SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: http://www.bcuc.com

BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-46-14

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

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

and

FortisBC Inc.
Application for the Radio-Off AMI Meter Option
Application for Reconsideration of
British Columbia Utilities Commission Decision and Order G-220-13

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

March 26, 2014

O R D E R

WHEREAS:

A. By Order C-7-13 dated July 23, 2013, the British Columbia Utilities Commission (Commission) granted FortisBC Inc. (FortisBC) a Certificate of Public Convenience and Necessity for the Advanced Metering Infrastructure (AMI) Project (AMI Decision). The approval was subject to the condition that FortisBC confirm in writing that it would file an application for an opt-out provision by November 1, 2013, based on principles set out in the AMI Decision;

B. On July 31, 2013, FortisBC confirmed in writing that it would file an application for an opt-out provision;

C. On August 30, 2013, FortisBC filed an application for a Radio-Off AMI Meter Option (FortisBC Application) based on principles set out in the AMI Decision. The FortisBC Application set out the rates and processes for customers who choose the Radio-Off AMI Meter Option. Specifically, the proposed rates per customer were as follows:

   i. Per-premises setup fee: $110.00; and
   ii. Bi-monthly per-read fee: $22.00;

D. By Order G-154-13 dated September 18, 2013, the Commission established a written hearing process and a Regulatory Timetable for the review of the FortisBC Application. Directive 2 of Order G-154-13 limited the scope of the written hearing to the opt-out principles outlined in Order C-7-13;

E. By Order G-220-13 dated December 19, 2013, the Commission, among other directives, did not approve the rates proposed in the FortisBC Application. The Commission reduced the amounts proposed for the per-premises setup fee for FortisBC customers who choose the Radio-Off AMI Meter Option prior to, and after the commencement of, AMI project deployment in their region and the bi-monthly per-read fee to $60.00, $88.00 and $18.00, respectively (Decision);

F. On January 20, 2014, the Citizens for Safe Technology Society (CSTS) filed an application pursuant to section 99 of the *Utilities Commission Act*, for reconsideration of the Decision (Reconsideration Application);

.../2

G. By Letter L-4-14 dated January 27, 2014, the Commission established the first phase of the reconsideration process setting deadlines for written comments by FortisBC and Registered Interveners in the Radio-Off AMI Meter Option proceeding. The letter also provided for Reply by CSTS;

H. FortisBC and the following Interveners submitted comments: Alex Atamanenko, M.P. for BC Southern Interior, B.C. Sustainable Energy Association and Sierra Club of British Columbia (BCSEA-SCBC), the Commercial Energy Consumers Association of British Columbia (CEC), the Director for Electoral Area "D" of the Regional District of Central Kootenay (RDCK), Robert Miles and Florence Winfrey;

I. CSTS filed its Reply on February 12, 2014;

J. By Letter L-11-14 dated February 18, 2014, the Commission sought responses from the parties to certain questions relating to the *Human Rights Code* and the *Canadian Charter of Rights and Freedoms* that were raised in the submissions in response to Letter L-4-14. The letter provided for a process that required all parties to provide their responses by February 26, 2014, and any reply they had to the responses of others by March 5, 2014;

K. CSTS, BCSEA-SCBC, CEC, FortisBC and RDCK filed their responses on February 26, 2014;

L. On March 3, 2014, CSTS requested changes to the process contemplated by Letter L-11-14 and by letter dated March 5, 2014, the Commission refused the CSTS request;

M. BCSEA-SCBC, FortisBC and RDCK filed their reply to the responses of others on March 5, 2014; and

N. The Commission Panel has considered the Reconsideration Application and the submissions it has received.

NOW THEREFORE for the reasons stated in the Reasons for Decision attached as Appendix A to this Order and pursuant to section 99 of the *Utilities Commission Act*, the British Columbia Utilities Commission orders that the Citizens for Safe Technology Society Reconsideration Application is dismissed.

DATED at the City of Vancouver, in the Province of British Columbia, this 26th day of March 2014.

BY ORDER

Original signed by:

L.F. Kelsey
Commissioner

Attachments

IN THE MATTER OF

FORTISBC INC.
APPLICATION FOR THE RADIO-OFF AMI METER OPTION
APPLICATION FOR RECONSIDERATION OF
BRITISH COLUMBIA UTILITIES COMMISSION DECISION AND ORDER G-220-13

REASONS FOR DECISION

March 26, 2014

BEFORE:

L.F. Kelsey, Panel Chair/Commissioner
D.M. Morton, Commissioner
N.E. MacMurchy, Commissioner

TABLE OF CONTENTS

PAGE NO.

1.0 INTRODUCTION

On December 19, 2013, the British Columbia Utilities Commission (Commission) issued Order G-220-13 and the accompanying Reasons for Decision (Decision) on the FortisBC Inc. (FortisBC) application for a Radio-Off Advanced Metering Infrastructure (AMI) Meter Option. On January 20, 2014, the Citizens for Safe Technology Society (CSTS) filed an application for a reconsideration of the Decision (Application), pursuant to section 99 of the *Utilities Commission Act* (Act).[1] Specifically, CSTS asserts that the Commission made errors of law in determining issues in relation to the application of the *British Columbia Human Rights Code*[2] and the *Canadian Charter of Rights and Freedoms* (*Charter*).[3]

In the course of its submissions, CSTS revised the relief it was seeking on the *Human Rights Code* ground, withdrawing its request that the Commission engage in any substantive analysis with respect to whether the Radio-Off AMI Meter Option program fee violates the *Human Rights Code.* CSTS requests that the Commission change certain wording it used at page 10 of the Decision relating to the *Human Rights Code*.

2.0 THE RECONSIDERATION PROCESS

An application for reconsideration with the Commission proceeds in two phases. In the interest of regulatory efficiency and fairness, the application undergoes an initial screening phase. In this first phase, the applicant must establish a *prima facie* case sufficient to warrant full reconsideration by the Commission. The Commission may invite submissions from the other participants in the original proceeding, or it may consider that comments from the parties are not required. The Commission 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.

Where an error is alleged to have been made the application must meet the following criteria to advance to the second phase of reconsideration:

- the claim of error is substantiated on a *prima facie* basis; and
- the error has significant material implications.

If the Commission determines that a full reconsideration is warranted, the second phase begins where the Commission hears arguments on the merits of the application.

[1] RSBC 1996, c. 473
[2] RSBC 1996, c. 210
[3] Part 1 of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3.0 THE ADVANCED METERING INFRASTRUCTURE PROJECT AND THE RADIO-OFF AMI METER OPTION DECISIONS

By Order C-7-13 dated July 23, 2013, the Commission granted a Certificate of Convenience and Public Necessity (CPCN) to FortisBC for its AMI project (AMI Decision)[4] subject to the condition that FortisBC confirm in writing by August 1, 2013 that by November 1, 2013 it would file an application for an opt-out provision based on the following principles:

- Customers may choose to opt-out of accepting a wireless transmitting meter.
- Customers who choose to opt-out will be provided with an AMI meter that has the wireless transmit functions disabled. Transmit functions on these meters will remain disabled until the individual chooses to opt back in to the AMI program; in the event that the customer moves to a new property, the opt-out choice will move with the customer.
- The incremental cost of opting-out of the AMI program will be borne by the individual choosing to opt-out.[5]

On July 31, 2013, FortisBC confirmed that it would file an application for an opt-out provision. On August 30, 2013, it filed its application for a Radio-Off AMI Meter Option based on the principles set out in the AMI Decision (the Proceeding).

By Directive 2 of Order G-154-13 dated September 18, 2013, the Panel appointed for the Proceeding provided, in part, the following direction on the limited scope of the Proceeding:

> "2. In reviewing the Radio-Off Advanced Metering Infrastructure Meter Option Application, the written hearing is limited in scope to the opt-out principles outlined by the Commission Panel in Order C-7-13."

No participant sought leave to expand the scope of the Proceeding.

In Section 2.3 of the Decision the Commission had this to say about the limited scope of the Proceeding:

> "The Panel, in determining the scope of the Proceeding, was mindful of the directives contained in Order C-7-13 and the principles described in section 2.1.1... Consequently, in Directive 2 of Order G-154-13, the Panel provided the following direction to participants on the limited scope of the proceeding:
>
> 2. In reviewing the Radio-Off Advanced Metering Infrastructure Meter Option Application, the written hearing is limited in scope to the opt-out principles outlined by the Commission Panel in Order C-7-13. ..." (Decision, p. 7)

[4] http://www.bcuc.com/Documents/Proceedings/2013/DOC_35184_C-7-13_FBC-AMI-ProjectDecision-WEB.pdf
[5] AMI Decision, pp. 148-149.

