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

Telecom Decision CRTC 2007-100

Ottawa, 25 October 2007

Shaw Cablesystems Limited's request for access to highways and other public places within the District of Maple Ridge on terms and conditions in accordance with Decision 2001-23

Reference: 8690-S9-200704900

In this Decision, the Commission grants Shaw Cablesystems Limited and any of its affiliated companies that is a Canadian carrier or a distribution undertaking, access to highways and other public places in the District of Maple Ridge, pursuant to subsection 43(4) of the Telecommunications Act. *The Commission also sets out the terms and conditions of a municipal access agreement that will govern that access.*

Introduction

1. On 30 March 2007, Shaw Cablesystems Limited (Shaw), on behalf of itself and its affiliated companies including Shaw Communications Inc., filed an application with the Commission. Shaw sought an order for access to highways and other public places within the District of Maple Ridge, British Columbia (the District or Maple Ridge) to construct, maintain and operate its transmission lines and related communications network facilities. Shaw requested that such access be granted under terms and conditions to be determined by the Commission in accordance with the principles set out in Decision 2001-23 (or the Ledcor Decision), as contained in the template municipal access agreement (MAA) attached to its application as Appendix 1 (the Shaw MAA), or such other conditions as the Commission may determine.

2. The Commission received submissions and/or responses to its interrogatory from Shaw and Maple Ridge. The record of the proceeding closed with a letter from Maple Ridge dated 16 July 2007.

Issues

3. The Commission considers that the parties' submissions in this proceeding raise the following issues:

    1. Maple Ridge's request for denial/adjournment of the application,

    2. Shaw's request for access pursuant to section 43 of the *Telecommunications Act* (the Act), and

    3. The terms and conditions of the MAA between Shaw and Maple Ridge.

4. The Commission notes that it must first address a procedural issue as to whether part of an interrogatory response by Maple Ridge should be excluded from the record of this proceeding as requested by Shaw.

Procedural ruling

5. In the Commission's interrogatory dated 6 June 2007, Shaw and Maple Ridge were asked, in view of Decision 2001-23, to compare the terms and conditions set out in the Shaw MAA with the correlative terms and conditions of the Richmond MAA.[1]

6. As part of its interrogatory response, Maple Ridge provided, among other things, a draft MAA which it found acceptable (the District MAA).

7. In response, Shaw submitted that Maple Ridge had placed new evidence on the record to which Shaw had not had an opportunity to reply. Shaw further submitted that Maple Ridge had proposed a comprehensive MAA setting out specific fees and terms for the first time. In Shaw's view, Maple Ridge's response went beyond the scope of the interrogatory and effectively sought to reply to Shaw's reply comments of 8 May 2007. Shaw indicated that it did not intend to provide further reply comments in response to Maple Ridge's letter.

8. In reply, Maple Ridge denied that it was attempting to circumvent the process by seeking to reply to Shaw's reply comments of 8 May 2007. Maple Ridge submitted that the purpose of the interrogatory was to determine what each party objected to and what each party would agree to in terms of an MAA.

9. The Commission notes that the establishment of appropriate terms and conditions of an MAA is the subject of the current proceeding. The Commission considers that the information filed by Maple Ridge provides terms and conditions favoured by Maple Ridge in an MAA that permits the Commission to better understand the nature of the issues that are at the core of the dispute between the parties. Accordingly, the Commission considers that the information filed by Maple Ridge is within the scope of the proceeding.

1. Maple Ridge's request for denial/adjournment of the application

Positions of parties

Maple Ridge

10. Maple Ridge submitted that the Commission should deny Shaw's application because:

    (a) while Shaw and Maple Ridge met to negotiate mutually advantageous business terms from April 2005 to January 2007, in the fall of 2006 they agreed to use as their starting point the Richmond MAA[2] which was consistent with the principles set out in the Ledcor Decision (Ledcor principles) and negotiations were proceeding until Shaw unilaterally terminated them;

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[1] In its Answer of 30 April 2007, Maple Ridge filed a copy of the MAA entered into by Shaw and the City of Richmond, British Columbia.

[2] Shaw and the City of Richmond had agreed on the terms of an MAA on or about August 2006, and upon ratification by the City of Richmond, the Richmond MAA would be available for review by other municipalities. On 15 December 2006, Shaw and the City of Richmond executed the MAA.

(b) Shaw's application was premature in that, other than the infrastructure Shaw had attempted to install in 2005, there was no evidence that Shaw had been denied access to the highways and public places of the District and Shaw had never made the District aware of any other needs that it had had to install infrastructure;

(c) since filing its application, Shaw had attempted to execute an interim agreement which was inconsistent with the relief sought in its application and inconsistent with the Vancouver/Shaw 2005 letter[3] wherein the Commission agreed that it was appropriate for Shaw to enter into a long-term agreement with Vancouver, and that an interim access agreement was inappropriate;

(d) Shaw's application was an attempt to bypass good faith negotiations with the District; and

(e) while for the purposes of this proceeding the Commission has jurisdiction to order the District to permit Shaw to have access to District highways, the Commission does not have jurisdiction to determine a long-term MAA. In Maple Ridge's view the Commission does not have the jurisdiction to impose and should not impose on the District the contractual terms set out in Shaw's template MAA, especially when those terms were contrary to the agreement by Shaw to use, as a starting point, the Richmond MAA. Maple Ridge added that contrary to the situation in the Vancouver/Shaw 2005 letter, sufficient time had not passed for the District "to be in a position to enter into a long-term, general application MAA."

