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**BRITISH COLUMBIA UTILITIES COMMISSION**

**ORDER NUMBER** G-21-13

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

and

An Application by FortisBC Inc.
for a Certificate of Public Convenience and Necessity
for the Advanced Metering Infrastructure Project

Electoral Area D in the Regional District Central Kootenay Application for
Reconsideration of part of Order G-177-12

**BEFORE:** L.F. Kelsey, Commissioner
D.M. Morton, Commissioner
N.E. MacMurchy, Commissioner

February 7, 2013

**O R D E R**

**WHEREAS:**

A. On July 26, 2012, FortisBC Inc. (FortisBC) applied to the British Columbia Utilities Commission (Commission or BCUC) pursuant to sections 45, 46 and 56 of the *Utilities Commission Act* (*Act*), for the approval of the Advanced Metering Infrastructure (AMI) Project (Project);

B. By Order G-105-12, dated August 2, 2012, the Commission established a Preliminary Regulatory Timetable requesting comments on the regulatory process by which to review the Application, such as written, oral or both;

C. By Order G-135-12, dated September 26, 2012, the Commission established a Procedural Conference to hear participant positions on the regulatory process by which to review FortisBC Inc.'s application for the Advanced Metering Infrastructure project (Application);

D. The Procedural Conference took place in Kelowna, BC on November 8, 2012;

E. By Order G-177-12, dated November 23, 2012, the Commission directed, among other things, that the review of the Application would proceed through a combination of a written and an oral hearing, with financial, operations, fire safety and privacy issues by way of a written hearing and health, security and environmental issues by way of an oral hearing;

F. By letter dated December 7, 2012, Mr. Andy Shadrack applied on behalf of Electoral Area D in the Regional District Central Kootenay (RDCK) for a reconsideration under section 99 of the *Utilities Commission Act* to vary part of Order G-177-12 (Exhibit C13-9). The relief sought was that the Decision and Order be reconsidered and varied to permit financial, operational, fire safety and privacy issues including wireless *vs*. wired meters in the oral hearing;

G. The *Participants' Guide to the B.C. Utilities Commission* document, available on the BCUC website, provides information and criteria on how the Commission handles reconsideration applications;

H. By Commission Letter L-71-12 (Exhibit A-18), dated December 14, 2012, the Commission established a phase one reconsideration process including a comment process for participants in the Proceeding;

I. Interveners other than RDCK filed their comments on or before December 21, 2012. FortisBC filed its comments on January 4, 2013 and RDCK filed its reply on January 11, 2013; and

J. The Commission Panel has considered the submissions and determines that a reasonable basis does not exist for allowing a reconsideration.

**NOW THEREFORE** as set out in the Reasons for Decision attached as Appendix A to this Order, the Commission denies the request for reconsideration.

**DATED** at the City of Vancouver, in the Province of British Columbia, this 7th day of February 2013.

BY ORDER

*Original signed by:*

L.F. Kelsey
Commissioner

Attachment

An Application by FortisBC Inc.
for a Certificate of Public Convenience and Necessity
for the Advanced Metering Infrastructure Project

Electoral Area D in the Regional District Central Kootenay Application for
Reconsideration of part of Order G-177-12

**REASONS FOR DECISION**

## 1.0 INTRODUCTION

On November 8, 2012, the British Columbia Utilities Commission (Commission) held a Procedural Conference in Kelowna to hear participant submissions on the regulatory process for the review FortisBC Inc.'s (FortisBC) application for the Advanced Metering Infrastructure Project (Application). By Order G-177-12, dated November 23, 2012, the Commission, among other things, ordered that the review of the Application take place by a combination of a written and an oral hearing. It ordered the review of financial, operations, fire safety and privacy issues by way of a written process and the review of health, security and environmental issues by way of an oral hearing process. In its Reasons, attached as Appendix B to Order G-177-12, the Panel agreed with FortisBC that the review of financial and operations matters are highly technical in nature, involve financial spreadsheets and particulars that participants can conveniently address in written form.

