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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-10-10

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

and

**An Application by Shaw Cablesystems Limited and Shaw Business Solutions Inc.
to continue to use FortisBC Inc.'s Transmission Facilities**

BEFORE: A.A. Rhodes, Commissioner
M.R. Harle, Commissioner
L.A. O'Hara, Commissioner

January 14, 2010

ORDER

WHEREAS:

- A. On October 26, 2009 Shaw Cablesystems Limited and Shaw Business Solutions Inc. (collectively "Shaw") applied for an order directing FortisBC Inc. ("FortisBC") to allow Shaw to continue to use FortisBC's electric transmission facilities for Shaw's telecommunication facilities throughout the FortisBC service area pursuant to section 70 of the *Utilities Commission Act* (the "Act", the "Application"); and
- B. The Application requests that the British Columbia Utilities Commission (the "Commission") issue an Order directing FortisBC to allow Shaw to install, operate and maintain telecommunications cables and related interconnection facilities on FortisBC's electric transmission facilities including the facilities located on FortisBC's 11 line, 40 line, 50 line and 76 line and setting reasonable terms and rates for Shaw's use of FortisBC's facilities. Shaw submits that such an order is in the public interest; and
- C. Shaw has accessed FortisBC's transmission and distribution poles for the placement of telecommunication facilities since 1972 with the agreement and cooperation of FortisBC and its predecessors; and
- D. Shaw submits that the issues in the Application are narrow and centre on fair and reasonable terms and rates and asks that a Negotiated Settlement Process be set as soon as possible; and
- E. On February 13, 2009, FortisBC notified Shaw that the Transmission License Agreement will terminate effective February 12, 2019; and
- F. On April 3, 2009, FortisBC notified Shaw to remove its facilities from FortisBC poles along lines 50 and 54 by April 3, 2010 and from poles along lines 40 and 76 by October 31, 2010 in accordance with good utility practice and the decommissioning of line 40; and

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- G. Shaw disputes the validity of the April 3, 2009 notices and submits they are related to unresolved issues on other matters, principally the ownership of the Kettle Valley telecommunication facilities and FortisBC's dissatisfaction with the Transmission License Agreement rates and FortisBC's proposal to increase the annual fee from approximately \$40,000 to \$927,000; and
- H. Shaw states that FortisBC recently commenced an action in the British Columbia Supreme Court (the "Court") that seeks:
- 1) a declaration that the Transmission License Agreement has been terminated,
 - 2) a mandatory injunction to have Shaw remove its telecommunications facilities from FortisBC's transmission facilities and land,
 - 3) an injunction to restrain Shaw from using its telecommunications facilities on FortisBC transmission facilities; and
- I. By Order G-133-09, the Commission required that FortisBC provide a submission by November 20, 2009 on whether the Application should be reviewed through a Negotiated Settlement or some other process before the Commission and for Shaw to make a reply submission by November 27, 2009 on the FortisBC submission. The FortisBC and Shaw submissions are summarized in the attached Reasons for Decision; and
- J. The Commission reviewed the Application and the November 20, 2009 submission from FortisBC and the November 27, 2009 submission from Shaw and by Order G-170-09 scheduled a Preliminary Procedural Conference for January 6, 2010 to address a List of Issues and procedural matters; and
- K. The Commission has reviewed the submissions received at the Preliminary Procedural Conference and considers that additional submissions are required.

NOW THEREFORE the Commission orders Shaw and FortisBC to respond to the questions asked in the Reasons for Decision attached as Appendix A to this Order and provide submissions on the applicability of section 70 of the Act to the present facts in accordance with the Regulatory Timetable established in Appendix B.

DATED at the City of Vancouver, in the Province of British Columbia, this 14th day of January 2010.

BY ORDER

Original signed by:

A.A. Rhodes
Panel Chair/Commissioner

Attachment

An Application by Shaw Cablesystems Limited and Shaw Business Solutions Inc.
to continue to use FortisBC Inc.'s Transmission Facilities

REASONS FOR DECISION

1.0 INTRODUCTION

On October 26, 2009 Shaw Cablesystems Limited and Shaw Business Solutions Inc. (collectively "Shaw") applied for an order directing FortisBC Inc. ("FortisBC") to allow Shaw to continue to use FortisBC's electric transmission facilities for Shaw's telecommunication facilities throughout the FortisBC service area pursuant to section 70 of the *Utilities Commission Act* (the "Act", the "Application"). The Application requests that the British Columbia Utilities Commission (the "Commission") issue an Order directing FortisBC to allow Shaw to install, operate and maintain telecommunications cables and related interconnection facilities on FortisBC's electric transmission facilities including the facilities located on FortisBC's 11 line, 40 line, 50 line and 76 line and setting reasonable terms and rates for Shaw's use of FortisBC's facilities. Shaw submits that such an order is in the public interest and that a Negotiated Settlement Process be established as soon as possible.

