



Telecom Decision CRTC 2009-462

Ottawa, 30 July 2009

Shaw Cablesystems Ltd. – Application seeking access to highways controlled by the Ministry of Transportation and Infrastructure of British Columbia on terms consistent with Decision 2001-23

File number: 8690-S9-200903923

In this decision, the Commission denies Shaw Cablesystems Ltd.'s (Shaw) request that the Commission direct the Ministry of Transportation and Infrastructure of British Columbia to reimburse Shaw for the costs of relocating its transmission facilities that are attached to the support structures of third parties as the dispute does not engage the Commission's jurisdiction under subsection 43(4) of the Telecommunications Act. As for the allocation of relocation costs with respect to Shaw's transmission facilities on its own support structures, the parties are to report back to the Commission within six months of the date of this decision as to whether they have concluded an agreement.

Introduction

1. The Commission received an application by Shaw Cablesystems Ltd., on behalf of itself and its affiliated companies including Shaw Communications Inc. (Shaw), dated 20 February 2009. Shaw sought an order pursuant to section 42 and subsection 43(4) of the *Telecommunications Act* (the Act) with respect to access to highways and other public places within the province of British Columbia for the purpose of constructing, maintaining, and operating its transmission lines and related communications network facilities.
2. Specifically, Shaw sought an order from the Commission directing the Ministry of Transportation and Infrastructure of British Columbia (the Ministry) to reimburse Shaw for the costs of relocating its transmission facilities at the request of the Ministry, whether those facilities are located on Shaw's own support structures or attached to the structures of third parties, on terms and conditions that are consistent with Decision 2001-23, and in any case no less favourable than those provided to TELUS Communications Company (TCC) and BC Hydro.
3. The Commission received comments from the Ministry, and reply comments from Shaw. The public record of this proceeding, which closed on 2 April 2009, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Background

4. Shaw's cable distribution network provides access to cable television, high-speed Internet, and digital telephone service to 1.5 million households in the province. Shaw's transmission facilities are located on provincial highway rights-of-way across the province. While some of Shaw's facilities are located in or on Shaw support structures and conduits, the vast majority of Shaw's facilities are attached to support structures owned by TCC, BC Hydro, and other electrical utility companies.
5. The Ministry issues permits only to support structure owners for the use of highway lands. The support structure owner controls the arrangement between itself and any third party that leases space on the structures. The permit does not require the support structure owner to advise the Ministry of any lessee utilizing the facilities.
6. With respect to reimbursement of relocation costs, the Ministry's policy requires that relocation costs be borne by the support structure owner when relocation is required by the Ministry. The only exception to the policy is set out in protocol agreements for access to provincial highway rights-of-way with TCC, BC Hydro, and Fortis (previously West Kootenay Power). The agreements generally provide for reimbursement of direct costs of relocation to the support structure owner when relocation is ordered within two years of the initial installation. Where relocation is ordered after two years of installation, the Ministry pays the support structure owner an amount per pole and per sheath metre of cable that is relocated.

Issues

7. The Commission has identified the following two issues to be addressed in its determinations:
 - I. Should the Ministry reimburse Shaw for the costs of relocating its transmission facilities that are attached to Shaw's support structures?
 - II. Does the Commission have the authority to direct the Ministry to reimburse Shaw for the costs of relocating its transmission facilities that are attached to the support structures of third parties?

I. Should the Ministry reimburse Shaw for the costs of relocating its transmission facilities that are attached to Shaw's support structures?

8. The Commission notes that Shaw seeks to enter into a protocol agreement that is similar to those in place with TCC and BC Hydro. The Commission further notes that the Ministry has offered to negotiate with Shaw similar agreements to the existing protocols to deal with Shaw-owned structures on provincial highway rights-of-way.
9. Accordingly, the Commission considers that no specific order regarding the allocation of relocation costs with respect to Shaw's transmission facilities on its own support structures is required at this time. The Commission expects the parties to negotiate an agreement with respect to Shaw's transmission facilities on Shaw-owned support structures that provides for reimbursement of Shaw's relocation costs when relocation is initiated by the Ministry. The

parties are to report back to the Commission within six months of the date of this decision as to whether they have concluded such an agreement. If the parties have not concluded an agreement by such date, the parties are to inform the Commission as to the progress of their negotiations.

