

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



**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-24-10

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

**IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 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 February 17, 2010
L.A. O'Hara, Commissioner

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 (the April 3, 2009 Notices); and
- 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

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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; and

J. The Commission reviewed the Application and the November 20, 2009 submission from FortisBC and the November 27, 2009 reply 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. Following its consideration of the submissions received at the Preliminary Conference on January 6, 2010, the Commission issued Order G-10-10 with Reasons for Decision dated January 14, 2010 whereby it requested additional submissions from Shaw and FortisBC relating to the applicability of section 70 of the Act in the context of the circumstances existing as between them; and

L. By letter dated January 14, 2010 FortisBC advised Shaw that it had extended the April 3, 2010 deadline contained in the April 3, 2009 Notices to October 1, 2010; and

M. The Commission Panel has reviewed the additional submissions received and has determined, for the Reasons for Decision contained in Appendix A, that it has the jurisdiction to and will hear the Application at this time. The Commission Panel requests that Shaw and FortisBC provide written submissions in respect of further process and proposed Regulatory Timetables as set out below.

NOW THEREFORE the Commission orders Shaw and FortisBC to provide written submissions in respect of further process for the hearing of the Application together with proposed Regulatory Timetables on or before Friday, February 26, 2010.

DATED at the City of Vancouver, in the Province of British Columbia, this 17th day of February, 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

On October 26, 2009 Shaw Cablesystems Limited and Shaw Business Solutions Inc. (collectively, Shaw) applied to the British Columbia Utilities Commission (the Commission) for an order directing FortisBC Inc. to continue to allow Shaw to use FortisBC's electricity transmission facilities for its telecommunication cable and related equipment pursuant to section 70 of the *Utilities Commission Act* (the Act) and asked that the Commission order a Negotiated Settlement Process to review its application (the Application).

FortisBC disputes the jurisdiction of the Commission to hear Shaw's application at this time in the face of ongoing litigation between the parties.

The litigation commenced on October 1, 2009 when FortisBC filed a Writ of Summons and Statement of Claim seeking, among other things, a declaration that its Transmission License Agreement with Shaw Cablesystems Limited was validly terminated. Shaw filed a Statement of Defence and Counterclaim on October 29, 2009 basically seeking specific performance of the contract.

On November 12, 2009 the Commission issued Order G-133-09 requesting submissions on whether the Commission should review the Application by way of a Negotiated Settlement or some other process.

Following receipt of the parties' submissions, the Commission issued Order G-170-09 which provided for a Procedural Conference to be held on January 6, 2010 to address a number of issues including: the status of the Supreme Court proceedings, the scope of a potential section 70 application and the appropriate regulatory process. The Procedural Conference took place on January 6, 2010, as scheduled.

Following submissions received at the Procedural Conference, the Commission issued Order G-10-10 with Reasons for Decision requesting additional submissions on the applicability of section 70 of the Act to the factual situation existing as between Shaw and FortisBC. The factual background to the proceedings is more particularly described in the Reasons for Decision appended to Order G-10-10.

The Commission Panel has now considered the submissions of the Parties and accepts Shaw's submission that it has the jurisdiction to hear Shaw's application pursuant to section 70 of the Act and that it should proceed to do so at this time.

Section 70 of the Act states:

- (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 argues that section 70 does not and should not apply to the present circumstances for a number of reasons, including:

- Shaw's position in the lawsuit denies that the Transmission License Agreement is at an end so there is no failure to agree on the use of the facilities etc.;
- Section 70 contemplates an order allowing present access to the electricity transmission facilities of a utility for purpose of electricity transmission, not future access for fibre optic cable which Shaw is seeking;
- Some of the structures to which Shaw seeks access are on First Nations land to which FortisBC has rights which are not subject to assignment or other forms of sharing and the Commission has no jurisdiction in this area;
- The Commission should strive to avoid a multiplicity of proceedings – in this regard, although the Commission has jurisdiction to hear questions of fact which are also the subject of judicial proceedings pursuant to section 81 of the Act, it has no jurisdiction over questions of law, such as whether the Transmission License Agreement has been terminated or will remain in effect.

Shaw, on the other hand, takes the position that FortisBC is ignoring its own position in the lawsuit, namely, that the Transmission License Agreement has been properly terminated; that a proper construction of section 70 contemplates a "broad scope and forward looking perspective", which is not limited to wheeling electricity; that issues such as the First Nations land and other substantive issues do not need to be resolved at this stage; that not all issues can necessarily be resolved in the court proceedings; and the efficient administration of justice favours the involvement of the Commission earlier, rather than later.

As noted above, the Commission Panel accepts Shaw's submission that it has the jurisdiction to hear the Application pursuant to section 70 of the Act. The Commission Panel is of the view that there is a clear failure to agree on Shaw's continued use of FortisBC's electricity transmission facilities as evidenced by the parties' positions which culminated in the Supreme Court proceedings. Section 70 of the Act, in the Panel's view, does not restrict the use of the transmission facilities to present uses, nor does it restrict the use to wheeling of electricity. The Commission Panel is of the view that such an interpretation would be overly restrictive and would not accomplish the intention of promoting the efficient use of what might be considered to be monopoly infrastructure. The Commission Panel agrees that the First Nations land and other substantive issues raised by FortisBC are not relevant to this preliminary stage of the proceeding dealing with the Commission's jurisdiction and can and should be raised during the evidentiary phase.

As noted by Shaw in its submission, the Commission Panel has previously determined 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 (Reasons for Decision, January 14, 2010, p.2). The Commission Panel agrees with Shaw that the nature of the Commission's inquiry and the remedies that it can impose differ from those of a Court.

The Commission Panel therefore asks that the parties provide written submissions on process together with their proposed Regulatory Timetables going forward on or before Friday, February 26, 2010.