Section 2.1.1 of the Decision provides:

> "In the application for a CPCN to acquire and install advanced metering infrastructure, FortisBC did not provide any provision for customers to opt-out of the requirement to have a radio-on AMI meter installed at their premises. The position adopted in the application was that FortisBC would work with customers who had concerns about the installation of a radio-on AMI meter, but if these concerns could not be satisfied and the customer continued to refuse to have a meter installed, then FortisBC would discontinue service to that customer.
>
> On page 148 of the AMI Decision the Commission states:
>
> > In Section 6.5.2, the Panel identified a potential risk to the implementation schedule arising from a protracted difference of views concerning the Project. This risk could increase costs to and reduce potential benefits from the Project, which would be detrimental to all FortisBC ratepayers. The Panel is of the view that an opt-out program could mitigate these potential schedule impacts. On the issue of financial or medical hardship, the Panel is of the view that a properly designed opt-out program allows individuals to decide not to accept a transmitting AMI meter while protecting the remaining FortisBC customers from the increased costs associated with the opt-out Program.
>
> Therefore, to mitigate this potential risk to the implementation schedule, the Commission directed FortisBC to bring forward an application for an opt-out program based on the following principles:
>
> - **Customers may choose to opt-out of accepting a wireless transmitting meter.**
> - **Customers who choose to opt-out will be provided with an AMI meter that has the wireless transmit functions disabled. Transmit functions on these meters will remain disabled until the individual chooses to opt back in to the AMI program; in the event that the customer moves to a new property, the opt-out choice will move with the customer.**
> - **The incremental cost of opting-out of the AMI program will be borne by the individual choosing to opt-out.**
>
> The Commission also noted in the AMI Decision that as radio-frequency (RF)-related issues, including health, security and privacy had been extensively dealt with, the opt-out provision application should be limited to dealing with the issues associated with the an opt-out option that is set out in accordance with the principles outlined above." (Decision, p. 6) [Emphasis in original; Footnote deleted]

4.0 THE RECONSIDERATION APPLICATION AND THE COMMISSION PROCESS FOR THE APPLICATION

The Commission issued Letter L-4-14 dated January 27, 2014, establishing the first phase of the reconsideration process with deadlines for written comments, if any, from FortisBC and Registered Interveners in the Proceeding and a written reply from CSTS. The Commission received submissions from FortisBC and the following Registered Interveners:

- Alex Atamanenko, M.P. for BC Southern Interior,
- B.C. Sustainable Energy Association and Sierra Club of British Columbia (BCSEA-SCBC),
- Commercial Energy Consumers Association of British Columbia (CEC),
- Director for Electoral Area "D" of the Regional District of Central Kootenay (RDCK),
- Robert Miles, and
- Florence Winfrey.

CSTS filed a reply on February 12, 2014.

In its submission dated February 3, 2014 (RDCK Submission), RDCK sought to expand the scope of the reconsideration process to matters relating to Order C-7-13, which were beyond the scope of the Application. By letter dated February 7, 2014, the Commission advised RDCK that in determining whether the Application should proceed to Phase 2, it would attempt to separate those sections of the RDCK Submission that relate to the Application from those that relate to Order C-7-13. It advised RDCK that any request for reconsideration of Order C-7-13 should be made by separate filing and should proceed with "all urgency." RDCK was requested to file any request for reconsideration of Order C-7-13 by February 14, 2014. No such request has been filed.

Following its preliminary review of the Phase 1 submissions, by Letter L-11-14 dated February 18, 2014, the Panel sought responses from the parties to certain questions relating to the *Human Rights Code* and the *Charter* that were raised in the submissions. The letter provided for a process whereby all parties would file their responses by February 26, 2014, and any reply they had to the responses of other parties by March 5, 2014.

No participant objected to the process contemplated by Letter L-11-14 until March 3, 2014, when CSTS stated it should have the right to consider all submissions filed in response to Letter L-11-14, including those to be filed on March 5, 2014. Accordingly, it requested leave to file its reply two weeks after opposing parties. By letter dated March 4, 2014 (March 4 Letter), FortisBC objected to the CSTS request. By letter also dated March 4, 2014, the Commission refused CSTS' request for the following reasons:

> "The process established for CSTS is no more onerous than the process established for the other parties involved. In addition, the CSTS request to respond two weeks after the opposing parties is contrary to the process established by Letter L-11-14 whereby all parties are to file a reply, if any, to the responses of other parties on the same date (Wednesday March 5, 2014).

> Finally, it is important to highlight that Letter L-11-14 was dated February 18, 2014. The CSTS letter was received on March 3, 2014. At no time prior thereto did CSTS request any alteration to the schedule provided in Letter L-11-14. The Panel determines that the CSTS requests are not timely considering that the process established by Letter L-11-14 has been underway since February 18, 2014, and the process has been almost fully implemented. The Commission received responses to its questions from several parties on February 26, 2014, including CSTS, and the deadline for a reply to the responses of other parties is set at March 5, 2014." (March 4 Letter, p. 2)

CSTS did not file a reply to the responses of other parties to Letter L-11-14.

The questions in Letter L-11-14, the responses of the parties and their replies, if any, to the responses of other parties are discussed in Section 6.0 of this Decision. Letter L-11-14 forms Attachment 1 to this Decision.

5.0 POSITIONS OF THE PARTICIPANTS

5.1 CSTS Application

CSTS asserts two grounds for reconsideration in the Application. It submits that the Commission erred in law in determining issues related to (1) the *Human Rights Code* and (2) the *Charter.*

It founds its assertions on the following passage at page 10 in the Decision:

> "The issue of potential discriminatory effects of the AMI project on persons who claim to be sensitive to electromagnetic radiation was first raised in the AMI Proceeding. In that proceeding, after a full consideration of the applicability of the Charter, including Section 15, the Commission Panel agreed with FortisBC that the Charter does not apply to non government actors. Although this issue of violation of the Charter rights of individuals with disabilities has again been raised, there has been no additional analysis provided concerning the applicability of the Charter to FortisBC. **Accordingly, the Panel finds the Charter is not applicable to FortisBC.**
>
> **The Panel also finds that the Radio-off AMI Meter Option put forward by FortisBC, including the fees that must be paid, is not discriminatory under the *Human Rights Code.* Parties are free to choose if they will participate in the program and all parties making this choice are treated in an equal manner.**
>
> **The Panel notes that the Radio-off AMI Meter option is available under exactly the same terms to all FortisBC ratepayers, as is the radio-on option. Each of the options has its own costs and attributes, which are reflected in the rates. The Panel finds that charging different rates based upon meter preferences is not unduly discriminatory under section 59 of the Act.**" [Emphasis in original]

On the first ground, CSTS submits that "the Decision is flawed because it fails to consider whether or not the opt-out program constitutes a particular barrier to the EHS [electromagnetic hypersensitivity] customer's access to the service, for reason of his/her disability." (Application, p. 2)

Secondly, it submits that all customers are not free to choose, since for customers suffering from EHS the matter is not one of choice, but of necessity. (Application, p. 3)

Thirdly, it submits that where the opt-out fee is imposed without considering the particular impact of such a program on disabled persons, people with EHS do not have the same or equal access to electrical service as abled persons. (Application, p. 3)

Finally, CSTS submits:

> "Further to the analytical flaws discussed above, the Commission, in dealing with the discrimination issues before it, did not address the key substantive issues that were before it, including the issues of whether EHS is a disability and whether the fee is discriminatory in its effect on a vulnerable population on a protected ground.
>
> The Commission makes an error by disposing of the issue on the basis that all opt-out customers are treated in an equal manner. The Decision ignores the fact that not all persons are the same; and therein lies the need for accommodation and inclusion of a vulnerable group up to the point of undue hardship. The Commission completely overlooks the essence of the appropriate human rights analysis." (Application, pp. 3-4)

On the second ground, CSTS asserts that the Commission misconstrued the CSTS Final Submission in the Proceeding (the November Submission). It submits that it did not suggest that the *Charter* applied to FortisBC rather that it applied to the Commission itself. It refers to paragraph 73 of its November Submission where it states:

> "We submit, in the absence of some kind of provision or qualification addressing the need to accommodate the Disabled Opt-outs[6], any BCUC approval of the opt-out program would have a discriminatory effect and constitute a violation of section 15 of the *Canadian Charter of Rights and Freedoms*." (Application, p. 4)

CSTS submits that the Commission erred in misconstruing the CSTS argument and dismissing it without considering it.

