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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-93-10

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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

June 1, 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 (the Application) pursuant to section 70 of the *Utilities Commission Act* (the Act); and
- B. The Application requests that the British Columbia Utilities Commission (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 that it required 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 Supreme Court of British Columbia 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, and
 - 3) an injunction to restrain Shaw from using its telecommunications facilities on FortisBC's 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, 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 reviewed the additional submissions received and determined, by Order G-24-10 with Reasons for Decision attached, that it has the jurisdiction to and would hear the Application. The Commission Panel requested that Shaw and FortisBC provide written submissions in respect of further process and proposed Regulatory Timetables on or before Friday, February 26, 2010. Following a request by FortisBC, the Commission extended its submission deadline to Friday, March 5, 2010; and
- N. On February 26, 2010, Shaw submitted a proposed Regulatory Timetable that included an oral public hearing commencing on June 21, 2010, the possibility of a Negotiated Settlement Process, with a Decision anticipated by September 3, 2010; and
- O. On March 5, 2010, FortisBC filed a request for Reconsideration of Order G-24-10, served a Leave to Appeal application to the B.C. Court of Appeal from that Order, and filed a proposed Regulatory Timetable. The Regulatory Timetable included a one-half day hearing for the Reconsideration Application, and if the Reconsideration or stay was not granted, provided for an oral public hearing commencing on September 20, 2010; and
- P. The Commission Panel considered FortisBC's Reconsideration Application and determined that FortisBC had put forward a prima facie case to allow the matter to proceed directly to Phase 2 of the reconsideration process; and

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- Q. By Order G-39-10, the Commission Panel scheduled a one-half hearing day for March 17, 2010, subject to comments from Shaw. The hearing of the Reconsideration Application proceeded on March 17, 2010, with additional submissions from the parties in response to outstanding questions from the Commission Panel; and
- R. By Order G-63-10 with Reasons attached, the Commission Panel dismissed the Reconsideration Application, established an oral hearing process for the review of the Shaw Application and a Regulatory Timetable that scheduled a Procedural Conference for May 11, 2010 in Kelowna, BC; and
- S. The Procedural Conference took place as scheduled on May 11, 2010; and
- T. The Commission Panel has considered the submissions of the parties at the Procedural Conference.

NOW THEREFORE the Commission Panel orders, with Reasons attached as Appendix A, that the Regulatory Timetable established by Order G-63-10 is varied by the Revised Regulatory Timetable attached as Appendix B.

DATED at the City of Vancouver, in the Province of British Columbia, this *First* day of June 2010.

BY ORDER

Original signed by:

A.A. Rhodes
Panel Chair/Commissioner

Attachments



IN THE MATTER OF

AN APPLICATION BY

**SHAW CABLESYSTEMS LIMITED
AND SHAW BUSINESS SOLUTIONS INC.**

TO CONTINUE TO USE FORTISBC INC.'S TRANSMISSION FACILITIES

REASONS FOR DECISION

BEFORE:

A.A. Rhodes, Panel Chair/Commissioner
L.A. O'Hara, Commissioner
M.R. Harle, Commissioner

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1.0 INTRODUCTION

In Order G-24-10 the Commission Panel determined that it had the jurisdiction under s. 70 of the *Utilities Commission Act* R.S.B.C. 1996 c. 473 (*Act*) to hear an application by Shaw Cable Systems Ltd. and Shaw Business Solutions Inc. (collectively, Shaw) for an Order allowing Shaw to continue to use the electricity transmission facilities belonging to FortisBC for its telecommunication equipment. On March 5, 2010, FortisBC filed a request for Reconsideration of Order G-24-10, served a Leave to Appeal application to the B.C. Court of Appeal, and filed a proposed Regulatory Timetable. By Order G-39-10, the Commission Panel held a half-day hearing on the Reconsideration request.

By Order G-63-10, dated April 1, 2010, the Commission Panel dismissed the Reconsideration Application, established an oral hearing process for the review of the Shaw Application and a Regulatory Timetable that scheduled a Procedural Conference for May 11, 2010 in Kelowna, BC.

For the reasons that follow, the Regulatory Timetable established by Order G-63-10 for the oral hearing process to review the Shaw Application is varied by the Revised Regulatory Timetable attached as Appendix B.

2.0 ISSUES

The issues raised at the Procedural Conference were: the starting date and location for the oral public hearing, interim participant assistance funding, the evidentiary burden, intervener comment on other intervener's arguments and FortisBC's leave to appeal application to B.C. Court of Appeal.

3.0 ANALYSIS

3.1 Starting Date and Location of the Oral Public Hearing

The Regulatory Timetable established by Order G-63-10 scheduled the oral public hearing into the Shaw Application from Monday, September 20 to Friday, September 24 in Kelowna, BC. By letter dated April 13, 2010, Shaw stated that one of its witnesses will not be available to testify from September 20 to October 11, 2010 and requested that the oral public hearing be moved up by one week and commence on September 13, 2010 (Exhibit B1-15, p. 2). Shaw also repeated this request at the May 11, 2010 Procedural Conference (T3:169). FortisBC suggested, as a compromise, advancing the date for the oral public hearing by one day to September 17, 2010, which would then preserve most of the original hearing dates (T3:172). Shaw replied that moving the hearing dates ahead one day, as proposed by FortisBC, may not allow sufficient time for the witness panel to be cross-examined. No other interveners commented on Shaw's requested change in the hearing dates.

