



## Telecom Decision CRTC 2011-28

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Ottawa, 13 January 2011

### **Axia SuperNet Ltd. – Application to review and vary certain determinations in Telecom Decision 2010-639 concerning the use of deferral account funds by TELUS Communications Company**

File number: 8662-A90-201015793

*In this decision, the Commission finds that Axia SuperNet Ltd. (Axia) has failed to demonstrate substantial doubt as to the correctness of the Commission's determinations in Telecom Decision 2010-639. Axia's request to review and vary Telecom Decision 2010-639 is denied.*

#### **Background**

1. In Telecom Decision 2006-9, the Commission determined that incumbent local exchange carriers (ILECs) should predominantly use the funds in their deferral accounts<sup>1</sup> to expand broadband services to rural and remote communities in their territories.<sup>2</sup>
2. In Telecom Decisions 2007-50 and 2008-1 (these two decisions and Telecom Decision 2006-9 are hereafter referred to collectively as the deferral account decisions), the Commission approved, among other things, proposals by TELUS Communications Company (TCC) to expand broadband services to certain rural and remote communities in Alberta, British Columbia, and Quebec (the approved communities) using funds from its deferral accounts.
3. The implementation of the deferral account decisions was put on hold pending disposition of appeals before the Federal Court of Appeal and the Supreme Court of Canada related to, among other things, the broadband expansion proposals. Following the dismissal of the appeals to the Supreme Court of Canada, TCC submitted revised

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<sup>1</sup> In 2002, the Commission set out a price cap framework, which included, among other things, rules governing the rates charged to residential customers of the ILECs. One of the elements of the price cap regime was the deferral account. ILECs were requested to place into their respective deferral accounts amounts equal to the revenue reductions that would have otherwise resulted from an application of the price cap formula.

<sup>2</sup> The Commission also permitted the use of funds for initiatives to improve access to telecommunications services for persons with disabilities, and concluded that any accumulated balance remaining in an ILEC's deferral account after any approved initiatives would be rebated to the ILEC's residential local subscribers in non-high-cost serving areas.

plans to provide broadband service to the approved communities in the deferral account decisions and in related decisions.<sup>3</sup>

4. In Telecom Decision 2010-639, the Commission approved a drawdown of \$99.4 million for Alberta and British Columbia from TCC's deferral accounts for the expansion of broadband services, and directed TCC to use these funds to serve the approved communities.
5. In that same decision, the Commission approved TCC's proposal to build its own facilities in certain approved communities where the use of Alberta SuperNet (SuperNet) was less expensive. However, in these instances, the permitted drawdown from the deferral accounts is limited to the amount of funds that would be required if it had used the SuperNet network.

### **The application**

6. The Commission received an application from Axia SuperNet Ltd. (Axia), dated 22 October 2010, requesting that the Commission review and vary Telecom Decision 2010-639 in order to reinstate the requirement set out in Telecom Decision 2008-1 that TCC use SuperNet transport to serve deferral account communities where it is least-cost and that TCC provide competitor services at tariffed rates. In the same application, Axia requested that the Commission stay implementation of the determinations in question pending its disposition of the company's review and vary application.
7. The Commission received comments from TCC, as well as comments in support of Axia's application from Shaw Communications Inc. and Slave Lake Communications LTD. The public record of this proceeding, which closed on 19 November 2010, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file number provided above.

### **Positions of parties**

8. Axia argued that the Commission, in Telecom Decision 2010-639, had overturned the requirement in Telecom Decision 2008-1 that TCC must use SuperNet transport to serve deferral account communities where SuperNet is least-cost and, in so doing, failed to consider the guidelines for disposing of the funds in TCC's deferral accounts for the purposes of broadband expansion.
9. Axia also submitted that there was substantial doubt as to the correctness of Telecom Decision 2010-639 as, in its view, the Commission failed to provide reasons for a number of determinations made in that decision. Namely, Axia submitted that the Commission failed to (i) provide a breakdown of the \$99.4 million drawdown for broadband expansion between Alberta and British Columbia, or for the deferral account

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<sup>3</sup> Other decisions related to the approval of the communities include Telecom Decisions 2008-5, 2008-29, 2008-87, and 2008-110.

communities served by SuperNet, (ii) identify the communities that were least-cost for TCC to use SuperNet and what costing evidence was accepted by the Commission, (iii) provide direction on how it would enforce the requirement that TCC withdraw from its deferral accounts funds that reflect the rates for the least-cost communities, and (iv) provide reasons as to how it would enforce TCC's commitment not to compete with SuperNet in the provision of competitor services when it permitted TCC to negotiate agreements for competitor services.

10. Finally, Axia argued that the Commission failed to respect the Policy Direction.<sup>4</sup>
11. TCC submitted that the determinations in that decision are consistent with the obligations set out in the Policy Direction to rely on market forces, and when relying on regulation, use measures that are efficient and proportionate to their purpose. TCC submitted that to do otherwise would violate the Policy Direction, as the Commission would be requiring TCC to use SuperNet's facilities by regulatory order.

