



Telecom Decision CRTC 2008-101

Ottawa, 17 October 2008

Shaw Cablesystems Limited – Application regarding the sale by TBayTel of its partial systems offering plant

Reference: 8622-S9-200806440

In this Decision, the Commission denies Shaw Cablesystems Limited's application regarding the sale by TBayTel of its partial systems offering plant.

Introduction

1. The Commission received an application from Shaw Cablesystems Limited (Shaw), dated 1 May 2008, seeking an order from the Commission that would
 - i) direct TBayTel to sell to Shaw, within 30 days of the date of the Commission's order, the partial systems offering (PSO) plant currently leased by TBayTel to Shaw pursuant to TBayTel's General Tariff, in accordance with the terms and conditions approved by the Commission for the sale of Bell Canada's PSO plant, as set forth in Telecom Order 99-1233;
 - ii) determine the net book value (NBV) of the PSO plant for the purposes of the sale, taking into consideration the circumstances in which the PSO plant has been installed and maintained;
 - iii) direct TBayTel to sell at a price equal to NBV any strand that is used exclusively to support the PSO plant; and
 - iv) declare that Thunder Bay Hydro poles that support the PSO plant and any associated strand are not poles owned by TBayTel, or on which TBayTel is entitled to allow the placement of the PSO facilities and associated strand, for the purposes of TBayTel's Support Structure Tariff.
2. The Commission received comments from TBayTel. The public record of this proceeding, which closed on 23 June 2008, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
3. The Commission has identified that the issue to be addressed in its determinations is whether it should mandate the sale of TBayTel's PSO plant to Shaw and grant Shaw's other requested relief.

Positions of parties

4. Shaw submitted that the Commission has the authority to mandate the sale of TBayTel's PSO plant, on the basis of terms and conditions it determines are just and reasonable, by virtue of sections 24 and 27 of the *Telecommunications Act* (the Act).

5. Shaw further submitted that, if there was any doubt as to the Commission's jurisdiction, section 42 of the Act clearly conferred such jurisdiction.
6. Shaw was of the view that Commission intervention is needed to require TBayTel to sell the PSO plant to Shaw and to address the terms of that sale.
7. Shaw stated that, despite negotiating the sale of the PSO plant with TBayTel for over eight years, there has been no progress.
8. Shaw submitted that recent events have made it clear that future negotiations between the parties would be fruitless. Shaw also submitted that it is clear that TBayTel will abuse its continued ownership of the PSO plant in any manner possible to thwart competition and gain a competitive advantage in telecommunications and broadcasting markets. In this regard, Shaw noted that the Commission had intervened and required TBayTel to comply with the Commission's rulings regarding local interconnection with Shaw. In addition, Shaw noted that, in Telecom Order 2008-74, the Commission denied TBayTel's request to withdraw its PSO tariff ostensibly to use the PSO plant solely for the purposes of providing its own retail services.
9. Shaw submitted that the sale of the PSO plant on just and reasonable terms and conditions is the only means of achieving end-to-end facilities-based competition in Thunder Bay in the provision of telecommunications services, including local exchange and broadband access services. Shaw added that, if TBayTel continues to own the PSO plant, ongoing regulatory intervention would be required to preclude TBayTel from conferring on itself an undue preference and jeopardizing competition and consumer choice.
10. Shaw submitted that the exercise by the Commission of its powers under sections 24, 27, and 42 of the Act to mandate the sale of the PSO plant would be consistent with section 47 of the Act. In this regard, Shaw further submitted that the sale of the PSO plant would further the implementation of the Canadian telecommunications policy objectives in a manner consistent with the Policy Direction's¹ dictate to rely on market forces to the maximum extent feasible as the means of achieving those objectives.
11. TBayTel argued that the Commission does not have the legislative authority to mandate that it sell its PSO plant to Shaw.
12. TBayTel further submitted that if the Commission believes that it does have the power to grant the relief requested, the exercise of its powers in the manner proposed by Shaw would be inconsistent with long-standing regulatory practice. TBayTel argued that companies such as itself are regulated as common carriers and, in this role, establish facilities and provide services using those facilities. TBayTel stated that the regulator concerns itself with how those services are delivered in terms of technical issues, quality, and price. TBayTel also argued that requiring the sale of the underlying facility would not be an appropriate way to regulate the provision of a common carrier service.

¹ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

13. TBayTel stated that the Commission has at its disposal all the regulatory tools it requires to ensure the appropriate provision of service.

Commission's analysis and determinations

14. Pursuant to section 47 of the Act, the Commission is required to exercise its powers and perform its duties under the Act, including those under sections 24, 27, and 42 of the Act, with a view to implementing the Canadian telecommunications policy objectives set out in section 7 of the Act, as well as in accordance with the Policy Direction.
15. In the Commission's view, the directives of the Policy Direction that are pertinent to the application are that 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.
16. The Commission considers that the record of this proceeding does not establish that the continued ownership of the PSO plant by TBayTel has conferred, or will allow it to confer, an undue preference upon itself.
17. In this regard, the Commission notes that, in Telecom Order 2008-74, it denied TBayTel's request to withdraw its PSO service, thus ensuring that Shaw will have continued access to the PSO plant. Further, the Commission notes that section 27 of the Act requires that TBayTel's monthly rate for the PSO service must be just and reasonable. In this regard, the Commission notes that in Telecom Decision 2008-100, it found TBayTel's monthly rate for the PSO service to be just and reasonable.
18. The Commission further notes that, notwithstanding the continued ownership of the PSO plant by TBayTel, Shaw has been offering local telephony service to the residents of Thunder Bay since January 2008 via the PSO. As there is competition in local telephone service in Thunder Bay, consumers in Thunder Bay have a competitive choice of service providers.
19. In light of the above, the Commission concludes that, contrary to Shaw's submissions, a Commission order mandating the sale of the PSO plant is not required to ensure the attainment of the Canadian telecommunications policy objectives.
20. Furthermore, the Commission concludes that an order on its part requiring that TBayTel divest itself of its ownership of the PSO plant would constitute a significant interference with the operation of competitive market forces and one which, given the preceding, would not be in compliance with the Policy Direction. The Commission is of the view that the regulatory measures it has adopted interfere with the operation of competitive market forces to the minimum extent necessary to meet the Canadian telecommunications policy objectives.
21. Therefore, the Commission determines that the mandated sale of the PSO plant to Shaw is not required to implement the Canadian telecommunications policy objectives in accordance with the Policy Direction.

22. In view of the Commission's determination not to mandate the sale of the PSO plant, Shaw's requested determinations with regard to the value of the PSO plant, the sale price of the strand, and Thunder Bay Hydro poles supporting the PSO plant are not required.
23. Given the determinations reached above, the Commission considers that a determination as to whether the Commission has the legislative authority to mandate the sale of TBayTel's PSO plant is not required.
24. Based on the above, the Commission **denies** Shaw's application.

Secretary General

Related documents

- *Shaw Communications Inc. – Application to revise the monthly rate for TBayTel's partial systems offering*, Telecom Decision CRTC 2008-100, 17 October 2008
- *Withdrawal of Partial Cable-Distribution System offering*, Telecom Order CRTC 2008-74, 13 March 2008
- *Bell Canada withdrawal from Partial System Offering and introduction of an option to purchase leased plant*, Telecom Order CRTC 99-1233, 23 December 1999

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