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British Columbia Utilities Commission
Suite 410, 900 Howe Street Vancouver, BC
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Attention: Sara Hardgrave,
Acting Commission Secretary and Manager

Dear Ms. Hardgrave:

Re: FortisBC Energy Inc. (FEI or the Company)

Application for a Certificate of Public Convenience and Necessity (CPCN) for Approval of the Advanced Metering Infrastructure (AMI) Project (Application) ~ Project 1599211

FEI Reply to Submissions on Further Process

Introduction

We deliver these Reply Submissions on Further Process on behalf of FEI pursuant to British Columbia Utilities Commission (**BCUC**) Order G-206-22.

In their submissions on Further Process in this proceeding, all interveners, with one exception, indicated they are content to proceed to final written argument. On the other hand, the intervener Coalition to Reduce Electropollution (**CORE**) in its submissions, dated August 23, 2022 (Ex. C7-21) is seeking further process prior to final written argument. Specifically, CORE is seeking "an additional round of written interrogatories in which witnesses respond under oath to questions intended to probe the truthfulness and reliability of prior evidence proffered by the parties' non-expert and expert witnesses" in various specified areas. CORE describes the purpose of its proposed "additional round of sworn written interrogatories" as not being to canvass new issues, "but to challenge, in particular, the factual assumptions upon which an expert's opinion evidence is based in a setting in which the expert is required to respond in affidavit format".

FEI disagrees with CORE's proposed additional "sworn interrogatory" process. The evidentiary record in this proceeding is fulsome and additional "sworn" evidence is not required by the governing legislation or the BCUC's long-standing practice, nor is it otherwise justified or appropriate in the circumstances of this proceeding. Consistent with the submissions of all other interveners, FEI submits that the BCUC should proceed to set a schedule for written final argument without further delay.

Legislative and Regulatory Framework

The *Utilities Commission Act,* R.S.B.C. 1996, c. 473 (***UCA***), the applicable provisions of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 (***ATA***) and the BCUC's *Rules of Practice and Procedure,* Order G-178-22 (***RPP***) set the framework for the BCUC's conduct of hearing processes.

Specifically related to the admissibility of information in tribunal proceedings, section 40 of the *ATA,* applicable pursuant to section 2.1(d) of the *UCA*, provides as follows:

> **Information admissible in tribunal proceedings**
>
> **40** (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.
>
> [Underlining added.]

The BCUC is not, therefore, required to follow the rules of evidence applicable in the courts and, in particular, there is no legislative requirement that written materials the BCUC receives into the evidentiary record be sworn or affirmed under oath. This is consistent with general principles of administrative decision-making, under which the law of evidence as applied in the courts has limited application.

The *UCA*, in section 86.2(2), also grants the BCUC authority to make rules respecting the "process by which written hearings may be conducted and specifying the form and content of materials to be provided in written hearings". To this end, the BCUC's *RPP*[1] do not require that documents and evidence filed in the evidentiary record be in affidavit or other sworn format.[2] Consistent with this regulatory framework, the BCUC's long-standing practice is that written evidence in the form of a utility's application materials, expert reports, and responses to information requests (**IRs**) is *not* provided in a sworn or affidavit format.

The use of written IRs or "interrogatories" in BCUC proceedings, which is the subject of CORE's request for further process, is addressed in the BCUC's *RPP*. Section 3(j) of the *RPP* defines "information request" as follows: "also referred to as an 'interrogatory', means a request that an applicant, intervener, BCUC staff or panel may make of a party to elicit information on the evidentiary record that is relevant to the issues to be considered by the BCUC in the proceeding." Sections 13 and 14 address, respectively, the scope and format of IRs and the requirements for responses to IRs. Notably, neither the definition of "information request", nor the provisions in respect of responses to IRs include any reference to or mention of the responses being sworn, under oath, or in affidavit form.

CORE's submissions refer to the use of interrogatories in court proceedings in the BC Supreme Court and responses to such interrogatories being by way of affidavit; however, as noted above the law of

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[1] The *RPP* are enacted pursuant to section 11 of the *ATA,* which provides: (1) Subject to an enactment applicable to the tribunal, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it" (underlining added).

[2] See the definitions of "document" and "evidentiary record" in subsections 3(e) and (g) of the *RPP*.

evidence and its application in court processes has limited application in administrative tribunal proceedings. FEI also notes that use of written interrogatories in BC Supreme Court proceedings is, since 2010 revisions to the BC *Supreme Court Civil Rules*, no longer available to parties as of right and requires leave of the court.

