



## Telecom Decision CRTC 2006-3

Ottawa, 18 January 2006

### **TELUS Communications Inc. - Applications to review and vary and to stay Telecom Decision CRTC 2005-12**

Reference: 8662-T66-200505034 and 8680-T66-200505042

*In this Decision, the Commission finds that it did not make errors in fact and/or law in Xit Télécom and Télécommunications Xittel Inc. v. TELUS Communications Inc. - Construction of a fibre optic network for the Commission scolaire de la Côte-du-Sud, Telecom Decision CRTC 2005-12, 9 March 2005. With regard to terminal equipment, the Commission finds that a tariff is not required for the equipment sold to the Commission scolaire de la Côte-du-Sud (the Commission scolaire) as it was forborne terminal equipment and not part of a bundle.*

*The Commission also finds that TELUS Communications Inc.'s (TCI) maintenance and engineering services for the Commission scolaire are telecommunications services, pursuant to section 23 of the Telecommunications Act, because they are both incidental to TCI's business of providing telecommunications services.*

*The Commission further finds that as TCI is the owner of the support structures and the grantor of the licence under that tariff, it cannot also become a third party to which a licence is subsequently transferred by the original licensee. Électro Saguenay Ltée (Électro Saguenay), as licensee, may share the ownership of its facilities with other parties so long as it maintains an ownership interest in the facility. Électro Saguenay may also share the applicable support structure access fee with other parties with whom it shares an ownership interest on a pro rata basis.*

### **Application**

1. On 22 April 2005, TELUS Communications Inc. (TCI) filed an application to review and vary *Xit Télécom and Télécommunications Xittel Inc. v. TELUS Communications Inc. - Construction of a fibre optic network for the Commission scolaire de la Côte-du-Sud*, Telecom Decision CRTC 2005-12, 9 March 2005 (Decision 2005-12). TCI simultaneously filed an application to stay Decision 2005-12 until the Commission had rendered its determination in TCI's application to review and vary Decision 2005-12.
2. TCI submitted that the Commission made errors in facts and/or in law in Decision 2005-12, which could be categorized as follows:
  - a) the Commission misapplied *Regulatory framework for Québec-Téléphone and Télébec ltée*, Telecom Decision CRTC 96-5, 7 August 1996 (Decision 96-5) regarding terminal equipment;

- b) the Commission erred in requiring TCI to file tariffs for the maintenance of fibre optic cables and the engineering service; and
- c) the Commission misinterpreted TCI's support structure tariff.

## **Background**

- 3. In Decision 2005-12, the Commission disposed of an application filed by Xit télécom on behalf of itself and Télécommunications Xittel inc. (Xit télécom), on 10 September 2004. In its application, Xit télécom alleged, among other things, that TCI had provided or was providing telecommunications services to the Commission scolaire de la Côte-du-Sud (Commission scolaire) related to the Commission scolaire's private fibre optic network (the Network) without an approved tariff, contrary to section 25 of the *Telecommunications Act* (the Act). Xit télécom requested that the Commission direct TCI to cease offering telecommunications services to the Commission scolaire without an approved tariff and to file a Special Facilities Tariff for the provision of those telecommunications services.
- 4. A panel of three Commissioners heard Xit télécom's application on an accelerated basis, in accordance with *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, 10 February 2004, in an oral hearing on 22 February 2005 (the 22 February 2005 oral hearing).
- 5. In Decision 2005-12, the Commission found that TCI was required to file tariffs for services provided to the Commission scolaire and Électro Saguenay Ltée (Électro Saguenay) for the construction and maintenance of the Network.
- 6. The Commission directed TCI to:
  - a) File a tariff for the equipment sold to the Commission scolaire, unless TCI could demonstrate that:
    - i) the equipment was forborne terminal equipment within the meaning of Decision 96-5; and
    - ii) the sale of forborne equipment was not bundled with non-forborne equipment, as specified within the Commission's bundling rules;
  - b) File a tariff for the maintenance of equipment sold to the Commission scolaire;
  - c) File a tariff for the maintenance of fibre optic cables for the Network;
  - d) File a tariff for the engineering service provided and to be provided to the Commission scolaire; and
  - e) Charge the Commission scolaire the full tariff rate for access to TCI's support structures.