11. Maple Ridge submitted that in the alternative, the Commission should adjourn Shaw's application either generally or to a specific date, without prejudice to either the District or Shaw. Maple Ridge stated that it had negotiated, and remained committed to negotiating, the MAA with Shaw consistent with the principles set out in Decision 2001-23 over the next two or four months.

Shaw

12. Shaw stated that it had been negotiating with Maple Ridge since April 2005. Shaw further stated that by January 2007, Maple Ridge had not provided comments on any of the MAAs that Shaw had put forward.

13. According to Shaw, it had been advised by Maple Ridge in 2005 that access would be denied until an MAA was in place and as a result it had had to use TELUS Communications Inc.'s (now TELUS Communications Company (TCC)) facilities. Shaw stated that despite two years of negotiations, it did not have access to the highways and other public places in Maple Ridge, and as such, its application was not premature.

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[3] In a Commission letter dated 1 September 2005, in the context of an application by Shaw for access to the City of Vancouver, the Commission recommended that the parties resume negotiations (the Vancouver/Shaw 2005 letter).

14. Shaw stated that it had proposed to Maple Ridge a time-limited interim arrangement while an MAA was negotiated that was not inconsistent with the application. Shaw further stated that it had at all times conducted itself in good faith and with a genuine desire to obtain access at reasonable terms and conditions.

15. Shaw noted that while the District acknowledged the Commission's jurisdiction to order the District to permit Shaw to have access to highways and public places in Maple Ridge, the District contended that the Commission does not have the jurisdiction "to impose contractual terms on the District." Shaw argued that this was a distinction without a difference. Shaw stated that subsection 43(4) of the Act gives the Commission the power, having due regard to the use and enjoyment of the highway or other public place by others, to permit a carrier or distribution undertaking to construct its facilities "subject to any conditions that the Commission determines." Shaw submitted that the fact that such conditions might include the conditions contained in Shaw's template MAA did not mean that the Commission would be "imposing contractual terms" on the parties.

16. Shaw argued that sending the parties back to the negotiating table would only prolong the impasse, causing further harm to Shaw's operations in Maple Ridge and undermining the Commission's policy of facilities-based competition. Shaw therefore requested that the Commission permit immediate access to highways and other public places in Maple Ridge.

Commission's analysis and determination

17. Section 43 of the Act provides the following:

> 43. (1) In this section and section 44, "distribution undertaking" has the same meaning as in subsection 2(1) of the *Broadcasting Act*.
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> 43. (2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.
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> 43. (3) No Canadian carrier or distribution undertaking shall construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.
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> 43. (4) Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the permission subject to any conditions that the Commission determines.

18. The Commission notes that Shaw filed its application on 30 March 2007 as a result of failed negotiations with Maple Ridge for a mutually agreeable MAA. The Commission notes that in 2005, when Shaw attempted to install its own infrastructure, Maple Ridge denied Shaw permits until an MAA was executed. The Commission notes that Shaw has had to use TCC's facilities in order to serve its customers. The Commission also notes that, by Maple Ridge's own admission, the parties were in negotiations from April 2005 to January 2007.

19. The Commission notes that after Shaw executed the MAA with Richmond in December 2006, Maple Ridge and Shaw were unable to reach a mutually acceptable MAA using the Richmond MAA either before or since Shaw filed its application in March 2007.

20. The Commission notes that after Shaw filed its application Shaw made attempts, in April 2007, to reach an interim access arrangement that would have a specific deadline that would allow Shaw to construct its facilities. In this regard, the Commission notes that Shaw was prepared to provide a Certificate of Insurance and, if required, a Letter of Credit equal to the value of any roadway restoration it would undertake as part of its work, and to retroactively adjust any permit fees paid to the District consistent with the terms of a final MAA. The Commission does not consider Shaw's attempts to reach an interim access arrangement in order to meet its immediate needs to be inconsistent with Shaw's desire to reach a final agreement with Maple Ridge. The Commission considers that this position was reasonable given Maple Ridge's stated position that Shaw would be denied access until an MAA had been agreed upon.

21. The Commission further notes that there is no evidence that the parties have since reached an agreement.

22. With respect to Maple Ridge's request to deny Shaw's application for the reasons put forward in paragraphs 10 (a) to (d) above, the Commission considers that the record of this proceeding clearly demonstrates that the parties have had ample opportunity over the past two years to reach an agreement and have not done so. Based on the evidence provided, the Commission is not convinced that the parties would be able to quickly reach agreement if further time was provided for negotiations. In light of the above, the Commission considers that it would not be appropriate to deny Shaw's application on the basis outlined by Maple Ridge in items (a) to (d) in paragraph 10 above. The Commission also considers that for the same reasons, it would not be appropriate to grant Maple Ridge its alternative request for an adjournment.

23. With respect to Maple Ridge's submission regarding the Commission's jurisdiction set out in paragraph 10 (e) above, the Commission notes that section 43 of the Act provides it with broad discretion to impose conditions on any order granting access to a highway or other public place. The Commission considers that section 43 is not limited in the manner suggested by Maple Ridge.

