

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-170-09**

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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

December 23, 2009

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 "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 filed a court 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. In its November 20, 2009 submission FortisBC states 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 states that Shaw accepted the Court's jurisdiction with respect to the dispute and filed a Statement of Defence. FortisBC also states that Shaw has advanced its own lawsuit for relief against FortisBC in the form of a Counterclaim; and
- K. In its November 27, 2009 Reply submission Shaw notes that FortisBC does not dispute the Commission's authority to make such an order. Shaw submits that the public interest calls for the Commission to exercise its authority now. Shaw also submits that FortisBC's efforts to deny 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; and
- L. The Commission has reviewed the Application and the submissions and considers that a Preliminary Procedural Conference is required.

NOW THEREFORE the Commission orders as follows:

1. A Procedural Conference regarding the review of the Application will be held commencing at 9:30 a.m. on January 6, 2010 in the Commission Hearing Room on the 12th Floor of 1125 Howe Street, Vancouver, British Columbia to address procedural matters.

After the Procedural Conference, the Commission may either issue a further procedural order and regulatory agenda for the review of the Application or issue an order declining to review the Application.

2. The Commission requires that Shaw and FortisBC be prepared to address, at the Procedural Conference, the List of Issues attached as Appendix A to this Order.

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3. Shaw and FortisBC are to circulate their respective proposed regulatory timetables, in the event that the Commission determines, following its consideration of the submissions it receives at the Procedural Conference, that it should conduct a review of the Application, to each other and the Commission by January 4, 2010.

DATED at the City of Vancouver, in the Province of British Columbia, this 23rd day of December 2009.

BY ORDER

Original signed by:

A. A. Rhodes
Panel Chair

Attachment

An Application by Shaw Cablesystems Limited and Shaw Business Solutions Inc.
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LIST OF ISSUES

1. What is the current status of the Shaw and FortisBC Supreme Court proceeding?
2. As part of the relief sought in the Supreme Court proceedings, both Shaw and Fortis seek injunctive relief of an interim, interlocutory and permanent nature. In view of its claim of urgency, why has Shaw not advanced an application for an interim or an interlocutory injunction?
3. Since FortisBC has asked the Supreme Court for a declaration that the Transmission Licence Agreement has been validly terminated, should any section 70 review be limited to 11 line, 40 line, 50 line, 54 line and 76 line and not extend to other transmission lines until the Supreme Court has decided the issue?
4. Do Shaw and FortisBC agree that the validity of the termination of the Transmission Licence Agreement is a matter for the Supreme Court, and not the Commission to decide?
5. Why does Section 2.1 of the Application not mention line 54? Why does Section 2.1 of the Application include 11 line when that line is not identified in the April 3, 2009 FortisBC notices?
6. Does Shaw intend to file any further evidence which might assist the Commission in determining the terms and conditions of Shaw's use of the FortisBC facilities, including the terms and conditions respecting the rates payable for the use? If so, when does it intend to do so?
7. Shaw states on page 2 of the Application that its requested order is in the public interest. Does Shaw therefore accept that a public notice is required?
8. What is the appropriate review process: written, oral or negotiated settlement or a combination of them, recognizing that the Negotiated Settlement Process Guidelines, Section 2, page 3 states that "Interested parties cannot be forced to participate in a settlement process"?
9. FortisBC submitted on page 4, item 20 of its November 20, 2009 submission that "FortisBC respectfully submits that the Commission should decline to proceed with Shaw's Application." Shaw's reply of November 27, 2009 on page 4, item 2(b), paragraph 2, states that "In stark terms, FortisBC seeks to terminate whatever access for Shaw it may have agreed to historically. Shaw's application deals with future access." Do FortisBC and Shaw accept that the Commission can proceed with a review of the Shaw Application concurrent with the Supreme Court proceeding?
10. Other issues identified by the parties.
11. Potential Regulatory timetable.
12. Location of Hearing.