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December 21, 2012

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street, Box 250
Vancouver, BC, V6Z 2N3
Attn: Erica Hamilton, Commission Secretary
By Web Posting

Dear Madam:

Re: FortisBC Inc. (FBC, Application for a Certificate of Public Convenience and Necessity (CPCN) for the Advanced Metering Infrastructure (AMI) Project
Project No. 698682; Order G-105-12
Submission on Reconsideration Application

These are the comments of the B.C. Sustainable Energy Association and the Sierra Club of British Columbia in response to the Commission's December 14, 2012 letter (Exhibit A-18) to Mr. Shadrack inviting intervenors to comment on Mr. Shadrack's request (Exhibit C13-9) for reconsideration of Order G-177-12 dated November 23, 2012 (Exhibit A-14).

Introduction

The portion of Order G-177-12 that the Reconsideration Application addresses is the Panel's decision regarding how topics are divided between the written portion of the hearing and the oral portion of the hearing. Order G-177-12 followed the November 8, 2012 Procedural Conference in Kelowna. For reference, the disputed portion of the order states:

> "2. The review of the Application will proceed by a combination of a written and an oral hearing, divided as follows:
>
> (i) Financial, operations, fire safety and privacy issues will be reviewed by way of the written process.
>
> (ii) Health, security and environmental issues will be reviewed by way of the oral hearing." [p.1]

Mr. Shadrack's request for reconsideration was initiated in his November 23, 2012 email (Exhibit C13-8) and elaborated upon in his December 7, 2012 email (Exhibit C13-9) under the heading "4. The Argument to Appeal a Portion of Order G-177-12 in this Proceeding" beginning at page 13.

The Commission's authority to reconsider a decision or order is found in s.99 of the *Utilities Commission Act*, which states:

> "Reconsideration
>
> **99** The commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

In Exhibit A-18, the Commission describes its two stage process for reconsideration applications. In the first phase, the applicant (Mr. Shadrack, here) must establish that there is a reasonable basis for the Commission to undertake a reconsideration. The criteria for passing phase one and getting to an actual reconsideration (phase two) are stringent. The applicant must establish one or more of the following situations:

- the Commission has made an error in fact or law that has material implications;
- there has been a fundamental change in circumstances or facts since the Decision;
- a basic principle had not been raised in the original proceedings; or
- a new principle has arisen as a result of the Decision.

In Exhibit A-18, the Commission also states that:

> "The first phase will be a preliminary examination to assess the application in light of the following questions:
>
> 1. Should there be a reconsideration by the Commission?
> 2. If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?
> 3. If there is to be a reconsideration, should it focus on the items from the Reconsideration Application, a subset of these items or additional items?
> 4. If there is to be a reconsideration, what process should be established for the reconsideration?" [bullets in the original replaced by numbers, for convenience]

The following comments are organized according to these four questions.

1. Should there be a reconsideration by the Commission?

BCSEA-SCBC respectfully submit that there should be a reconsideration by the Commission.

The gist of the Reconsideration Application presented by Mr. Shadrack is that the Commission made an error in "prevent[ing] intervenors from orally cross-examining FortisBC on whatever evidence the Commission allows or subsequently requires FortisBC to provide in these proceedings" in a context in which "[not] every intervenor has either the skills or experience to ensure that all the questions required to be asked will be covered through written submission before the Commission moves to the oral stage of these proceedings." [Exhibit C13-9, p.14] Mr. Shadrack makes particular reference to the "wired option" topic.

It is acknowledged that that rationale may or may not meet the 'error in law' test usually applied by the Commission. In making the disputed decision, the Panel did hear written and oral submissions and exercised its discretion not unreasonably.

However, the current application concerns an interlocutory (procedural) decision, not a final determination on the merits of the CPCN application. The stringency of the Commission's

threshold test for reconsideration is based on the principle of administrative certainty. Generally speaking, the parties ought to be able to be confident that a final decision is indeed final. However, it is submitted that the principle of certainty applies with somewhat less force in the case of an interlocutory decision. Many things change during the course of a proceeding, and 'certainty' may in some instances have to be balanced with efficiency and fairness.

In the present case, two points have arisen that BCSEA-SCBC submit support reconsideration of the dividing line between the written and oral portions of the hearing. These concern the 'wireless vs. wired' topic, and the 'opt-out' topic.