## **Process**

7. On 10 May 2005, the Commission addressed interrogatories to TCI. TCI filed responses 17 and 24 May 2005.
8. Xit télécom filed comments on 31 May 2005 and TCI filed reply comments on 7 June 2005.
9. The following parties filed interventions with the Commission: Bell Canada; Société en commandite Télébec (Télébec); Coalition for Competitive Telecommunications (the Coalition); the Commission scolaire, the municipalité régionale de comté (the MRC) of l'Islet, the MRC of Montmagny and the MRC of Bellechasse individually and jointly; the municipality of Notre-Dame-du-Rosaire; the municipality of Berthier-sur-Mer; the municipality of Saint-Jean-Port-Joli; the municipality of Saint-Cyrille-de-Lessard; the municipality of Sainte-Perpétue; the municipality of Sainte-Félicité; the municipality of Saint-Henri; the municipality of Saint-Lazare-de-Bellechasse; the municipality of Saint-Adalbert Comté de l'Islet; the municipality of Saint-Gervais; the municipality of Saint-Roch-des-Aulnaies; the municipality of Saint-François-de-la-Rivière-du-Sud; the municipality of Saint-Philémon; the municipality of Saint-Charles-de-Bellechasse; the municipality of Saint-Nérée; the municipality of Beaumont; the municipality of Saint-Anselme; the municipality of Armagh; the municipality of Saint-Aubert; the municipality of Sainte-Claire; the municipality of Saint-Damien-de-Buckland; the municipality of La Durantaye; the municipality of Honfleur; the municipality of Saint-Malachie; the municipality of Saint-Michel-de-Bellechasse; the municipality of Saint-Nazaire; the municipality of Saint-Pamphile; the municipality of Notre-Dame-Auxiliatrice-de-Buckland; the municipality of Tourville and the municipality of Saint-Vallier (collectively, the Intervenors).
10. On 20 June 2005, Xit télécom and TCI each filed reply comments.

## **Issues**

11. The issues considered in this Decision are discussed below in the following sections:
  - A Terminal equipment
  - B Maintenance of fibre optic cables and engineering services
  - C Support structure tariff

### **A - Terminal equipment**

#### ***Background***

##### *Terminal equipment forbearance*

12. In Decision 96-5, the Commission found that to forbear from regulating the sale, lease and maintenance of the Competitive Terminal - Other (CT-O) equipment category (single-line telephones and accessories) and the Competitive Terminal - Multiline & Data (CT-MD)

equipment category, which includes key systems, private branch exchanges and data equipment, for Québec-Téléphone (now TCI) and Télébec, was consistent with Canadian telecommunications policy objectives.

13. In *Accutel Conferencing Systems Inc. - Definition of terminal equipment revenues within the contribution regime*, Telecom Decision CRTC 2005-32, 2 June 2005 (Decision 2005-32), the Commission determined that Accutel Conferencing Systems Inc. was providing a telecommunications conferencing service and not terminal equipment. In that determination, the Commission confirmed that equipment had to be located on the customer's premises in order to be considered terminal equipment.
14. In AGT Limited's (now TCI) Phase III Manual (TCI's Phase III Manual), approved by the Commission in *AGT Limited - Phase III Manual: Compliance with Public Notice 94-41 and Order 93-20*, Telecom Decision CRTC 95-9, 26 May 1995, the definition of CT-MD includes costs related to all data terminal equipment at a customer's premises that are not integral to the operation of the carrier-provided channel. TCI's Phase III Manual also states that the boundary between the Access and Competitive Terminal categories is the demarcation point on the customer's premises.
15. In *Interexchange competition and related issues*, Telecom Decision CRTC 85-19, 29 August 1985 (Decision 85-19), the Commission extended the definition of terminal equipment to include private networks that are not located on contiguous premises. The Commission was of the view that this would provide users greater flexibility and choice in the way they configured and operated customer-provided systems, as well as greater efficiencies and choices of equipment.