On the issue of remedy, CSTS submits that a proper analysis "will require a finding of whether EHS constitutes a disability." The remedy sought in the Application includes a request that:

[6] This is CSTS' terminology; not the Commission's. The term does not appear in either the AMI Decision or the Decision.

> "…the impugned parts of the Decision be set aside and that the questions of the application of the Human Rights Code and section 15 of the Charter be appropriately determined by the Commission ("the Redetermination")." (Application, p. 4)

CSTS requests that the Redetermination be deferred until the outcome of its complaint against British Columbia Hydro and Power Authority (BC Hydro) presently before the BC Human Rights Tribunal (BCHRT Proceedings) is known.

5.2 Participants Supporting the Application

RDCK supports the Application, although takes no position on the specific remedies sought by CSTS (RDCK Submission, paras 5, 14). In paragraph 23 of its submission, RDCK refers to the following statements in *R. v. Conway*[7] at paragraphs 20 and 21:

> "[20] We do not have one Charter for the courts and another for administrative tribunals (Cooper v. Canada (Human Rights Commission), 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, per McLachlin J. (in dissent), at para. 70; Dunedin; Douglas College; Martin). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the Charter apply to both courts and administrative tribunals. It is also reflected in the jurisprudence flowing from Mills and the Cuddy Chicks trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the Charter to the issues that arise in the proper exercise of their statutory functions.
>
> [21] The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of Charter issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the Charter."

RDCK also references section 59 of the Act and submits that "s. 59, read through the lens of the *Charter*, bolsters and underscores the Commission's duty to avoid discriminatory and prejudicial rate structures." (RDCK Submission, paras 24-25)

RDCK agrees with CSTS that the key issue of disability as it relates to EHS was never covered in either the AMI Decision or the Decision. It further submits that the World Health Organization (WHO), the Commission, FortisBC and Dr. Sears in the AMI Decision are essentially in agreement that the symptoms of EHS are real and that if sufficiently severe, can be disabling.

It submits that the fact that no causal scientific relationship can be demonstrated between RF emissions and the symptoms of EHS is irrelevant. It relies upon *Brewer v. Fraser Milner Casgrain* LLP, 2006 ABQB 258 at paras 29 and 32 (reversed on other grounds 2008 ABCA 160), citing paragraph 29 in part:

[7] [2010] 1S.C.R. 765

> "[29] A distinction should be drawn between the question of whether a disability exists and the question of whether medical science has a label for it or has determined its cause." (RDCK Submission, paras 26, 31)

RDCK also submits that:

> "…it is prima facie demeaning and discriminatory to force a disabled person to pay a penalty as a result of their disability, in effect, to apply a tax or surcharge on the severely limiting imperative imposed upon them by their disability to avoid exposure to radio frequency emitting devices." (RDCK Submission, para 34)

RDCK concludes its submissions expressing the view that the *prima facie* criterion for an error of law is a low threshold, which requires only an "arguable case" or a "serious question to be tried" and that a *prima facie* case exists for the Commission to reconsider the applicability of the *Charter*. It submits that the question of whether or not the *Charter* applies "has significant material implications for the health and safety of FortisBC customers." It further submits that:

> "Given that the issue of disability, as opposed to epidemiological cause and effect, has not been dealt with by the Commission, specifically or at all, RDCK also submits that the Commission should hear new evidence related to this subject, and that new parties be given an opportunity to submit evidence. Among other things, RDCK wishes to introduce evidence of recent studies which support the role of the nocebo effect in triggering acute symptoms in persons with EHS. " (RDCK Submission, paras 35, 36)

Alex Atamanenko, M.P. for BC Southern Interior, filed a letter dated February 4, 2014, supporting the Application.

Florence Winfrey also filed a letter dated February 4, 2014, on the stationery of Similkameen Technology Awareness Group, but the letter does not say whether either Ms. Winfrey or the Group, which did not intervene in the Proceeding, supports the Application.

5.3 Participants Opposing the Application

FortisBC, BCSEA-SCBC and CEC all oppose the Application. Each submits that CSTS has not met the two criteria required for CSTS to advance to Phase 2, namely: (1) the claim of error has to be substantiated on a *prima facie* basis; and (2) the error needs to have significant material implications.

FortisBC submits that in order for a section 15 *Charter* argument to succeed two conditions must be met: first, the *Charter* must apply and second, a breach of section 15 must be at issue. FortisBC further submits that:

> "…a *Charter* argument can fail on various grounds. The argument fails if the *Charter* does not apply, even if a breach could otherwise have been established. The argument fails if the *Charter* does apply but there is no breach. In circumstances where a limit is "prescribed by

> law", the argument fails as well if the *Charter* applies and a *Charter* right has been breached but, under s. 1 of the *Charter*, the offending limit is reasonable and "demonstrably justified in a free and democratic society."" (FortisBC Submission, p. 2)

FortisBC states that the Commission cannot be faulted "for not having guessed that paragraph 73 of CSTS' November Submission meant what CSTS now says it means." Further, FortisBC states that "it is still not apparent that [the argument that the *Charter* applies to the Commission itself] is what CSTS intended to say." FortisBC submits:

> "CSTS knew that the Commission had already made a determination on the application of the Charter in its July 2013 decision on FortisBC's CPCN application. If CSTS wished to rely on a different applicability analysis than had already been rejected, it was incumbent on CSTS to clearly state, explain and justify its position. It did not do so. " (FortisBC Submission, p. 2)

FortisBC further submits that even if the Commission erred in construing the November Submission, it would not have received the relief it sought for the following reasons:

(1) CSTS has provided no basis to believe that the *Charter* applicability argument would have been accepted; it did not in either the November Submission or its Application "explain its reasoning or provide any authority in support of its position on applicability, by which it seeks to achieve indirectly the result that it could not achieve directly; making the Radio-Off Option Program of a private actor, FortisBC, subject to the *Charter";*

(2) Even if the Commission had found the *Charter* to apply, the significant material implications test could only have been met if as CSTS argued, "in the absence of some kind of provision or qualification addressing the need to accommodate the Disabled Opt-outs, any BCUC approval of the opt-out program would have a discriminatory effect and constitute a violation of section 15 of the *Canadian Charter of Rights and Freedoms*." FortisBC says there is no breach, for the reasons set out in its Reply Submission in the Proceeding dated November 20, 2013.

(3) As for the alleged error relating to the *Human Rights Code*, FortisBC points out that the Commission does not have jurisdiction to "'apply'" the *Human Rights Code*. It references section 2(4) of the Act and section 46.3 of the *Administrative Tribunals Act* (ATA).[8] FortisBC submits that the Commission's comment that the "Radio-off AMI Meter Option…is not discriminatory under the Human Rights Code" was responsive to the manner in which CSTS made its *Charter* argument, as it relied upon the provincial human framework to support its section 15 *Charter* argument.

(4) Even if the Commission was incorrect in its view of the provincial human rights regime [FortisBC says it was not], its comment was *obiter dictum*[9], as the Commission had already found the *Charter* not to apply. (FortisBC Submission, pp. 2-4)

[8] SBC 2004, c. 45.
[9] Defined by FortisBC at p. 3 of its Submission as "a statement unnecessary to the result"

Section 2(4) of the Act makes section 46.3 of the ATA applicable to the Commission. Section 46.3 of the ATA provides as follows:

> 46.3 (1) The tribunal does not have jurisdiction to apply the *Human Rights Code*.
>
> (2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

FortisBC also makes submissions against the Commission hearing new evidence if the Commission advances the Application to Phase 2 and argues for a written process for Phase 2, if a second phase is ordered. (FortisBC Submission, pp. 4-5)

BCSEA-SCBC submits that neither of the errors alleged by CSTS have been substantiated on a *prima facie* basis or have significant material implications.