24. The Commission has consistently identified access to municipal rights-of-way as a barrier to entry and to local competition. The Commission considers that in order for the full benefits of local competition to be realized through facilities-based competition, Shaw should be able to plan the orderly build-out of its network with certainty of access to the highways and other public places in Maple Ridge under an MAA of general application.

2. Shaw's request for access pursuant to section 43 of the Act

Positions of parties

Shaw

25. Shaw noted that in Decision 2001-23, the Commission established the Ledcor principles to assist carriers and municipalities in negotiating terms and conditions under which municipalities grant carriers access to construct, maintain and operate transmission lines on or in municipal property.

26. Shaw noted that among the principles articulated in Decision 2001-23 was the notion that municipalities should be able to recover the causal costs incurred when carriers construct, maintain and operate transmission lines in municipal rights-of-way and that the Commission defined causal costs as prospective (forward-looking) and incremental (only costs that change as a result of the project).[4] Shaw further noted that in Decision 2001-23, the Commission had determined that "market-based" charges were neither necessary nor appropriate.[5]

27. Shaw stated that since 2005 it had been unable to obtain access to municipal rights of way in Maple Ridge at terms and conditions consistent with the Ledcor principles.

28. Shaw stated that although it and the District had made progress in defining and resolving some of the terms of an MAA, the District's repeated insistence on "special compensation" in the form of the provision of fibre optic cable as consideration for entering into MAA discussions was contrary to the Ledcor principle that municipalities should recover only their prospective and incremental costs. Shaw noted that moreover, Maple Ridge had refused to issue any permits to Shaw until an agreement was signed.

29. Shaw stated that it was willing to pay the direct causal and related costs for access in accordance with the Ledcor principles but was not, however, prepared to pay to the District, or to any other municipality, a package of extraordinary benefits beyond those costs described in the Ledcor Decision.

30. Shaw noted that as a result of its inability to finalize an MAA with Maple Ridge, it had been unable to construct its own facilities within the District and had been forced to rely on the facilities of its competitors to serve its customers.

31. Shaw submitted that as such, it was requesting the Commission to exercise its authority under subsection 43(4) of the Act to grant Shaw access to Maple Ridge municipal property at reasonable terms and conditions. Given the time-sensitive nature of this matter and the substantial costs associated with continuing delay, Shaw requested that the Commission deal with this application on an expedited basis.

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[4] Decision 2001-23 at paragraph 61.

[5] Decision 2001-23 at paragraph 120.

Maple Ridge

32. Maple Ridge denied Shaw's claim that Shaw had been unable for two years to negotiate an MAA. Maple Ridge argued that Shaw, by its own admission in a 27 September 2006 email, had agreed to use the Richmond MAA as the starting point. Maple Ridge noted that, in fact, the Richmond MAA had not been executed until 15 December 2006. Maple Ridge stated that at no time did it refuse to execute an MAA unless Shaw provided some form of "consideration" to the District.

33. Maple Ridge submitted that contrary to Shaw's agreement to use the Richmond MAA as the starting point, the Shaw MAA, though similar to the Richmond MAA, differed on several key elements.

Shaw's reply

34. Shaw submitted that the record of this proceeding provided ample evidence that the parties had commenced negotiations in April 2005 and that by January 2007 the District had still not provided substantive comment to Shaw on any of the MAAs or interim access proposals. Shaw further stated that it had notified the District on several occasions that if a negotiated settlement could not be reached it would be forced to seek a remedy under subsection 43(4) of the Act.

Commission's analysis and determination

35. The Commission notes that Shaw and Maple Ridge started negotiations in April 2005. The Commission notes that since April 2005 the parties have been back and forth in negotiations and have even continued to negotiate after Shaw filed its application. The Commission notes that there are a number of areas of disagreement with respect to the terms under which Maple Ridge is to provide access to Shaw. The Commission finds that despite efforts to negotiate a mutually acceptable MAA, Shaw has been unable, on terms acceptable to it, to obtain the consent of Maple Ridge to construct transmission lines within Maple Ridge.

36. In the Commission's view, ample time has passed for Shaw and Maple Ridge to negotiate an MAA that would allow Shaw access to any highway or other public place in Maple Ridge for the purpose of constructing, maintaining or operating its transmission lines. Accordingly, the Commission considers it appropriate to grant Shaw or any of its affiliated companies that are Canadian carriers or distribution undertakings, permission to construct transmission lines in the District of Maple Ridge, pursuant to section 43 of the Act.

37. However, the Commission's powers under section 43 of the Act are subject to the Governor in Council's *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (the Policy Direction).

38. In the Commission's view, the following sections of the Policy Direction are pertinent to the application:

> 1(*a*) the Commission should (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;
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> 1(*b*) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that (i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with this Order.

39. With respect to subparagraph 1(*a*)(i) of the Policy Direction, as noted above, the Commission is of the view that ample time has passed for Shaw and Maple Ridge to negotiate an MAA. The Commission is also of the view that no further progress would be made by directing the parties to return to the bargaining table as suggested by Maple Ridge. Accordingly, the Commission considers that market forces cannot be relied on to achieve the telecommunications policy objectives set out in paragraph 41 below.