#### *Bundling*

16. In *Review of price floor safeguards for retail tariffed services and related issues*, Telecom Decision CRTC 2005-27, 29 April 2005 (Decision 2005-27), the Commission defined a tariffable bundle as an arrangement under which a subscriber is provided two or more service elements, at least one of which is a tariffed service element, under a single rate, a set of rates or other rate structure, and which provides a financial or other readily measurable benefit to any customer or identifiable group of customers that is contingent on the use, consumption of, or subscription to any or all service elements.

#### *Positions of parties*

17. TCI noted that the Network was built using a star configuration. TCI submitted that the main switch was located at the Commission scolaire's administration centre, with distribution facilities and switches installed at various secondary schools in different municipalities, affiliated with the Commission scolaire and connected to the main switch.
18. TCI submitted that the equipment sold to the Commission scolaire for the construction of the Network was forborne terminal equipment in accordance with Decision 96-5. In addition, TCI submitted that the equipment was:

- a) data equipment;
  - b) located on the customer's premises, on the customer's side of the demarcation point;
  - c) under the control of the customer who could install, modify or change the configuration of the equipment;
  - d) not integral to the operation of TCI's network; and
  - e) sold by TCI to the Commission scolaire at a profit.
19. Xit télécom submitted that in *Attachment of subscriber-provided terminal equipment*, Telecom Decision CRTC 82-14, 23 November 1982, the Commission determined that in order to qualify as terminal equipment, the equipment had to operate within a single building, or the portion thereof owned or leased by the subscriber, or between buildings, or the portions thereof owned or leased by the subscriber, provided these buildings were on contiguous property and within the same exchange.
20. Intervenors who provided comments on the terminal equipment submitted that the equipment sold to the Commission scolaire was forborne terminal equipment. The Commission scolaire, the Coalition and the MRCs of l'Islet, Montmagny and Bellechasse submitted that the equipment was forborne terminal equipment because it was located on the Commission scolaire's premises and was within the Commission scolaire's control. The Coalition noted that Xit télécom had admitted that the equipment was terminal equipment at the 22 February 2005 oral hearing. The Coalition further submitted that the terminal equipment market was competitive and stated that there were numerous suppliers and a vast array of types of equipment available from which customers could choose.

***Commission's analysis and determinations***

21. As noted above, in Decision 2005-12 the Commission directed TCI to file a tariff for the equipment sold to the Commission scolaire unless TCI could demonstrate that the equipment was forborne terminal equipment within the meaning of Decision 96-5.
22. In Decision 96-5, the Commission outlined the types of terminal equipment that were forborne. The Commission notes that, in subsequent determinations, it provided further guidance as to the types of terminal equipment that would be subject to forbearance. The Commission has found that terminal equipment would be subject to forbearance where the terminal equipment is:
- a) data equipment (Decision 96-5);
  - b) located on customer's premises (Decision 2005-32);
  - c) located on the customer side of the demarcation point (TCI's Phase III Manual); and
  - d) not integral to the operation of the carrier's network (TCI's Phase III Manual).

