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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-87-12**

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

and

**An Application by Andrea Collins and the Citizens for Safe Technology Society
For Reconsideration of Commission Decision in L-13-12
Regarding the British Columbia Hydro and Power Authority
Smart Metering Infrastructure Program**

BEFORE: L.F. Kelsey, Commissioner

June 22, 2012

O R D E R

WHEREAS:

- A. On March 5, 2012, the British Columbia Utilities Commission (Commission) issued Letter L-13-12 (Decision) wherein it dismissed a complaint pursuant to section 47 of the *Utilities Commission Act* (UCA) by Andrea Collins and the Citizens for Safe Technology Society (collectively the Applicants) requesting that the British Columbia Hydro and Power Authority (BC Hydro) be required to file an application for a Certificate of Public Convenience and Necessity (CPCN) for its Smart Metering and Infrastructure Program (SMI), and other ancillary relief (Complaint);
- B. On April 4, 2012, the Applicants applied for reconsideration of the Decision, asserting the Commission made various errors of fact and law in its assessment in determining that the *Clean Energy Act* (CEA) operates to exempt BC Hydro from having to obtain a CPCN with respect to the installation and operation of smart meters and related equipment in British Columbia. The Applicants also sought to introduce new evidence;
- C. On April 11, 2012, the Commission issued Letter L-22-12 establishing a written comment process for phase one of a reconsideration;
- D. The Commission received submissions from BC Hydro on April 25, 2012 on the merits of the application for reconsideration. The Applicants filed their reply on May 9, 2012;
- E. The Commission has considered the application for reconsideration, the submissions of BC Hydro and the Applicants' reply;

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- F. The Commission has determined that the Applicants have not established the alleged errors of fact and/or law on a *prima facie* basis and have accordingly failed to meet the Commission criteria for the second phase of reconsideration.

NOW THEREFORE the Commission orders, for the reasons set out in the Reasons for Decision attached as Appendix A to this Order, that:

1. The request to introduce new evidence is denied.
2. The application for reconsideration of the Decision is dismissed.

DATED at the City of Vancouver, in the Province of British Columbia, this 22nd day of June, 2012.

BY ORDER

Original signed by:

L.F. Kelsey
Commissioner

Attachments

An Application by Andrea Collins and the Citizens for Safe Technology Society
For Reconsideration of Commission Decision in L-13-12
Regarding the British Columbia Hydro and Power Authority
Smart Metering Infrastructure Program

REASONS FOR DECISION

1.0 INTRODUCTION

By letter dated April 4, 2012, Andrea Collins and the Citizens for Safe Technology Society (collectively the Applicants) requested the British Columbia Utilities Commission (Commission) reconsider its Decision in Letter L-13-12 dated March 5, 2012 (Decision) pursuant to section 99 of the *Utilities Commission Act* (UCA).¹ The Decision dismissed the Applicants' complaint requesting that the British Columbia Hydro and Power Authority (BC Hydro) be required to file an application for a Certificate of Public Convenience and Necessity (CPCN) for its Smart Metering and Infrastructure Program (SMI), and other ancillary relief (Complaint). The Applicants' assertion that the wireless and domestic interface capabilities of the SMI Program are outside the scope of the exemptions granted to BC Hydro pursuant to section 7 of the *Clean Energy Act* (CEA) formed the basis of the Complaint. Section 7 of the CEA, in part, exempts BC Hydro from sections 45 to 47 of the UCA for certain "projects, programs, contracts and expenditures" as described in that section or "further described by regulation." Sections 45 to 47 of the UCA relate to CPCNs.

1.1 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 invites 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 Section 99 of the UCA together with the other legislative provisions referred to in these reasons are found in Attachment 1

1.2 Reconsideration Application and Commission Process

By letter L-22-12 dated April 11, 2012, the Commission established the first phase of the reconsideration process for the application. The first phase is a preliminary examination to assess the application in light of the following questions:

- Should there be a reconsideration by the Commission?
- If there is to be a reconsideration:
 - should the Commission hear new evidence and should new parties be given the opportunity to present evidence?
 - should it focus on the items from the Reconsideration Application, a subset of these items, or additional items?
 - what process should be established for the reconsideration?

BC Hydro filed its submissions on the first phase on April 25, 2012. The Applicants filed their reply on May 9, 2012.

In making the decision to dismiss the Complaint, the Commission framed the question to be answered as:

“Do the wireless and domestic interface capabilities of the SMI fall outside the scope of the exemptions granted to BC Hydro under section 7 of the CEA, and therefore require a CPCN?”

This question raises two issues. The first issue relates to whether the *wireless capabilities* are outside the scope of the exemption and the second issue relates to whether the *domestic interface* capabilities are outside the scope of the exemption.

In the Decision, the Commission addressed the first issue as follows:

“In the absence of a specific stated requirement that the meters used to fulfill section 17 of the CEA be wired or wireless, the Commission concludes the legislature entrusted BC Hydro, as the technical expert, to determine the equipment needed to meet the requirements under the CEA and the Regulation.”²

The Commission finds that there is insufficient evidence to substantiate the Complainants’ argument that the legislature intended BC Hydro to use a specific type of equipment, wired or wireless to fulfill its obligations under section 17 of the CEA and to meet the prescribed requirements under section 2 of the Regulation.” (Decision, p. 4)

The Applicants do not request reconsideration of the Commission’s decision on the second issue and for that reason it is not discussed further in these reasons.

² *Smart Meters and Smart Grid Regulation*, BC Reg. 368/2010

2.0 SUBMISSIONS

The following section summarizes the submissions made by the Applicants and BC Hydro.

