Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Order CRTC 2005-309

Ottawa, 26 August 2005

TELUS Communications Inc.

Reference: 8340-T66-200409286

Fibre and related services agreement

The Commission ***denies*** *the Fibre and Related Services Agreement between TELUS Communications Inc. (TCI) and 653117 B.C. Ltd. The Commission directs TCI to file a tariff with respect to the services identified in the Agreement that TCI proposes to provide to the customer.*

The application

1. The Commission received an application by TELUS Communications Inc. (TCI), dated 25 August 2004, requesting approval of a Fibre and Related Services Agreement (the Agreement) between itself and 653117 B.C. Ltd. (EnTel), a registered non-dominant carrier, pursuant to section 29 of the *Telecommunications Act* (the Act). The Agreement pertained to an arrangement for the sale of fibre optic facilities in the Nass Valley area in British Columbia and services directly related to these facilities. Initially, TCI filed the Agreement in confidence. Subsequently, as described below, the company filed an abridged version.

2. The Agreement provided for the development of fibre optic cable systems and the delivery of certain services, in two phases, for fibre facilities serving the communities in the Nass Valley, namely Gingolx, Gitwinksihlkw, Laxgalts'ap and New Aiyansh.

3. In Phase I:

   (a) TCI would transfer to EnTel a number of fibre strands located in the existing TCI fibre optic cable system located along a 10-kilometre route connecting New Aiyansh to Gitwinksihlkw (Phase I existing fibre);

   (b) TCI would transfer to EnTel a number of fibre strands in a new fibre optic cable system to be engineered and constructed by TCI located along a 36-kilometre route connecting Gitwinksihlkw and Laxgalts'ap (Phase I additional fibre);

   (c) TCI would provide to EnTel certain carrier wide area network (WAN) services and related services between Laxgalts'ap and Gingolx, and also between Terrace and New Aiyansh, in accordance with the terms of the Master Wholesale Agreement (MWA); and

(d) EnTel would pay TCI for existing and additional fibre.

4. In Phase II:

(a) EnTel would transfer to TCI a number of fibre strands in a new fibre optic cable system to be engineered and constructed by EnTel along a 53-kilometre route connecting New Aiyansh to Rosswood (Phase II additional fibre);

(b) TCI would transfer to EnTel a number of fibre strands in the existing TCI fibre optic cable system located along a 48-kilometre route connecting Rosswood and Terrace (Phase II existing fibre);

(c) if EnTel constructed a new fibre optic cable system along a 30-kilometre route connecting Laxgalts'ap and Gingolx, it would transfer to TCI a number of fibre strands in this system; and

(d) in consideration of the sale of the Phase II additional fibres by EnTel to TCI, TCI would pay EnTel a specified amount.

5. Attached as Schedule F to the Agreement was a separate Fibre Maintenance Agreement under which TCI would provide maintenance services on the fibre under the Agreement for a 10-year period and EnTel would pay to TCI a percent of all actual and reasonable costs incurred by TCI associated with maintenance services.

6. Schedule H to the Agreement referenced an MWA for the sale of carrier WAN services to EnTel. TCI submitted that although the MWA was referenced in the Agreement, the MWA was not submitted for Commission approval as it did not constitute an agreement contemplated by section 29 of the Act.

Process

7. On 24 September 2004, Axia SuperNet Ltd. (Axia) filed comments. Axia stated that, because the Agreement was filed in confidence, it was not able to provide further comment on the application without knowing more about the arrangement. Axia submitted that the Commission should direct TCI to provide an abridged copy of its Agreement with EnTel for the public record, along with justification as to why the Agreement was subject to section 29, and not section 25 of the Act.

8. On 15 October 2004, TCI filed reply comments and an abridged version of the Agreement, the latter to demonstrate that the Agreement contained nothing of an anticompetitive or discriminatory nature.

9. On 4 November 2004, Axia filed comments on the abridged version of the Agreement. On 15 November 2004, TCI filed reply comments.

10. The issues raised by the parties will be addressed as follows:

A. Whether disposition of the application is subject to section 25 or 29 of the Act;

B. Bundling of carrier WAN services; and

C. Fibre Maintenance Agreement

A. Whether disposition of the application is subject to section 25 or 29 of the Act

Positions of parties

11. Axia submitted that it appeared that the application was similar in nature to a previous TCI agreement filed pursuant to section 29 of the Act.