23. In regard to Xit télécom's submission that terminal equipment must only operate within a building or buildings owned by the customer and located on contiguous lands located within an exchange, the Commission notes that in Decision 85-19, it extended the definition of terminal equipment to include private networks that are not located on contiguous premises.
24. The Commission considers that the market for the various types of equipment sold by TCI to the Commission scolaire is highly competitive and protects customers from potential abuse. The Commission is of the view that the reasons for extending the definition of terminal equipment to include private networks that are not located on contiguous premises also apply to private networks located in more than one exchange. Accordingly, the Commission considers that forborne terminal equipment used in private networks does not need to be on contiguous exchanges.
25. Based on the information provided by TCI with respect to the terminal equipment, the Commission is satisfied that all of the terminal equipment sold to the Commission scolaire is forborne pursuant to Decision 96-5.
26. In view of the fact that all of the terminal equipment sold by TCI to the Commission scolaire was forborne terminal equipment, the Commission considers that TCI did not bundle forborne terminal equipment with non-forborne equipment.
27. The Commission further considers that the sale of the terminal equipment was not bundled with any of the other tariffed services provided by TCI, namely maintenance, engineering and support structure services, because neither Électro Saguenay nor the Commission scolaire drew a benefit, financial or otherwise, that was contingent on the purchase of the equipment. Accordingly, the Commission is satisfied that the forborne terminal equipment was also not bundled with other tariffed services.
28. The Commission finds that TCI, as directed by the Commission in Decision 2005-12, has demonstrated that the equipment sold to the Commission scolaire was forborne terminal equipment and was not provided with any tariffed service element. Therefore, the Commission finds that TCI does not need to file a tariff for the sale of the equipment it sold to the Commission scolaire.
29. The Commission notes that in Decision 96-5, it forbore from the maintenance of terminal equipment where the terminal equipment was forborne. As the terminal equipment sold by TCI to the Commission scolaire is forborne, the Commission finds that maintenance of the terminal equipment is also forborne. Therefore TCI does not need to file a tariff with respect to the maintenance of the terminal equipment it sold to the Commission scolaire.

## **B - Maintenance of fibre optic cables and engineering services**

### ***Background***

30. Section 2 of the Act provides the following definitions:

"telecommunications facility" means any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility;

"telecommunications service" means a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise;

"transmission facility" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.

31. Section 23 of the Act provides that:

For the purposes of this Part and Part IV, "telecommunications service" has the same meaning as in section 2 and includes any service that is incidental to the business of providing telecommunications services.

32. Subsection 25(1) of the Act provides that:

No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

33. In *Bell Canada - Provision of telephone directory data base information in machine-readable form*, Telecom Decision CRTC 90-12, 14 June 1990, the Commission stated that under the *Railway Act*, the predecessor legislation to the Act, its approach to determine whether the provision of a service was incidental to a telephone business had been to consider the extent to which the service in question engaged fundamental elements of the telephone system or the relationship that the service in question bore to the essential nature of the telephone business. The Commission found that the more the service in question involved fundamental components for the provision of telephone services, and was closely related to services generally provided by telephone systems, the more likely the service was to be contemplated by the definition of toll in the *Railway Act* and thus subject to Commission regulation.

34. In *AGT Limited - Revenue requirement for 1992*, Telecom Decision CRTC 92-9, 26 May 1992, the Commission found that the installation and maintenance of telecommunications equipment constituted incidental services for a telephone business, and charges for such services were thus considered tolls within the meaning of the *Railway Act*.
35. In *Tariff filings related to the installation of optical fibres*, Telecom Decision CRTC 97-7, 23 April 1997, the Commission rejected TCI's suggestion that optical fibre that was only provided in response to customer-initiated requests did not constitute a service to the public. The Commission determined that the provision of optical fibre was a telecommunications service and that it had the jurisdiction to order the tariffing of optical fibre on a General Tariff basis.
36. In *Part VII Application by Vidéotron Télécom ltée against Bell Canada and BCE Nexxia Inc. relating to the provision of fibre optic private network*, Telecom Decision CRTC 2005-8, 28 February 2005 (Decision 2005-8), the Commission found that Bell Canada was providing maintenance and support structure services to the Patriotes School Board without an approved tariff. The Commission determined that those services were telecommunications services and had to be provided in accordance with approved tariffs.
37. In *Customer-specific Fibre Maintenance Service (Alberta only)*, Telecom Order CRTC 2005-73, 23 February 2005 (Order 2005-73), the Commission approved a customer-specific arrangement filed by TCI under Tariff Notice 148 (TN 148) for fibre maintenance on specific fibre routes and related support structures owned by a customer in Alberta.

