



## Telecom Decision CRTC 2017-9

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Ottawa, 13 January 2017

*File number: 8661-S9-201601625*

### **Shaw Cablesystems G.P. – Application requesting relief from TELUS Communications Company’s monthly recurring charge for service entrance conduit**

*The Commission determines that TCC’s Support Structure Service tariff is not applicable to service entrance conduit and, therefore, TCC may not charge rates for service entrance conduit. Accordingly, the Commission **directs** TCC to (a) cease billing Shaw for service entrance conduit pursuant to the rates set out in TCC’s Support Structure Service tariff, (b) withdraw all invoices to Shaw for service entrance conduit since the first quarter of 2015, and (c) refund Shaw in accordance with TCC’s Terms of Service for payments made by Shaw related to service entrance conduit since the first quarter of 2015 and interest.*

*In addition, the Commission finds that if TCC is providing access to service entrance conduit, because such service is a telecommunications service, it must file and obtain Commission approval for a tariff specific to that service. Further, to the extent that the company has incurred, or is incurring, costs causal to the service that have not been otherwise recovered, any proposed tariff must be supported by a cost study specific to that service.*

### **Background**

1. TELUS Communications Company (TCC) charges licensees<sup>1</sup> for access to its support structures pursuant to item 404 - Support Structure Service of TCC’s General Tariff (referred to hereafter as TCC’s Support Structure Service tariff).<sup>2</sup> One such support structure that TCC provides access to licensees is conduit.<sup>3</sup> TCC’s Support

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<sup>1</sup> Licensees are cable television undertakings or Canadian carriers that make use of incumbent local exchange carrier support structures to serve their own end-users.

<sup>2</sup> TCC’s Support Structure Service tariff defines support structures as the supporting structures, including poles, conduits, strands, anchors, and manholes (but excluding central-office vaults and controlled environmental vaults) which TCC owns or which TCC does not own but for which it has the right to grant license(s) thereto.

<sup>3</sup> TCC’s Support Structure Service tariff defines conduit as a reinforced passage or opening in, on, over or through the ground or watercourses capable of containing communication facilities and includes main conduits, laterals to poles and into buildings, underground dips, short sections of conduits, under roadways, driveways, parking lots and similar conduit installations but excludes manholes, central-office vaults or other access points and conduit entering the central-office vault.

Structure Service tariff defines four types of conduit (i.e. Types A, B, C, and D), and contains Commission-approved rates specific to each conduit type.<sup>4</sup>

2. In late 2014, TCC conducted an audit of its underground conduit, including service entrance conduit.<sup>5</sup> In early 2015, TCC notified Shaw Cablesystems G.P. (Shaw) of the audit and provided information to Shaw with regard to that audit.
3. In March 2015, TCC began invoicing Shaw a monthly recurring charge for service entrance conduit identified in the audit in which Shaw had facilities. TCC charged the Type A conduit rate of \$2.25 per 30 metres (or part thereof) per cable for the service entrance conduit.
4. On 23 March 2015, Shaw sent a letter to TCC stating that it would pay the service entrance conduit invoices subject to verifying the audit results provided to it by TCC. Shaw also reserved its right to contest any of the invoice charges.
5. On 28 September 2015, Shaw sent a second letter to TCC questioning whether Type A conduit rates were appropriate for service entrance conduit.
6. On 28 October 2015, Shaw sent a third letter to TCC, arguing that Note 1 of TCC's Support Structure Service tariff<sup>6</sup> specifically excludes service entrance conduit from the application of the rates in that tariff.
7. From 16 December 2015 to 20 January 2016, Shaw and TCC held joint committee meetings in an attempt to resolve the dispute, but the parties were unable to do so.