II. Does the Commission have the authority to direct the Ministry to reimburse Shaw for the costs of relocating its transmission facilities that are attached to the support structures of third parties?

10. Shaw indicated that it seeks relief under section 42 and subsection 43(4) of the Act. Shaw submitted that its request for relief falls squarely within the terms of subsection 43(4) of the Act as Shaw is both a Canadian carrier and a distribution undertaking and cannot, on terms acceptable to it, obtain the consent of the Ministry to construct, maintain, or operate its transmission lines on highways controlled by the Ministry.
11. In its response, the Ministry submitted that the Commission does not have the authority to make an order against the Ministry under section 43 of the Act in respect of Shaw's transmission facilities that are attached to third-party support structures.
12. The Ministry submitted that the purpose of subsection 43(4) of the Act is to permit a carrier to apply to the Commission for relief from the exercise by a public authority of its conditional right to refuse its consent to construct a transmission line. The Ministry further submitted that in this case, Shaw does not need the Ministry's permission to place its lines on existing poles along provincial highways. As such, the Ministry has no right, or ability, to refuse consent to Shaw to construct on the poles of third-party support structure owners.
13. In reply, Shaw submitted that whether its transmission lines are placed on its own support structures or the structures of others is irrelevant to a determination of the Commission's jurisdiction under subsection 43(4) of the Act.
14. Shaw stated that the jurisdiction granted under subsection 43(4) of the Act is not dependent on whether a carrier constructs, operates, and maintains its transmission lines using its own support structures or the support structures of a third party. Shaw noted that the provision makes no reference to support structures at all.
15. Shaw submitted that subsection 43(4) of the Act also makes no distinction between terms of access imposed by contract, permit, or otherwise. Shaw expressed the view that even though the Ministry has a policy of issuing permits only to support structure owners, the implicit or explicit consent of the Ministry to enter provincial highways and rights-of-way is a prerequisite to obtaining access to those support structures. Shaw submitted that it is irrelevant that it has not actually been denied access to provincial highways because it is obliged, as a condition of access, to relocate its transmission lines at the request of the Ministry and accept the imposition of the costs incurred.

Commission's analysis and determinations

16. The preliminary consideration in this matter is whether the Commission has the authority under subsection 43(4) of the Act to make an order with respect to relocation costs where Shaw's transmission facilities are attached to the support structures of third parties. Subsection 43(4) of the Act provides that a Canadian carrier or distribution undertaking may apply to the Commission for permission to construct¹ a transmission line where it cannot obtain the consent of the municipality or public authority to do so on terms acceptable to it.
17. The Commission notes that the issue of the appropriate compensation for relocation costs in respect of transmission facilities on highways or other public places falls squarely within the scope of issues that can be dealt with by the Commission under subsection 43(4) of the Act. The question here is whether the statutory precondition for the exercise of the Commission's authority has been met.
18. The Commission notes that the Ministry does not require that Shaw obtain its consent, whether by permit or otherwise, in order to attach its transmission lines to the support structures of third parties or impose a fee for the use of provincial land. The Commission considers that the mere fact that Shaw is required to move its transmission lines and incur costs when the Ministry requires a support structure owner to relocate does not in itself constitute a term of access to provincial highway rights-of-way. As such, the Commission finds that Shaw's transmission facilities are not on the support structures of third parties by virtue of the Ministry's consent.
19. In light of the above, the Commission concludes that Shaw's application does not engage the Commission's jurisdiction under subsection 43(4) of the Act, as Shaw has not failed to obtain the consent of the Ministry with respect to its transmission facilities on the support structures of third parties. Accordingly, the Commission **denies** Shaw's request to direct the Ministry to reimburse Shaw for the costs of relocating its transmission facilities that are attached to the support structures of third parties.

Secretary General

Related document

- *Ledcor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001

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>

¹ The Federal Court of Appeal in *Edmonton (City) v. 360Networks Canada Ltd.* (2007 FCA 106) found that the Commission's jurisdiction under subsection 43(4) of the Act encompasses disputes over matters necessarily incidental to the act of constructing, including keeping in place what has already been constructed.