2.1 The Position of the Applicants

The Applicants' request that the Decision be set aside and the relief sought in their December 22, 2011 submissions on the Complaint be granted. They also seek leave to put new evidentiary material before the Commission which they say had not been in their possession previously. This new evidence relates to a filing made in California which suggests that such meters transmit wireless radiofrequency radiation more often than has been publicly disclosed to date by BC Hydro. The Applicants assert that the Commission made various errors of fact and law in determining that the CEA operates to exempt BC Hydro from having to obtain a CPCN with respect to the installation and operation of microwave radio-frequency emitting smart meter devices at the homes of British Columbians.

The Applicants submit that although the Commission correctly framed the question it had to answer, the Commission erred in the answering of that question by treating it as one of fact rather than of pure law. The Applicants rely on two passages in the Decision to support this submission. The first is found at page 2 of the Decision, which states:

“In the Commission’s view, the burden of proof rests on the Complainants to provide sufficient evidence to show the two capabilities of the SMI, mentioned above, are beyond the scope of the exemptions granted by section 7 of the CEA.”

The second is the Commission’s conclusion at page 4 of the Decision noted above, that “there is insufficient evidence to substantiate the Complainants’ argument that the legislature intended BC Hydro to use a specific type of equipment, wired or wireless to fulfill its obligations under section 17 of the CEA and to meet the prescribed requirements under section 2 of the Regulation.”

The Applicants submit that the Commission fundamentally misconstrued their argument: they did not submit that the Legislature intended BC Hydro to use a specific type of equipment, wired or wireless, to fulfill its obligations under section 17 of the CEA. Rather, the argument, in essence, is premised on the assertion that the Legislature carved out a discrete and limited exemption to the requirement for a CPCN. The scope of that exemption is delineated by the Regulation’s description of the exempt system by reference to its functionalities. The Applicants submit that the wireless communication functionalities are not referenced in the Regulation and are therefore not within the scope of the exemption.

Further, the Applicants submit that the burden of proof does not fall to them to prove that the Legislature intended a specific type of equipment to be used. The Applicants submit they need only establish that the exemption does not extend to the wireless system. They submit if the exemption does not apply, a CPCN is required by default.

The Applicants refine their argument further by presuming that all equipment and infrastructure necessary to achieve the prescribed functionalities are mandated by the CEA and exempted from the requirement for a CPCN. However, the Applicants submit that the wireless system is not necessary to achieve the functionalities prescribed by the Regulation and, as such, the wireless system is not within the scope of the exemption: it is an add-on and therefore requires a CPCN.

To support the submission that the wireless system is an “add-on,” the Applicants submit that prior to the impugned smart meter regime, all BC Hydro meters have operated on the basis of hard-wired circuitry. Therefore, the default system in place is a hard-wired metering system. The augmentation of the hard-wired system so as to include a wireless transmission system constitutes an expansion of that system that must be expressly exempted by reference to wireless functionality or authorized by the issuance of a CPCN. The absence of a specific requirement that the meters be wired or wireless does not result in permissive application of the exemption to either one of those communication system options. Rather, what has not been dealt with by exemption, by default, requires a CPCN.

The Applicants also submit that the Commission erred in fact by characterizing the wireless component of the smart meter system as “equipment needed to meet the requirements of the CEA and the Regulation.” As noted above, the Commission’s conclusion on this point is found at page 4 of the Decision:

“In the absence of a specific stated requirement that the meters used to fulfill section 17 of the CEA be wireless or wired, the Commission concludes the legislature entrusted BC Hydro, as the technical expert, to determine the equipment needed to meet the requirements under the CEA and the Regulation.”

The Applicants submit that the Commission erred by characterizing the wireless system as “equipment.” They submit that characterization ignores the fact that the wireless system constitutes a significantly added functionality in the context of an exemption regime that is delineated by reference to functionality alone.

2.2 The Position of BC Hydro

BC Hydro opposes the request for reconsideration of the Decision. It submits that the Applicants have not met the burden of establishing a *prima facie* case that the Commission erred in law in denying the Complaint. BC Hydro submits, therefore, that the reconsideration application should be dismissed.

BC Hydro agrees with the Applicants that the question the Commission asked itself is a matter of law but disagrees with the assertion that the Commission treated the question as a “question of fact to be determined on the basis of evidence.” BC Hydro submits the Applicants have isolated passages from the Decision wherein the Commission states the Applicants have failed to provide sufficient evidence to substantiate their interpretation of the CEA and Regulation. The Applicants equate these references to providing evidence as necessarily meaning that the Commission treated the question as a question of fact, not a question of law.

BC Hydro says the Applicants rely on the erroneous proposition that evidence is never appropriate in cases involving pure questions of law. The Supreme Court of Canada has expressly recognized the utility, relevance and importance of evidence of legislative intent when engaging in statutory interpretation. Evidence of legislative history, legislative speeches and debates, and explanatory documents can all be relied on to support an argument that the Legislature intended a statute to be interpreted a particular way.³

BC Hydro submits that when the isolated passages relied on by the Applicants are read within the larger context of the Decision, it is plainly obvious that the Commission’s comments were in respect to a lack of evidence of legislative intent in support of the Applicants’ interpretation of the provisions. BC Hydro referenced a number

³ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, see paras. 21, 31, 34 and 35

of extrinsic sources of evidence (including *Hansard* and the explanatory note at the end of the CEA) that support its position that it was not the Legislature's intent to have the Commission regulate the wire/wireless functionality of the smart meters system. BC Hydro also relied upon research available to the Legislature and Cabinet at the time the CEA and Regulation were drafted to show that they had knowledge of similar smart meter systems.

