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January 4, 2013

BY EMAIL

British Columbia Utilities Commission
6th floor, 900 Howe Street
Vancouver, BC V6Z 2N3

**Attention: Erica M. Hamilton,
Commission Secretary**

Dear Sirs/Mesdames:

**Re: FortisBC Inc. (FortisBC) – Application for a Certificate of Public
Convenience and Necessity for the Advanced Metering Infrastructure
Project (AMI Project)**

We write further to Letter L-70-12 (Exhibit A-17) and, more particularly, in response to Mr. Flynn's request to make a powerpoint presentation at the oral hearing which is scheduled to commence on March 4, 2013. Like the Commercial Energy Consumers Association of British Columbia (Exhibit C17-9) and the BC Sustainable Energy Association and the Sierra Club of British Columbia (Exhibit C 4-8), we oppose that request.

Mr. Flynn's request raises several multi-faceted issues which we address below.

As alluded to by Mr. Shadrack in his submissions (Exhibit C13-11), if it is filed in advance an Opening Statement can typically be made by an Intervener at the commencement of the oral hearing or immediately before the Intervener calls its evidence, if any (an **Introductory Opening Statement**). An Introductory Opening Statement outlines the Intervener's position on the matters that are to be addressed at the oral hearing and, where the Intervener intends to call evidence, identifies in a general way the witness or witness panels that the Intervener intends to call. As Mr. Flynn is an Intervener, he would be entitled to make an Introductory Opening Statement at the oral hearing irrespective of the points we make below as to Mr. Flynn's qualifications to serve the further role of witness. However, we do not understand the powerpoint presentation that Mr. Flynn wishes to make to serve the function of an Introductory Opening Statement. Rather, it appears to be in the nature of evidence.

Two other modes of conveying information, which are addressed later in this submission but do not include the powerpoint presentation that Mr. Flynn appears to wish to make, are available at the oral hearing to persons who (a) qualify to be witnesses and (b) in this case, will have filed their evidence in

written form by January 24, 2013. In advance of seeing any filing that Mr. Flynn may wish to make by January 24, 2013 (including a statement of qualifications) and evaluating the relationship between any such qualifications and the evidence proffered, we cannot agree that Mr. Flynn is qualified to testify. Even if, upon that review, FortisBC determines there is no basis to object to Mr. Flynn's qualifications, for the reasons set out on page 3 of this correspondence that should not translate into an ability to make a powerpoint presentation at the oral hearing.

Turning first to the issue of qualifications, evidence can be of two forms: fact and opinion. Lay persons may give "fact" evidence, but we do not expect that Mr. Flynn has evidence of this nature to provide. Certainly that has not been the nature of the submissions he has made to date, which are comprised of opinion as to the health and other implications of wireless technology.

As to "opinion" evidence, that should be provided only by experts who have the requisite skill, knowledge and experience in the field that they will address, and who otherwise provide their evidence in the appropriate form. The Commission already provided the opportunity for non-expert opinion evidence to be submitted at the Community Input Sessions; the remainder of the process should not simply be an extension of the same.¹ As set out by the Commission in Letter L-70-12 and as reflected in part in Mr. Shadrack's submission on this point:

...[A]s FortisBC described at the Procedural Conference in Kelowna on November 8, 2012, expert evidence should be addressed by properly qualified experts who set out the facts on which they rely and whose evidence can be tested and measured. If you are not the expert witness for the written evidence submitted, then the appropriate expert must be available to be called upon to support and be cross-examined at the Oral Hearing....

At this point, it appears that Mr. Flynn's powerpoint would consist of material authored by others which he has located on the internet. The fact that Mr. Flynn has located such material does not render him an expert, and we note that Mr. Flynn has previously acknowledged he is a "messenger" and "not an 'expert' on EMR, in the legal sense of the word".²

If Mr. Flynn were to qualify as a witness and were to file his written evidence by January 24, 2013 (and wish to testify - we had understood from Mr. Flynn's September 1, 2012 email to the Commission that he did not at that point intend to call witnesses), like other witnesses he would nonetheless be confined only to two further modes of conveying information at the oral hearing, namely:

1. if filed in advance, an Opening Statement of a witness or a witness panel, being a short statement of the position of the witness or witness panel on the matters that he or it will address (a **Witness Opening Statement**). It does not appear to us that the powerpoint Mr. Flynn seeks to present would serve the function of a Witness Opening Statement. It has not been characterized as a short statement of position but seems, rather, to constitute the evidence that Mr. Flynn wishes to convey to the Commission.

¹ In this regard, though this has not affected BCSEA's position on Mr. Flynn's request in this case, we should note for clarity that our position as to qualifications appears to be narrower than that of BCSEA, which has previously referred to the filing of written evidence by "citizen experts" (Exhibit C4-5).

² Please see Mr. Flynn's December 4, 2012 letter to Ms. Hamilton, at p. 2; Transcript Volume 3 (Kelowna) p. 17, ll. 1-4.

2. responding to cross-examination questions or re-examination questions. However, the powerpoint presentation, given that formulated in advance, does not appear to fall within this category. Rather, it appears to be in the form of direct evidence.

We do not see any reason to depart from the principle that witnesses at an oral hearing simply adopt pre-filed written testimony rather than being afforded the opportunity to testify in direct examination (except to the extent of certain limited points). In this regard:

1. The nature of the presentation that Mr. Flynn seems to wish to make appears to be of the nature that the Community Input Sessions were organized to accommodate. Mr. Flynn properly took advantage of the opportunity to make submissions to the Commission in that forum.³ There is no need to broaden the procedures at the oral hearing itself in addition to having held the Community Input Sessions.
2. It would be unfair for one Intervener to have the opportunity to address the Commission at the oral hearing by means of a powerpoint presentation while other participants (including the applicant) do not have that opportunity. FortisBC refrained from seeking to speak at the Community Input Sessions despite strongly disagreeing with many of the comments made, as that was not the purpose of that forum. However, the oral hearing is a different matter entirely. Those putting forward a case in favour of AMI should have no less of an opportunity to address the Commission at that hearing.
3. As BCSEA notes, Mr. Flynn has demonstrated no difficulty in filing extensive written material to date.
4. We also note that Mr. Flynn seems to be suggesting that his powerpoint presentation is for an audience larger than the Commission. Of course, nothing in our submissions would constrain Mr. Flynn's ability to make his powerpoint presentation other than in the context of the oral hearing, which is not suited to such an exercise. From Mr. Flynn's correspondence, the powerpoint presentation appears already to have been used in public speaking engagements.

Thank you for the opportunity to make submissions with respect to the above.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: 

Ludmila B. Herbst

LBH/lb

c.c.: Registered Interveners
Boughton Law Corporation – Attention: Gordon Fulton, Q.C.
FortisBC Inc. – Attention: Dennis Swanson

³ Transcript Volume 3 (Kelowna) at p. 16, l. 21 to p. 25, l. 17.