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**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-39-10**

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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

March 9, 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 (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

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-39-10**

2

- 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 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 at this time. 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 has considered FortisBC's Reconsideration Application and has determined that FortisBC has put forward a prima facie case to allow the matter to proceed directly to Phase 2 of the reconsideration process.

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-39-10

3

NOW THEREFORE the Commission Panel orders, with Reasons attached as Appendix A, that:

1. The Commission Panel will hear the Reconsideration Application and will allow one half day for the hearing, subject to any comments it may receive from Shaw on whether Shaw intends to file additional evidence and whether Shaw agrees that the matter can be heard in one half day.
2. Shaw's comments, if any, in response to Item 1 of this Order are to be received by the Commission no later than 4:00 p.m., Thursday, March 11, 2010.
3. In the absence of comments from Shaw, the hearing will commence at 1:00 p.m. on Wednesday, March 17, 2010 at the Commission Hearing Room, 12th Floor, 1125 Howe Street, Vancouver, BC.

DATED at the City of Vancouver, in the Province of British Columbia, this 9th day of March 2010.

BY ORDER

Original signed by:

A.A. Rhodes
Panel Chair/Commissioner

Attachment



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

On March 5, 2010 FortisBC Inc. (FortisBC) applied to the British Columbia Utilities Commission (Commission) for a reconsideration of its Order G-24-10 whereby it determined that it had the jurisdiction under section 70 of the *Utilities Commission Act* (Act) to hear an application made by Shaw Cablesystems Limited and Shaw Business Solutions (collectively, Shaw) for an order allowing Shaw to continue to use FortisBC's electricity transmission facilities for its telecommunication facilities.

FortisBC argues that the Commission erred in law in determining that s. 70 of the Act permits it to:

- (1) Direct FortisBC to provide access to its electricity transmission facilities for purposes other than electricity transmission;
- (2) Intercede where the applicant has ongoing access to and use of the electricity transmission facilities; and
- (3) Intercede where the "failure to agree" on continued access alleged is inconsistent with the applicant's position that a contract providing for access to 2019 remains operative.

FortisBC also submits that the Order has resulted in a new principle—that the Commission has jurisdiction to direct a utility to use its assets in a manner that does not involve electricity generation, transmission or distribution.

Fortis BC submits that Order G-24-10 may have significant, material implications going forward.

The Commission Panel has determined that it will hear FortisBC's application for a reconsideration on its merits. The Commission Panel is of the view that FortisBC has put forward a *prima facie* case to allow the matter to proceed directly to Phase 2 of the reconsideration process.

FortisBC has requested that it be given the opportunity to make oral submissions on the reconsideration and suggests one half day during the week of March 15, 2010. FortisBC also suggests that no further evidence should be required.

The Commission Panel will allow one half day for the hearing of Reconsideration Application, subject to any comments it may receive from Shaw on whether it intends to file additional evidence and whether it agrees that the matter can be heard in one half day. Shaw's comments are to be received by the Commission no later than 4:00 p.m., Thursday, March 11, 2010. In the absence of such comments, the hearing will commence at 1:00 p.m. on Wednesday, March 17, 2010 at the Commission Hearing Room, 12th Floor 1125 Howe Street, Vancouver, BC.