#### *Positions of parties*

38. TCI submitted that the Commission erred in requiring that it file tariffs for the maintenance of fibre optics and for the engineering service. TCI submitted that the Commission did not provide adequate rationale to conclude that maintenance and engineering services were telecommunications services. TCI argued that maintenance of the Network was not a telecommunications service because it was for the benefit of an unregulated party, the Commission scolaire, for the maintenance of a private network. TCI similarly argued that the engineering service was not a telecommunications service because it was used in the construction of a private network by an unregulated party, Électro Saguenay, for the benefit of another unregulated party, the Commission scolaire.
39. TCI submitted that filing TN 148 was not an admission that the maintenance of fibre optic cables was a telecommunications service. TCI submitted that it filed TN 148 because the customer wanted to reduce its regulatory risks. TCI further submitted that Commission approval of TN 148, in Order 2005-73, did not prove that the maintenance of fibre optic cables was a telecommunications service because the Commission had not explained in that Order how the service met the test to qualify as a telecommunications service.
40. TCI noted that it had hired an independent engineering firm to provide the engineering service, and had then sold the services to the Commission scolaire. TCI submitted that any update required after the construction of the Network was an extension of the original service and not a future or additional service. TCI submitted that since the Network was for the

Commission scolaire's own internal needs and would not be used to offer telecommunications services to the public, the engineering service required to build the Network should not qualify as a telecommunications service.

41. Xit télécom submitted that, in Decision 2005-8, the Commission determined that the maintenance of fibre optic cables was a telecommunications service.
42. Xit télécom also submitted that because the engineering service was indirectly provided by TCI through a subcontractor, it should be considered a telecommunications service. Xit télécom noted that the Commission had never forborne from the regulation of engineering service.
43. The Commission scolaire and the MRCs of l'Islet, Montmagny and Bellechasse submitted that TCI did not and would not directly provide an engineering service for the construction of the Network.
44. In reply, TCI submitted that Decision 2005-8 was not relevant to this matter as the Commission did not rely on it in Decision 2005-12.

*Commission's analysis and determination*

45. The Commission notes that, pursuant to section 2 of the Act, a telecommunications service includes the provision in whole or in part of telecommunications facilities and any related equipment. The Commission also notes that a telecommunications facility includes a transmission facility which is defined as any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points.
46. The Commission notes that the definition of telecommunications service in section 23 of the Act focuses on any service that is incidental to the business of providing telecommunications services.
47. The Commission considers that the Network is a transmission facility as defined in section 2 of the Act, as it consists, among other things, of fibre optic cable and is used for the transmission of intelligence between network termination points. The Commission notes that section 2 of the Act does not distinguish between public and private transmission facilities for the purpose of defining a telecommunications service.
48. The Commission notes that TCI did not contest that it was providing a maintenance service for the fibre optic cables used in the Network for the Commission scolaire.
49. The Commission considers that maintenance of the elements, such as fibre optic cables, of a telecommunications network is critical to ensure that it remains operational and is therefore fundamental to the provision of telecommunications services.
50. The Commission notes that it has found that the maintenance of telecommunications facilities was a telecommunications service where no network facilities were provided or where a maintenance service was provided for a customer-owned network. In such cases, the

Commission considered that maintenance service was a telecommunication service, pursuant to section 23 of the Act, as it was incidental to the business of providing telecommunication services.

51. In this case, the Commission also finds that the maintenance of the fibre optic cables provided by TCI to the Commission scolaire is a telecommunications service, pursuant to section 23 of the Act, because this service is incidental to TCI's business of providing telecommunications services.
52. The Commission notes that TCI specifically contracted the engineering plans for the construction of the Network. The Commission notes that TCI sold these engineering plans to the Commission scolaire who used them with Électro Saguenay to construct the Network. The Commission therefore considers that TCI did in fact provide an engineering service to the Commission scolaire.
53. It is the Commission's view that the construction of telecommunication networks cannot be achieved without the engineering plans and as a result, the plans are fundamental to the provision of telecommunications services, namely, a transmission facility.
54. The Commission finds that the engineering service provided by TCI to the Commission scolaire is a telecommunications service, pursuant to section 23 of the Act, because this service is incidental to TCI's business of providing telecommunications services.
55. With regard to the ongoing need for an engineering service, the Commission notes that the engineering firm is required to update the engineering plans upon completion of the Network. The Commission considers that ongoing updates to the engineering plans are a continuation of the engineering service provided by TCI to the Commission scolaire.
56. Accordingly, the Commission finds that it did not commit an error in fact and/or in law in Decision 2005-12 when it ordered TCI to file tariffs for the maintenance and engineering services provided and to be provided to the Commission scolaire pursuant to subsection 25(1) of the Act.