On February 13, 2009, FortisBC notified Shaw that the Transmission License Agreement ("TLA") will terminate without cause pursuant to section 14.01 of the TLA effective February 12, 2019. On April 3, 2009, FortisBC also notified Shaw to remove its facilities from FortisBC poles along lines 50 and 54 by April 3, 2010 pursuant to section 8.05 of the TLA. Specifically, FortisBC stated that it requires the space currently occupied by the Shaw Facilities to install new infrastructure that will allow FortisBC to operate these assets in accordance with Good Utility Practice. On April 3, 2009 FortisBC further notified Shaw to remove its facilities from poles along lines 40 and 76 by October 31, 2010, because FortisBC is in the process of decommissioning its transmission line in accordance with Good Utility Practice.

Shaw disputes the validity of the April 3, 2009 notices and submits they are related to unresolved issues on other matters, principally the ownership of the Kettle Valley telecommunication facilities and FortisBC's dissatisfaction with the TLA rates and its proposal to increase the annual fee from approximately \$40,000 to \$927,000. Shaw also asks "the Commission to look at FortisBC's reasons for refusing to allow Shaw to continue to use the support structures, and its reasons for not allowing Shaw to relocate to the new rebuilt lines" (T1:14).

On September 8, 2009 FortisBC again notified Shaw in writing that it required the removal by Shaw of its cable from FortisBC transmission poles in certain specified areas in 2010 because FortisBC required the subject poles for its own use. On September 18, 2009 Shaw responded to FortisBC that Shaw does not accept the purported terminations and that FortisBC has not provide a factual foundation to support the termination of Shaw's TLA rights. In FortisBC's view, Shaw's denial that FortisBC had the right to issue the notices is a breach of the TLA.

On October 1, 2009, FortisBC filed a Writ and Statement of Claim in the British Columbia Supreme Court (the "Court"). FortisBC alleges that Shaw committed a breach of the license contract under the TLA which sets out the terms and conditions upon which Shaw may attach its own facilities to FortisBC's transmission poles. FortisBC is seeking a declaration from the Court that the TLA is terminated due to the breach.

The Commission considered Shaw's request that the Application be reviewed through a Negotiated Settlement Process and by Order G-133-09 required that FortisBC provide a submission by November 20, 2009 on whether the Application should be reviewed through a Negotiated Settlement Process or some other process before the Commission. Shaw was required to make a reply submission on the FortisBC submission by November 27, 2009.

In its November 20, 2009 submission FortisBC stated that it declines to participate in a Negotiated Settlement Process without having first resolved (by consensual agreement or court determination) the respective rights of the parties at issue in the lawsuit because FortisBC considers that concurrent proceedings would not best serve the interests of ratepayers. FortisBC stated that Shaw accepted the Court's jurisdiction with respect to the dispute and filed a Statement of Defence. FortisBC also stated that Shaw has advanced its own lawsuit for relief against FortisBC in the form of a Counterclaim.

In its November 27, 2009 Reply submission Shaw noted that FortisBC does not dispute the Commission's authority to make an order allowing Shaw to access the FortisBC infrastructure. Shaw submits that the public interest calls for the Commission to exercise its authority now. Shaw also submits that FortisBC's efforts to deny Shaw access to its transmission facilities poses an immediate threat to Shaw's communications network and service to its customers. Shaw argues that failure to agree on the use of a public utility's electric transmission facilities is one of the triggers under section 70 for the Commission to intervene.

The Panel reviewed the Application and the submissions from FortisBC and Shaw and by Order G-170-09 established a Preliminary Procedural Conference on January 6, 2010 to address procedural matters and other issues as set out in a List of Issues. The Procedural Conference took place as scheduled.

2.0 SECTION 81: PENDING LITIGATION and SECTION 70: USE OF ELECTRICITY TRANSMISSION FACILITIES

Two of the issues before the Commission are whether: 1) the Commission has the jurisdiction to hear the Shaw Application, and 2) the Commission should conduct that hearing now or wait until the Court rules on the FortisBC contention that the TLA has been terminated.

The Panel will first consider the second question.

Shaw submits that the Commission has the authority to proceed immediately with a review of the Application pursuant to section 81 of the Act (T1:25). FortisBC did not address section 81 directly.