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<sup>4</sup> Type A conduit is conduit that is supplied, installed, owned, and maintained entirely by and at the expense of TCC. Type B conduit is conduit that is supplied, owned, and maintained by and at the expense of TCC, but installed by TCC at the expense of the developer prior to the "Policy - Underground Servicing" of 81 01 01 (revised 83 08 31) [hereafter referred to as the revised construction policy]. Type C conduit is conduit that is supplied, owned, and maintained by and at the expense of TCC, but installed by TCC at the expense of the developer in areas formerly served by the Okanagan Telephone Company prior to the revised construction policy. Type D conduit is conduit that is owned by TCC, but supplied and installed by TCC at the expense of the developer under the revised construction policy.

<sup>5</sup> A service entrance conduit is a type of conduit that provides a connection from a mainline support structure to an individual customer's premises. A service entrance conduit spans from a service box on public property through to the point of interconnection on the outside wall or inside the customer's premises on private property.

<sup>6</sup> Note 1 of item 404.4.d of TCC's Support Structure Service tariff is as follows: Rates apply to conduit installed after 81 01 01 under the revised construction policy, but excluding service entrance ducts.

## Application

8. The Commission received an application from Shaw, dated 12 February 2016, in which the company requested relief from TCC's monthly recurring charge for service entrance conduit in British Columbia. Specifically, Shaw requested that the Commission
  - determine that the charging of a monthly recurring rate by TCC for service entrance conduit housing Shaw cable in British Columbia is inconsistent with the provisions of TCC's Support Structure Service tariff;
  - order TCC to withdraw the monthly recurring charge for service entrance conduit that has appeared in TCC's quarterly support structure invoices to Shaw since the first quarter of 2015; and
  - order TCC to refund Shaw the amounts paid by Shaw on account of the recurring charge for service entrance conduit since the first quarter of 2015.
9. The Commission received an answer regarding Shaw's application from TCC. The public record of this proceeding, which closed on 21 June 2016, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) or by using the file number provided above.

### **Can TCC charge Shaw for service entrance conduit pursuant to TCC's Support Structure Service tariff?**

10. Shaw argued that TCC was not entitled to charge a monthly recurring rate for service entrance conduit, citing *British Columbia Telephone Company – Tariff for the Use of Underground Ducts By Cable Television Licensees*, Telecom Decision CRTC 82-6, 26 July 1982 (Telecom Decision 82-6). In that decision, the Commission determined that (i) it was not appropriate for TCC<sup>7</sup> to recover the costs of service entrance conduit installed pursuant to the "Policy - Underground Servicing" of 81 01 01 (revised 83 08 31) [hereafter referred to as the revised construction policy] through the tariffed monthly recurring conduit rates, and (ii) the Type B conduit rate covered investment in manholes, conduit that were reusable in place, and service boxes, and that none of those costs were incurred by TCC for service entrance conduit installed pursuant to the revised construction policy. Shaw considered that Note 1 of TCC's Support Structure Service tariff clearly and unambiguously excluded monthly conduit rental rates from applying to service entrance conduit.
11. Shaw also argued that, given that the revised construction policy has been carried forward to the present day in TCC's British Columbia serving territory, the Commission's findings of fact in Telecom Decision 82-6 as to the limited extent of costs incurred by TCC in relation to the installation of service entrance conduit were

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<sup>7</sup> Telecom Decision 82-6 dealt with an application from British Columbia Telephone Company, which is now part of TCC.

fatal to TCC's attempts to justify the imposition of the tariffed Type A conduit rate to service entrance conduit.

