Permit issued pursuant to it shall be construed to contain or provide, expressly or by implication, any representation whatsoever as to the suitability or fitness of the FortisBC Structures for any particular purpose or use.

**13.14 Severability**

If for any reason whatsoever, any term or condition of this Agreement or the application thereof to any party or circumstance shall to any extent be invalid or unenforceable, all other terms and conditions of this Agreement and/or the application of such terms and conditions to parties or circumstances, other than those as to which were held to be invalid or unenforceable, shall not be affected thereby and each term and condition of this Agreement shall be separately valid and enforceable to the fullest extent permitted by law.

**13.15 Force Majeure**

“Except as herein otherwise expressly provided, if and whenever to the extent that either FortisBC or they Licensee shall be prevented, delayed or restricted in the fulfillment of any obligations hereunder, in respect of the supply or provision of any service or utility, the making of any repair, the doing of any work or anything (other than the payment of the fees or any other money as herein required), by reason of civil commotion, war-like operation, invasion, rebellion, hostilities, sabotage, strike, or other work stoppage or being unable to obtain any material, service, utility, or other labour required to fulfill such obligation or by reason of any statute, law, or regulation of or inability to obtain any permission from any governmental authority having lawful jurisdiction, preventing, delaying, or restricting such fulfillment, or by reason of other

unavoidable occurrence other than a lack of funds, time for fulfillment of such obligations shall be extended during the period in which such circumstance operates to prevent, delay or restrict the fulfillment thereof, and the other party to this agreement shall not be entitled to compensation for any inconvenience, nuisance, or discomfort thereby occasioned, nor shall fees or monies payable herein abate; nevertheless, FortisBC or the Licensee as the case may be, shall act diligently and take all reasonable steps to remove the cause or causes of delay.”

IN WITNESS WHEREOF each party has caused this Agreement to be executed, by its duly authorized representative(s).

**FORTISBC INC.**

By: \_\_\_\_\_

Title: •

**THE CORPORATION OF THE CITY OF KELOWNA**

By: \_\_\_\_\_

Title: •

By: \_\_\_\_\_

Title: •

SCHEDULE A

**PERMIT APPLICATION FOR LICENSED ATTACHMENT TO FORTISBC  
STRUCTURES**

\*Please complete all boxes above the dotted line.

To be attached to and form part of the agreement effective:		Licensee's project name/refer #	
		Supersedes Permit No., "New" or "Cancel"	
Permission is requested by	Signature:	Name and Title: (please print)	
To place attachments as follows: (note specific quantity, size and nature of proposed attachment(s))			
Company Division		External Permit Number	
Lot no. (in or between)	Conc./Street or Road names	Township/Village or town of	County/Municipality

\* Please orient sketch to the north, show transformer numbers and adjacent Permit numbers

**For Internal Use Only**

Approved Signature (FortisBC)	Legend	No. of full rental poles
Name and Title (please print)		
Operations manager or designate		
Operations Centre	Permit no.	
Date	Other internal project	

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**SCHEDULE B****INITIAL CONTACT INVENTORY**  
(reference Section 5.1)

<b>Pole ID</b>	<b>LAT</b>	<b>LONG</b>
1018568539	49.89735	-119.487922
1018568538	49.897348	-119.487299
1018568536	49.897344	-119.48631
1018575483	49.8975	-119.48626
1018568537	49.89698	-119.485219
1018568560	49.896643	-119.484171
1018568559	49.896278	-119.483136
1018568558	49.895974	-119.482187
1018568557	49.895543	-119.480926
1018568556	49.895104	-119.47958
1018568555	49.894824	-119.4788
1018568554	49.894374	-119.477465
1018568553	49.894096	-119.476646
1018568552	49.893732	-119.475583
1018568551	49.893258	-119.474181
1018568550	49.892945	-119.473218
1018568549	49.892494	-119.472499
1018568548	49.892692	-119.472439
1018568547	49.892448	-119.471257
1018568546	49.892203	-119.470061
1018568545	49.89195	-119.46885
1018568544	49.891697	-119.467626
1018568543	49.891469	-119.466514

23 Poles