First, it submits that CSTS did not argue that the *Human Rights Code* applied in the Proceeding and accordingly cannot now argue that the Commission erred in not applying the *Human Rights Code*.

Secondly, it argues that the Commission's statement that the Radio-Off AMI Meter Option is not discriminatory under the *Human Rights Code* is *obiter dicta* as the Commission does not have jurisdiction to apply the *Human Rights Code*.

Thirdly, it submits that there is no *prima facie* error in the Commission's rejection of CSTS' argument that approval of the Radio-Off AMI Meter Option rates would violate section 15 of the *Charter* for the following reasons:

- "CSTS did not persuade the Commission that "electrical hypersensitivity" (EHS) is a "mental or physical disability" within the meaning of section 15.
- CSTS did not persuade the Commission that radio frequency (RF) emissions from radio-on smart meters would have any negative health impact on customers or anyone else.
- CSTS did not persuade the Commission that RF emissions, in general or from radio-on FBC smart meters, had any causal link to perceived symptoms of EHS.
- CSTS did not persuade the Commission that the Radio-Off rates were discriminatory on the basis of "mental or physical disability" (or any other basis) within the meaning of section 15. More specifically, CSTS did not persuade the Commission that the Radio-Off Option rates create a distinction based on protected or analogous grounds, or that such a distinction creates a disadvantage by perpetuating prejudice and stereotyping."

Even assuming the section 15 *Charter* argument does apply, BCSEA-SCBC says it has no significant material implications.

Finally, BCSEA-SCBC argues that the Commission does not have jurisdiction over constitutional questions such as the application of the *Charter*. (BCSEA-SCBC Submission, pp. 1-3)

CEC supports the positions adopted by FortisBC.

Mr. Miles also opposes the Application.

5.4 CSTS Reply

In its Reply dated February 12, 2014 (CSTS Reply), CSTS addresses both the *Human Rights Code* and *Charter* submissions of the other participants. First, it revises the relief it originally sought for its *Human Rights Code* ground for reconsideration.

CSTS now states that it "withdraws its request that the Commission engage in a substantive analysis with respect to whether the proposed FortisBC opt-out fee program violates the Human Rights Code." It agrees with FortisBC and BCSEA-SCBC that the Commission has no jurisdiction to apply the *Human Rights Code*, by reason of the operation of section 2(4) of the Act and section 46.3 of the ATA.

CSTS now submits that the appropriate remedy under this ground is for the Commission to withdraw the following finding on page 10 of the Decision:

> "The Panel also finds that the Radio-off Meter Option put forward by FortisBC, including the fees that must be paid, is not discriminatory under the Human Rights Code."

and substitute:

> "The Commission has no jurisdiction to apply the Human Rights Code and therefore declines to make any determination as to whether the opt-out program proposed by FortisBC violates the Human Rights Code." (CSTS Reply, pp. 3-4)

In its reply to submissions on its *Charter* ground for reconsideration, CSTS acknowledges that the outcome of a *Charter* analysis "is a matter of conjecture", but asserts that the fact is that the Commission did not undertake a *Charter* analysis since it did not consider whether it, as a statutory tribunal, was obliged to comply with the *Charter.* (CSTS Reply, p. 4) It relies on *R. v. Conway* to support its assertion. Amongst the paragraphs it cites from *R. v. Conway* is paragraph 46 which references *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2. S.C.R. 817:

> "**[46]** In 1999, the Court decided *Baker*, a judicial review of the exercise of statutory discretion by an immigration officer pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2. L'Heureux-Dubé J., relying on *Slaight* and *Roncarelli v. Duplessis*, 1959 CanLII 105 (SCC), [1959] S.C.R. 121, among others, concluded that statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* (paras. 53 and 56). " (CSTS Reply, p.6) [Underlining by CSTS]

CSTS further submits that while the ATA applies to exclude "constitutional issues" from the Commission's jurisdiction, the Commission is not relieved from its obligation, as a creature of statute, to comply with the *Charter* in the exercise of its statutory discretion.

CSTS concludes its reply with the assertion that "significant, material implications arise from the Commission's error in failing to consider whether the *Charter* applies to the Commission." (CSTS Reply, p. 8)

6.0 LETTER L-11-14

6.1 The Panel's Questions

The questions for which the Commission sought answers in Letter L-11-14 are as follows:

> Question 1:
>
> Given that FortisBC, BCSEA and CSTS agree that the Commission has no jurisdiction to apply the *Human Rights Code* and the Panel acknowledges that jurisdictional limitation is it necessary for the Panel to hold a Phase 2 hearing to determine whether it should grant the revised relief now sought by CSTS under this heading?
>
> Question 2:
>
> Do you agree that the Commission does not have jurisdiction to grant a section 24(1) Charter remedy?
>
> Question 3:
>
> Is the relief being sought by CSTS under the Charter part of its submissions relief in the nature of a section 24(1) Charter remedy?
>
> Question 4:
>
> Provided the question does not fall within the definition of "constitutional question", must the Commission take a Charter argument into account in exercising its discretion under sections 59-60 of the Act?

Question 5:

Alternatively, do the factors which the Commission is required to take into account in making its determination under sections 59-60 of the Act, preclude it from taking into consideration the Charter values raised in this proceeding?

Question 6:

What is the evidentiary basis in this proceeding that supports a finding of disability?

Question 7:

If there is no evidentiary basis in this proceeding that supports a finding of disability, how can the Panel

a) determine whether section 15 of the Charter applies; and
b) properly exercise its discretion in respect of Charter values?

CSTS, BCSEA-SCBC, CEC, FortisBC, and RDCK filed responses to the Panel's questions. BCSEA-SCBC, FortisBC, and RDCK each filed a reply to the responses of other parties.

6.2 The Responses of Participants to the Questions

6.2.1 Responses of CSTS

CSTS filed its responses to the Panel's questions on February 26, 2014 (CSTS Responses). In its response to Question 1, CSTS says that it would not object to the Commission granting the revised relief without going to a Phase 2 hearing. It says, however, it would object if the Commission declined to grant the relief without going to a Phase 2 hearing.

In response to Question 2, CSTS takes no position on whether the Commission is without jurisdiction to grant a *Charter* remedy. In response to Question 3, it states it was not seeking a *Charter* remedy, but rather asserts that in exercising its powers under the Act, the Commission must do so in a manner which complies with the *Charter*.

In response to Question 4, CSTS asserts that the Commission's misconstruction of CSTS' *Charter* argument results in procedural unfairness and that the Commission must take its argument into account in exercising its discretion under the Act. It responds in the negative to Question 4 on whether the factors that the Commission is required to take into account in making a determination under sections 59 and 60 of the Act preclude it from taking into consideration *Charter* values raised in this Proceeding.

Finally in response to Questions 6 and 7 relating to the evidentiary basis in the Proceeding to support a finding of disability, it says in part:

"In the context of the FortisBC CPCN application, the Commission heard plenty of evidence with respect to EHS. The only determination that the Commission made in that regard was with respect to the absence of a causal connection between RF emissions and the symptoms of EHS. We have already argued that the absence of that causal link does not preclude a finding, at law, of disability.

However, it is not clear that the Commission is required to make a specific finding of disability in these proceedings. Certainly, the Commission is not being asked to determine the merits of any specific claim of disability.

…

Whether any individual disability claim has merit will need to be determined on a case by case basis and, presumably, may be the subject of a complaint before the Human Rights Tribunal, which is the appropriate forum for the adjudication of the merits of such claims. As such, the Commission cannot make any pronouncement on the prospective merits of any such claim. However, the Commission, in consideration of the equality guarantees under the Charter, should qualify its order such that FortisBC's right to charge an opt-out fee is subject to FortisBC's compliance with its duty to accommodate, lest the Commission be seen to be relieving FortisBC from its duties in that regard." (CSTS Responses, pp. 2-3) [Emphasis added]

6.2.2 Responses of BCSEA-SCBC

BCSEA-SCBC filed its responses to the Panel's questions on February 26, 2014 (BCSEA-SCBC Responses). In its response to Question 1, BCSEA-SCBC submits that it is not necessary nor would it be proper for the Commission to hold a Phase 2 hearing to determine whether or not to grant the revised relief sought by CSTS under the *Human Rights Code*. It also argues that the Commission's finding was *obiter dicta* and states that the substitution "would in no way" change the Decision. It argues that the Commission does not have the authority to grant the revised relief sought by CSTS without proceeding to Phase 2, as Letter L-4-14 contemplates that the reconsideration would proceed in the usual two phase manner, without going directly to Phase 2.