Regarding the 'wireless vs. wired' topic, on December 20, 2012 the Panel issued Order G-198-12 [Exhibit A-19]. The thrust of the decision was to reject an application for suspension of the proceeding and for a requirement that FortisBC file additional evidence regarding a wired option. In its reasons for decision, the Panel said that the key question was "Should the Commission order FortisBC to file additional information for a wired option?" The Panel concluded:

> **The Panel finds that the existing and evolving process of reviewing the AMI Project Application does provide Interveners an opportunity to bring forward issues and evidence on a wired alternative for FortisBC to respond to through information requests, evidence and cross-examination.** The onus is on FortisBC to provide sufficient information for the Commission to make a determination that a CPCN for the AMI Project is in the public interest and should be granted. The Commission notes that the comments and concerns raised in this process related to health and security will be heard at the Oral Hearing scheduled for March 2013. **Because this finding has been made by the Commission Panel, suspension of the proceeding is not required, therefore the applications to suspend the proceeding are denied.** [p.6 of 6, bold in the original, underline added]

The Panel goes on to state:

> **The issue of wireless vs. wired technology remains a live issue in this Proceeding.** FortisBC may wish to file additional information in a timely way that it considers might provide additional insight on this matter and address specific issues and evidence raised by the Interveners in this Proceeding. [p.6 of 6, bold in the original]

This statement is significant for present purposes because the *status quo ante* was that FortisBC had already filed (on December 14, 2012) its responses to the second round of information requests and there was no opportunity in the regulatory timetable for FortisBC to file further evidence on the "wireless vs. wired" topic, with two implicit exceptions.

One implicit exception is if the Panel decides to allow a third round of information requests either generally or on the "wireless vs. wired" topic specifically.[1]

[1] This possibility arises from section 5 of Order G-177-12, which denies the request for a third round of information requests but states: "An Intervener may renew its request for a third round of Information Requests following the filing of FortisBC's responses to Commission and Intervener Requests No. 2. Any such request is to be made no later than Friday, December 21, 2012."

The other implicit exception is that FortisBC could apply to file rebuttal evidence following the filing of intervenor evidence.

Neither of those implicit exceptions appears to be referenced by the Panel's statement that "FortisBC may wish to file additional information in a timely way" [underline added] regarding the "wireless vs. wired" topic." Rather, it appears that the Panel in G-198-12 is inviting FortisBC to file additional information (on the topic) as a revision to the Regulatory Timetable established by Order G-177-12. In doing so, the Panel acknowledges a possible need for "additional insight on this matter" that was not contemplated at the time of Order G-177-12. This is a change in circumstances since the Original Decision that, in BCSEA-SCBC's respectful submission, meets the threshold for reconsideration.

As noted above, the second point supporting reconsideration of the dividing line between the written and oral portions of the hearing concerns the 'opt-out' topic. At the time when Order G-117-12 was made, the CPCN application did not include any potential opt-out program. Subsequently, however, FortisBC provided considerable detail regarding a potential opt-out program in response to BCUC IR 50.2 [Exhibit B-14].

To be clear, FortisBC does not *recommend* an opt-out option. However, it provides principles that it implies would be acceptable to it. It states:

> "Although FortisBC does not recommend providing customers with an "opt-out" option, it has considered the matter carefully and suggests the following principles if such an option was to be provided:..." [Exhibit B-14, BCUC IR 50.2, pdf p.116 of 309, underline added]

It is submitted that this is a change in circumstances since the Original Decision that meets the threshold for reconsideration. Now that the possibility of an opt-out program is 'on the table,' the Commission should consider whether it should be addressed in the written or the oral portion of the hearing.

2. If there is to be a reconsideration, should the Commission hear new evidence and should new parties be given the opportunity to present evidence?

BCSEA-SCBC submit that if there is to be a reconsideration of the dividing line between the written and oral portions of the hearing, then the appropriate next step would be for the Commission to invite written submissions on whether there should be a change in the scope of the written and oral portions of the hearing, and if so what the revised scope should be.

3. If there is to be a reconsideration, should it focus on the items from the Reconsideration Application, a subset of these items or additional items?

BCSEA-SCBC submit that if there is to be a reconsideration it should focus on whether the "wireless vs. wired" topic and the "opt-out" topic should be added to the scope of the oral hearing.

4. If there is to be a reconsideration, what process should be established for the reconsideration?

As noted above, if there is to be a reconsideration BCSEA-SCBC suggest that there be an opportunity for written submissions by the intervenors and FortisBC.

All the above is respectfully submitted.

Yours truly,

William J. Andrews

Barrister & Solicitor

cc. Distribution List by email