### **C - Support structure tariff**

#### ***Background***

57. TCI's support structure service, under section 4 of its General Tariff states that:

[TRANSLATION]

#### Item 4.12.01

- a. The support structure service allows cable television undertakings or Canadian carriers to install their own facilities on structures owned or controlled by the Company, where spare capacity is available.

#### Item 4.12.02

...

##### h. Licence

A non-exclusive license granted by the Company to a licensee to use support structures for the placement of the licensee's facilities under the terms and conditions of this Support Structure Service Tariff and the Support Structure License Agreement.

...

##### o. Licensee

A cable television undertaking duly licensed or exempted by the Canadian Radio-television and Telecommunications Commission (Commission) or a Canadian carrier as defined in the *Telecommunications Act*, that has been granted a licence pursuant to the terms and conditions of this Tariff item.

...

#### Item 4.12.03

- a. The licensee must enter into a Support Structure License Agreement (SSA) with the Company, the form of which has been approved by the Commission and which, together with this Tariff item, defines the support structure service. The terms of the support structure service are governed by this Tariff item. The Tariff item on support structures shall prevail in all cases where it conflicts directly with the SSA. Where the General Tariff, including the Terms of Service, conflicts directly with the specific Tariff item on support structures or the SSA, the aforementioned Tariff item or the SSA as applicable, shall prevail.
- b. The Company provides to the licensee the use of support structures where spare capacity is available except where such use will unduly interfere with the rights of any joint user or other licensee.
- c. The licensee may not assign, sublet, sublease or otherwise transfer its access to support structures to third parties without the Company's prior written consent, which consent shall not be unreasonably withheld. The licensee may share ownership of its facilities with a third party. In all such cases, the licensee remains fully responsible for compliance with the rates, terms and conditions of support structures access as if it remained sole owner of the facilities for which it shares an ownership interest.

### *Positions of parties*

58. TCI submitted that Électro Saguenay was the only party licensed to access TCI's support structures while the Network was under construction and was consequently solely responsible to pay the tariff rate. TCI submitted that the Commission's direction that TCI charge the Commission scolaire the full support structure tariff while Électro Saguenay was the sole licensee was therefore contrary to the tariff.
59. TCI also submitted that it would transfer ownership of the Network to the Commission scolaire once Électro Saguenay had completed its construction. TCI submitted that at that time, it would acquire the sheath and the remaining fibre optic cables within it. TCI further submitted that it would assume Électro Saguenay's support structure licence and thereby replace Électro Saguenay as the licensee under the tariff.
60. TCI stated that as the licensee, it would be responsible for the payment of the entire support structure tariff rate and would share the access fee with any other party with which it shared the sheath, namely the Commission scolaire. TCI submitted that it was standard industry practice that a licensee under the tariff and third parties that owned fibres in the same optical fibre sheath divide the tariff rate on a *pro rata* basis. TCI added that requiring each party that owned fibres in the same fibre optic sheath to pay the full support structure tariff rate would be tantamount to requiring each party to have a dedicated facility. TCI submitted that sharing the support structure tariff on a *pro rata* basis allowed for an efficient use of its support structures.
61. Xit télécom submitted that in assuming the support structure licence from Électro Saguenay, TCI was attempting to provide access to its support structures to the Commission scolaire at a lower rate than the tariff rate. Xit télécom submitted that TCI's interpretation of its tariff was anti-competitive.
62. Bell Canada and Télébec agreed with TCI that only the licensee could be charged the support structure tariff rate. Bell Canada and Télébec also submitted that it was standard industry practice for the licensee to share the applicable support structure access fee on a *pro rata* basis with other parties who owned fibres in the same fibre optic sheath.
63. The Commission scolaire and the MRCs of l'Islet, Montmagny and Bellechasse questioned why they would be required to pay the full support structure tariff rate when they shared ownership of the fibres in the sheath with other parties.