12. Shaw further submitted that TCC had already recovered its costs associated with service entrance conduit. Shaw argued that TCC had not established that there were any costs associated with service entrance conduit that it had not already included in its embedded conduit cost base, and therefore recovered through the conduit rate applicable to mainline conduit or recovered from owners and developers. In this regard, Shaw noted that the Commission determined in Telecom Decision 82-6 that service entrance conduit costs were almost entirely borne by the developer through installation and materials costs.
13. With respect to the date from which Shaw should be refunded should its relief be granted, Shaw submitted that it repeatedly and consistently stated that it reserved the right to dispute the charges in the three letters to TCC referenced above. In those letters, Shaw stated that its payments related to service entrance conduit were made without prejudice and that TCC should refrain from invoicing Shaw for any additional service entrance conduit.
14. TCC submitted that it provided a regulated service in making its service entrance conduit available to licensees, and was entitled to just and reasonable compensation from licensees. TCC argued that the Commission has made incumbent local exchange carrier (ILEC) support structures available for decades on a compulsory basis at tariffed rates. TCC considered that the Commission has recognized that support structures serve a public utility function, arguing that this function conferred rights and obligations in relation to the common law duty to provide service, and that the obligation to provide a service entitled it to charge a monthly rate for the provision of such service.
15. TCC submitted that it incurred costs to own and maintain conduit, which needed to be recovered. TCC argued that regardless of conduit type and developer contribution, it bore service entrance conduit costs as it provided the service boxes, vaults, precast manholes, and associated hardware that are required over and above the conduit material for a specific development.
16. TCC considered that the Type A conduit rate was appropriate for service entrance conduit. TCC submitted that the Type A conduit rate ensured just and reasonable compensation for the use of its support structure assets that it is mandated to provide, own, and maintain on public rights-of-way. TCC further submitted that the costs of facilities such as manholes, reusable conduits, and service boxes are applicable to service entrance conduit and that the Type A conduit rate recognized the costs involved.
17. TCC argued that Note 1 of TCC's Support Structure Service tariff was irrelevant in the context of this dispute and should be disregarded by the Commission. TCC submitted that it was inconceivable that TCC ever intended for Note 1 of TCC's

Support Structure Service tariff to mean that licensees should be allowed to use and occupy service entrance conduit without incurring the applicable conduit charge.

18. TCC submitted that Shaw's argument relied on a flawed interpretation of Note 1 of TCC's Support Structure Service tariff by failing to consider the broader regulatory context. TCC considered that Note 1 of TCC's Support Structure Service tariff applied to conduit sections on private property, but did not apply to conduit sections on public rights-of-way, adding that the tariff must be read in its entire context in a harmonious manner that takes into consideration the purpose and objective of that tariff and the *Telecommunications Act* (the Act), including the intention of Parliament.
19. TCC argued that only if the tariff, including Note 1 of TCC's Support Structure Service tariff, is read in this context, would it give proper effect to the regulatory purpose of the Act's tariff regime, namely, ensuring that an important public service is provided at just and reasonable rates. TCC considered that Shaw's interpretation, which would result in the service being rendered for free, would defeat this regulatory purpose.
20. TCC considered that Telecom Decision 82-6 did not exclude service entrance conduit from a monthly recurring charge, rather that the Commission had concluded that although the Type B conduit rate was not acceptable, TCC may charge a monthly rate for service entrance conduit installed under the revised construction policy. As such, TCC considered that it was entitled to recover the just and reasonable costs for providing access to its support structures.
21. With respect to the appropriate date from which any refund should be given, TCC considered that Shaw's 23 March 2015 letter included standardized wording, but did not indicate specific concerns with the quantity of service entrance conduit found. With respect to Shaw's 28 September 2015 letter, TCC argued that Shaw did not dispute the application of the service entrance conduit rates, but focused instead on what the appropriate rate should be. Accordingly, TCC concluded that Shaw's 28 October 2015 letter was the first time that Shaw questioned the application of service entrance conduit charges.

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

22. The main issue in this dispute is whether TCC is permitted, under the terms of TCC's Support Structure Service tariff, to charge Shaw one of its tariffed conduit rates for service entrance conduit.
23. Despite the age of Telecom Decision 82-6, the principles underlying the Commission's determinations in that decision are still applicable today. As noted in Telecom Decision 82-6, the costs associated with structures such as manholes, conduit that is reusable in place, and service boxes that are used in mainline conduit, are not applicable to service entrance conduit. Thus, consistent with Telecom

Decision 82-6, TCC should be charging a rate for service entrance conduit that does not include such costs.