### **Issue**

12. The Commission considers that the issue to be addressed in this decision is whether there is substantial doubt as to the correctness of Telecom Decision 2010-639 because, in Axia's view, the Commission
  - a. failed to consider the guidelines for disposing of the funds in TCC's deferral accounts for the purposes of broadband expansion;
  - b. failed to provide reasons for a number of determinations made in Telecom Decision 2010-639; and
  - c. failed to respect the Policy Direction.

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

***a. Did the Commission fail to consider the guidelines for disposing of the funds in TCC's deferral accounts for the purposes of broadband expansion?***

13. In Telecom Decision 2006-9, the Commission established guidelines for the disposition of funds remaining in the deferral accounts of ILECs for broadband expansion. These guidelines included competitive neutrality, least-cost technology, and complementing existing government initiatives. The Commission directed the ILECs to submit proposals for broadband expansion that took the guidelines into consideration. Pursuant to the Commission's 10 March 2006 letter,<sup>5</sup> the ILECs were

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<sup>4</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

<sup>5</sup> In paragraph 199 of Telecom Decision 2006-9, the Commission stated that it would issue a letter outlining the requirements for filing broadband expansion initiatives, including, among other things, details of how the proposed broadband services would be comparable to those provided in urban areas.

to propose broadband services comparable to those they offer in urban areas in terms of rates, terms and conditions, upload and download speeds, and reliability.

14. In Telecom Decision 2008-1, the Commission noted that TCC's submission in the proceeding that led to that decision did not support a broadband service model which utilized SuperNet for broadband transport facilities, but considered that there was no serious impediment to TCC's use of SuperNet. The Commission directed TCC to use the least-cost solution – that is, SuperNet or its own backbone facilities – for each community where interconnection with the SuperNet backbone was available. The Commission considered that TCC should include the results of its analysis in its updated cost studies to be filed as a follow-up to that decision.
15. In the proceeding leading to Telecom Decision 2010-639, for the first time, the Commission had a comparative analysis of the costs of TCC building its own facilities to all deferral account communities and the costs of TCC using SuperNet backbone facilities, where available, to these communities. Further, despite the direction to use SuperNet in these communities, the Commission had before it a request by TCC to build its own facilities while drawing down from the deferral accounts only the amount that would be required if it had used SuperNet.
16. In reviewing the evidence on the record of the proceeding that led to Telecom Decision 2010-639, the Commission remains of the view that, while it would be desirable to avoid duplication of facilities to certain communities and to complement government initiatives, the approach taken in that decision represents a technologically neutral position consistent with the Policy Direction. Further, the Commission notes, as stated in Telecom Decision 2010-639, the service provided to subscribers will be the same regardless of which facilities TCC uses, and will be equivalent to TCC's broadband services provided in urban areas, thereby satisfying the Commission's determination in the deferral account decisions. In addition, the Commission still considers that there are benefits of TCC having a uniform network as it provides TCC with end-to-end control of its broadband network and permits TCC to better manage its network.
17. In light of the above, the Commission considers that its determination to allow TCC to build its own network in the least-cost communities was not a review and vary of Telecom Decision 2008-1. The Commission was still dealing with the disposition of TCC's deferral account funds and the final determinations could not have been made without the detailed costing comparison that had been submitted, for the first time, in the proceeding that led to Telecom Decision 2010-639. Further, in disposing of the deferral account funds, TCC was permitted to draw down only the amount that would be required if it had used SuperNet, which was in keeping with the guideline of least-cost expenditures from the deferral account.
18. In view of the above, the Commission considers that it did not fail to consider the guidelines for disposing of the funds in TCC's deferral accounts for the purposes of broadband expansion.