BC Hydro argues that the Applicants' decision not to provide evidence in support of their position was freely made and the Commission was entitled to rely on the evidence put before it by BC Hydro in deciding what was intended by the enactment. BC Hydro submits it was reasonable for the Commission to dismiss the Complaint.

BC Hydro also submits that the Applicants are wrong when they submit that section 7 of the CEA carves out exemptions on a functionality by functionality basis. It submits that section 7 of the CEA provides that exemption from the CPCN requirements applies to "the following projects, programs, contracts and expenditures of the authority, as they may be further described by regulation..." [Emphasis added by BC Hydro] The exempt program is the installation and operation of smart meters. Section 17 of the CEA defines the term "smart meter" as follows:

"smart meter" means a meter that meets the prescribed requirements, and includes related components, equipment and metering and communication infrastructure that meet the prescribed requirements. [Emphasis added by BC Hydro]

BC Hydro submits that the Applicants' argument that because the Regulation is structured in terms of smart meter functionalities the Legislature could only have intended to exempt those functionalities and everything not expressly included is an "add-on" and therefore requires a CPCN, is fundamentally flawed. This flaw becomes evident if the legal requirement for a CPCN is considered.

BC Hydro relies on section 45(1) of the UCA which states:

"Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation." [Emphasis added by BC Hydro]

As the exemption under section 7 of the CEA focuses on the whole of the program being contemplated by BC Hydro, BC Hydro submits that section 45 of the UCA also focuses on the overall system. There is no support in section 45 of the UCA for the proposition that a CPCN is required for individual functionalities of a system.

BC Hydro says that the Applicants are suggesting that the Commission is required to read down the scope of the exemption by construing it as narrowly as possible. BC Hydro has two responses to that suggestion. First, the Applicants' *de minimus* argument is contradictory because it provides that unless functionality is expressly mentioned, the exemption does not apply. However, there is no express reference to wired communication in the Regulation and yet the Applicants state that wired communication is covered by the exemption from a CPCN.

Second, there is no support in the legislation for the *de minimus* approach. The definition of smart meter includes not only the meter but also "related components, equipment and metering and communication

infrastructure that meet the prescribed requirements.” [Emphasis added by BC Hydro] Therefore, to be covered by the exemption, the component, equipment and metering or communication infrastructure, must be: (1) related to a meter that meets the prescribed requirements and (2) must be the prescribed requirements itself. No more, no less. According to BC Hydro, both requirements are satisfied. The Legislature decided the exemption would extend to things “related” to smart meters, not only those things that are “necessary” for smart meters. A wireless communication infrastructure is related to the proper functioning of a smart meter.

Further, a smart meter system with wireless technology meets the prescribed requirements under sections 2 and 3 of the Regulation; namely, it is part of a communications infrastructure that transmits information among smart meters and the computer hardware and software systems, and it supports a secure software system that enables the authority to undertake the activities listed in subsections 3(b)(ii)(A) to (F) of the CEA [sic]. The Commission assumes BC Hydro intended its reference to be to subsections 3(1)(b)(ii)(A) to (F) of the Regulation.

Finally, BC Hydro submits that the Commission is owed deference when interpreting its own statute or statutes closely connected to their function. It cites *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 34 where the Rothstein J states:

“...unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of “its own statute or statutes closely connected to its function, with which it will have particular familiarity” should be presumed to be a question of statutory interpretation subject to deference on judicial review.”

Therefore, BC Hydro concludes that the Applicants’ challenge to the Decision will succeed only if it can be shown that the Commission’s interpretation of the legislation was unreasonable. It submits that the Applicants have failed to present even a *prima facie* case that this is the case.

With regard to the Applicants’ request for admission of new evidence, BC Hydro submits there is no basis for its consideration as the only evidence that is relevant to a query involving statutory interpretation is proof of legislative intent. The new evidence provided by the Applicants would only become potentially relevant if a CPCN is required.

2.3 The Applicants’ Reply

The Applicants reply by agreeing with BC Hydro that the CEA exemption was meant to capture the smart meter system. However, there are two kinds of smart meter systems: hard-wired and wireless, the latter of which are accompanied by a host of health and environmental concerns. The Legislature and Cabinet knew, at all material times, that both these options existed. If it was intended that the exemption apply to the wireless option, the Applicants ask why did the Legislature and Cabinet fail to make a specific reference in that regard – either by describing a system that includes a wireless component or by wireless functionality? The failure to make explicit reference to wireless communication technology in the scope of the exemption, results, by default, in the requirement for a CPCN because:

- hard-wired technology has been the standard in residential electrical meters for decades;
- the Legislature and Cabinet, at all material times, knew that both wireless and hard-wired options existed for smart meters;

- the Legislature and Cabinet failed to explicitly reference wireless technology and/or functionality in describing the exempt system; and
- the failure to explicitly exempt, by default, results in the requirement for a CPCN.

The Applicants submit that the CEA is not a stand-alone statute prescribing the installation of smart meters. Rather, the CEA carves out a discrete exemption to the broad application of the UCA's requirement for a CPCN. If the CEA were a stand-alone statute, then its lack of specificity could be taken as giving rise to an ambit of discretion as to the choice of technology; however, because the CEA is not, the failure to explicitly extend itself to wireless technology does not result in a vacuum of legislative specificity so as to give rise to discretion.

As stated above, the Applicants agree with BC Hydro that the CEA was meant to capture the smart meter system. However, they submit that the smart meter system is defined by reference to components, etc. "that meet the prescribed requirements." [Emphasis added by the Applicants.] The prescribed requirements are enumerated in the Regulation in terms of the necessary functionality of the system. There is no functionality requirement that the system be wireless so the UCA's CPCN requirement applies.