### 1.1 The Reconsideration Application

By email dated December 7, 2012, Mr. Andy Shadrack applied, on behalf of Electoral Area D in the Regional District Central Kootenay (RDCK), for a reconsideration under section 99 of the *Utilities Commission Act* (*Act*) to vary part of Order G-177-12. (Exhibit C13-9) The relief sought was that the Decision and Order be reconsidered and varied to permit financial, operations, fire safety and privacy issues including wireless vs. wired meters in the oral hearing.

Mr. Shadrack describes the "primary intent" of the RDCK application as being "to ask the Commission to reconsider why it wants to prevent interveners from orally cross-examining FortisBC on whatever evidence the Commission allows or subsequently requires FortisBC to provide in these proceedings." (Exhibit C13-9, p. 14)

He also suggests bias on the part of the Commission relating to both the statements made on its website under the link "Quick Facts About Smart Meters" (Quick Facts) and to its decision "to make matters of a financial, operational, fire safety and privacy nature, including consideration of a wired vs. wireless option, reviewable by written process only, under order G-177-12 also shows a certain bias against some interveners." (Exhibit C13-9, p. 2)

By Letter L-71-12 dated December 14, 2012, the Commission established a phase one reconsideration review including a written comment process for participants in the Proceeding. The letter appended the RDCK application and a copy of the Reconsideration and Appeals section of the Commission's "A Participant's Guide to the B.C. Utilities Commission." An application for reconsideration before the Commission takes place in two phases. The first phase is an initial screening phase that requires an applicant for reconsideration to establish a *prima facie* case sufficient to warrant a second phase full consideration by the Commission.

After the first phase evidence has been received, the Commission generally applies the following criteria to determine whether or not a reasonable basis exists for allowing reconsideration:

- the Commission has made an error in fact or law;
- 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.

While the reconsideration application did not specifically address the above criteria, Exhibit A-18 established a written process for the application and a Timetable for the filing of comments by Interveners, FortisBC, and RDCK reply. Intervener comments were due by December 21, 2012, FortisBC's comments by January 4, 2013 and RDCK reply by January 11, 2013. All comments were received on or before the deadlines established by Exhibit A-18.

## 2.0 INTERVENER COMMENTS

The following Interveners commented on the application:

(1) Riding of BC Southern Interior (BCSI, Alex Atamanenko, MP);
(2) B.C. Sustainable Energy Association and the Sierra Club of British Columbia (BCSEA-SCBC);
(3) Nelson Creston Green Party Constituency Association (NCGP); and
(4) Commercial Energy Consumers of British Columbia (CEC);

### 2.1 BCSI

The BCSI supports the reconsideration application. It also submits a second ground for reconsideration, namely that section 86.2 [1] of the *Act* does not allow for a hybrid hearing. Mr. Atamanenko submits "speaking as a legislator, had I intended to grant the Commission the authority to structure a combination or "hybrid" hearing, I would have made that intent perfectly clear." He further submits that "the portion of Order G-117-12 which stipulates a combination written and oral hearing is *ultra vires*." (Exhibit C1-5, p. 2)

Section 86.2 of the *Act* provides as follows:

> (1) Despite any other provision of this Act, in any circumstance in which, under this Act, a hearing may or must be held, the commission may conduct a written hearing.
>
> (2) The commission may make rules respecting the circumstances in which and the process by which written hearings may be conducted and specifying the form and content of materials to be provided for a written hearing.

### 2.2 BCSEA-SCBC

BCSEA-SCBC also supports the application. It acknowledges that the RDCK request "may or may not meet the 'error in law' test usually applied by the Commission, but argues that the threshold [phase one] reconsideration test is based on the principle of administrative certainty and that principle applies with "somewhat less force in the case of an interlocutory decision."

BCSEA-SCBC submits that two points have arisen that support reconsideration of the content of the oral and written portions of the hearing: the issues of (1) wired v. wireless and (2) opting-out. On the first issue, it submits that in its Reasons for Decision for Order G-198-12 (Exhibit A-19), the Panel acknowledges 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 issue of wired vs. wireless 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 (Exhibit A-19, p.6 of 6;bold in the original; underline added by BCSEA-SCBC] (Exhibit C4-9, p. 3 of 5)."