### *Commission's analysis and determination*

64. The Commission notes that, pursuant to its support structure tariff, TCI may only grant a licence for access to its support structures to Canadian carriers and broadcast distribution undertakings (BDUs). The Commission notes that Électro Saguenay is a Canadian carrier and, as such, is eligible to hold a licence under TCI's support structure tariff. The Commission further notes that in its current capacity, the Commission scolaire is neither a Canadian carrier nor a BDU and thus cannot qualify as a licensee under TCI's support structure tariff.

65. The Commission also notes that the agreement between TCI, Électro Saguenay and the Commission scolaire anticipates that upon completion of the Network, Électro Saguenay will transfer ownership of the Network to the Commission scolaire and the remaining fibre optic cables, the sheath and its support structure licence to TCI.
66. The Commission notes that, pursuant to TCI's support structure tariff, Électro Saguenay must enter into a Support Structure Licence Agreement with TCI in order to gain access to TCI's support structures. The terms and conditions of the tariff also allow the licensee, in this case Électro Saguenay, to assign, sublet, sublease or otherwise transfer its licence to third parties. The tariff further allows the licensee to share ownership of the facilities with third parties, on the condition that the licensee remains fully responsible for compliance with all the terms and conditions of the tariff. The Commission notes that, according to certain parties to this proceeding, this reflects standard industry practice.
67. The Commission considers that because TCI is the owner of the support structures and the grantor of the licence under the tariff, it cannot also become a third party to which a licence is subsequently transferred by the original licensee. In the Commission's view, allowing the transfer of a support structure licence back to the incumbent telephone company that originally granted the licence would allow the incumbent telephone company to provide non-tariff access to its support structures. Accordingly, although Électro Saguenay, as licensee, can assign, sublet, sublease or otherwise transfer its licence to a third party, the Commission finds that TCI does not qualify as a third party in this case and Électro Saguenay therefore cannot transfer its licence to TCI.
68. The Commission considers that there is no basis in the tariff to allow Électro Saguenay to remain a licensee under the tariff, after having transferred all of its ownership interests in the Network to the Commission scolaire and the remaining fibre optic cables to TCI. While TCI's support structure tariff allows Électro Saguenay to share ownership of a fibre facility, it requires that the party sharing its ownership have an ownership interest over some part of the fibre in the facility. The Commission is therefore of the view that if Électro Saguenay transfers all of its ownership interest in the Network and in the remaining fibre optic cables to the Commission scolaire and TCI, it would no longer qualify as a licensee.
69. With regard to the industry practice allowing a licensee to recoup the tariff rate on a *pro rata* basis from parties sharing the same facility, the Commission agrees that the practice permits an efficient and cost-effective use of support structures. The Commission considers that the practice reduces the number of licensees with facilities on the support structures and encourages cooperation between parties seeking access to the incumbent telephone company's support structures.
70. In light of the above, the Commission finds that:
  - a) TCI cannot be a licensee or sublicensee of its own support structures;
  - b) Électro Saguenay, as licensee, may share the ownership of a facility with other parties, such as the Commission scolaire, so long as Électro Saguenay maintains an ownership interest in the facility; and

c) Électro Saguenay may share the applicable support structure access fee with the Commission scolaire on a *pro rata* basis.

71. The Commission notes that in Decision 2005-12, it directed TCI to charge the Commission scolaire the full support structure tariff rate for access to TCI's support structures. In light of the findings above, the Commission provides the following clarification to Decision 2005-12:

- TCI must charge the full support structure tariff rate to one licensee;
- if Électro Saguenay remains the licensee, TCI must charge Électro Saguenay the full support structure tariff rate;
- if the Commission scolaire becomes the licensee once satisfying the licensee eligibility requirements under the tariff, then TCI must charge the Commission scolaire the full support structure tariff rate.

### **Stay of Decision 2005-12**

72. In light of the fact that the Commission has rendered its determinations regarding TCI's application to review and vary Decision 2005-12, the Commission considers it unnecessary to address TCI's application to stay Decision 2005-12.

Secretary General

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*