The Applicants also take issue with BC Hydro's submission related to evidence of legislative intent. They submit that while it may be appropriate to consider evidence of legislative intent to resolve a statutory interpretation question, per *Rizzo*, the burden on the Applicants, as complainants, does not involve an absolute requirement that it adduce extrinsic evidence of legislative intent in support of its interpretation of the statute.

The Applicants submit that *Rizzo*⁴ provides that legislative intent is merely one factor to consider in the analysis of statutory interpretation questions. *Rizzo* does not say that evidence of legislative intent is required to support an interpretation of a provision. The Supreme Court of Canada has repeatedly noted the limited utility of evidence of legislative intent in resolving statutory interpretation questions.⁵ They submit that the Commission erred when it treated the statutory interpretation of the CEA and Regulation as being akin to a question of fact by requiring evidence as an absolute precondition to establishing an interpretation of these enactments. If the Commission was properly looking to the extrinsic evidence of legislative intent to resolve a question of statutory interpretation, it should have considered the words of the CEA and Regulation "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."⁶

The Applicants submit that one of the objectives of the CEA is environmental protection because of its focus in section 2 on greenhouse gas reduction and the use of clean or renewable resources for energy production. An interpretation of the CEA and Regulation that is harmonious with this object requires an explicit exemption from the environmental oversight conducted in a CPCN.

Further, the Applicants state a CPCN is a means for considering environmental and human health concerns. It would be contrary to the CEA's environmental and health objectives to hold that it implicitly exempts wireless communication technology from environmental scrutiny where there remain serious questions about the environmental and human health impacts of wireless emissions.

⁴ *Rizzo*, para. 21

⁵ *Rizzo*, para. 35; *R v. Morgentaler*, [1993 3 SCR 463, at para. 28; *R v. Gladue*, [1999] 1 SCR 688, at para. 45; *R v. Heywood*, [1994] 3 SCR 761, at para. 41

⁶ Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), at 87, as cited in *Rizzo*, at para. 21

With regard to the extrinsic evidence of legislative intent relied upon by BC Hydro, the Applicants address BC Hydro's submission that the Legislature's silence on the type of smart metering system contemplated for installation, as reported in *Hansard* and evidenced in the explanatory note to the CEA, shows "there is no basis whatsoever to support the inference that the legislature intended that a hard-wired system be installed rather than a wireless system."⁷ The Applicants submit this evidence provides no basis whatsoever to support the inference that the Legislature intended to exempt wireless communication technology from the CPCN requirement under the UCA.

The Applicants also disagree that the Commission is owed deference when interpreting the CEA. The UCA can be described as the Commission's own legislation while the CEA cannot. The CEA does not set out the functional requirements of the Commission. Rather, it carves out and removes a segment of the Commission's administrative oversight. No deference is owed to the Commission on a question of law arising out of its interpretation of the CEA. Instead, the UCA has a privative clause (section 105) which is the source of deference to the Commission. The CEA does not come within the scope of that privative clause or realm of deference.

Finally, the Applicants take issue with BC Hydro's submission that the Legislature consciously decided the exemption would extend to things "related" to smart meters, not those things that are "necessary" for smart meters. The Applicants submit this open characterization of the exemption scheme to all "things related" easily lends itself to absurd results. There needs to be some consideration of remoteness and necessity in determining what is "related." The operative qualifier in the smart meter definition is the phrase "...that meets the prescribed requirements." That is, only those components and infrastructure elements that are necessary to meet the prescribed requirements are exempt.

3.0 THE COMMISSION'S ANALYSIS

The Applicants filed the Complaint with the Commission pursuant to section 47 of the UCA. Section 47(1) provides that an interested person may file a complaint with the Commission if a public utility:

- (a) is engaged, or is about to engage in the construction or operation of a plant or system, and
- (b) has not secured or has not been exempted from the requirement for, or is not deemed to have received a certificate of public convenience and necessity required under this Act.

Pursuant to section 83 of the UCA, the Commission has the power to determine whether to take action on a complaint. In this case, the Commission exercised its power under section 83 of the UCA to look into the Complaint and sought input from the parties before making a decision to dismiss the Complaint. The burden was upon the Applicants, as complainants, to establish the Complaint on a balance of probabilities.

The Applicants allege that the Commission has committed both errors of law and fact as the basis for their request for reconsideration. To move to the second phase of reconsideration based on errors of law or fact, the Applicants are required to establish the claim of error is substantiated on a *prima facie* basis and the error has significant material implications.

⁷ Response letter from BC Hydro dated January 13, 2012, at para. 10

The Commission notes the following points of agreement between the Applicants and BC Hydro:

1. The Commission correctly framed the question it had to answer;
2. The question to be answered is a question of law;
3. Evidence of legislative intent can be used to resolve statutory interpretation questions;
4. The CEA exemption was meant to capture the smart meter system; and
5. The Legislature and Cabinet knew, at all material times, that both hard-wired and wireless options existed for the smart meter system.

3.1 Should new evidence be allowed?

The new evidence arises from a California proceeding and relates to the frequency (number of times) of transmission of radiofrequency radiation. The new evidence is being offered to show that wireless systems have the potential to cause harm to the environment and health. The Commission agrees with BC Hydro that this evidence is only relevant if BC Hydro requires a CPCN. This evidence is not relevant to an issue the Commission must decide in this reconsideration application. The parties agree that the question the Commission must address is a question of law. Extrinsic evidence may assist in determining legislative intent; however the proposed new evidence cannot assist the Commission in determining the legislative intent behind the disputed provisions of the CEA or the Regulation.