BCSEA-SCBC submits that the statement is significant because FortisBC had already filed its second round information responses and the regulatory timetable did not allow for further evidence on the "wired vs. wireless" topic apart from two implicit exceptions:

> (1) if the Panel decides to allow a third round of information requests either generally or specifically on the issue specifically. It notes that Order G-177-12 , permits Interveners to renew their requests for a third round of Information Requests following the filing of FortisBC's responses to Commission and Intervener Requests No. 2; and
>
> (2) FortisBC could apply to file rebuttal evidence following the filing of Intervener evidence. (Exhibit C4-9, pp. 3/4 of 5)

On the second issue, BCSEA-SCBC notes that while at the time Order G-177-12 was made, the CPCN Application did not include a potential opt-out program, FortisBC subsequently "provided considerable detail regarding a potential opt-out program in response to BCUC IR 50.2 [Exhibit B-14]." (Exhibit C4-9, p. 4 of 5)

While it acknowledges that FortisBC is not recommending an opt-out option, BCSEA-SCBC submits that FortisBC's suggestion of the principles to be applied if an opt-out option is to be provided represents a change in circumstances that meets the threshold for reconsideration. BCSEA-SCBC further submits that now the possibility of an opt-out option is "on the table", the Commission should consider whether it should be addressed in the written or oral part of the hearing. (Exhibit C4-9, p. 4 of 5)

If there is to be a reconsideration, BCSEA-SCBC submits that the next step would be for the Commission to invite written submissions on whether there should be a change in scope for the written and oral portions of the hearing and, if so, the content of the revised scope. It submits that the reconsideration should focus on the two issues it identified: wired vs. wireless and opting-out. (Exhibit C4-9, p. 4 of 5)

### 2.3 NCGP

The NCGP also supports the application. It expresses a concern that there will be no opportunity to cross-examine on written hearing issues. It submits that RDCK has raised serious questions of conflict of interest and apprehension of bias relating to the evidence submitted by FortisBC from Itron "concerning the relative merits

of the wired versus wireless AMI systems." It submits: "Reducing a hearing to written process is to abandon the tried and true methods of resolving conflicting evidence and testing credibility. [Underlining in original] In addition it agrees with the BCSI submissions on section [86.2 (1)] of the *Act*. It further argues that the failure of the Legislature to provide for a combination hearing "is of sufficient gravity that it immediately meets the "prima facie" and "significant material implication" secondary thresholds for reconsideration of an error of law." (Exhibit C18-8, pp. 2-3)

### 2.4 CEC

CEC opposes the application and submits RDCK has not met the threshold test to move to phase two. It submits the Commission has made no error in fact or law and points to section 86.2 of the *Act* as providing the Commission with the flexibility to order a combined written and oral process. Nor, it submits has there been a fundamental change in circumstances. Further, it submits that there is "no basic principle which was not raised in the original proceeding. It argues that the fundamental concern relating to the wireless meters results from an apparent disagreement on the health impacts, if any of that system. It submits that the Commission has ruled that health concerns are a matter for the oral hearing. It states RDCK has made its position on the "wireless system " "known and clear". It further submits the Commission has no authority to approve an alternative to the FortisBC Application. (Exhibit C17-10)

## 3.0 FORTISBC COMMENTS

FortisBC opposes the application. It submits "no reasonable basis exists for proceeding to the second phase of the reconsideration process." (Exhibit B-19, p. 1)

First, it reviews the regulatory history of the hybrid process, noting that it had been subject to consideration and comment by Interveners since FortisBC filed its CPCN Application on July 26, 2012. It refers to the following Commission Orders and letters:

(1) Order G-105-12 dated August 2, 2012, where the Commission established a Preliminary Regulatory Timetable which set September 7, 2012 as the deadline for comments on the regulatory process to be used to review the CPCN Application. (Exhibit A-2) The Order contemplates the possibility of a combined written and oral process;

