

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



**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-114-10**

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, Panel Chair/Commissioner
M.R. Harle, Commissioner June 30, 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 (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, pursuant to a number of different contracts; and
- D. On February 13, 2009, FortisBC notified Shaw that the Transmission License Agreement will terminate effective February 12, 2019; and
- E. 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
- F. 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

- G. 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
- H. By Order G-133-09, the Commission required submissions from FortisBC and Shaw on whether the Application should be reviewed through a Negotiated Settlement or some other process before the Commission; and
- I. Following its receipt of the submissions, by Order G-170-09, the Commission scheduled a Preliminary Procedural Conference for January 6, 2010; and
- J. Following its consideration of the submissions received at the Preliminary Conference, 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
- K. 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
- L. 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; and
- M. On March 5, 2010, FortisBC filed a request for Reconsideration of Order G-24-10, served a Leave to Appeal Application to the BC Court of Appeal from that Order, and filed a proposed Regulatory Timetable which included a one-half day hearing for the Reconsideration Application; and
- N. The Commission Panel 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 by Order G-39-10, scheduled a one-half hearing day for March 17, 2010; and
- O. 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 Application with a Regulatory Timetable that included a Procedural Conference on May 11, 2010 in Kelowna, BC; and
- P. Following the May 11, 2010 Procedural Conference the Commission issued Order G-93-10 which included, among other things, a Revised Regulatory Timetable; and
- Q. On June 2, 2010 the BC Court of Appeal granted FortisBC leave to appeal; and

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- R. On June 16, 2010, FortisBC applied under section 102 of the Act for an order suspending all process relating to the Shaw Application pending a determination by the BC Court of Appeal on the issue of the Commission's jurisdiction to hear the Application (Suspension Request); and
- S. By letter dated June 22, 2010 Shaw responded to FortisBC's Suspension Request and also sought interim relief in the form of an order requiring FortisBC "to leave Shaw's currently installed fibre optic cable in place and take no action to disrupt Shaw's service pending the resolution of the appeal, and the [Commission] determination under section 70"; and
- T. By letter dated June 28, 2010, FortisBC responded to, *inter alia*, Shaw's request for interim relief; and
- U. By letter dated June 29, 2010, Shaw replied to FortisBC's response to its request for interim relief; and
- V. The Commission Panel has considered the June 16, 22, 28, and 29, 2010 submissions of FortisBC and Shaw as well as submissions from other Interveners and considers that a determination is required.

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

- 1. FortisBC's request to suspend all regulatory process relating to the Application pending a determination by the BC Court of Appeal on the Commission's jurisdiction to hear the same is approved.
- 2. Shaw's application for interim relief pending the BC Court of Appeal decision and the Commission determination under section 70 of the Act is denied.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of June 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

JUNE 30, 2010

BEFORE:

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

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COMMISSION PANEL DETERMINATION

FortisBC Inc.'s (FortisBC) application for an order suspending all further process in the above-captioned proceeding before the British Columbia Utilities Commission (Commission) is granted, effective immediately. The application of Shaw Cablesystems Limited and Shaw Business Solutions Inc. for interim relief is dismissed.

1.0 BACKGROUND

This matter has a fairly lengthy procedural history.

Shaw Cablesystems Limited and Shaw Business Solutions Inc. (collectively, Shaw) has been using the electricity transmission infrastructure of FortisBC to support its telecommunication facilities for a number of years pursuant to several agreements, including an agreement (the Transmission License Agreement) dated July 1, 1999 between the two parties.

On October 1, 2009, FortisBC commenced Action No. S097217-Vancouver Registry, in the Supreme Court of British Columbia seeking various remedies against Shaw including a declaration that the Transmission License Agreement is terminated.

Shaw filed a Statement of Defence and Counterclaim in the Action on October 29, 2009 and also made an application to this Commission on October 26, 2009, seeking an order pursuant to section 70 of the *Utilities Commission Act* R.S.B.C. 1996 c. 473 (as amended) (the Act) that FortisBC be required to allow Shaw continued access to its electricity transmission facilities.

The jurisdiction of the Commission to hear Shaw's application was disputed by FortisBC. Following a series of submissions and determinations by the Commission Panel that it did have the necessary jurisdiction and would hear Shaw's application, FortisBC applied for and received leave to appeal the Orders pursuant to which those determinations were made to the British Columbia Court of Appeal on June 2, 2010.