3.2 Have the Applicants met the requirements to proceed to the second phase of the reconsideration process?

The Applicants submit that the Commission erred by treating the question it had to answer as a question of fact rather than one of law. The Applicants say that the Commission's comment that the burden rests on the Applicants to provide sufficient evidence to show that the two capabilities of the smart meter program are beyond the scope of the exemptions, displays how the Commission treated the question as one of fact to be determined on the basis of evidence.

The Commission does not accept the Applicants' characterization of its treatment of the question. Both the Applicants and BC Hydro agree that the CEA and the Regulation are expressly silent on whether the smart meter system should be hard-wired or wireless. To assist it in interpreting the question it had to answer, the Commission looked to extrinsic evidence to try to determine the legislative intent. The Commission looked to evidence from *Hansard* and evidence from the explanatory note in the CEA. Neither of these sources of evidence provided any basis for determining whether the Legislature expressly intended a wireless or hard-wired system. However, BC Hydro did provide evidence that the Legislature knew both hard-wired and wireless options were available when the CEA was being enacted.

When addressing the question to be answered, the Commission was faced with a choice between three options: (1) the Legislature intended the use of a hard-wired system; (2) the Legislature intended the use of a wireless system; and (3) the Legislature intended that either system could be used. The Applicants submit that the effect

of the Legislature's failure to expressly prescribe a wireless functionality means the CEA exemption does not apply and a CPCN under the UCA is required. In other words, the exemption applies only to option 1 – hard-wired systems.

While the Applicants are not required as a matter of law to provide extrinsic evidence of legislative intent on issues of statutory interpretation, the failure to do so when the opposing party has done so with that evidence being unchallenged and accepted, can lead to a finding that one party's submission on legislative intent prevails.

The Commission's reference to the burden upon the Applicants was made to indicate that, as complainants, they were required to substantiate the Complaint on a balance of probabilities. The reference to provision of sufficient evidence related to sufficient extrinsic evidence of legislative intent to support the submission the Applicants were putting forward. As stated above, the CEA and the Regulation provide no express indication of a preference for any of the three options. BC Hydro provided extrinsic evidence to show that the Legislature knew of both the hard-wired and wireless options. The Commission concluded that given such knowledge and the lack of specificity as to which type of system or equipment (hard-wired or wireless) should fulfill the prescribed requirements, the Legislature intended that BC Hydro, as the technical expert, would have the discretion to make the decision.

The Commission does not accept the Applicants' submission that the Commission erred in fact by characterizing the wireless component of the smart meter system as "equipment needed to meet the requirements of the CEA and Regulation." The Applicants premise their submissions on functionalities and submit the Commission erred by characterizing the wireless system as "equipment." The Applicants submit that the characterization ignores the fact that the wireless system constitutes a significantly added functionality in the context of an exemption regime that is delineated by reference to functionality alone.

The Commission agrees with BC Hydro that section 7 of the CEA was not intended to make exemptions on a functionality by functionality basis. The Commission also agrees that the wording of both the CEA and the Regulation plainly focus the exemption on the smart metering system, not the smart meters' functionalities.

Section 7 of the CEA uses broad wording to describe the matters exempt from the requirements for a CPCN. The exempt matters include "programs...as they may be further described by regulation." Section 7(1)(j) refers to "the actions taken to comply with section 17(2) and (3)." Section 17(2) requires BC Hydro to "install and put into operation smart meters and related equipment in accordance with and to the extent required by the regulations." Section 17(3) requires it to complete those obligations by the end of the 2012 calendar year.

Section 17(1) of the CEA broadly defines "smart meter." The definition of "smart meter" explicitly encompasses "related components, equipment and metering and communication infrastructure" and for that reason it is the Commission's view it did not err in its reference to equipment needed to meet the requirements of the CEA and the Regulation.

In addition, the reference to related equipment within section 17(2) further supports the Commission's view on this point.

Section 2 of the Regulation provides the prescribed requirements for a "smart meter." Section 3 of the Regulation, in part, requires BC Hydro, subject to certain exceptions, to install and put into operation smart meters for eligible premises as defined by the Regulation and all the related equipment. The related equipment includes the communications infrastructure for transmitting information among smart meters and the computer

hardware and software systems described in section 3(1)(b)(ii) of the Regulation.⁸ The related equipment also includes the secure computer hardware and software systems which enable BC Hydro to perform the activities in paragraph 3(1)(b)(ii)(A) to (F) of the Regulation.⁹ The Regulation does not refer to either wired or wireless communication.

The Commission concludes that the Legislature through the use of broad wording in sections 7 and 17 of the CEA did not intend to restrict the exemption to the prescribed functionalities of the meter. Rather the exemption was intended to cover the overall smart metering system, including its installation and operation, provided it is capable of fulfilling certain functions.

The Commission shares BC Hydro's view that neither the CEA nor the Regulation support the Applicants' *de minimus* approach as neither wired nor wireless functionalities are stated in the CEA or the Regulation and because the definition of "smart meter" includes related components, equipment and metering and communications infrastructure.

The Commission does not accept the Applicants' submission that the hard-wired system applies by default because historically all of BC Hydro's meter systems have been hard-wired; neither the CEA nor the Regulation specify wireless or wired functionality, or equipment that meets the functionality of either. The parties to this matter expressly acknowledge that the Legislature was aware of both options at the time of enactment of the CEA. Due to the lack of specification either way, the Commission is of the view that the Legislature left the determination of the appropriate technology to be used in the implementation and operation of the smart meter program to BC Hydro.