(2) Order G-124-12 dated September 13, 2012, which subsequently extended the deadline for filing comments to September 21, 2012. (Exhibit A-4);

(3) Order G-135-12 dated September 26, 2012, where the Commission established a combined process and ordered a Procedural Conference for November 8, 2012 in Kelowna "to consider more precisely the topics to be reviewed by the written and oral processes and to consider the regulatory agenda for the remainder of the proceeding." (Exhibit A-7);

(4) Commission Letter dated October 11, 2012, which included an Agenda for the Procedural Conference. (Exhibit A-10) The Agenda invited submissions on the identification of "issues or topics of significance relating to health security and privacy to be included in the oral hearing" and the identification of "issues or topics of significance of a financial and operations nature that should be included in the written process" and on "Other matters that will assist the Commission to efficiently review the [CPCN] Application"; and

(5) Order G-117-12 and accompanying Decision, which reaffirmed the hybrid review process. (Exhibit A-14)

In addition, FortisBC notes that the submissions on regulatory process issues contemplated by the various Orders and the Letter were made by RDCK and other Interveners either in writing prior to the Procedural Conference and in some cases orally at the Procedural Conference as well. (Exhibit B-19, pp. 1-3)

Second, FortisBC submits that the application should not be allowed because the Phase 1 Reconsideration criteria have not been met. It points out that the RDCK letter addresses none of the Phase 1 Reconsideration criteria. FortisBC submits there is no legal requirement that any part of a CPCN hearing be heard orally or that there even be a hearing. It submits that the decision of whether to hold a hearing is a matter of discretion for the Commission to decide. It relies upon sections 46(2) and 86.2(1) of the *Act*. Section 46 of the *Act* relates to CPCN applications. Section 46(2) provides:

> (2) The commission has the discretion whether or not to hold any hearing on the application.

Further, FortisBC submits that the submission of Mr. Atamanenko and the NCGP that the Commission lacks jurisdiction to order a hybrid process "is plainly wrong, not simply for the reasons that the CEC properly sets out in Exhibit C17-10 but also pursuant to express statutory authority." It relies upon section 2(4) of the *Act* which provides that certain sections of the *Administrative Tribunals Act* S.B.C. 2004, c.45 (*ATA*) apply to the Commission. It specifically refers to section 36 of the *ATA* which provides:

> 36. In an application or an interim or preliminary matter, the tribunal may hold any combination of written, electronic and oral hearings.

Third, FortisBC submits there has been no fundamental change in circumstances or facts. It submits that the Commission has previously held that "[f]undamental change in circumstances is normally interpreted to mean that circumstances or facts have been essentially or radically altered" citing the *Pacific Northern Gas Ltd. 2002 Revenue Requirements Reconsideration Decision,* Appendix A to Order G-77-02 at p. 4. [Underlining added by FortisBC] It submits that test has not been met. (Exhibit B-19, p. 4)

Fourth, it submits the "wired versus wireless" issue raised by BCSEA-SCBC and NCGP has been a live issue since the filing of the CPCN Application which addressed wired alternatives.

Fifth, in reply to the NCGP's concerns about the inability to cross-examine on wired alternatives, it notes that that at page 6 of 10 in the Commission's November 23, 2012 Reasons (Appendix B to Order G-177-12) the Commission "had already determined that 'the review of financial and operations matters in this proceeding will be by way of a written process, except where health or security issues relate to project alternatives. Those matters will be the subject of an oral hearing.'" (Exhibit B-19, p. 5) [Underlining added by FortisBC.]