12. Axia stated that in *TELUS Communications Inc. – Fibre Use and Management Agreement*, Telecom Decision CRTC 2003-4, 31 January 2003 (Decision 2003-4), the Commission granted interim approval to a TCI application to provide dark fibre facilities and related management services to Axia. Axia noted that, in so doing, the Commission found that the provision of inter-exchange dark fibre, as proposed in the Agreement, was a telecommunications service and that tariff approval of the proposed service was, therefore, required pursuant to section 25 of the Act.

13. Axia also noted that in Decision 2003-4, the Commission considered that the Agreement in that proceeding did not fall within section 29 of the Act because its essence was the provision of a telecommunications service rather than primarily addressing matters falling within section 29.

14. Axia noted that in Decision 2003-4, the Commission determined that, in view of the regulatory treatment applicable to intra-exchange optical fibre, there would be merit in initiating a proceeding to consider whether it would be appropriate for TCI to similarly provide inter-exchange fibre pursuant to a general tariff. Axia noted that this was being addressed within the follow-up proceeding initiated in *Xit Télécom v. TELUS Québec - Provision of fibre optic private networks*, Telecom Decision CRTC 2003-58, 22 August 2003 and in *Xit Télécom v. Bell Canada - Provision of fibre optic private networks*, Telecom Decision CRTC 2003-59, 22 August 2003 (the Follow-up Proceeding).

15. Axia submitted that, in order to determine whether section 25 or section 29 of the Act applied to TCI's application, it was essential to determine if the service being offered was a telecommunications service under the Act or a swap of like facilities. Axia noted that in Telecom Order CRTC 99-346, dated 13 April 1999 (Order 99-346), the Commission had stated with respect to fibre swaps and costs:

> 7. Bell also submitted that while the company's GT provides for the lease of fibre facilities to other carriers under GT Item 960, Optical Fibre Service, the GT applies in situations where a carrier requires facilities from Bell, but the company does not require any facilities in exchange.

> The fact that this is a two-way arrangement makes the fibre exchange appreciably different from a one-way arrangement from the company to the customer contemplated by the tariff. Therefore, it is the company's view that no existing tariff applies to the situation in question, and an agreement under section 29 of the *Telecommunications Act* (the Act) is appropriate.

and

> 11. The Commission considers that while the agreement involves the swap of equivalent units of fibre, the costs of such identical physical units may not necessarily be the same. In a situation where Bell Mobility has built fibre at lower costs but is swapping with Bell's fibre built at a higher cost, there would be preference to Bell Mobility if the facilities were swapped.

16. Axia noted that in Phase I of the Agreement, TCI would be offering to transfer 10 kilometres of existing fibre assets plus 36 kilometres of fibre assets to be built by TELUS, in exchange for zero kilometres of existing assets or fibre to be built by EnTel and an undisclosed amount of money paid at Phase I closing. Axia submitted that Phase I appeared to be a simple sale of TCI dark fibre which, on a stand-alone basis, would require a Special Facilities Tariff (SFT) or a General Tariff filed under section 25 of the Act.

17. Axia noted that in Phase II of the Agreement, TCI would provide 48 kilometres of existing TCI fibre assets to 653117 B.C. Ltd. in exchange for 53 kilometres of fibre assets to be built by 653117 B.C. Ltd. Axia submitted that Phase II of the Agreement appeared to be a swap of equivalent units or "like for like" fibre facilities that, on a stand-alone basis, could be approved by the Commission under section 29 of the Act as a carrier agreement.

18. Axia also noted that in Phase II of the transaction, EnTel would commit to provide a further 30 kilometres of fibre assets as part of the arrangement set out in Article 2.3(c) of the Agreement: "If the Company constructs a new fiber optic system between Laxgalts'ap and Gingolx the Company will, upon completion of construction transfer to TELUS # # fiber strands in the system…." Axia submitted that the facilities referred to in Article 2.3(c) of the Agreement should not be included from a valuation perspective.

19. Axia submitted that like swaps of dark fibre between TCI and carriers in high-cost serving areas should not be discouraged and should not be subject to tariff. Axia submitted that swaps and co-builds were essential commercial arrangements to ensure cost-effective deployment of telecommunications and high-speed services in rural and remote territories. Axia argued that general tariffs priced to reflect an unrealistic premium were not in the public interest. Axia submitted that, as it had stated in the Follow-up Proceeding, availability of inter-exchange TCI dark fibre must be a certainty and could be achieved through commercial agreement and SFT application(s) whereby the Commission could ensure, on a case-by-case basis, that no unjust discrimination or undue preference existed. Further, Axia submitted that the price for inter-exchange dark fibre must recognize the essentiality, as defined in *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8), of the service and the crucial need to minimize anticompetitive mark-ups.