40. With respect to subparagraph 1(*a*)(ii) of the Policy Direction, the Commission notes that it is only intervening to the extent necessary to resolve those issues outstanding between Shaw and Maple Ridge. The Commission is not changing any of the terms and conditions of access which both Shaw and Maple Ridge have already agreed upon. In light of this, the Commission considers that its measures are efficient and proportionate to their purpose and interfere with market forces to the minimum extent necessary to meet the policy objectives.

41. With respect to subparagraph 1(*b*)(i) of the Policy Direction, the Commission considers that granting Shaw access to the highways and public places in Maple Ridge will advance the following policy objectives as set out in section 7 of the Act:

> (*a*) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
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> (*b*) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
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> (*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
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> …
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> (*e*) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; [and]

…

(*h*) to respond to the economic and social requirements of users of telecommunications services.

42. Accordingly, the Commission considers that its decision to grant Shaw and any of its affiliated companies that is a Canadian carrier or a distribution undertaking, permission to construct, maintain and operate transmission lines in Maple Ridge under section 43 of the Act as set out above is consistent with the Policy Direction.

3. The terms and conditions of the MAA between Shaw and Maple Ridge

Positions of parties

43. In the Commission's interrogatory, Shaw and Maple Ridge were asked, in view of Decision 2001-23, to compare the terms and conditions set out in the Shaw MAA with the correlative terms and conditions of the Richmond MAA.

44. As part of its interrogatory response, as indicated above, Maple Ridge provided, among other things, a draft MAA, i.e., the District MAA, which it found acceptable.

45. In its interrogatory response in which it compared the Shaw MAA with the correlative terms and conditions to the Richmond MAA, Shaw submitted that the differences between both MAAs were not extensive. In its view, the few differences that existed reflected the fact that the Richmond MAA was a package of trade-offs negotiated in good faith over an extended period of time. Shaw provided a detailed description of the differences.

46. In its interrogatory response, Maple Ridge submitted that in its answer of 30 April 2007, it had identified the substantive differences between the Shaw MAA and the Richmond MAA. Maple Ridge stated however that at no point had it agreed to execute the Richmond MAA. Maple Ridge remained of the view that the Richmond MAA was to serve as a starting point.

47. Maple Ridge submitted that the starting point should not be a comparison of the Richmond MAA to the Shaw MAA but rather, at a minimum, should be a comparison of the Shaw MAA and the District MAA. Maple Ridge stated that the District MAA identified what changes would be necessary to the Richmond MAA to make it acceptable to the District.

Commission's analysis and determination

48. The Commission notes that in Decision 2001-23, while it established principles to assist carriers and municipalities in negotiating MAAs, the Commission stated that its determination in the specific case before it would not be a template for future MAA disputes, and that it would deal with any other MAA issue on a case-by-case basis.

49. The Commission considers it appropriate to set out the terms and conditions for an MAA between Shaw and Maple Ridge which are particular to the circumstances of this case.

50. In order to set the terms and conditions of the MAA that will govern Shaw's access in this specific case, the Commission has assessed the Shaw MAA, the Richmond MAA, and the District MAA.

51. The Commission notes that the three MAAs each contain 53 main sections set out under the same title headings and a Schedule A with three main sections. The Commission notes that the majority of the sections, subsections, and paragraphs of the three MAAs are identical in wording. Therefore, given that there is no disagreement between Shaw and Maple Ridge on these provisions, these sections, subsections, and paragraphs are to be included as part of the terms and conditions of Shaw's access within Maple Ridge.

52. The Commission notes that a minority of terms and conditions were not identical in the three MAAs, as follows: Preamble (b); 1; 3(b); 4; 5; 6(d); 7(a)(i);[6] 7(b);[7] 12(a); 12(b)(ii), (iii),[8] and (vii);[9] 14; 16; 18; 19; 20; 23; 24; 25(b); 32; 35; 39; and A, B, C 1-3, and C.3(b)[10] of Schedule A. The Commission also notes that the District MAA contained additional terms and conditions, namely, 4.1.2; 4.1.3; 6(f);[11] 8.2; 12(b)(iii); and C.1.3, C.2.1, and C.2.2 of Schedule A.

53. For the minority of terms and conditions that were not identical in the three MAAs, the Commission has assessed the differences in wording. As a result, the Commission has either selected the wording from the Shaw MAA, the Richmond MAA, or the District MAA, or selected wording that modifies the wording from one of these three MAAs.

54. Set out below is the selection the Commission has made for those provisions listed in paragraph 52 above and the Commission's reason for that selection. Unless otherwise indicated, where the Commission compares the Shaw MAA to the District MAA, it is understood that the wording in the Shaw MAA is identical to that in the Richmond MAA.

55. With respect to the Preamble (b), the Commission selects the wording of the Shaw MAA. The Commission considers that given that Telecom Decision 2005-36[12] formulated the criteria for determining "public places," wording defining "public places" in the Richmond MAA[13] and the District MAA does not need to be included in an MAA. Further, the Commission has not included proposed wording from the District MAA providing that a telecommunications facility "does not include cellular towers or equipment related to cellular technology." In the Commission's view, given that the placement of cellular towers or equipment related to

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6 Numbered as 7.1.1(a)(i) in the District MAA.