The Commission agrees with BC Hydro that by defining "smart meter" as it did, the Legislature intended for the exemption to apply where the component, equipment and metering or communications infrastructure was (1) related to a meter that meets the prescribed requirements and (2) must be the prescribed requirement itself. In the Commission's view such an interpretation is most consistent with the language used. The Commission also agrees with BC Hydro that wireless communication infrastructure is "related" to the proper functioning of a smart meter.

The Commission further agrees with BC Hydro that a smart meter system with wireless technology also meets the prescribed requirements under sections 2 and 3 of the Regulation, since it forms part of a communications infrastructure that transmits information among smart meters and the computer hardware and software systems and supports a secure software system that allows BC Hydro to undertake the activities listed in section 3(1)(b)(ii)(A) to (F) of the Regulation.

The Commission is also not persuaded that the absence of a specific provision in the CEA or Regulation for wireless capability, which the Applicants describe as an additional functionality not mandated by the Regulation, means the exemption in the CEA does not apply. In this regard, the Commission shares the view of BC Hydro concerning applications under section 45 of the UCA. Section 45 requires a CPCN for the construction or operation of a plant or system, or an extension of either. It does not require the Commission to address the specific *functionalities* of particular components of a plant or system. Rather, the whole of the proposed plant or system or extension of either is reviewed to determine if its operation or construction is in the public interest.

⁸ Regulation, section 3(1)(b)(i)

⁹ Regulation, section 3(1)(b)(ii)

In their reply, the Applicants make submissions on certain of British Columbia's energy objectives found in section 2 of the CEA. In particular they refer to those relating to the reduction of green house gas emissions and the use of clean and renewable resources for energy production. Section 46(3.3)(a) of the UCA requires the Commission to consider and be guided by British Columbia's energy objectives, in deciding whether to issue a CPCN to BC Hydro. However the exemption of the smart meters program from sections 45-47 of the UCA resulting from section 7 of the CEA precludes the Commission from considering and being guided by British Columbia's energy objectives as they may relate to the smart meters program. The Commission's conclusion that "the legislature entrusted BC Hydro, as the technical expert, to determine the equipment needed to meet the requirements under the CEA and the Regulation" means the Commission is without jurisdiction to consider any of British Columbia's energy objectives in relation to that program.

Both BC Hydro and the Applicants make submissions on the issue of deference. The Applicants also submit that the privative clause in section 105 of the UCA does not apply in the case of the CEA or fall within the realm of deference. The Commission considers the issue of deference and the applicability of the privative clause to be matters more appropriately argued before the Court of Appeal.

4. COMMISSION DETERMINATION

For all the above reasons, the Commission concludes that the Applicants have not made a *prima facie* case that the Commission erred in fact or law in arriving at the Decision. The Commission also concludes that the proposed new evidence cannot assist it in determining the legislative intent behind the disputed provisions in the CEA and the Regulation. Therefore, the Commission denies the Applicants' request to introduce new evidence and dismisses the application for reconsideration of the Decision.

UTILITIES COMMISSION ACT, RSBC 1996, c. 473

Certificate of public convenience and necessity

- 45 (1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.
- (2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it
- (a) to operate the plant or system, and
 - (b) subject to subsection (5), to construct and operate extensions to the plant or system.
- (3) Nothing in subsection (2) authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.
- (4) The commission may, by regulation, exclude utility plant or categories of utility plant from the operation of subsection (1).
- (5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.
- (6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.
- (6.1) and (6.2) [Repealed 2008-13-8.]
- (7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.
- (8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.
- (9) In giving its approval, the commission
- (a) must grant a certificate of public convenience and necessity, and
 - (b) may impose conditions about
 - (i) the duration and termination of the privilege, concession or franchise, or
 - (ii) construction, equipment, maintenance, rates or service,as the public convenience and interest reasonably require.

Procedure on application

- 46 (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.
- (2) The commission has a discretion whether or not to hold any hearing on the application.
- (3) Subject to subsections (3.1) to (3.3), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.
- (3.1) In deciding whether to issue a certificate under subsection (3) applied for by a public utility other than the authority, the commission must consider
- (a) the applicable of British Columbia's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
 - (c) the extent to which the application for the certificate is consistent with the applicable requirements under sections 6 and 19 of the *Clean Energy Act*,
- (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
- (3.3) In deciding whether to issue a certificate under subsection (3) to the authority, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider and be guided by
- (a) British Columbia's energy objectives,
 - (b) an applicable integrated resource plan approved under section 4 of the *Clean Energy Act*, and
 - (c) the extent to which the application for the certificate is consistent with the requirements under section 19 of the *Clean Energy Act*.
- (4) If a public utility desires to exercise a right or privilege under a consent, franchise, licence, permit, vote or other authority that it proposes to obtain but that has not, at the date of the application, been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate.
- (5) On application under subsection (4), the commission may make an order declaring that it will, on application, under rules it specifies, issue the desired certificate, on the terms it designates in the order, after the public utility has obtained the proposed consent, franchise, licence, permit, vote or other authority.
- (6) On evidence satisfactory to the commission that the consent, franchise, licence, permit, vote or other authority has been secured, the commission must issue a certificate under section 45.

(7) The commission may amend a certificate previously issued, or issue a new certificate, for the purpose of renewing, extending or consolidating a certificate previously issued.

(8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption.

Order to cease work

47 (1) If a public utility

(a) is engaged, or is about to engage, in the construction or operation of a plant or system, and

(b) has not secured or has not been exempted from the requirement for, or is not deemed to have received a certificate of public convenience and necessity required under this Act,

any interested person may file a complaint with the commission.