It is noteworthy that very little of a substantive nature has yet transpired regarding Shaw's initial application to continue to use FortisBC's transmission facilities.

2.0 FORTISBC STAY APPLICATION

FortisBC now applies to the Commission under section 102(2) of the Act, to have the Commission suspend the operation of its orders until such time as the BC Court of Appeal rules on the issue of the Commission's jurisdiction which is now before it.

Section 102 (2) of the Act states:

"The commission may, in its discretion, suspend the operation of its decision, order, rule or regulation from which an appeal is taken until the decision of the Court of Appeal is given."

FortisBC submits that the Commission should exercise its discretion to suspend the proceedings and that it has done so in the past where:

- (a) There is a prima facie case on the merits of the Applicant's appeal;
- (b) Irreparable harm will be suffered if the stay is not granted; and
- (c) The balance of convenience favours a stay of proceedings.

Briefly, FortisBC's position is that the continuation of the process before the Commission, while an appeal is pending on the issue of the Commission's jurisdiction, is harmful and inconvenient to the participants and further, that Shaw will not be unduly inconvenienced in that it will not be deprived of a forum in which to seek a remedy, given the existing proceedings in the Supreme Court of British Columbia.

Commission Panel Discussion

The Commission Panel notes that section 75 of the Act states: "[t]he commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions." The Commission Panel intends to make its decision in this case on that basis.

3.0 SHAW RESPONSE

Shaw agrees that the success of FortisBC's leave application creates uncertainty. Shaw states that it "would consent to the stay if the Commission orders FortisBC to leave Shaw's currently installed fibre optic cable in place and take no action to disrupt Shaw's service pending the resolution of the appeal, and the BCUC determination under section 70." (Shaw Submission, p. 1)

Shaw argues that the Commission has the general power under section 73 of the Act to grant the interim relief it seeks pursuant to its jurisdiction to issue mandatory or restraining orders. Section 73 states:

"73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, *so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.*

(2) The commission may forbid and restrain the doing or continuing of anything contrary to or which may be forbidden or restrained under any Act, general or special, *to which the commission's jurisdiction extends.*" (emphasis added)

Commission Panel Discussion

The Commission Panel notes that section 73 only contemplates actions of the Commission that are consistent with its jurisdiction, given the use of the phrase "to which the commission's jurisdiction extends" in both subsections. As the Commission's jurisdiction under section 70, which is central to Shaw's application, is in issue, the Commission would need to find jurisdiction elsewhere in the Act.

4.0 FORTISBC REPLY/RESPONSE

FortisBC submits that the proceedings before the Commission should be suspended and that Shaw's application for interim relief should be dismissed.

FortisBC notes Shaw's agreement that the successful application for leave to appeal creates uncertainty in respect of the Commission's jurisdiction to hear Shaw's application and submits that the real issue before the Commission Panel is whether the Commission should grant the interim relief sought by Shaw.

FortisBC also notes that the interim relief sought by Shaw is the same relief it seeks in its Application, except on an interim basis, and submits that the uncertainty surrounding the Commission's jurisdiction extends to the interim relief. FortisBC further submits that, as Shaw can obtain injunctive relief, if warranted, from the ongoing proceedings in the Supreme Court of British Columbia, where there is no jurisdictional uncertainty, there is no need for the Commission to grant the interim relief and it should decline to do so.

5.0 SHAW REPLY TO FORTISBC RESPONSE ON SHAW'S REQUEST FOR INTERIM RELIEF

Shaw submits in reply to FortisBC's submission, that its request for interim relief is based on the scheme of regulation founded in the *Utilities Commission Act* and, in particular, the Commission's jurisdiction to regulate public utility plant and equipment through the process relating to the issuance of Certificates of Public Convenience and Necessity (CPCNs) as set out in sections 45 and 46 of the Act.

6.0 GROUNDS FOR INTERIM RELIEF

Shaw contends that the order requested is justified on the following three main grounds:

- (a) FortisBC may not discontinue service without Commission approval;
- (b) FortisBC may not alter its facilities without an amendment to its CPCN; and
- (c) The BCUC is the appropriate forum to deal with these public utility issues.

For the first ground, Shaw takes the position that FortisBC cannot discontinue "service" to Shaw without the Commission's approval under section 41 of the Act. To provide the foundation for this argument, Shaw also argues that FortisBC must obtain the Commission's approval under section 45 of the Act, which, as noted earlier, deals with the requirement for a person to obtain a CPCN prior to the construction or operation of a utility plant or system, to include the attachment of Shaw's cables to its electricity distribution system and must therefore also receive the Commission's approval to discontinue this use.