7 Numbered as 7.1.1(b) in the District MAA.

8 Subparagraph 12(b)(iii) of the Shaw MAA is the equivalent numbered subparagraph 12(b)(iv) in the District MAA because of a new subparagraph 12(b)(iii) in the District MAA.

9 Subparagraph 12(b)(vii) is the equivalent numbered paragraph 12(b)(viii) in the District MAA.

10 Numbered as C.4.1(b) of the District MAA.

11 Paragraph 6(f) of the District MAA should have been numbered 6(g) as it is a new paragraph.

12 Federal Court of Appeal dismissed on 13 March 2007, an appeal by the City of Edmonton of Telecom Decision 2005-36.

13 The Richmond MAA was executed in 2006 before the Federal Court of Appeal dismissed an appeal of Telecom Decision 2005-36.

cellular technology is not the subject of MAAs between municipalities and Canadian carriers but is the responsibility of Industry Canada, it is not appropriate to include the wording put forth by the District.

56. The Commission selects section 1 of the Shaw MAA as it contains the word "service" which was not contained in the Richmond and the District MAAs after the word "telecommunications." In the Commission's view, this is a minor editorial change that provides further clarity.

57. The Commission selects paragraph 3(b) of the District MAA. The Commission considers that the additional wording "including size and depth" which is not in the Shaw MAA, is a reasonable requirement. In the Commission's view, the provision that Shaw provide, with its engineering plans, a description of the size and depth of its facilities, will allow Maple Ridge to effectively manage placement of all facilities in the streets.

58. The Commission selects section 4.1.1 of the District MAA. Given that this section deals with emergency work performed by Shaw, the Commission considers that it is appropriate to remove the words "or situation of necessity" which are contained in the Shaw MAA. In the Commission's view, a situation of necessity is not an emergency and therefore, in these situations, prior notice should be given. Further, the Commission considers that the inclusion of the reference to section 40 is appropriate as it simply refers to the process for providing notice.

59. The Commission selects section 4.1.2 of the District MAA. This section is not contained in either the Shaw or the Richmond MAAs. The Commission considers that this section under which Shaw is to provide the District with written reasons for the emergency is a reasonable requirement that allows Maple Ridge to be informed of the nature of the emergency where advance notice could not be given by Shaw.

60. The Commission selects section 4.1.3 of the District MAA with some modifications. This section is not contained in either the Shaw or the Richmond MAAs. The Commission considers that this section, which provides for the parties to meet to discuss issues around emergencies, encourages joint planning. In the Commission's view, the modifications, which are reflected in the paragraph below, are consistent with the intent of the section which is to encourage joint planning between the parties. Therefore, section 4.1.3 is to read as follows:

> If the number of emergencies, in any 12 month period, exceeds a mutually agreed number of occurrences, the District and the Company shall meet and shall, in good faith, attempt to establish a plan so as to reduce the number of emergencies. The District and the Company may also establish objective criteria whereby the Company may carry out work in an emergency without prior notice to the District.

61. The Commission selects section 5 of the District MAA modified to use 500 metres in place of 250 metres. This section deals with Shaw carrying out routine work where there is no need to excavate or break the surface of any service corridor. Section 5 of the District MAA differs from section 5 of the Shaw MAA in that it requires Shaw to provide notice if any routine work

involves replacement of surface Equipment with Equipment that is greater than 25 percent larger than the Equipment it is replacing, or if the routine work requires obstruction of an intersection or if any routine work is for a project that is equal to or exceeds 250 metres in length in any Service Corridor. Section 5 of the Richmond MAA also provided for such notice but with a 500 metre distance. The District submitted that anything beyond 250 metres should not be considered routine maintenance. The Commission considers that the use of a 500 metre distance as the threshold to trigger the requirement of a notice to the District (a) provides Shaw with the ability to carry out routine maintenance without adding administrative work to provide a notice and at the same time (b) provides the District with a notice and the time to prepare for situations where the likelihood of traffic congestion is greater due to the distance covered by the routine work.

62. The Commission selects paragraph 6(d) of the District MAA with modification. This paragraph deals with how Shaw will repair and restore the surface of a Service Corridor. The paragraph provides that if Shaw fails to repair and restore a Service Corridor to the reasonable satisfaction of the District's General Manager, Engineering & Public Works within ten business days of being notified by the District, the District may effect such repairs. In its proposed MAA, the District added the following wording "or in the opinion of the General Manager, acting reasonably, the repair and restoration is of an urgent nature," the District may effect such repairs. The District stated that it has a responsibility for public safety and in some circumstances ten days may be too long. In the District's view, the additional wording gave it the option of completing the work if it reasonably believed ten days was too long to wait. The Commission recognizes the responsibility of the District for public safety. However, the Commission finds that the wording suggested by the District is too permissive. The Commission considers that it is more appropriate that the paragraph specifically indicate that the District can effect repairs in situations where public safety is a concern. The Commission therefore modifies the District's proposed wording as follows: "or in situations where public safety is a concern" the District may effect such repairs.