20. TCI noted that section 29 of the Act states:

> 29. No Canadian carrier shall, without the prior approval of the Commission, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting
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> (a) the interchange of telecommunications by means of their telecommunications facilities;
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> (b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or
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> (c) the apportionment of rates or revenues between the carriers.

21. TCI submitted that the Agreement fell under subsection 29(b) of the Act, as it pertained to the management and operation of the parties' facilities. TCI argued that the Agreement was fundamentally different from the simple one-way transaction captured in the Fibre Use and Management Agreement between TCI and Axia that had been approved in Decision 2003-4. TCI stated that that Agreement was a reciprocal deal in which two Canadian carriers proposed to exchange strategic assets in order to create a mutual benefit. TCI submitted that in this case, neither party would be selling dark fibre for compensation per se; both would be exchanging strategic assets in order to enhance their own networks at a reduced cost. TCI argued that although the Agreement did govern the transfer of fibre assets between the parties, it did not represent a means of selling dark fibre in order to generate revenue, but a means of acquiring dark fibre to better serve the communities in the Nass Valley without the capital outlay that would otherwise be required.

22. TCI questioned the general applicability of Order 99-346 to the Agreement for the following reasons.

23. First, TCI noted that the arrangement addressed by Order 99-346 contemplated the temporary use of one party's fibre in exchange for the use of the other party's fibre. TCI submitted that, in other words, the essence of that arrangement was the mutual provision of similar telecommunications services. TCI submitted that in contrast, the current Agreement did not govern the mutual provision of similar services but rather, the exchange of fibre assets.

24. Second, TCI stated that the service that Bell Canada proposed to provide to Bell Mobility under that arrangement was intra-exchange dark fibre service, a service that was also offered by Bell Canada under its General Tariff. TCI submitted that even if it was offering a dark fibre service to EnTel under the Agreement, there would be no conflict with the TCI General Tariff because the tariff did not contain an inter-exchange dark fibre service.

25. Third, TCI noted that the proposed Bell Canada-Bell Mobility arrangement was between affiliates, whereas in the current application, TCI was not affiliated with EnTel. TCI submitted that it was not reasonable that the Agreement be subject to the same level of scrutiny as was given to agreements between incumbent local exchange carriers (ILECs) and affiliates, since TCI has no interest in enriching EnTel. TCI noted that the Commission apparently agreed that these facts were significant, stating the following in paragraph 14 of Order 99-346:

> With respect to the instances that Bell cites where the Commission has approved fibre-swap agreements before, the Commission notes (i) that optical fibre facilities were not available under the GT, and (ii) these agreements did not involve the provision of local fibre facilities by a dominant telco to an affiliate.

26. TCI was of the view that Axia's specific intent in citing Order 99-346 seemed to be to capture the Commission's consideration that the costs of fibre exchanged may not be the same, even if they were of equal length. TCI noted that the Agreement included non-recurring cash settlements, specifically to address such differences, among other things. TCI submitted that, furthermore, to the extent that the assets being transferred were not precisely equal in cost, length, market value or other measures that may be contemplated, this would generally be the case in business transactions of this nature, and that the parties to the Agreement had made commercially reasonable efforts to maximize the benefit that each would enjoy. TCI argued that since TCI and EnTel were not affiliated, the Commission had no reason to suspect that TCI was not acting in its own best interests.

27. TCI submitted that the premise that Phase I of the Agreement did or could stand alone was invalid. TCI argued that the obligations in the Agreement were captured in phases for the convenience of the parties, and doing so did not suggest that the individual phases constituted stand-alone agreements. TCI stated that EnTel's obligations under Phase II of the Agreement to construct and provide fibre to TCI (and TCI's Phase II obligations to EnTel) remained an enforceable, inseparable, and material part of the Agreement. TCI stated that it would have no interest in offering Phase I on its own, and had not offered to do so. TCI submitted that therefore, Axia's assertion that Phase I would be a dark fibre sale if offered on its own was academic and unhelpful to the Commission in disposing of TCI's application. TCI argued that this argument had nothing to do with section 25 or section 29 of the Act and was an attempt to mischaracterize the nature of the Agreement as a stand-alone fibre sale in order to support unfounded claims of unjust discrimination.