The implication of CORE's submissions is that the BCUC's practice of not receiving sworn written evidence creates the spectre of parties to BCUC proceedings providing inaccurate, non-credible, or untruthful written evidence. FEI disagrees that this is the case. The potential for a public oral hearing, where members of witness panels do give testimony under oath, exists for most application proceedings before the BCUC. Utility applicants or interveners will typically not know whether the BCUC will order an oral hearing at the time they file written evidence. For example, in this proceeding, FEI filed the Application (including Exponent's expert reports), responses to two initial rounds of IRs, its Rebuttal Evidence, and Evidentiary Update, before the BCUC issued Order G-206-22 on July 22, 2022, declining to order an oral hearing. This procedural structure to BCUC proceedings promotes the filing of accurate and truthful written evidence given the potential for it to be subject to cross-examination at an oral hearing.

Furthermore, for a public utility such as FEI that appears regularly before the BCUC to provide inaccurate or unreliable written evidence on the basis that it is not sworn under oath would seriously jeopardize the utility's ongoing institutional credibility and standing before the BCUC.

In summary, none of the governing legislation, general principles of administrative decision-making in BC, or the BCUC's procedural rules or past practice supports CORE's request for a further round of IRs to be responded to under oath.

FEI is not asserting that the BCUC could *not* impose such a requirement under its general power to control its own processes. However, if the BCUC does have such authority, then imposing it would be inconsistent with section 40(1) of the *ATA*, which, as set out above, only requires that information be "relevant, necessary and appropriate" to be admissible. Accordingly, FEI submits that this should occur rarely and only in exceptional circumstances. For the reasons set out below, FEI submits that this proceeding is not such a circumstance in which an additional round of IRs with sworn responses would be appropriate or justified.

CORE's Further Process Request is Not Justified or Appropriate

FEI understands CORE's main ground for requesting additional, sworn IR responses is that the numerous IRs that FEI and Exponent have responded to in this proceeding to date did not "adequately test" the evidence and that the evidentiary record therefore "remains incomplete" (Ex. C7-21, p. 4). CORE elaborates that without the ability to test FEI's written evidence "in a sworn format, its ability to fully test the truthfulness and reliability of the evidence proffered … will be materially prejudiced" (Ex. C7-21, p. 11).

FEI disagrees. First of all, CORE's submission has not identified <u>*any*</u> specific FEI evidence in the already voluminous written record that it suggests is inaccurate, not "truthful", or otherwise non-credible or unreliable and that would benefit from further "testing" through additional sworn IR responses. CORE has not even identified any material disagreements or contradictions between FEI's written evidence (including from Exponent) and its own filed witness statements that would require the BCUC to prefer or

choose between competing testimony. FEI submits that, generally speaking, the benefit of sworn testimony arises in circumstances where there are material contradictions or incompatibilities on matters of fact that require an adjudicator to make findings based on opposing, contradictory evidence. CORE has not been able to identify any such disputed factual matters that would potentially turn on witness credibility.

Similarly, as it relates to the expert opinion evidence of Exponent, CORE has not actually identified any reason for the BCUC to doubt the "truthfulness and reliability" of the Exponent witnesses, such that further testing through "sworn" IR responses would be justified or of any benefit to the BCUC. FEI submits that there is no basis for CORE's suggestion that Exponent's evidence may be non-credible. Its proposed process for "fully" testing the "truthfulness and reliability" of that evidence is at best a fishing expedition and the BCUC should not endorse it.

FEI notes that none of CORE's filed evidence, including the witness statement of Mr. Karow and the expert reports of Drs. Heroux, Miller, and Havas, was submitted under oath or in a sworn or affidavit format. The implication of CORE's current submissions, that generically unsworn evidence would be less credible or reliable, seems to be that the BCUC should inherently doubt the credibility and reliability of CORE's own evidence.

CORE's submissions outline a list of proposed "topics for sworn responses to written interrogatories" (Ex. C7-21, p. 11-12). As CORE itself recognizes these topics are not intended to "canvass new issues" and it is apparent on the face of CORE's list that FEI and Exponent have already responded to numerous IRs on these various topics. Indeed, FEI has already responded to approximately 1,290total IRs in this proceeding, including IRs on its Rebuttal Evidence and Evidentiary Update. CORE does not explain why the previous IRs in this process were not adequate to test FEI's evidence on these topics.

The Panel itself, in Order G-206-22, at p. 10, determined that "there have been sufficient opportunities to test the evidence in this proceeding with written IRs". The Panel further held that it was "satisfied that CORE's concerns about the possible 'evasiveness, exaggeration, and partisanship' of experts providing testimony in this proceeding can be adequately assessed by written IRs, which may include examination of the credentials of the experts that have provided testimony." By the time of the Panel's decision, CORE had already had multiple opportunities to pose IRs on such topics, as well as a further opportunity to pose IRs on FEI's pending Rebuttal Evidence and Evidentiary Update.