(2) The commission may, with or without notice, make an order requiring the public utility complained of to cease the construction or operation until the commission makes and files its decision on the complaint, or until further order of the commission.

(3) The commission may, after a hearing, make the order and specify the terms under this Act that it considers advisable.

(4) If the commission considers it necessary to determine whether a person is engaged or is about to engage in construction or operation of any plant or system, the commission may request that person to provide information required by it and to answer specifically all questions of the commission, and the person must comply.

Action on complaints

83 If a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken.

Reconsideration by commission

99 The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

Jurisdiction of commission exclusive

105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

CLEAN ENERGY ACT, SBC 2010, c. 22

British Columbia's energy objectives

2 The following comprise British Columbia's energy objectives:

- (a) to achieve electricity self-sufficiency;
- (b) to take demand-side measures and to conserve energy, including the objective of the authority reducing its expected increase in demand for electricity by the year 2020 by at least 66%;
- (c) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity;
- (d) to use and foster the development in British Columbia of innovative technologies that support energy conservation and efficiency and the use of clean or renewable resources;
- (e) to ensure the authority's ratepayers receive the benefits of the heritage assets and to ensure the benefits of the heritage contract under the *BC Hydro Public Power Legacy and Heritage Contract Act* continue to accrue to the authority's ratepayers;
- (f) to ensure the authority's rates remain among the most competitive of rates charged by public utilities in North America;
- (g) to reduce BC greenhouse gas emissions
 - (i) by 2012 and for each subsequent calendar year to at least 6% less than the level of those emissions in 2007,
 - (ii) by 2016 and for each subsequent calendar year to at least 18% less than the level of those emissions in 2007,
 - (iii) by 2020 and for each subsequent calendar year to at least 33% less than the level of those emissions in 2007,
 - (iv) by 2050 and for each subsequent calendar year to at least 80% less than the level of those emissions in 2007, and
 - (v) by such other amounts as determined under the *Greenhouse Gas Reduction Targets Act*;
- (h) to encourage the switching from one kind of energy source or use to another that decreases greenhouse gas emissions in British Columbia;
- (i) to encourage communities to reduce greenhouse gas emissions and use energy efficiently;
- (j) to reduce waste by encouraging the use of waste heat, biogas and biomass;
- (k) to encourage economic development and the creation and retention of jobs;
- (l) to foster the development of first nation and rural communities through the use and development of clean or renewable resources;
- (m) to maximize the value, including the incremental value of the resources being clean or renewable resources, of British Columbia's generation and transmission assets for the benefit of British Columbia;
- (n) to be a net exporter of electricity from clean or renewable resources with the intention of benefiting all British Columbians and reducing greenhouse gas emissions in regions in which British Columbia trades electricity while protecting the interests of persons who receive or may receive service in British Columbia;

- (o) to achieve British Columbia's energy objectives without the use of nuclear power;
- (p) to ensure the commission, under the *Utilities Commission Act*, continues to regulate the authority with respect to domestic rates but not with respect to expenditures for export, except as provided by this Act.

Section 7 - Exempt projects, programs, contracts and expenditures

- 7 (1) The authority is exempt from sections 45 to 47 and 71 of the *Utilities Commission Act* to the extent applicable, and from any other sections of that Act that the minister may specify by regulation, with respect to the following projects, programs, contracts and expenditures of the authority, as they may be further described by regulation:

...

- (j) the actions taken to comply with section 17 (2) and (3);

...

Section 17 - Smart meters

- 17 (1) In this section:

"private dwelling" means

- (a) a structure that is occupied as a private residence, or
- (b) if only part of a structure is occupied as a private residence, that part of the structure;

"smart grid" means the prescribed equipment;

"smart meter" means a meter that meets the prescribed requirements, and includes related components, equipment and metering and communication infrastructure that meet the prescribed requirements.

(2) Subject to subsection (3), the authority must install and put into operation smart meters and related equipment in accordance with and to the extent required by the regulations.

(3) The authority must complete all obligations imposed under subsection (2) by the end of the 2012 calendar year.

(4) The authority must establish a program to install and put into operation a smart grid in accordance with and to the extent required by the regulations.

(5) The authority may, by itself, or by its engineers, surveyors, agents, contractors, subcontractors or employees, enter on any land, other than a private dwelling, without the consent of the owner, for a purpose relating to the use, maintenance, safeguarding, installation, replacement, repair, inspection, calibration or reading of its meters, including smart meters, or of its smart grid.

(6) If a public utility, other than the authority, makes an application under the *Utilities Commission Act* in relation to smart meters, other advanced meters or a smart grid, the commission, in considering the application, must consider the government's goal of having smart meters, other advanced meters and a smart grid in use with respect to customers other than those of the authority.

SMART METERS AND SMART GRID REGULATION (BC Reg. 368/2010)

Definitions

1 In this regulation:

"**Act**" means the *Clean Energy Act*;

"**automation-enabled device**" means a device that, when installed on the authority's electric system, is capable of being used by the authority, at a location remote from the device, to control the flow of electricity;

"**connectivity model**" means a computer model of the electric distribution system identifying all of the following:

- (a) the locations at which eligible premises are connected to the electric distribution system;

- (b) the locations known to the authority at which unmetered buildings, structures or equipment are connected to the electric distribution system;

- (c) the locations of

- (i) distribution transformers,

- (ii) distribution circuit conductors,

- (iii) substations,

- (iv) system devices, and

- (v) switches,

that are within the electric distribution system;

- (d) the locations of generators connected to the electric distribution system;

- (e) the phase and direction of the electricity flowing through the conductors referred to in paragraph (c);