24. The rates applicable to the four conduit types in TCC's Support Structure Service tariff, however, recover costs for manholes, conduit that is reusable in place, and service boxes. They do not purport to recover costs that are specific to service entrance conduit. Accordingly, the conduit rates provided in TCC's Support Structure Service tariff do not apply to the provision of service entrance conduit. Further, there is no evidence on the record of this proceeding, in TCC's tariffs, or in a Commission order or decision, that TCC filed and obtained Commission approval for a tariff setting out a rate specifically for service entrance conduit following Telecom Decision 82-6.
25. With specific regard to Note 1 of TCC's Support Structure Service tariff, the Commission considers that this note was introduced as a result of its direction in Telecom Decision 82-6 for TCC to file tariff pages introducing a new conduit type and associated rate, better reflecting the company's practice and resulting costs relating to the installation and maintenance of conduit subsequent to the adoption of its revised construction policy. Consistent with its conclusion that it would not be appropriate for it to approve TCC's request to apply its rate for Type B conduit to service entrance ducts, the Commission specifically provided that TCC may charge a rate for service entrance conduit installed under the revised construction policy, but only after a separate application for a proposed rate was filed and approved. Accordingly, the rate applicable to Type D conduit and Type A conduit cannot apply to service entrance conduit.
26. In light of all of the above, TCC's Support Structure Service tariff is not applicable to service entrance conduit. Further, under the Act, TCC may not charge rates for service entrance conduit absent an approved tariff. Accordingly, the Commission **directs** TCC to cease billing Shaw for service entrance conduit pursuant to the rates set out in TCC's Support Structure Service tariff and to withdraw all invoices to Shaw for service entrance conduit since the first quarter of 2015.
27. With regard to charges already paid by Shaw for service entrance conduit, TCC should not have charged such rates and, accordingly, Shaw should be provided with a refund, in accordance with TCC's Terms of Service. In this regard, item 120.1 of TCC's Terms of Service in its General Tariff specifies that a customer can dispute a charge within one year of the date of an itemized statement.<sup>8</sup> Even if the Commission agrees with TCC that Shaw's 28 October 2015 letter was the first time that Shaw disputed TCC's service entrance conduit charges, that letter is within one year of the first invoice received by Shaw related to those charges.

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<sup>8</sup> Item 120.1 of TCC's Terms of Service in its General Tariff reads as follows: In the case of a recurring charge that should not have been billed or that was over-billed, a customer must be credited with the excess back to the date of the error subject to applicable limitation periods provided by law. However, a customer who does not dispute the charge within one year of the date of an itemized statement which shows that charge correctly, loses the right to have the excess credited for the period prior to that statement.

28. Accordingly, the Commission **directs** TCC to refund Shaw in accordance with TCC's Terms of Service for (a) payments made by Shaw related to service entrance conduit since the first quarter of 2015 and (b) interest.
29. Although this proceeding arose as a result of a bilateral dispute between Shaw and TCC, there may be other licensees in the same position as Shaw. Accordingly, the Commission **directs** TCC to apply the findings in the resultant decision to any other similarly placed licensees.
30. The Commission notes that, pursuant to subsection 25(1) of the Act, and subject to section 34 of the same Act, TCC may not provide a telecommunications service to the public otherwise than in accordance with a tariff filed and approved by the Commission, which tariff must specify the rate or the maximum and minimum rate, or both, to be charged for the service.
31. Accordingly, the Commission finds that if TCC is providing access to service entrance conduit, because such service is a telecommunications service, it must file and obtain Commission approval for a tariff specific to that service. Such a tariff application must include a definition of the telecommunications service that is being provided, identifying any costs of this service that are recovered through other means, with supporting rationale. Further, to the extent that the company has incurred, or is incurring, costs causal to the service that have not been otherwise recovered, any proposed tariff must be supported by a cost study<sup>9</sup> specific to that service.

Secretary General

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<sup>9</sup> Such a cost study should be consistent with the methodology documented in TCC's *Regulatory Economic Studies Manual*.