CORE does not explain why it believes the Panel's prior determination was incorrect or why the prior opportunities to present IRs were insufficient for this purpose without FEI and Exponent providing responses under oath. CORE seems to imply that an additional round of sworn IRs may somehow result in different or alternative responses or evidence on CORE's proposed topics that will expose FEI and Exponent's prior written evidence as being unreliable or lacking credibility, but again CORE provides no reason to believe this would actually occur. CORE likewise does not explain why final written argument, with the benefit of prior IR responses, would not be sufficient to present any submissions it can make regarding contradictions or disputes in the expert and non-expert evidence and the weight the BCUC should give to FEI and CORE's evidence in deciding the Application.

That CORE may not like FEI's evidence and responses to IRs and may disagree with FEI's position regarding the Application and the use of AMI technology does not make FEI's written statements untruthful or otherwise unreliable. No other intervener in this proceeding has questioned the credibility or integrity of FEI's evidence in any such way.

FEI submits that, consistent with the BCUC's prior decision in respect of Order G-206-22, the previous rounds of IRs to FEI have provided more than an adequate opportunity for interveners, including CORE to challenge the reliability and credibility of FEI's evidence in support of the Application. The evidence has already been tested through the BCUC's regular IR process, which CORE did not question at the time. CORE has not provided any justification for the BCUC to make an exceptional procedural order requiring additional IR responses under oath. Such an additional process would unnecessarily increase the regulatory costs of this proceeding and could further delay the BCUC reaching a decision in respect of the Application.

Other Matters Arising from CORE's Submissions on Further Process

CORE's submission argues that there is "no evidence on the record in this proceeding that confirms that any of the parties' expert witnesses have gone 'on record' to confirm they have discharged their duty to give fair, objective and non-partisan opinion evidence in this proceeding". FEI notes that the requirement of specific, express attestations in expert reports is, where applicable, specifically provided for in procedural rules for court proceedings, such as Rule 11-2 of the BC *Supreme Court Civil Rules.*[3] Neither the *UCA*, nor the *ATA* creates such a requirement for expert reports in BCUC proceedings (or in administrative proceedings generally in BC) and the BCUC's *RPP* does not address the matter.

FEI submits that the independence and impartiality of Exponent's evidence can be readily assessed from the content of Exponent's reports and IR responses and from the C.V.s of the Exponent scientists involved in preparation of this evidence, including their academic credentials and lengthy experience in their fields of expertise. Exponent witnesses, including Dr. William Bailey, Ph.D. were also qualified to give expert testimony in the FortisBC Inc. (FBC) 2012-2013 AMI proceeding. The BCUC Panel in FBC's 2012-2013 AMI proceeding found that Dr. Bailey, "demonstrated a comprehensive knowledge and understanding of a wide range of studies that have been conducted within the area of his qualified expertise", that he "exhibited no apparent signs of bias and he was careful to restrict his responses to those areas where he had been qualified to give opinion evidence" and that Dr. Bailey's evidence "was very useful to the Panel".[4] FEI submits that CORE has not raised any grounds to question the impartiality or independence of the Exponent witnesses' in this proceeding and, in any event, such matters are appropriately dealt with in final argument.

CORE's submissions on Further Process also describe CORE's position on the exchange of final written argument in this proceeding. In doing so, CORE describes its view that FEI's entitlement to file Reply Argument "should be restricted to new evidence raised in the written final argument of CORE and/or other

[3] Rule 11-2(2) provides that expert reports tendered in BC Supreme Court proceedings must "certify" that the expert "(a) is aware of the duty referred to in subrule (1) [i.e. to assist the court and not to be an advocate for any party], (b) has made the report in conformity with that duty, and will, if called on to give oral or written testimony, give that testimony in conformity with that duty". None of the *UCA, ATA*, or the *RPP* contains an equivalent requirement for expert reports filed in BCUC proceedings.

[4] BCUC Decision and Order C-7-13, p. 17.

interveners" (Ex. C7-21, p. 2; underlining added). FEI does not agree with CORE's suggestion that interveners could submit "new evidence" as part of their written Final Argument, and with the scope of Reply that CORE correspondingly suggests.

Conclusion

For the reasons set out above, and consistent with the position of all other interveners, FEI submits that the BCUC should decline to order the further "sworn" IR process requested by CORE. FEI submits that the BCUC should instead proceed to set a schedule for written Final Argument according to the schedule in FEI's submission on Further Process, dated August 19, 2022 (Ex. B-41).

Yours truly,

FARRIS LLP

Per:

Nicholas T. Hooge

NTH/eg

c.c.: Registered Interveners;
Client;
Ludmila B. Herbst, Q.C.