63. The Commission is not including paragraph 6(f)[14] of the District MAA. This paragraph is not contained in either the Shaw or the Richmond MAAs and provides that surface equipment (such as pedestals, vaults and structures above ground defined in section 25) will be screened and landscaped to the satisfaction of the District's General Manager. In support of this paragraph Maple Ridge stated this practice was a recognized principle of "smart growth communities" and was consistent with the District's expectations on other utilities. The Commission notes that there is no evidence that the screening and landscaping provisions are a requirement on all utilities and there are no criteria for evaluating the screening and landscaping provisions.

64. The Commission selects subparagraph 7(a)(i) of the District MAA. The Commission notes that the only difference between the District and the Shaw MAAs for this subparagraph is the addition of the words "adjacent property owners." The Commission considers that the additional wording is reasonable as Shaw should take responsibility for its actions and protect the adjacent property owners with respect to any work that it undertakes in a service corridor.

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[14] Paragraph 6(f) of the District MAA should have been numbered 6(g) as it is a new paragraph.

65. The Commission selects paragraph 7(b) of the Shaw MAA which provides that Shaw, after completing work in a service corridor will restore the service corridor to as good a condition as it was before commencement of the work. The Commission notes the District MAA included the word "aesthetic" as one of the conditions in which Shaw is to leave the service corridor. In the Commission's view, this paragraph affirms that the obligation is on Shaw to restore the service corridor to as good a condition as it was before commencement of the work. Therefore, the use of the word "aesthetic" is not required.

66. The Commission selects section 8.2 of the District MAA with modifications. This section is not contained in the Shaw or the Richmond MAAs. The Commission considers that section 8.2 recognizes that Maple Ridge should have the details of historical infrastructure that was installed without consent or inspection. The Commission modifies however the time frame from six months to twelve months as a more appropriate time frame for Shaw to provide the drawings for historic plant. The Commission also modifies the word "shall" provide to "should" provide. The Commission considers that if Shaw has an obligation to provide the drawings, it may be required to dig into Service Corridors to fulfill its obligation to provide the drawings. The Commission considers that if Shaw has the drawings, it is in its best interests to provide them to Maple Ridge with respect to the location of its equipment to avoid the possibility of accidental damage to this equipment.

67. The Commission selects paragraph 12(a) of the Shaw MAA. The Commission notes that the District MAA excluded wording that would allow Shaw to propose an alternate alignment to any relocation notice from Maple Ridge. The Commission considers such wording is appropriate as there may be instances where Shaw may be aware of an alternate alignment that would be beneficial to all parties. The Commission notes that in any event, any alternate alignment proposed by Shaw would have to be approved by Maple Ridge through the permitting process.

68. The Commission selects subparagraph 12(b)(ii) of the Shaw MAA which provides for the allocation of costs for relocating equipment. In the Richmond MAA, the percentage of costs paid by the District shall be 100 percent for the first two years reduced by 20 percent in each subsequent year if the relocation is required within the first seven years. The Shaw MAA provides that the percentage of costs paid by the District shall be 100 percent for the first five years reduced by 20 percent in each subsequent year if the relocation is required within the first ten years. The Commission considers that the Shaw MAA is appropriate as the longer terms provide an incentive for effective planning on the part of the District.

69. The Commission selects subparagraph 12(b)(iii) of the District MAA. The Commission notes that this wording is not in either the Shaw or the Richmond MAAs. The Commission considers that the selected wording is appropriate as it addresses how costs will be allocated for infrastructure that was installed up to five years prior to the date of the agreement without the District's permission or inspection. The Commission considers that the District should not be responsible for relocation costs if it did not grant permission and was not provided the opportunity to inspect the installations.

70. The Commission selects subparagraph 12(b)(iv) of the District MAA. The Commission notes that in this subparagraph[15] the cost allocation percentage for relocation of equipment installed ten years prior to the agreement is the same as in the Shaw MAA except that the District MAA limits the District's cost responsibility only for equipment installed with its permission. Also, the District MAA contains costs for "depreciation, salvage and betterment cost factors." As noted above, the Commission considers that the District should not be responsible for relocation costs if it did not grant permission and was not provided the opportunity to inspect the installations. With respect to "depreciation, salvage and betterment cost factors," the Commission considers them appropriate given that Shaw indicated that these cost factors were not substantial and was prepared to accept them.

71. The Commission selects subparagraph 12(b)(vii)[16] of the Shaw MAA which deals with the costs of relocation of equipment for beautification, aesthetic or other similar purposes. In the corresponding section of the Richmond MAA, the costs were a negotiated 50 percent split between Shaw and the City. The Commission notes that the Richmond situation was unique, in that Richmond has a formal and focused beautification program in concert with the construction that is happening in preparation for the 2010 Winter Olympic Games and that Shaw made a decision to contribute to a portion of the beautification costs. In the Commission's view, costs for beautification, aesthetic or other similar purposes are properly the responsibility of the District. The Commission is including the "depreciation, salvage and betterment cost factors" as set out in the Richmond MAA and the District's MAA in order to be consistent with cost factors included in subparagraph 12(b)(iv) as discussed above.

72. The Commission selects section 14 of the Shaw MAA which sets out the District's liability to Shaw. This section is in the Richmond MAA but was omitted from the District MAA. The Commission considers that section 14 which sets out the District's liability to Shaw provides an equal liability provision to section 13 which sets out Shaw's liability to the District, with the result that both parties save harmless each other.