Sixth, in reply to the BCSEA-SCBC submission relating to opt-out, FortisBC observes this matter has also been before the Commission since the outset. (Exhibit B-19, p. 5)

Seventh, on the issues of conflict of interest and bias raised by RDCK, FortisBC submits that the "QuickFacts" document and its placement on the Commission's website predated the Interveners' initial procedural submissions. In addition, it submits that the suggestion that "using an adverse decision as evidence of bias" fails

to meet a *prima facie* threshold for over-turning a Commission decision. As for the allegation of conflict relating to Itron, FortisBC submits that there is no connection between the allegation and the oral hearing. It submits that the relationship is a matter for legal argument. (Exhibit B-19, pp. 5-6)

Finally, FortisBC submits there is no basic or new principle at issue or other just cause to reconsider Order G-177-12. It submits the Commission has received extensive submissions and no new principle has arisen since the November 23 decision. It refers to other proceedings where the Commission has ordered hybrid hearings, ordered written argument only, ordered written argument on some issues and oral argument on others or ordered an oral argument phase after a written argument. (Exhibit B-19, pp. 6-7)

## 4.0 REPLY BY RDCK

In its reply comments, RDCK acknowledges that its suggestion that a perception of bias might arise from the Commission's website content was not relevant to the reconsideration application. (Exhibit C13-15, p. 1)

On the jurisdictional issue of whether the Commission can hold a hybrid hearing, RDCK adopts the submissions of Mr. Atamanenko and NCGP; however it believes all sections of the statute concerned with hearings must be read together. It provides its analysis of sections 1, 46(1) and (2), 86, 86.2 of the *Act* and *ATA* sections 36 and 41(1), the latter of which provides that an oral hearing must be open to the public. It argues that from a statutory interpretation stand point, to the extent that section 36 might be said to be inconsistent with the far more specific sections 86 and 86.2 of the *Act*, it is overridden by those sections. (Exhibit C13-15, pp. 1-2)

It further submits that since section 75 of the *Act* provides that the Commission is not bound to follow its own decisions, it is not obliged to apply the "essentially and radically altered test" when considering whether a change from a written hearing to an oral hearing should be made. RDCK also adopts the NCGP submissions on the impact of new information that has resulted from Information Requests and from other jurisdictions. (Exhibit C13-15, p. 2)

In addition, it adopts the BCSEA-SCBC submissions. (Exhibit C13-15, p. 3)

## 5.0 COMMISSION DETERMINATION

The Commission Panel will address the criteria to determine whether a reasonable basis exists for allowing a reconsideration of its decision to hold a hybrid oral and written review of the Application in the following order:

1. Has the Commission committed an error in fact or law?
2. Has there been a fundamental change in circumstances or facts since the decision?
3. Is there a basic principle that has not been raised in the original proceeding?
4. Has a new principle arisen as a result of the decision?

### 5.1 Has the Commission committed an error in fact or law?

The error of law alleged on the reconsideration is that the Commission Panel did not have the jurisdiction to order a hearing that included both written and oral hearing components.

For the reasons that follow, the Commission Panel concludes that it has the jurisdiction to order a combination written and oral hearing process.

5.1.1 Statutory Interpretation

The correct approach to statutory interpretation is the modern approach articulated in E.A. Driedger's Construction of Statutes (2nd ed. 1983 at p. 87):

> Today there is only one principle or approach; namely, the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament.

The approach has been adopted by the Courts and by the Commission.[1]

RDCK appears to at least implicitly accept the modern principle when it states its belief that "all sections of the statute concerned with hearings must be read together" and then provides its analysis of sections 1, 46(1) and (2), 86 and 86.2 of the *Act* and sections 36 and 41(1) of the *ATA*.

For the purposes of the reconsideration application the Commission's hearing powers are found both in the *Act* and the *ATA*. Therefore, the determination of whether the Commission Panel has the jurisdiction to order a hearing that has both written and oral hearing components turns on the proper interpretation of the relevant provisions of both the *Act* and the *ATA*.

The Commission Panel agrees with FortisBC that the combined effect of section 2(4) of the *Act* and section 36 of the *ATA* empowers the Commission to hold any combination of written, electronic and oral hearings. Section 2(4) of the *Act* provides, in part, as follows:

> (4) Sections…35-42…of the *Administrative Tribunals Act* apply to the commission, …

Neither the BCSI submission nor that of NCGP referred to either section 2(4) of the *Act* or section 36 of the *ATA*. The modern principle of statutory interpretation requires the Commission Panel to consider them.