In its response to Question 2, it agrees that the Commission cannot grant a section 24 (1) *Charter* remedy. In response to Question 3, it describes the final order CSTS is seeking concerning the application of the *Charter* as "significantly unclear."

In response to Question 4, BCSEA-SCBC says that the Commission must take into account all constitutional provisions including section 15 of the *Charter* in exercising its discretion under sections 59-60 of the Act, "if and when there is an evidentiary basis for doing so." [Emphasis added] It submits that the Commission made evidentiary findings that precluded any evidentiary basis for the relevance of section 15 to the Commission's application of its discretion under those sections of the Act. (BCSEA-SCBC Responses, p. 2)

BCSEA-SCBC answers Question 5 in the negative, stating that the Commission did consider section 15 values and made findings that precluded any evidentiary basis for the relevance of section 15 to the Commission's application of its discretion under those sections of the Act.

In response to Question 6, it refers to the AMI Decision and says that the Commission did not accept that EHS is a disability nor did it accept that RF emissions from radio-on AMI meters would have a negative health impact on customers or on anyone else.

In terms of the present proceeding, BCSEA-SCBC says the evidentiary basis regarding disability is the Commission's findings in the AMI Decision that EHS is not found to be a disability and that RF emissions from radio-on AMI meters are not found to have a negative health impact on customers or on anyone else. BCSEA-SCBC refers to its February 4, 2013 submission (BCSEA-SCBC Submission) and notes that CSTS' grounds for reconsideration do not attack the AMI Decision.

In response to Question 7, it again refers to the Commission's findings in the AMI Decision and concludes:

> "a) There is no *prima facie* error in law concerning the application or non-application of section 15 of the *Charter* that would vitiate the Order; and
>
> b) The original Panel already properly exercised its discretion under sections 59-61 of the *Act* in a manner consistent with section 15 *Charter* values when it examined and rejected on the evidence the arguments concerning disability and adverse health impacts. " (BCSEA-SCBC Responses, p. 3)

6.2.3 Responses of CEC

CEC filed its responses to the Panel's questions on February 26, 2014 (CEC Responses). In response to Question 1, CEC is of the opinion that the Commission need not proceed to Phase 2 to grant the revised relief sought by CSTS.

CEC answers Question 2 in the affirmative. In response to question 3, CEC submits that "The CSTS submission is not clear. In any event the Commission does not have jurisdiction over constitutional questions." (CEC Responses, p. 2)

In response to Question 4, CEC submits the Commission is not precluded from taking a *Charter* argument into account in exercising its discretion under sections 59 and 60 of the Act, but it also has no jurisdiction over constitutional questions. It adds that in any event the Commission precluded evidence to make any such assessment.

CEC answers Question 5 in the negative. In response to Question 6, CEC states it is not aware of any evidentiary basis in this Proceeding. Finally, in response to Question 7, CEC answers that without an evidentiary basis that supports a finding of disability, the Panel can neither determine whether section 15 of the *Charter* applies nor properly exercise its discretion with respect to *Charter* values.

6.2.4 Responses of FortisBC

FortisBC filed its responses to the Panel's questions on February 26, 2014 (FortisBC Responses). In its response to Question 1, FortisBC states that it does not believe that the change is necessary as the finding was *obiter* and any change "has no effect on the Order." It further submits that:

> "… what the Commission said in its December 2013 Reasons does not necessarily constitute an 'appl[ication]' of the Human Rights Code (to use the wording of section 46.3 of the Administrative Tribunals Act). What the Commission said was responsive to certain case law that had been before it." (FortisBC Responses, p. 2) [Emphasis in original]

Despite its position that no change is necessary, FortisBC states that the Commission need not proceed to Stage 2 of the reconsideration process to make the change CSTS seeks. FortisBC states that if there is a Stage 2 process, CSTS would not again rely on the case law under the *Human Rights Code* and if it does, that case law would be ignored. According to FortisBC, reliance on that case law would again require discussion on *Human Rights Code* related issues.

In response to Question 2, FortisBC agrees that the Commission does not have jurisdiction to grant a section 24(1) *Charter* remedy. In response to Question 3, FortisBC states that it had not been of the view that CSTS was seeking a section 24(1) *Charter* remedy but offered a general response in case CSTS was seeking such a remedy.

FortisBC provided a qualified response to Question 4. It submits that:

> "As an administrative tribunal, the Commission derives its authority from statute. Thus if the Utilities Commission Act were to require the Commission to proceed in a certain way, the Commission would not have discretion to do otherwise. This is so even if the requirement were contrary to the Charter (which no one has suggested in this case). Though we would need to consider the particular circumstances if this ever arose, on its face section 44 of the Administrative Tribunals Act may not leave the Commission with the jurisdiction to determine a challenge to the constitutional validity or applicability of a statutory requirement, though in cases where a statutory requirement is found to be ambiguous (a necessary prerequisite which no one has suggested to arise in this case) it could look to the Charter for assistance in interpreting it (Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559; R. v. Rodgers, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 18)." (FortisBC Responses, p. 4)

FortisBC agrees that to the extent that the Commission does have the opportunity to exercise discretion under sections 59-60 of the Act, the authorities set out in the *R. v. Conway* extract quoted by CSTS in its reply support the proposition that the Commission must exercise that discretion in accordance with *Charter* values. It notes, however, that in neither its Application nor its reply did CSTS "identify what opportunity it says the Commission has to exercise discretion or whether it arises under sections 59-60 (it was Mr. Shadrack who argued in November 2013 that the FBC Radio-Off Option Program was contrary to section 59)." (FortisBC Responses, p. 5)

FortisBC submits that the "ambit of the Commission's discretion is necessarily circumscribed before *Charter* values come into play, given the statutory derivation of the Commission's powers." It describes the restriction as twofold:

(1) the Commission does not have the discretion to decide contrary to mandatory statutory requirements. In this respect, FortisBC points to section 59(1) of the Act which precludes the Commission from approving a rate which is unjust, or unreasonable as defined by section 59(5). It refers to Prince George Gas Co. Ltd. v. Inland Natural Gas Co. Ltd. (No. 2) (1958), 25 W.W.R. 337 (B.C.C.A.) at p. 137 (per Davey J.A.) and (Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 at p. 1749) in support of its argument on the impact of statutory limits on the Commission's discretion in setting rates.

(2) even where exercised under broadly worded statutory provisions, the discretion "is also limited by 'the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation'" citing ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4 at paras 46, 49 and 50). (FortisBC Responses, pp. 5-6)

FortisBC submits that the kinds of factors set out in sections 59(5)(a) and (b) of the Act have been traditionally defined to mean price discrimination practices not based on the classification of customers in terms of cost of service, demand characteristics, and elasticity of demand.

FortisBC acknowledges that in the case of any residual discretion that may exist under sections 59-60 of the Act, once the Commission has taken the statutory and regulatory context into account, it may take *Charter* values into account. However, FortisBC does not consider there to be a conflict between *Charter* values and the statutory and regulatory framework under which the Commission operates since:

> "Among other things, [FortisBC does] not believe that in this case any component of the FBC Radio-Off Option Program would be contrary to the *Charter* or that section 15 of the *Charter* would point to rate differentiation between radio-off option customers based on personal characteristics unrelated to the cost they cause the utility to incur." (FortisBC Responses, p. 7)

In response to Question 5, FortisBC does not believe that the Commission is precluded from taking into account *Charter* values, where a residual discretion exists. It refers to its response to Question 4 on the limits of the scope of the Commission's discretion.

In response to Question 6, FortisBC submits that there is no evidentiary basis in the Radio-Off AMI Meter Option Program to support a finding of disability. It argues that the evidence on the record in the AMI CPCN proceeding clearly supported a finding that there is in fact no disability and that there is, therefore, no serious issue which could support advancing to Phase 2. Nor, FortisBC argues, has CSTS shown any significant material implications associated with the error it alleges the Commission made in determining whether the *Charter* applies to this Proceeding.