73. The Commission selects section 16 of the District's MAA but modifies it to exclude the insurance requirements. With the modification, section 16 of the District MAA is identical to section 16 of the Richmond MAA which provides for a five-year term with two successive five-year terms and for successive one-year periods thereafter, unless Maple Ridge or Shaw give written notice of cancellation to the other not less than three months prior to the end of the initial term or any renewal term. The Commission notes that irrespective of the term of the agreement, the fees set out in Schedule A are renegotiated on an annual basis. Further, the Commission considers that the wording of the District MAA, which would add insurance requirements to be renegotiated, are not necessary given that section 33 of the agreement provides that Shaw shall maintain insurance in sufficient amount and description as to protect Shaw and the District from the types of claims set out therein.

74. The Commission selects sections 18 and 19 of the Richmond MAA which deal with taxes and utilities. The Commission considers that the wording for sections 18 and 19 sets out Shaw's responsibilities for taxes and the cost of utilities consumed. To section 18, the Commission adds the wording from the Shaw MAA that provides that Shaw should not be responsible for

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15 Numbered as subparagraph 12(b)(iii) of the Shaw MAA.

16 Numbered as subparagraph 12(b)(viii) of the District MAA.

interest and/or penalty where the District failed to properly charge and impose such taxes on Shaw as required by law. The Commission considers that the additional wording clarifies that if the District fails to charge taxes, Shaw will only be responsible for the taxes and not the interest and penalties.

75. The Commission selects section 20 of the Shaw MAA modified to provide that the District will determine the amount of the security and that the amount of the security is to be proportional to the work being undertaken. The Commission notes that section 20 of the Richmond MAA and the District MAA has similar wording to that of the Shaw MAA dealing with security to ensure performance of road restoration work. The Commission considers that this wording modification provides clarity as to what party will be determining the amount of the security and recognizes that the costs for road restoration work would vary depending on the length of the road that Shaw excavated. Also, the Commission considers that an irrevocable Letter of Credit as proposed by the District would be a financial hardship on Shaw given that Shaw must provide such security for each permit and such security will not be less than $50,000 for each permit. The Commission notes that in the Shaw and Richmond MAAs, Shaw would only provide a Letter of Credit when requested. Therefore, the last sentence of section 20 will read as follows:

> The security shall be in a form of a Letter of Credit and the amount of security shall be determined by the District's General Manager, Engineering & Public Works, acting reasonably, having regard to an amount that is proportional to the work being undertaken, and in no case shall the security be less than $50,000.00.

76. The Commission selects section 23 of the Shaw MAA. The Commission notes that section 23 of the District MAA is identical to that of the Shaw MAA except that the District MAA uses the word "District" rather than the word "Company" (meaning Shaw) as noted in italics in the phrasing "If the Company fails to complete the relocation of the Equipment in accordance with section 12 or fails to repair the Service Corridors or to do anything else required by the *District* under the agreement…" The Commission considers that the wording of the Shaw MAA is consistent with the intent of the section that if Shaw fails to act according to the named sections or any section of the agreement, the default remedies available to the District are triggered.

77. The Commission selects section 24 of the Shaw MAA as the wording allows either party to initiate legal proceedings and/or submit the matter to the Commission thus providing for a balanced dispute resolution procedure and recognition of the Commission's jurisdiction over municipal access disputes with Canadian carriers.

78. The Commission selects paragraph 25(b) of the District MAA. The Commission notes that the paragraph is identical to that in the Shaw MAA except for the wording "at its expense." The Commission considers that the wording "at its expense" in the District MAA clarifies which party is to pay for the removal of equipment when the agreement is terminated. In the Commission's view, since the equipment is owned by Shaw, it should pay for the costs to remove its equipment. For similar reasons, the Commission has selected section 39 of the District MAA, which has the wording "at its expense," to clarify that Shaw is to pay for the removal of any of its abandoned or obsolete equipment.

79. The Commission selects section 32 of the Richmond MAA which is the same as the District MAA. The Commission notes that the wording for section 32 in all three MAAs is identical except that the reference to the Workers' Compensation Board in the Shaw MAA is referred to as the WorkSafeBC in the Richmond MAA. The Commission considers the reference to WorkSafeBC is appropriate as it accurately reflects the legal entity under the current legislation in British Columbia.

80. The Commission selects section 35 of the District MAA which deals with utility coordination which is identical to section 35 of the Richmond MAA. The Commission notes that section 35 of the District MAA is identical to section 35 of the Shaw MAA except that the District MAA contains additional wording that provides that in utility coordinating committees the parties agree to consider capacity needs in the use of the service corridors. The Commission considers that the additional wording is appropriate as it emphasizes the importance of joint planning.

81. The Commission selects section A of Schedule A of the Shaw MAA which sets out the definition of causal costs. In the District MAA the word "direct" was omitted. The Commission considers that the selected wording is appropriate because by definition, causal costs are a direct result of the presence and/or the proposed installation of any of Shaw's equipment.