- (f) whether or which of the distribution circuit conductors connected to switches referred to in paragraph (c) are energized;

"**electric distribution system**" means the equipment of the authority that is energized at less than 60 kilovolts and is used by the authority to provide electricity at less than 60 kilovolts;

"**electricity balance analysis**" means an analysis of the electricity in a portion of the electric distribution system, including an analysis of the amount of electricity that

- (a) is measured by the smart meters at all eligible premises supplied from that portion,

- (b) is measured by the system devices installed on that portion,

- (c) is supplied from that portion to unmetered loads known to the authority, and

- (d) is lost in that portion because of resistance or another cause known to the authority;

"**eligible premises**" means a building, structure or equipment of a customer of the authority if the building, structure or equipment is connected to the electric distribution system and has an electricity meter;

"**in-home feedback device**" means a device that is capable of

- (a) displaying

- (i) a smart meter's measurements of electricity supplied to an eligible premises, and

- (ii) the cost of the electricity measured by the smart meter, and
- (b) transmitting information in digital form to and receiving information in digital form from a smart meter with which the authority has established a secure telecommunications link;

"system device" means a device, including a distribution system meter and a sensor, that, when installed on the electric distribution system, is capable of

- (a) measuring and recording measurements of electricity as frequently as smart meters,
- (b) transmitting and receiving information in digital form,
- (c) measuring bi-directional flow of electricity, and
- (d) being configured by the authority at a location either remote from or close to the device.

Prescribed requirements for smart meters

2 For the purposes of the definition of "smart meter" in section 17 (1) of the Act, the prescribed requirements for a meter are that it is capable of doing all of the following:

- (a) measuring electricity supplied to an eligible premises;
- (b) transmitting and receiving information in digital form;
- (c) allowing the authority remotely to disconnect and reconnect the supply of electricity to an eligible premises, unless
 - (i) the point of metering for the eligible premises
 - (A) is greater than 240 volts,
 - (B) is greater than 200 amperes, or
 - (C) is three phase, or
 - (ii) the eligible premises
 - (A) has a bottom-connected meter,
 - (B) has an output or input pulse meter, or
 - (C) has a meter that measures maximum electricity demand in watts;
- (d) recording measurements of electricity, and recording the date and time of the recording, at least as frequently as in 60-minute intervals;
- (e) being configured by the authority at a location either remote from or close to the meter;
- (f) measuring and recording measurements of electricity generated at the premises and supplied to the electric distribution system;
- (g) transmitting information to and receiving information from an in-home feedback device, unless the point of metering for the eligible premises meets any of the criteria set out in paragraph (c) (i) or the eligible premises meets any of the criteria set out in paragraph (c) (ii).

Installation of smart meters and related equipment

3 (1) Subject to subsection (3), by the end of the 2012 calendar year, the authority must install and put into operation

- (a) a smart meter for each eligible premises, and
- (b) all of the following related equipment:
 - (i) communications infrastructure for transmitting information among smart meters and the computer hardware and software systems described in subparagraph (ii);
 - (ii) secure computer hardware and software systems that enable the authority to do all of the following:
 - (A) monitor, control and configure smart meters and the communications infrastructure referred to in subparagraph (i);
 - (B) store, validate, analyze and use the information measured by and received from smart meters;
 - (C) provide, through the internet, to a person who receives electricity from the authority secure access to information about the person's electricity consumption and generation, if any, measured by a smart meter;
 - (D) establish a secure telecommunications link between in-home feedback devices and smart meters that are compatible with each other;
 - (E) bill customers in accordance with rates that encourage the shift of the use of electricity from periods of higher demand to periods of lower demand;
 - (F) integrate the systems with the authority's other business systems.
- (2) The communications infrastructure referred to in subsection (1) (b) (i) must include a telecommunications network that is capable of delivering two-way, digital, and secure communication.
- (3) If it is impracticable because of distance, electromagnetic interference, physical obstruction or other similar cause for the authority to establish a telecommunications link between the smart meter at an eligible premises and the computer hardware and software system referred to in subsection (1) (b) (ii), the authority is not required to install or put into operation the communications infrastructure referred to in subsection (1) (b) (i) for the purpose of establishing that telecommunications link.
- (4) The authority must integrate the operation of smart meters and related equipment with the authority's other operations.

Smart grid

- 4 (1) The program required under section 17 (4) of the Act must be established by the end of the 2015 calendar year and include the following components:
 - (a) the establishment and operation of a connectivity model and the installation and operation of
 - (i) at least 9 000 but no more than 35 000 system devices, and
 - (ii) computer hardware and software systemsto enable the authority to
 - (iii) perform electricity balance analyses for the electric distribution system, and
 - (iv) estimate the amount of electricity supplied from a portion of the electric distribution system to unmetered loads that are not known to the authority and to estimate the location of those loads;

- (b) the acquisition of investigation devices and computer software to enable the authority to identify the location of the unmetered loads referred to in paragraph (a) (iv);
- (c) the establishment and operation of telecommunications networks that
 - (i) have sufficient speed and bandwidth, and
 - (ii) enable two-way, digital, and secure communication among system devices, automation-enabled devices and the systems and equipment used by the authority for monitoring and controlling its electric systemto facilitate
 - (iii) the operation of the authority's electric system,
 - (iv) the integration, on a large scale, of distributed generation into the electric distribution system, and
 - (v) the provision of electricity service that allows for the large-scale use of electric vehicles by its customers.

(2) The authority must integrate the operation of the smart grid with the authority's other operations.

[Provisions relevant to the enactment of this regulation: *Clean Energy Act*, S.B.C. 2010, c. 22, section 37 (g)]