Commission's analysis and determination

28. The Commission notes that it denied the application for approval of an arrangement for the swap of fibres between Bell Canada and Bell Mobility in Order 99-346 because of concerns with respect to undue preference.

29. More recently, the Commission has examined fibre swap arrangements to determine whether they involve the provision of telecommunications services and, if so, has determined that such arrangements are subject to section 25 of the Act, rather than section 29.[1]

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[1] In *NorthernTel, Limited Partnership – Fibre swapping agreement*, Telecom Order CRTC 2004-356, 29 October 2004, the Commission denied a fibre swap agreement between NorthernTel, Limited Partnership and Bell Canada. In *Société en commandite Télébec – Fibre swapping agreement*, Telecom Order CRTC 2005-21, 13 January 2005, the Commission denied a fibre swap agreement between Société en commandite Télébec and Bell Canada.

30. In *Tariff filings related to the installation of optical fibres*, Telecom Decision CRTC 97-7, 23 April 1997 (Decision 97-7), the Commission determined that the provision of optical fibre was a "telecommunications service" as defined by the Act and that the Commission had jurisdiction to order the tariffing of optical fibre on a general tariff basis. The Commission notes that since Decision 97-7, the Commission has denied fibre swap agreements and directed that a SFT be filed for the optical dark fibre, if a general tariff was not already available.

31. In Decision 2003-4, the Commission approved on an interim basis, a Fibre Use and Management Agreement arrangement between TCI and Axia, as a special facilities arrangement in which TCI provided inter-exchange dark fibre to Axia by way of indefeasible rights of use (IRUs) for use in the Alberta SuperNet project. The Commission determined that the provision of inter-exchange dark fibre was a "telecommunications service" and that tariff approval of the proposed service was, therefore, required pursuant to section 25 of the Act.

32. Further, in Decision 2003-4, the Commission considered that the Agreement in that proceeding did not fall within section 29 of the Act because its essence was the provision of a telecommunications service rather than primarily addressing matters falling within section 29, namely, the interchange of telecommunications by means of telecommunications facilities, the management or operation of facilities, or the apportionment of rates or revenues between carriers.

33. In the Commission's view, similar considerations apply in this proceeding. Notwithstanding that the arrangement is a fibre swap arrangement, the Commission considers that because it involves the provision of optical fibre, its essence is the provision of a telecommunications service rather than one or more of the matters falling within section 29, as identified above. Given this determination, the Commission considers that the arrangement is subject to section 25 of the Act, and not section 29.

34. With respect to Axia's submission that no tariff should be required for Phase II of the Agreement because the facilities are located in high-cost serving areas, the Commission considers that to the extent that a service is a telecommunications service, it is subject to tariff approval unless forborne, regardless of where it is provided. Accordingly, the Commission is not persuaded by Axia's argument.

35. With respect to TCI's position that the Agreement does not conflict with the General Tariff as TCI does not have a tariff for inter-exchange dark fibre, the Commission considers that pending the Commission's determination in the Follow-up Proceeding, it would be appropriate for TCI to file a SFT.

36. In light of the above, the Commission concludes that the Agreement falls within section 25 of the Act since its essence is the provision of a telecommunications service rather than primarily addressing matters falling within section 29.

B. Bundling of carrier WAN services

Positions of parties

37. Axia expressed concern regarding the reference in TCI's application to WAN services. Axia questioned whether the carrier WAN services were bundled or interconnected with the fibre to be sold.

38. In response to Axia's concern regarding whether the inclusion of the MWA for WAN services as a Schedule to the Agreement constituted a bundle, TCI submitted that it did not constitute a bundle for the reasons set out below.

39. TCI stated that, under the MWA, TCI was providing EnTel with carrier WAN services to connect its network to Terrace while its own fibre network was being completed through the implementation of this Agreement.

40. TCI stated that the carrier WAN services offered under the MWA provided EnTel with connectivity to Terrace, where it could purchase Internet transit services from TCI or other providers. TCI submitted that the execution of the Agreement was in no way dependent on EnTel purchasing these WAN services, Internet transit services, or any other services from TCI, nor was the offering of WAN services dependent on the Agreement. TCI noted that the parties had executed the MWA in 2003 and that termination of the Agreement would not also terminate the MWA.[2] TCI stated that the MWA was attached to the Agreement because EnTel required these services until the facilities it acquired under the Agreement were in place, and because the price that TCI would pay to EnTel for the fibre strands that EnTel provided increased in relation to the amount paid for the WAN services.