82. The Commission selects section B of Schedule A of the Shaw MAA which sets out the definition of lost productivity. The Commission notes that in the District MAA the word "significant" was omitted. The Commission considers that the selected wording is appropriate as the word "significant" relates to those costs that are identifiable and directly related to the presence of Shaw's facilities. The Commission notes that costs that are not significant but attributable to the presence of Shaw's facilities are captured by the loading factor which is discussed in the following paragraph.

83. The Commission selects section C.1 of Schedule A of the Richmond MAA. The Commission notes that the selected wording includes a loading factor on permitting and inspection costs which is not in the Shaw MAA but in the District MAA. The Commission considers that a loading factor is appropriate as it is used to estimate indirect and variable common costs, where it would be difficult to reliably estimate certain construction disruption costs. Further, the Commission considers that in the absence of evidence to the contrary, fees of $500.00 are appropriate for permitting and inspection costs as these are the fees agreed to by Shaw in the Richmond MAA. The Commission does not consider it appropriate, however, to include the wording of the District MAA that would require that the $500.00 fee would apply to the historical plant that was installed without the District's consent. In this regard, the Commission notes that the section does not state that the District would inspect any historical plant given that such plant is buried installation.

84. The Commission selects section C.1.2 of Schedule A of the Shaw MAA which is identical to the District MAA except for the use of the Consumer Price Index (CPI). This section sets out the dates for the annual adjustment to the permitting and inspection fees. The Commission notes that Maple Ridge suggested the use of the Vancouver CPI but did not provide any rationale. The Commission considers that the use of the national CPI published by Statistics Canada, which is that used in the Richmond MAA, is appropriate. In addition, the Commission is not including the costs as suggested in section C.1.3 of the District MAA for administering,

filing and record keeping, and attendance at a co-ordinating committee. The Commission considers these costs to be common costs of operations and that to allow for their recovery would result in double recovery by the District as the loading factor on permitting and inspection costs set out in section C.1 is intended to recover common costs.

85. The Commission selects section C.2 of Schedule A of the Richmond MAA which sets out the schedule of fees for pavement degradation. The Commission notes that Shaw was prepared to have these fees apply to Maple Ridge because, in Shaw's view, the cost and complexity of preparing a study to substantiate the costs as required in Decision 2001-23, would be onerous for a community the size of Maple Ridge. The Commission therefore considers the use of the Richmond MAA fees for pavement degradation to be appropriate.

86. The Commission selects sections C.2.1 and C.2.2 of Schedule A of the District MAA providing for the recovery of lost revenue, including parking meter and filming revenue if Maple Ridge can substantiate it. The Commission notes that these sections are not in the Richmond MAA or the Shaw MAA. The Commission notes that in Decision 2001-23, the Commission recognized various types of revenue loss caused by construction disruption. For example, in Decision 2001-23, the Commission recognized that there may be loss of revenues when parking meters are taken out of service for a particular construction project. In Decision 2001-23, the Commission indicated that if the net loss due to parking meters being taken out of service for a particular construction project could be reliably estimated then such loss should be recovered. Otherwise if a reasonable estimate proved to be difficult, the Commission considered a suitable alternative to recognize the causal impact would be through the loading factor on permitting and inspection costs. The Commission considers that if the District can provide reasonable written documentation to substantiate the causal impact of lost revenue, then it should be compensated for the lost revenue.

87. The Commission selects paragraph C.3(b)[17] of Schedule A of the Shaw MAA which sets out what is to be included in a description of District work. The Commission notes that the District MAA uses the words "infrastructure lines" rather than the words "sewage lines." In the Commission's view, the reference in the Shaw MAA to "sewage lines" is consistent with the wording used in the new section for Lost Revenue in the District MAA which the Commission has selected, as set out in the previous paragraph.

88. The Commission notes that as a result of the new terms and conditions to be added to the MAA, the numbering will have to be necessarily altered. In addition, in order to reflect the legal status of the entity of the District of Maple Ridge, the parties will be required to change the reference to "the City" to "the District" in the appropriate places, except as noted for section 23 as discussed above.

89. The Commission notes that despite the MAA, Shaw will still be required to comply with Maple Ridge's permitting process and by-law requirements to the extent that such process and requirements do not impose terms that are inconsistent with those of the MAA. It is through the permitting process that the parties can address site-specific issues not already dealt with by the MAA.

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[17] Numbered as C.4.1(b) of the District MAA.

Conclusion

90. In light of the above, the Commission grants to Shaw or any of its affiliated companies that are Canadian carriers or distribution undertakings, permission to construct transmission lines in Maple Ridge on the terms and conditions set out above, pursuant to subsection 43(4) of the Act.

Secretary General

Related documents

- *Letters regarding Part VII applications requesting municipal access in the City of Vancouver*, Telecom Public Notice CRTC 2005-12, 1 September 2005:
    - *Re: Part VII application by MTS Allstream Inc. against the City of Vancouver – Access to municipal property in the City of Vancouver*, 1 September 2005
    - *Re: Part VII application by Shaw Cablesystems Limited seeking an order granting access to municipal property in the City of Vancouver*, 1 September 2005
- *Part VII Application by Allstream Corp. seeking access to Light Rail Transit (LRT) lands in the City of Edmonton*, Telecom Decision CRTC 2005-36, 17 June 2005
- *Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001