RDCK also submits that the requirement for an oral hearing under section 86 of the *Act* arose when the Commission exercised its discretion to hold a hearing under section 46(2) of the *Act*. In the Commission Panel's view, section 46(2) does not require a particular form of hearing, once the Commission has exercised its discretion to hold a hearing. The word "oral" does not appear in the section. Section 46(2) provides:

> (2) The commission has a discretion whether or not to hold any hearing on the application.

Further, section 86 limits the circumstances where a public hearing needs to be held:

[1] See for example, *Rizzo v. Rizzo Shoes Ltd*. (*Re*), [1998] 1 S.C. R. 27 at para 21; *Bell ExpressVu v. Rex* [2002] 2 S.C.R. 559 at para 26; *Barrie Public Utilities v. Canadian Cable Television Association* [2003] 1 S.C.R. 476 at para 20; *FortisBC inc. v. Shaw Cablesystems Limited* 2010 BCCA 552 at para 26 and *In the Matter of an Application by Shaw Cablesystems Limited and Shaw Business Solutions Inc. to continue to use FortisBC Inc.'s Transmission Facilities*, BCUC Decision and Order G-63-10 dated April 1, 2010 at p. 2 of 8.

> 86. If this Act requires that a hearing be held, it must be a public hearing whenever, in the opinion of the commission or the Lieutenant Governor in Council, a public hearing is in the public interest. [Emphasis added.]

Unlike other sections of the *Act*[2], section 46(2) does not require a hearing to be held. The Commission is given the discretion to determine whether a hearing is necessary.

*The Concise Oxford Dictionary of Current English* (8th ed, 1990 at p. 1022) defines "require" as follows:

> **1** need; depend on for success or fulfilment (*the work requires much patience*). **2** lay down as an imperative (*did all that was required by law*). **3** command; instruct (a person etc.). **4** order; insist on (an action or measure). **5 (**often foll. by *of, from* or *that* + clause) demand (of or from a person) as a right. **6** wish to have (*is there anything else you require*?).

The RDCK submission ignores the plain meaning of the word "require".

Therefore, in the Commission Panel's view, section 86 does not apply. Further, even if section 86 does apply, the Commission is of the view that the hybrid hearing process it has adopted for the hearing of the Application meets the definition of "public hearing" in the *Act*.

RDCK submits that section 41(1) of the *ATA*, which also applies to the Commission, requires oral hearings to be open to the public. The question to be determined, however, is whether the Commission can order a hearing that has both written and oral components, not whether oral hearings are to be open to the public.

Based on its interpretation of sections 86 of the *Act*, the definition of "public hearing" in section 1 of the *Act* and section 41(1) of the *ATA,* RDCK submits that a public hearing is "in short, an oral hearing open to the public." (Exhibit C13-15, pp. 1-2) The Commission Panel disagrees with this interpretation.

Neither the *Act* nor the *ATA* define "open to the public". The *Act* defines "public hearing" as follows:

> "**public hearing**" means a hearing of which public notice is given, which is open to the public, and at which any person whom the commission determines to have an interest may be heard

The definition is silent as to the form of hearing required to meet the definition. The Commission Panel is of the view that a written hearing process, which includes public notice, is open to the public in the sense that the record of the proceedings is accessible to the public, and provides persons the Commission has determined to have an interest in the matter with an opportunity to be heard, meets the definition of public hearing for the purposes of the *Act*. In the case of the Application, the Commission has provided a process which includes:

> (1) publication of notice of the Application;

[2] See for example: s.25 (hearing required before Commission may order improved service); s. 30 (hearing required before Commission may order an extension of existing service; s.33 (hearing required to dispense with municipal consent re placement of distribution equipment); s.48 ( hearing required before Commission can cancel or suspend a franchise, licence or permit)

(2) an Information Request process, which applies to both the oral and written components of the hearing;

(3) public access to the record, except for certain confidential evidence to which it has granted all counsel and a limited number of Interveners access upon the signing of an Undertaking of Confidentiality;

(4) the filing of Intervener evidence; and

(5) the filing of written submissions on the matters subject to both the written and oral review processes.