**b. Did the Commission fail to provide reasons for a number of determinations made in Telecom Decision 2010-639?**

19. Axia's argument that the Commission failed to provide reasons for a number of determinations in Telecom Decision 2010-639 has been reviewed. The Commission has set out its findings in the paragraphs which follow.
20. The Commission notes that TCC's costing information by deferral account community is confidential. Accordingly, the Commission did not provide a breakdown of the \$99.4 million drawdown for broadband expansion. However, because TCC has one deferral account for Alberta and British Columbia, the Commission set the amount from TCC's deferral account to be allocated to broadband expansion based on the costs for all the approved deferral account communities, and not on provincial boundaries.
21. Contrary to Axia's claim, the Commission did identify in Telecom Decision 2010-639 what costing evidence was used to determine that there were some communities where it was less costly for TCC to use SuperNet. In that decision, the Commission states that it has reviewed the costs provided by TCC and Axia. Further, the Commission notes that TCC had already identified on the public record the communities that it stated were least cost. In this context, once the Commission determined that TCC was allowed to build its own facilities, there was no further need for the Commission to differentiate between the communities on how broadband service was to be provided.
22. With respect to Axia's concerns related to the enforcement of the deferral account drawdown, the Commission directed TCC to withdraw only that amount which reflected the current rates that TCC would be charged for use of SuperNet facilities. The Commission also fixed this amount at \$99.4 million with no further adjustments to ensure that TCC would draw down only the appropriate amount. Further, to ensure that build-out occurs in the approved communities, TCC is to provide the Commission with annual reports providing its progress on the rollout of broadband services to those communities.
23. With respect to Axia's claim that TCC made a commitment not to compete with SuperNet, the Commission notes that in Telecom Decision 2006-9, it set out the parameters for the rates that the ILECs would charge for the competitor backbone services (CBSs) and stated that the rates would be established when it approved each ILEC's broadband expansion proposal.
24. In the proceeding that led to Telecom Decision 2010-639, TCC proposed to offer its CBSs only to alternate broadband service providers (ABSPs) in the approved communities and only on a contractual basis. Further, TCC proposed to classify its CBSs as non-essential subject to phase-out. The Commission disagreed and determined that CBSs must be tariffed. The Commission also classified TCC's CBSs as conditional mandated non-essential which, along with tariffs, provides for negotiated agreements filed on the public record.

25. Thus, by requiring tariffs and classifying these services as conditional mandated non-essential services, the Commission has ensured that TCC provides CBSs at appropriate rates. TCC has filed its tariffs for CBSs, and Axia has the right to intervene in the process to dispose of the tariff applications. Further, Axia can file a complaint or comment regarding any negotiated agreements that are filed on the public record.
26. For the above reasons, the Commission finds that it did not err because it did not fail to provide reasons for a number of its determinations made in Telecom Decision 2010-639.

**c. Did the Commission fail to respect the Policy Direction?**

27. Axia noted that, in Telecom Decision 2008-87, in denying its request for a review and vary of Telecom Decision 2008-1, the Commission relied on the Policy Direction, stating that its requirement that TCC use the lowest-cost alternative to provide its broadband services is efficient and proportionate to its purpose. Axia argued that if the requirement to use SuperNet has been removed, the Policy Direction cannot be satisfied unless there is new evidence or argument before the Commission.
28. The Commission notes that the Policy Direction requires it, among other things, to
- rely on market forces to the maximum extent feasible to achieve the telecommunications policy objectives set out in section 7 of the *Telecommunications Act*; and
  - 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 these policy objectives.
29. The Commission notes that TCC is to only withdraw, from its deferral accounts for the least-cost communities, amounts that reflect the updated costing information and the current rates that Axia would charge TCC for use of its facilities. In so requiring, the Commission has ensured that the funds in TCC's deferral accounts will be used effectively and efficiently. Further, the Commission notes that requiring TCC to use SuperNet would not be consistent with a technologically neutral position. In light of the above, the Commission considers that its determinations in Telecom Decision 2010-639 are consistent with the Policy Direction requirement to use regulatory measures that are efficient and proportionate to their objective.

**Conclusion**

30. In light of all the above, the Commission concludes that Axia has not demonstrated that there is substantial doubt as to the correctness of Telecom Decision 2010-639. Accordingly, Axia's application is **denied**.

31. Given its determinations in this decision, the Commission considers that Axia's request for a stay of implementation of Telecom Decision 2010-639 is moot.

Secretary General

### **Related documents**

- *Follow-up to Telecom Decision 2008-1 – Proposal by TELUS Communications Company to dispose of the funds remaining in its deferral accounts*, Telecom Decision CRTC 2010-639, 31 August 2010
- *Axia SuperNet Ltd. – Request to exclude certain Alberta communities from the approved list of communities for broadband service expansion by TELUS Communications Company in Telecom Decision 2008-1*, Telecom Decision CRTC 2008-110, 25 November 2008
- *Axia SuperNet Ltd. - Application to review and vary part of Telecom Decision 2008-1 related to the use of deferral account funds for broadband expansion*, Telecom Decision CRTC 2008-87, 9 September 2008
- *Follow-up to Andy Shadrack, Director, Area D, Regional District of Central Kootenay – Application to review and vary certain determinations in Telecom Decision 2007-50, Telecom Decision 2008-5*, Telecom Decision CRTC 2008-29, 2 April 2008
- *Andy Shadrack, Director, Area D, Regional District of Central Kootenay – Application to review and vary certain determinations in Telecom Decision 2007-50*, Telecom Decision CRTC 2008-5, 25 January 2008
- *Use of deferral account funds to improve access to telecommunications services for persons with disabilities and to expand broadband services to rural and remote communities*, Telecom Decision CRTC 2008-1, 17 January 2008
- *Telecom Public Notice CRTC 2006-15 – Use of deferral account funds to expand broadband services to certain rural and remote communities*, Telecom Decision CRTC 2007-50, 6 July 2007, as amended by Telecom Decision CRTC 2007-50-1, 27 July 2007
- *Disposition of funds in the deferral accounts*, Telecom Decision CRTC 2006-9, 16 February 2006