FortisBC points to the broader scope of the AMI CPCN hearing, which included oral expert testimony, written expert reports and documentary evidence. It observes that CSTS has not challenged the AMI Decision. It submits that the participants now asserting a breach of section 15(1) of the *Charter* "failed to establish the existence of a relevant disability and failed to establish any breach of the *Charter*." (FortisBC Responses, p. 7) It refers to the Commission's determination at page 137 of the AMI Decision, emphasizing the following part of the determination:

> "However based on the scientific evidence in this Proceeding, the Panel is not persuaded that there is a causal link between RF emissions and the symptoms of EHS. The Panel notes that according to the World Health Organization, there is "no scientific basis to link EHS symptoms to EMF exposure."" (FortisBC Responses, p. 8)

FortisBC further points out that neither CSTS nor other participants asserting a breach of the *Charter* in the Proceeding asked to lead evidence on disability. It asserts had they done so and had the evidence been in scope, the evidence would have led to the same conclusion arrived at in the AMI CPCN proceeding. FortisBC further submits:

> "The Commission's finding – which it properly made on all of the evidence – that the evidence does not establish a causal link between RF emissions and the symptoms of EHS confirms that there is no need for the Commission to consider section 15 of the *Charter* in relation to the FBC Radio-Off Option Program. Before a breach of section 15 of the *Charter* can be found, the claimant must establish not only a disability but also that the impugned matter creates a distinction **on the basis of disability** which imposes a disadvantage on the claimant (*Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 62; *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para. 41). That is, in order for CSTS to have succeeded on a section 15 argument it would need to have demonstrated, among other things, that the FBC Radio-Off Option Program will impose an adverse effect **on the basis of disability** because allegedly disabled persons will be compelled to exercise the option and incur the higher rates **in order to avoid the symptoms of EHS caused by RF emissions**. The Commission's findings in July 2013, including that it "is not persuaded that there is a causal link between RF emissions and the symptoms of EHS", mean that the FBC Radio-Off Option Program simply does not impose any distinction on the basis of disability, let alone one that is discriminatory and unjustified. The inescapable result of the Commission's findings is that section 15 is not engaged by the FBC Radio-Off Option Program." (FortisBC Responses, p. 8) [Emphasis in original]

In response to Question 7, FortisBC submits that the fact there is no evidentiary basis to support a finding of disability indicates that advancing to a Phase 2 reconsideration is not warranted. FortisBC submits:

> "CSTS has indicated no basis on which it would overcome the clear reality that no disability has been established, that section 15 is not engaged, and that the Commission's decision is consistent with *Charter* values even to the extent that the Commission may have a duty to consider them." (FortisBC Responses, p. 8)

FortisBC states that the Commission's factual finding that it has not been persuaded of a causal link between symptoms of EHS and RF "conclusively establishes that the FBC Radio-Off Option Program does not impose any distinction on the basis of disability." (FortisBC Responses, p. 9)

FortisBC notes there are other hurdles to CSTS' request as well. First, it would need to establish that the FortisBC Radio-Off AMI Meter Option program was not reasonable accommodation. Second, it would need to show that "the impugned distinction was discriminatory in the sense of impairing the fundamental human dignity of the allegedly disabled individuals." And third, it would need to demonstrate that the Commission did not reasonably balance the severity of *Charter* values with the exercise of statutory discretion and the severity of the interference of the *Charter* protection with the statutory objectives as required by *Doré v. Barreau du Québec*, 2012 SCC 12 at paras 55-56. (FortisBC Responses, p. 9)

FortisBC submits that fair rates for customers is an important objective of the legislative scheme under which the Radio-Off AMI Meter Option program application was approved, including that set out in sections 59-60 of the Act. It submits that the Act encourages cost of service to be taken into account in setting rates and prohibits undue discriminatory rates. FortisBC submits that the universal applicability of rates in the Radio-Off AMI Meter Option program to those who enroll in it is a reasonable and justifiable approach, since it avoids other customers having to subsidize the costs of those rates. (FortisBC Responses, p. 9)

6.2.5 Responses of RDCK

RDCK filed its responses to the Panel's questions on February 26, 2014 (RDCK Responses). In response to Question 1, RDCK submits that by acknowledging that it does not have jurisdiction to apply the *Human Rights Code* in Letter L-11-14,

> "…the Commission might, in effect, be seen to have already advanced this particular aspect of the CSTS reconsideration application through phase two automatically." (RDCK Responses, para 10)

In response to Questions 2 and 3, RDCK agrees that the Commission has no jurisdiction to grant a section 24(1) *Charter* remedy and does not believe the relief sought by CSTS is in the nature of a section 24(1) remedy. (RDCK Responses, paras 25 and 27)

In response to Question 4, RDCK refers in part to the authorities it referred to in its Submission and states, in part, that the Commission must take the *Charter* into account in exercising its discretion under sections 59 and 60 of the Act. In response to Question 5, RDCK states:

> "…the factors which the Commission is required to take into account under ss. 59 and 60 of the *Act* are not contradicted by the provisions of the *Charter*, but are enhanced, and should be read together with the *Charter* to best fulfil the intent of those sections in harmony with the *Charter*." (RDCK Responses, para 34)

In response to Questions 6 and 7 on the issue of whether there is an evidentiary basis in this Proceeding to support a finding of disability, RDCK repeats the reference in the RDCK Submission to *Brewer* and that the WHO, the Commission, FortisBC and Dr. Sears are essentially in agreement that the symptoms of EHS are real and that if sufficiently severe, can be disabling. It suggests, therefore that they:

> "…implicitly recognize a causal link between the presence of electromagnetic and radio frequency emitting devices, such as smart-meters, and the onset and continuation of the symptoms of EHS." (RDCK Responses, para 39)

Accordingly, RDCK submits that an evidentiary basis for disability is demonstrated within the AMI Decision. However, RDCK also states that:

> "…the key issue of disability as it relates to the symptoms of EHS was never covered in either of the Commission's decisions, the hearings becoming unfortunately side-tracked on scientifically demonstrable effects of radio-frequency emissions, rather than the fact of disability." (RDCK Responses, para 41)

RDCK submits that if the Commission is of the opinion that the present evidentiary record is inaccurate, it "…should invite submissions of new evidence on this issue, which clearly should have been adjudicated upon, but wasn't." (RDCK Responses, para 42)

6.3 The Reply of Participants to the Responses of Other Participants

6.3.1 Reply of BCSEA-SCBC

In its reply to the responses of other parties (BCSEA-SCBC Reply), BCSEA-SCBC emphasizes the "'material implications'" requirement of the Commission's reconsideration process and argues that it is simply not enough to allege an error in the Commission's reasons. BCSEA-SCBC makes four points.

First, it submits that as reconsideration is an extraordinary procedural remedy, the Commission only has limited powers to correct perceived errors, other than minor slips in published orders. It submits that to warrant reconsideration an applicant must show "material implications." [The Panel assumes BCSEA-SCBC intended to say "significant material implications", which is the criterion the Commission applies and the criterion referred to in the BCSEA-SCBC Submission.]

Second, it submits that the Commission cannot skip Phase 2 if it originally decides to proceed in the usual two phase manner.

Third, even if the Commission erred in connection with its *Human Rights Code* finding, there are no [significant] material implications. Neither CSTS nor RDCK contend that Order G-220-13 would have been any different had the statement been removed from the Decision and the revised relief does not seek a change to Order G-220-13.

Finally, it submits that based on the CSTS Responses it is clear that CSTS is attempting to reargue a point that it argued unsuccessfully in paragraphs 71-79 of its November Submission.

6.3.2 Reply of FortisBC

FortisBC's reply to the responses of others is in two parts. The two part reply results from FortisBC first responding on March 4, 2014, to the March 3, 2014 CSTS request to extend the period for its reply (March 4 Reply). Subsequently, FortisBC filed its reply on March 5, 2014 (March 5 Reply), and referred also to its submissions in its March 4 Reply.

The March 4 Reply focuses on the CSTS responses to the Commission's questions, while its March 5 Reply responds principally to the submissions of RDCK and CSTS.