Section 86.2 of the *Act* provides for written hearings. Although section 86.2 is quoted in full in section 2.1 of this Decision, for convenience we include it again here:

> 86.2(1) Despite any other provision of this Act, in any circumstance in which, under this Act, a hearing may or must be held, the commission may conduct a written hearing.
>
> (2) The commission may make rules respecting the circumstances in which and the process by which written hearings may be conducted and specifying the form and content of materials to be provided for a written hearing.

RDCK submits that section 86.2(1) of the *Act* only applies when a public hearing is not in the public interest. It further submits that apart from the fact that section 36 of the *ATA* is permissive and section 86 is mandatory:

> "a primary maxim of statutory interpretation is that, in the event of inconsistency, a statute or clause in general terms must yield to a statute or clause in special terms. *ATA*, s. 36 to the extent it might be said to be inconsistent, is overridden by the far more specific *Act* ss. 86 and 86.2." (Exhibit C13-15, p. 2)

The Commission does not agree that there is any inconsistency between section 36 of the *ATA* and sections 86 and 86.2 of the *Act*. Section 86 leaves the decision to order a public hearing to the opinion of the Commission or the Lieutenant Governor in Council. Both section 86.2 of the *Act* and section 36 of the *ATA* provide for a written hearing at the Commission's discretion. Section 36 of the *ATA* also provides for oral hearings, electronic hearings or a combination of the three types of hearings. To accept the RDCK interpretation would be to remove the discretionary power that the Legislature has given the Commission by the operation of sections 2(4) of the *Act* and section 36 of the *ATA* to hold combined hearings in every case where the Commission orders the holding of a hearing under section 46(2) of the *Act*.

Further, the RDCK interpretation, if adopted, would mean that where the *Act* explicitly requires a hearing, the Commission still has the option under section 86 to determine whether the hearing needs to be a public hearing, (which RCDK submits means an oral hearing) whereas if it exercises its discretion to conduct a hearing under section 46(2), for example, that hearing must be an oral public hearing. In the Commission Panel's view the Legislature could not have intended such an outcome.

Finally, RDCK's argument that section 86.2 of the *Act* only applies when a public hearing is not in the public interest also ignores the plain wording of section 86.2(1) which begins, "Despite any other provision of [the *Act*]….". [Emphasis added]

For all these reasons, the Commission Panel agrees with FortisBC that there "is no legal requirement that any part of a hearing on a CPCN application be held orally or, indeed that there be a hearing at all; this is a matter within the Commission's discretion." (Exhibit B-19, p. 4)

Therefore, the Commission Panel finds that RDCK has not met the criterion of an error of fact or law.

### 5.2 Has there been a fundamental change in circumstances or facts since the decision?

#### 5.2.1 New and/or conflicting information

Both RDCK and NCGP submit that new information obtained through the written Information Request process and from other jurisdictions constitute a fundamental change in circumstances and facts. The purpose of Information Requests is to develop a deeper understanding and gain greater insight into an application. The Panel recognizes that new and conflicting information is not an unusual outcome of the Information Request process. The Commission Panel finds that the new and/or potentially conflicting information as a result of Information Requests does not constitute a fundamental change in circumstances or facts since the decision. The Information Request process has served to provide a deeper understanding of the Application and evidence relating to it. The information so obtained should provide Interveners with the evidence they need to make their Final Submissions on the matters that are the subject of the written review process. The Commission Panel has also provided Interveners with the opportunity to file their own evidence. If an Intervener considers FortisBC's evidence on those matters deficient, it can make that submission.

In its Evidentiary Filing (Exhibit B-23) FortisBC provided additional evidence outside of the Information Request process on the wired advanced metering market. This additional evidence, though it may contain new information, does not, in the Panel's view, constitute any fundamental change in facts or circumstances. By Order G-17-13 dated February 1, 2013, the Commission has provided Interveners with the opportunity to submit an additional round of Information Requests on this new evidence.