FortisBC did not provide any reason for its proposal for only a one day adjustment other than to say it would preserve the existing hearing dates in so far as possible.

The Commission Panel accepts Shaw's request to commence the oral public hearing on Monday, September 13, 2010. The Commission Panel agrees that moving the hearing ahead by one day may not allow sufficient time for the cross-examination of any witness panel of which that witness is a member. The rescheduling of the hearing dates consequently requires that the deadline for FortisBC/ Intervener response to Information Requests needs to advance by one week to August 31, 2010 in order to allow parties sufficient time to prepare for the hearing.

With regards to location for the oral public hearing, Shaw stated that Vancouver would be convenient (T3:169), BC Hydro expressed a preference for Vancouver but was indifferent to the location (T3:171), FortisBC would prefer Kelowna principally driven by its base of operations and where it understands the bulk of the interveners reside (T3:172), both the Okanagan Nation Alliance (Alliance) and the Penticton Indian Band (Band) were agreeable to having the oral public hearing in Vancouver (T3:175).

The Commission Panel is of the view that, given the subject matter of the Application involves FortisBC's infrastructure in FortisBC's service area, the hearing should take place in Kelowna, BC.

3.2 Interim Participant Funding

Counsel for the Okanagan Nation Alliance and the Penticton Indian Band stated that the Alliance and the Band intend to take an active role in this proceeding and requested that the Regulatory Timetable be amended to add the opportunity for interveners to apply for interim participant funding awards. Counsel stated that the interests of his clients are in the potential effect of the Commission's decision on the Okanagan [Nation] Aboriginal title and rights and the potential effect of the decision on reserve lands of the Penticton Indian Band. Counsel further stated that his clients have serious capacity funding issues when taking part in Commission hearings and noted that interim funding has been provided to First Nations in the past (T3: 175).

The Commission Panel will accept requests for interim participant funding from the Alliance and the Band. Intervenors intending to apply for participant assistance must submit a budget estimate by June 14, 2010 consistent with the Commission's Participant Assistance/Cost Award Guidelines (Guidelines) and Order G-72-07. Copies are available upon request or can be downloaded from the Commission's web site at <http://www.bcuc.com>. In accordance with the Guidelines, participants applying for an Interim Award should explain in detail the reimbursement request and provide justification for an accelerated approval process.

3.3 Evidentiary Burden

Shaw stated that the evidentiary burden for the review of its Application should rest with FortisBC since the Application is in the nature of a complaint and that the onus should shift to FortisBC to justify its refusal to allow the use (Exhibit B1-15, pp. 2-3; T3: 177-178). The Commission Panel, Shaw and FortisBC acknowledged that the evidentiary burden has not been resolved and remains a live issue (T3: 183-185).

The Commission Panel does not intend to make a determination on this issue in the absence of submissions from the parties, which it will hear at a later date.

3.4 Intervener Comment on Other Intervener's Arguments

Counsel for the Alliance and the Band requested that the Regulatory Timetable be amended to allow an intervener the opportunity for reply if any other intervener arguments are contrary to his clients' interests (T3: 176).

The Commission Panel does not intend to make a determination on this issue at this time. It can be addressed, if necessary, when the Panel considers submissions on the timing of Final Argument during the oral hearing.

3.5 FortisBC's Leave to Appeal Application

FortisBC stated that its leave to appeal application is scheduled to be heard by B.C. Court of Appeal on May 31, 2010. FortisBC intends to return to the Commission to seek a stay of the Commission's process pending the determination of the appeal if leave to appeal is granted (T3:171).

The Commission Panel will consider such an application if and when it is made.

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REVISED REGULATORY TIMETABLE

ACTION	DATE (2010)
Shaw Response to Information Request No. 1	Friday, June 11
Participant Assistance Budgets submitted	Monday, June 14
BCUC / FortisBC / Intervener Information Request No. 2	Tuesday, June 22
Shaw Response to Information Request No. 2	Tuesday, July 20
FortisBC / Intervener Evidence	Friday, July 30
Information Requests on FortisBC / Intervener Evidence	Tuesday, August 10
FortisBC / Intervener response to Information Requests	Tuesday, August 31
Oral Hearing (Kelowna)	Monday, September 13- Friday, September 17
Shaw Argument (tentative)	Friday, October 1
FortisBC / Intervener Argument (tentative)	Friday, October 15
Shaw Reply Argument (tentative)	Friday, October 22

LOCATION OF ORAL PUBLIC HEARING

DATE:	Monday, September 13, 2010
TIME:	9:00 a.m.
LOCATION:	Holiday Inn Express 2429 Hwy 97 North Kelowna, BC