41. TCI further submitted that the Agreement, including the provision of WAN services, would have a beneficial effect on competition. TCI noted that by transferring the fibre assets as described above, both TCI and EnTel would be able to serve the Nass Valley with increased capacity and a more robust network. TCI noted that it had not restricted EnTel from providing any services in competition with TCI, nor had it obligated EnTel to buy other services from TCI. TCI argued that, on the contrary, the Agreement would make it easier for EnTel to meet the demand for high-speed Internet services in the Nass Valley and to reach Terrace to obtain competitive prices for upstream services. TCI added that the ability to enter into arrangements such as this with an ILEC might encourage non-dominant carriers to invest in facilities to underserved areas.

Commission's analysis and determination

42. The Commission notes TCI's submission that the offering of WAN services is not dependent on the provisioning of the optical fibre under the Agreement.

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[2] Article 6.5 (a) states that EnTel "… may terminate this Agreement by providing written notice to TELUS, which termination shall not affect the enforceability of the MWA which the Parties agree shall continue in full force and effect in accordance with its terms". Article 6.6 (a) contains the same text in relation to termination by TELUS.

43. Based on the information provided by TCI, the Commission concludes that there is no bundling of fibre and the MWA services in the Agreement.

C. Fibre Maintenance Agreement

Positions of parties

44. TCI submitted that in addition to the Agreement, it would also provide to EnTel fibre maintenance services for the first 10 years, after which EnTel may choose to self-supply these services or contract them to TCI or another party.

45. Axia noted that the Maintenance Agreement would cover maintenance services for all the fibre structures contained in the Agreement. Axia stated that TCI maintenance agreement(s) including rates to date had been approved by the Commission under section 25 of the Act and therefore the Fibre Maintenance Agreement should also be approved under section 25.

46. In reply, TCI disagreed that maintenance services could have or should have been offered under tariff, pursuant to section 25 of the Act. TCI submitted that the pro-rated charges for maintenance services could only reasonably be charged to carriers that had entered into a fibre arrangement similar to the Agreement. TCI argued that, in any event, Axia's argument that these services could have been offered under tariff was not a compelling reason to do so.

47. TCI submitted that Axia's assertion that only Phase II of the Agreement should be approved under section 29 of the Act seemed to be predicated on Axia's suggestion that Phase I and the Maintenance Agreement should not be. TCI argued that without this foundation, Axia had presented no reason that the entire Agreement should not be approved pursuant to section 29 of the Act.

Commission's analysis and determination

48. The Commission notes that attached as Schedule F to the Agreement, is a Fibre Maintenance Agreement under which TCI would provide maintenance services for a 10-year period on the fibre under the main Agreement, and EnTel would pay to TCI a percent of all actual and reasonable costs incurred by TCI associated with maintenance services.

49. The Commission agrees that services for maintenance would only be charged to a carrier that entered into an agreement. The Commission, however, is not persuaded by TCI's submission that a tariff is not required for the Fibre Maintenance Agreement.

50. The Commission notes that under Tariff Notice 148 (TN 148), TCI filed for approval a SFT to provide for the introduction of customer-specific fibre maintenance services in Alberta (new item 220). The proposed service would provide maintenance services on specific fibre routes and related support structures owned by the customer. The Commission approved TCI's application in *TELUS Communications Inc. – Customer-specific Fibre Maintenance Service (Alberta only)*, Telecom Order CRTC 2005-73, 23 February 2005.

51. The Commission further notes that with TN 148, TCI filed a copy of the customer-specific Fibre Maintenance Services Agreement associated with the proposed service. As reflected in that Agreement, the proposed maintenance service is related to a separate fibre-strand purchase arrangement between TCI and the customer.

52. The Commission considers that the maintenance service contemplated in the Fibre Maintenance Agreement is similar to the service for which TCI sought Commission approval in TN 148. Accordingly, the Commission concludes that service identified in the Fibre Maintenance Agreement should be filed for Commission approval as a SFT.

Commission's directives

53. In light of the above, the Commission **denies** TCI's application for approval of the Fibre and Related Services Agreement. The Commission directs TCI to file for approval, under section 25 of the Act, a SFT providing for the sale of the fibre and the associated maintenance services provided under the proposed Agreement.

Secretary General

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