Section 81 of the Act states that:

“The fact that a suit, prosecution or other proceeding in a court involving questions of fact is pending does not deprive the commission of jurisdiction to hear and determine the same questions of fact.”

The Panel is of the view that the plain wording of section 81 contemplates court proceedings and proceedings before the Commission taking place at the same time. The Panel therefore determines that the Commission has the jurisdiction under section 81 of the Act to hear the Application while the FortisBC action and Shaw counterclaim are pending before the Court.

Having determined that it has the jurisdiction to review the Application concurrently with the Court proceedings, the Panel now turns to the first question,

Section 70 of the Act provides that:

70 (1) On application and after a hearing, the commission may make an order directing a public utility to allow a person, other than a public utility, to use the electricity transmission facilities of the public utility if the commission finds that

- (a) the person and the public utility have failed to agree on the use of the facilities or on the conditions or compensation for their use,
- (b) the use of the facilities will not prevent the public utility or other users from performing their duties or result in any substantial detriment to their service, and
- (c) the public interest requires the use of the facilities by the person.

(2) An order under subsection (1) may contain terms and conditions the commission considers advisable, including terms and conditions respecting the rates payable to the public utility for the use of its electricity transmission facilities.

- (3) After a hearing, the commission may, by order, vary or rescind an order made under this section.
- (4) Any interested person may apply to the commission for an order under this section, and the application must contain the information the commission specifies.

FortisBC states that Shaw is asking the Court to declare that there is an existing contract which provides Shaw with rights of access, while Shaw is asking the Commission for relief on the basis that there is no such agreement. FortisBC submits that whether there are or are not existing agreements that allow Shaw to continue to use FortisBC facilities is a legal issue for the courts to decide (T1:33). In FortisBC's view if Shaw succeeds before the Court then there are existing agreements that provide access and there is no need or basis for a section 70 application (T1:34). A court date is not likely until January 2011 (Exhibit B2-3, p. 3, T1:5).

The Panel has concluded that it requires further submissions on the applicability of section 70 before it determines whether it will review the Application. In particular, in addition to any other submissions Shaw and FortisBC may make on the applicability of section 70 to the present facts, the Panel asks Shaw and FortisBC to address the following questions:

1. The FortisBC notice dated February 13, 2009 provides 10 years' notice of the termination of the TLA in accordance with section 14.01 of the TLA. In the absence of the Court approving FortisBC's request to terminate the TLA immediately and all else being equal, will the TLA agreement or portions thereof, remain in effect until the termination date of February 12, 2019? If the TLA is in effect, how is the "failed to agree" requirement of section 70(1)(a) relevant (Exhibit B1-1, Appendix 5, p. 14; Appendix 8(a))?
2. The FortisBC termination notices dated April 3, 2009 require removal of Shaw facilities from lines 50 and 54 by April 3, 2010 and from lines 40 and 76 by October 31, 2010 in accordance with section 8.05 of the TLA (Exhibit B1-1, Appendix 8(b) and (c)). Have Shaw and FortisBC been unable to agree on the relocation of the Shaw facilities affected by these notices and does that failure to agree meet the requirements of section 70(1)(a) of the Act for those Shaw facilities?
3. Shaw has requested a general order pursuant to section 70 of the Act to allow Shaw access to all of FortisBC's transmission poles and related support equipment (Application, p. 2; T1:10). Should the Commission consider issuing a ruling under section 70 that is conditional on the Court determining that the TLA has been terminated? Could the Commission issue a ruling that is not conditional on the Court determination on the termination of the TLA?
4. Does the fact that Shaw has made this Application and that FortisBC has indicated its unwillingness to participate in a Negotiated Settlement Process or the existence of the litigation in the Court constitute sufficient failure to agree to invoke section 70 (1)(a), or will failure to agree only be ascertained once the Court has made a determination in relation to whether an agreement exists between Shaw and FortisBC?

The Regulatory Timetable for submissions is set out in Appendix B to the Order issued concurrently with these Reasons.

Following a review of the submissions, the Commission may issue a further procedural order and a regulatory agenda for the review of the Application, or issue an order declining to review the Application.

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to continue to use FortisBC Inc.'s Transmission Facilities

REGULATORY TIMETABLE

ACTION	DATE
Shaw files and distributes its submissions on the applicability of section 70 of the Act to the present facts	Thursday, January 21, 2010
FortisBC files and distributes its submission on the applicability of section 70 of the Act to the present facts	Thursday, January 28, 2010
Shaw files and distributes its reply to the submission of FortisBC	Thursday, February 4, 2010