In its March 4 Reply, FortisBC provides the following comment on CSTS' March 3, 2014 request having regard to its involvement in the AMI CPCN proceeding:

> "CSTS seeks further indulgence despite having already enjoyed numerous opportunities to formulate and distil its position. CSTS intervened in FortisBC's AMI CPCN application in September 2012 on the basis that health and environmental concerns were properly the subject of Commission consideration, and successfully argued for a longer oral hearing than initially planned, without constraints on the number of witnesses, because "with respect to the health impact and the health concerns relating to the RF emission….this is the opportunity, this is the opportunity to flesh out these questions of fact. This is the only opportunity. It's not going to happen at the -- at any subsequent -- it's not going to happen on reconsideration, it's not going to happen before the Court of Appeal." CSTS filed a report which devoted a lengthy chapter to the *Charter* and other human rights issues (but on which it then did not rely, in line with its expert's lack of qualifications). Though not addressing the *Charter* in its April 2013 written submissions, in them CSTS reaffirmed its view that "[t]he Commission's mandate under the CPCN analysis includes analysis of health, environmental and social interests – all of which should properly factor into the economic analysis…"" (FortisBC March 4 Reply, p. 2 [Footnotes omitted]

FortisBC further submits that all participants were aware of the Commission's observation in the AMI Decision at page 137 that:

> "Interveners raising this issue do not indicate how they see the Charter of Rights applying in these circumstances."

FortisBC notes that CSTS in its November Submission provided no indication that the *Charter* was claimed to apply pursuant to the analysis in cases such as *R. v. Conway*, which CSTS did not cite until its Reply and even then did not engage in any *Charter* analysis. FortisBC further notes that CSTS did not cite any authority with respect to the *Charter* issue in the Application.

FortisBC submits that CSTS' responses to certain of the questions in Letter L-11-14 support a conclusion that the Phase 2 process is "utterly unjustified." In particular, it refers to the CSTS responses to Questions 6 and 7 where CSTS states that "'it is not clear that the Commission is required to make a specific finding of disability in these proceedings'." FortisBC rhetorically asks:

> "If not clear to the applicant who seeks an exercise of discretion with reference to section 15 of the *Charter*, in which disability is the only potentially applicable ground, to whom else should it be?" (FortisBC March 4 Reply, p. 3) [Underlining by FortisBC]

In further addressing CSTS' responses to the questions in Letter L-11-14, in its March 5 Reply, FortisBC rejects CSTS' submission that the Commission's approval of any opt out-fee should be subject to FortisBC's duty accommodate disabilities in the provision of its services. FortisBC argues that the request addresses a hypothetical set of circumstances and that there is no basis in CSTS' submissions to support the request. FortisBC describes the hypothetical nature of the request as follows:

> "This proposed qualification is based on the prospect of other proceedings being brought against FortisBC, in another forum. It is also based on the prospect that those potential proceedings would result in (a) a finding that FortisBC has a duty to accommodate pertinent to the present circumstances and, connected with that, (b) findings (i) that there is differential treatment on the basis of disability, (ii) that if accommodation were required it has not already been sufficient, and (iii) that FortisBC should not be permitted to charge certain customers an opt-out fee reflecting the incremental cost of providing the Radio-Off Option." (FortisBC March 5 Reply, pp. 3-4)

In its March 5 Reply to the RDCK Responses, FortisBC first addresses the submissions of RDCK relating to the *Human Rights Code*.

FortisBC then addresses the responses of RDCK to the *Charter* questions in Letter L-11-14. It clarifies a footnote in the FortisBC Submission relating to section 2(4) of the Act, section 44 of the ATA and section 8 of the *Constitutional Question Act.*[10] FortisBC agrees with the concept that any residual discretion under sections 59 and 60 of the Act should be applied in accordance with *Charter* values.

FortisBC challenges the assertions of RDCK that the WHO, the Commission, FortisBC, and Dr. Sears:

a) "are thus essentially in agreement that the symptoms of EHS are real and that, if sufficiently severe, those symptoms can become disabling"; and

b) "implicitly recognize a causal link between the presence of electromagnetic and radio frequency emitting devices, such a smart-meters, and the onset and continuation of the symptoms of EHS." (FortisBC March 5 Reply, p. 2)

[10] RSBC 1996, c. 68

FortisBC also refers to the contrary finding of the Commission at page 137 of the AMI Decision.

Finally, in its March 5 Reply to the RDCK Responses, specifically as they relate to Question 7, FortisBC submits that:

> "…all Interveners in the AMI CPCN proceeding had the opportunity to advance such evidence and arguments as they wished on health-related issues, including as to the existence of disability. They also could have sought to file Intervener evidence in the FortisBC Radio-Off Option proceeding. At this point, CSTS itself does not even seem to be seeking a finding of disability, saying at page 2 of its February 26 submissions that "it is not clear that the Commission is required to make a specific finding of disability in these proceedings." There is no basis for reconsideration in this regard, nor is there any basis, contrary to Mr. Shadrack's suggestion, for new evidence to be submitted."
> (FortisBC March 5 Reply, p. 3)

6.3.3 Reply of RDCK

RDCK filed its reply to the responses of other parties on March 5, 2014 (RDCK Reply). In its reply to the responses of FortisBC and BCSCEA-SCBC to Question 1, RDCK takes issue with the position of those parties that the Commission's *Human Rights Code* findings are *obiter dicta*. It asserts that the findings were a necessary step to the decision and form part of its *ratio*. It argues that "leaving aside the issue of jurisdiction, had the Commission found that the parties were not free to choose and that the *Human Rights Code* did apply, the Commission's decision would obviously have been much different." (RDCK Reply, paras 4-7)

In its reply to the responses of FortisBC and BCSCEA-SCBC to Questions 4 and 5, RDCK submits that the Commission must comply with the *Charter*, even if there is statutory language to the contrary. It distinguishes *Bell ExpressVu*[11] on the basis that the Court in that case declined to decide the *Charter* issue and comments that the Court's observation at paras 66-67 "provide an almost textbook example of *obiter dicta*." That part of the Court's observations which RDCK cites is as follows:

> *". . . As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.*
>
> *It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(c) of the Radiocommunication Act declared unconstitutional for violating the Charter. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(c), and, if they are, whether they are justified under s. 1."* (RDCK Reply, paras 10-13)

[11] *Bell ExpressVu Limited Partnership* v. *Rex*, 2002 SCC 42; [2002] 2 S.C.R. 559

In reply to the BCSEA-SCBC response to Question 4, RDCK submits that the Commission made a finding which "in effect, precluded any reason for an examination of whether or not there was an evidentiary basis for applying s. 15." It submits "the Commission made no finding which 'precluded any evidentiary basis' for applying s. 15." (RDCK Reply, paras 14-17)

In reply to the responses to Question 6, RDCK submits:

> "As is the Director for RDCK, the vast majority of the intervenors in this proceeding were lay people with no legal training and few resources at their disposal. Regardless of whose fault it may have been, the issue of actual disability associated with electromagnetic devices, as opposed to questions of, for instance, the degree to which radio-frequency emissions might be capable of heating human tissue, was somehow not adequately brought before the Commission." (RDCK Reply, para 18)

RDCK points to a letter and an email from a person providing a letter of comment in the AMI CPCN proceeding which it submits provides some evidence of EHS disability. (RDCK Reply, para 19)

7.0 GROUND 1 – APPLICABILITY OF THE *HUMAN RIGHTS CODE*

By its Reply, CSTS withdraws the relief it originally sought under this ground for reconsideration and now seeks the revised relief described in Section 5.4 of this Decision, which involves the Commission removing certain wording in the Decision and substituting other wording.

The limited scope of the Proceeding needs to be borne in mind in considering the revised relief sought by CSTS under this ground. Amongst others, matters of health were extensively dealt with in the proceeding which resulted in the AMI Decision. They were not the subject of the Proceeding.

Order G-154-13 limited the scope of the Proceeding. No applications were made to change the limited scope of the Proceeding. Further, in keeping with the limited scope of the Proceeding, the Panel disregarded evidence and submissions that could be viewed as out of scope. (Decision, p. 7)

Therefore, what the Commission Panel was deciding was a very narrow issue - whether the Radio-Off AMI Meter Option program for which FortisBC sought approval was consistent with the opt-out principles in the AMI Decision and the statutory requirements of sections 59 and 60 of the Act. Those sections form Attachment 2 to this Decision and were referred to in part in Section 2.5 of the Decision. Section 2.5 of the Decision also discusses the manner in which the Panel approached its statutory obligations under the Act while meeting the opt-out principles set by the Commission in the AMI Decision.