Commission Panel Discussion

Section 41 of the Act states:

"A public utility that has been granted a certificate of public convenience and necessity...and has begun any operation for which the certificate...is necessary...must not cease the operation or part of it without first obtaining the permission of the commission."

The Commission Panel notes that there is no reference to the term "service" in section 41, such that section 41 does not preclude FortisBC ceasing to provide "service" to Shaw, to the extent that it can be considered as currently doing so.

The Commission Panel also disagrees with Shaw that FortisBC necessarily required Commission approval under the provisions of the Act relating to CPCNs, namely sections 45 and 46, to allow Shaw to attach its cables to FortisBC's electricity transmission facilities. The evidence indicates that Shaw has been using FortisBC's infrastructure pursuant to a contract between the parties. That contract is the subject of litigation in the Supreme Court of British Columbia. In the Commission Panel's view, the CPCN process is relevant to the construction, operation, and/or extension of a "public utility plant or system," which would refer to FortisBC's electricity transmission facilities. The use by Shaw is an ancillary use, which may have an impact on FortisBC's cost structure and rates, but does not necessarily invoke the CPCN process.

The Commission Panel is supported in its view by the wording of section 70, which is the section Shaw seeks to invoke to continue to access FortisBC's electricity transmission facilities and is the section which will be in issue in the BC Court of Appeal. Section 70 contemplates the Commission making an order that a person, other than a public utility (i.e. Shaw) be allowed to use the electricity transmission facilities of a public utility (i.e. FortisBC) if there is a failure to agree on the use or compensation, the use will not prevent the public utility or others from performing their duties or result in a substantial detriment to their service, and the public interest requires the use of the facilities by the person.

The fact that there needs to be a failure to agree indicates that the use by Shaw of FortisBC's electricity transmission facilities can be accomplished by the agreement of the parties, which has been the case to date. Further, the requirement that the use not interfere with the public utility performing its duties supports the view that the use by another person is an ancillary use. Finally, section 70 invokes a public interest requirement, which would be otherwise duplicative if Commission approval, pursuant to the CPCN provisions of the Act, were required.

The Commission Panel's views on the issue of the necessity of Commission approval pursuant to the CPCN provisions of the Act to allow for Shaw's use of FortisBC's infrastructure are also an answer to Shaw's second ground of argument as well as its Reply.

Shaw's third ground of argument, that the British Columbia Utilities Commission is the appropriate forum to deal with issues relating to the proper use of public utility plant and the broader public interest is, in the Commission Panel's view, one of the arguments which will likely be addressed in the BC Court of Appeal proceedings.

7.0 BURDEN OF PROOF

Shaw also argues that FortisBC bears the burden of proof to establish that its proposed discontinuance of service to Shaw and the alteration of its public utility plant to cease to carry Shaw's cables are in compliance with the Act.

Given the Commission Panel's view on the applicability of the CPCN process to the dispute between the parties and the applicability of the other provisions of the Act (discussed above) to the situation before it, the Commission Panel finds this argument to be without merit.

8.0 INTERVENER SUBMISSIONS

All other Interveners in the Commission proceeding who chose to make comments, favour its suspension until the issues relating to the Commission's jurisdiction to hear Shaw's application have been determined by the BC Court of Appeal.

Commission Panel Determination

In the Commission Panel's view, the issue of jurisdiction is essential to the continuation of proceedings before it. Given the success of FortisBC's leave application, the Commission Panel is not prepared to continue the proceedings before it unless and until such time as it is determined by BC Court of Appeal that it has the necessary jurisdiction. To proceed otherwise would risk the time and resources of all the participants, including the Commission itself. Accordingly, all further process in this matter is suspended, effective immediately, pending a determination of the BC Court of Appeal on the jurisdiction of the Commission to hear Shaw's application under section 70 of the Act.

The Commission Panel is of the further view that its jurisdiction to grant Shaw the interim relief it seeks is in large measure dependent upon its jurisdiction under section 70, the very issue before the BC Court of Appeal. For this reason, and the reasons set out above, the Commission Panel declines to make the order for interim relief requested by Shaw. The Commission Panel notes as well that Shaw has made an injunction application in the Supreme Court of British Columbia and is not without a remedy, should it choose to pursue that avenue.