#### 5.2.2 Bias and Conflict of Interest

RDCK also alleges that the Commission may have created an apprehension of bias by deciding to make financial, operational, fire safety and privacy matters, including the consideration of a wired versus wireless option subject to the written process only. In addition, RDCK adopts the BCSI and NCGP allegations that Itron is in a conflict of interest because it is acting in the dual role of assessor of the wired alternative and provider of the wireless alternative.

RDCK's application for reconsideration initially makes two allegations of apprehension of bias against the Commission Panel. The first relates to the posting of the "Quick Facts" document on the Commission website. RDCK withdrew that allegation in its reply.

The remaining allegation relates to its suggestion that the Commission Panel's decision "to make matters of a financial, operational, fire safety and privacy nature, including consideration of the wired v. wireless option by written process only, under order G-177-12 also shows a certain bias against some interveners."

The Commission Panel considers the allegations unfounded. Simply because the Commission Panel determines a matter against one party cannot, in and of itself, be said to create an apprehension of bias. As FortisBC submits, and the Commission Panel agrees, the use of an adverse decision fails to meet any kind of *prima facie*

threshold for meeting the criterion that there has been a fundamental change in circumstances or facts. (Exhibit B-19, pp. 5-6)

The Commission Panel also agrees with FortisBC that the NCGP and BCSI allegations (which RDCK adopts in reply) that Itron is in a conflict of interest because of its combined role of assessing the wired alternative and providing the wireless alternative is a matter for legal argument. The dual role is, as FortisBC points out, undisputed. The parties will have the opportunity to make submissions on the weight to be given to the Itron evidence in their final submissions.

The Commission Panel therefore concludes that there is no basis for reconsideration on the grounds of bias or conflict of interest. As a result, the Commission Panel finds RDCK has not met the criterion of a fundamental change in facts or circumstances since the decision.

### 5.3 Is there a basic principle that has not been raised in the original proceeding?

#### 5.3.1 Conflicting evidence and ability to cross-examine conflicting evidence

NCGP assert that the usual means of resolving conflicting evidence and issues of credibility is by way of cross-examination and that the issue of cross-examination of conflicting evidence had not been raised in the original proceeding. The NCGP state this is further justification of a fundamental change in circumstances or facts since the Decision. The Panel has addressed the specific issue of new and/or conflicting evidence in 5.2.1 above, but will consider the ability to cross-examine conflicting evidence and testing credibility under the criteria of basic principle that has not been raised in the original proceeding.

The NCGP state it is unaware of any provision for cross-examination other than in oral hearing, and thus the most contentious and substantive issues in this hearing, which were not fully obvious as such at the outset, are being denied full hearing and cross-examination. Further it states that "[r]educing a hearing to written process is to abandon the tried and true methods of resolving conflicting evidence and testing credibility." (Exhibit C18-8, underlining in original)

The short answer to this submission is that the Legislature, through the operation of section 86.2 (1) of the *Act* and section 36 of the *ATA,* has empowered the Commission to determine the form of its hearings. There is no right to cross-examine witnesses in all proceedings before the Commission.

The Commission Panel considers issues of procedural fairness and efficiency when considering how to process an application that comes before it. Interveners in this proceeding have had the opportunity to file evidence which may challenge the evidence filed by FortisBC. Ultimately it is the Commission Panel that must assess the weight to be given to the evidence and make its decision based on the evidence whether submitted in written or oral form.

For the above reasons, the Commission Panel finds that the application does not meet the criterion of a basic principle that has not been raised in the original proceeding.

### 5.4 Has a new principle arisen as a result of the decision?

Neither RDCK nor any other Intervener made submissions that refer to a new principle being raised as a result of the decision. This criterion therefore does not apply to the application.

## 6.0 CONCLUSION

In considering whether a reasonable basis exists for allowing the applied for reconsideration the Commission Panel finds, for the reasons stated above, that the reconsideration criteria have not been met and therefore the reconsideration application is denied.