In Section 2.4.3 of the Decision, the Panel set forth its section 59 finding as follows:

> "**The Panel notes that the Radio-off AMI Meter option is available under exactly the same terms to all FortisBC ratepayers, as is the radio-on option. Each of the options has its own costs and attributes, which are reflected in the rates. The Panel finds that charging**

> **different rates based upon meter preferences is not unduly discriminatory under section 59 of the Act.**" (Decision, p. 10) [Emphasis in original]

The Panel did not approve the rates proposed by FortisBC as filed, but made adjustments to them in a manner that it considered met the statutory requirements of the Act. Reductions were made to the proposed Per-premises setup fees and the Bi-monthly per-read fee. (Order G-220-13, Directives 1 and 2; Decision, pp. 13, 19-20, 24)

In the Panel's view, the result that it arrived at under the Act did not require it to be correct in its *Human Rights Code* finding. In that sense, as argued by FortisBC, BCSEA-SCBC and CEC, the *Human Rights Code* finding was not necessary for the result that the Commission arrived at in the Decision. Further, no party has suggested the Decision would be different had the Panel stated in the Decision that it has no jurisdiction to apply the *Human Rights Code*.

For all these reasons, while the Panel may have erred in its finding that the Radio-Off AMI Meter Option proposed by FortisBC, including the fees that must be paid, is not discriminatory under the *Human Rights Code*, CSTS has not persuaded the Panel that "the error has significant material implications" so as to enable CSTS to advance to Phase 2 of the reconsideration process.

Nor does the Panel see any benefit to granting the revised relief CSTS seeks as part of its Phase 1 determination. CSTS is not precluded from arguing in any proceedings before the Human Rights Tribunal that the Commission Panel was without jurisdiction to make the finding that it did by reason of the operation of section 2(4) of the Act and section 46.3 of the ATA.

As part of its response to Question 1 in Letter L-11-14, BCSEA states: "The statement CSTS asks the Commission to substitute for the impugned statement would in no way change the Order concerning the AMI Radio-Off Meter Option." (BCSEA-SCBC Responses, p. 1) The Panel agrees with BCSEA-SCBC on this point. While the Panel acknowledges that it does not have jurisdiction to apply the *Human Rights Code*, the finding in the Decision regarding the *Human Rights Code* does not impact the determinations made by the Panel under sections 59 and 60 of the Act and accordingly has no significant, material implications on the Decision.

CSTS's request for reconsideration on the first ground is denied.

8.0 GROUND 2 – APPLICABILITY OF THE *CHARTER OF RIGHTS AND FREEDOMS*

CSTS submits that the Commission erred in misconstruing the CSTS argument and dismissing it without considering it.

The original remedy sought by CSTS was that:

> "…the impugned parts of the Decision be set aside and that the questions on the application of the Human Rights Code and section 15 of the Charter be appropriately determined by the Commission ("the Redetermination")." (Application, p.4)

CSTS submits that the Redetermination:

> "…on the proper analysis, will require a finding as to whether EHS constitutes a disability. This is a substantial question of mixed fact and law that is already before the B.C. Human Rights Tribunal in a complaint launched by CSTS against B.C. Hydro prior to the commencement of FortisBC's AMI application ("the BCHRT Proceedings")." (Application, p.4) [Emphasis added]

CSTS also proposes in the Application that the Redetermination be deferred until the outcome of the BCHRT proceedings is known.

In its Reply, CSTS acknowledges that the outcome of a *Charter* analysis "is a matter of conjecture", but asserts that the fact is that the Commission did not undertake a *Charter* analysis since it did not consider whether it, as a statutory tribunal, was obliged to comply with the *Charter.* CSTS concludes its Reply with the assertion that "significant, material implications arise from the Commission's error in failing to consider whether the *Charter* applies to the Commission." (CSTS Reply, pp. 4, 8)

In its response to Questions 6 and 7 of Letter L-11-14, CSTS requests that:

> "…the Commission, in consideration of the equality guarantees under the Charter, should qualify its order such that FortisBC's right to charge an opt-out fee is subject to FortisBC's compliance with its duty to accommodate, lest the Commission be seen to be relieving FortisBC from its duties in that regard." (CSTS Responses, p. 3)

For convenience, the Panel will repeat Questions 6 and 7 of L-11-14 which are found in Section 6.1:

> Question 6:
>
> What is the evidentiary basis in this proceeding that supports a finding of disability?
>
> Question 7:
>
> If there is no evidentiary basis in this proceeding that supports a finding of disability, how can the Panel
>
> a) determine whether section 15 of the Charter applies; and
> b) properly exercise its discretion in respect of Charter values?

In the Commission's view, the first matter to be addressed in considering the *Charter* ground for reconsideration is whether there is an evidentiary basis supporting a finding of disability.

Section 15 of the *Charter* provides as follows:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Application originally contemplated a future finding of whether EHS constitutes a disability. In its response to Questions 6 and 7 of Letter L-11-14, CSTS now states:

> "However, it is not clear that the Commission is required to make a specific finding of disability in these proceedings. Certainly, the Commission is not being asked to determine the merits of any specific claim of disability." (CSTS Responses, p. 2) [Emphases added]

BCSEA-SCBC submits that in the AMI Decision the Commission made findings that EHS is not found to be a disability and that RF emissions from radio-on AMI meters would not have a negative health impact on customers or anyone else. It does not point to any specific finding that EHS was not a disability. (BCSEA-SCBC Responses, p. 3) If what BCSEA-SCBC is saying is that a specific finding that EHS was not a disability was made, that is not correct. Rather, the finding in the AMI Decision was that based on the evidence in that proceeding, there was no causal link between RF emissions and the symptoms of EHS. (AMI Decision, p. 137)

FortisBC and CEC assert that there is no evidentiary basis to support a finding of disability.

RDCK alone asserts that an evidentiary basis for disability exists, although its position does not appear to be consistent on the issue. On the one hand, in its response to Question 6 of Letter L-11-14, it submits that the AMI Decision shows that the WHO, the Commission, FortisBC and Dr. Sears are essentially in agreement that the symptoms of EHS are real and, if sufficiently severe, can be disabling. RDCK further states that they "implicitly recognize a causal link between the presence of electromagnetic and radio frequency emitting devices, such as smart-meters and the onset and continuation of the symptoms of EHS." It therefore submits that the AMI Decision provides an evidentiary basis for disability. (RDCK Responses, paras 35-40) This response is not supported by the wording of the AMI Decision. As FortisBC points out, such an interpretation contradicts the finding at page 137 of the AMI Decision that there was no such causal link.

On the other hand, RDCK states in its response to Question 7 that "the key issue of disability as it relates to the symptoms of EHS was never covered in either of the Commission's decisions…" (RDCK Responses, para 41).

The references to the AMI Decision to some extent confuse the issue of whether there is an evidentiary basis in the Proceeding that supports a finding of disability. Order G-154-13 precluded health issues from the scope of the Proceeding. As already noted above, neither CSTS nor any other Participant sought to expand the scope of the Proceeding. Further, as pointed out by FortisBC in its reply to RDCK's response to Question 7 in Letter L-11-14, the interveners in the AMI Decision proceedings had the opportunity to advance the evidence they wished on health related issues, including the issue of disability. There is no evidentiary basis in the Proceeding to support a finding of disability.

Section 15 of the *Charter* contemplates discrimination on the basis of "mental or physical disability" among others. In the absence of an evidentiary basis in the Proceeding to support a finding of disability, there is no basis in the Panel's view for advancing to a Phase 2 of the reconsideration process on the *Charter* ground. The Panel agrees with FortisBC that section 15 is not engaged.

Having arrived at the conclusion, the Panel does not find it necessary to consider the extent to which *Charter* values may apply in the context of its determinations on rate applications which engage sections 59 to 60 of the Act.

CSTS submits that significant, material implications arise from the Commission's alleged error in failing to consider whether the *Charter* applies to it. It does not identify the significant material implications. RDCK describes them as relating to the health and safety of FortisBC customers. As the Panel has already observed, the issue of health was not within the scope of the Proceeding. Nor was the issue of security. Therefore, even assuming that the Commission Panel misconstrued the CSTS *Charter* submission, there is no evidence of any disability such as would engage section 15 of the *Charter* in the Proceeding.

For the foregoing reasons, CSTS's request for reconsideration on the second ground is denied.

9.0 CONCLUSION

The Application is dismissed.