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

Telecom Decision CRTC 2007-101

Ottawa, 26 October 2007

TELUS Communications Company – Regulatory issues with respect to the provision of interexchange dark fibre

Reference: 8662-T66-200515398, 8640-T66-200606931 and 8638-C12-200715120

In this Decision, the Commission approves the application of TELUS Communications Company (TCC) for forbearance from the regulation of interexchange (IX) dark fibre in its Alberta and British Columbia serving territories. This determination is preceded by Commission findings that, contrary to TCC's submissions, dark fibre is a telecommunications service within the meaning of the Telecommunications Act*, and that the provision of IX dark fibre by TCC is subject to tariff approval, absent forbearance.*

Further to its forbearance determination with respect to TCC, the Commission initiates a proceeding to consider whether to forbear from the regulation of IX dark fibre in the serving territories of Bell Aliant Regional Communications, Limited Partnership, Bell Canada, MTS Allstream Inc., Saskatchewan Telecommunications, TCC (in Quebec), and Télébec, Limited Partnership

Pending the outcome of the above-noted proceeding, the Commission suspends its direction to TCC to apply the existing IX dark fibre general tariff to the two arrangements with Vidéotron Télécom ltée that were the subject of Telecom Order 2005-387.

Introduction

1. The Commission received an application by TELUS Communications Company (TCC), dated 19 December 2005, and amended on 23 January 2006,[1] to review and vary, among other things, that part of Telecom Decision 2005-63 that required it to file a General Tariff (GT) for the provision of Interexchange (IX) dark fibre.[2] TCC submitted that the Commission did not have the legal authority to regulate dark fibre but that, if the Commission concluded otherwise, Telecom Decision 2005-63 should be varied to remove the obligation on TCC to file a GT for IX dark fibre in its Alberta and B.C. serving territories.

[1] TCC submitted that since its 19 December 2005 and 23 January 2006 applications addressed common issues, the two applications should be treated together. By Commission letter dated 3 February 2006, parties were informed that the two applications would be dealt with in the same proceeding.

[2] The term "dark fibre" is defined in the Computer Desktop Encyclopedia as "optical fibre that spans some geographic area and is sold to carriers and large businesses without any optical or electronic signaling in its path. The customer is responsible for adding the transmission system at both ends." In contrast, "lit fibre" actively carries a signal and is defined in the Computer Desktop Encyclopedia as "optical fibre that is regularly being used to transmit data." In this Decision, dark fibre and optical fibre are used interchangeably.

2. TCC also requested that the Commission review and vary its directions in Telecom Order 2005-387 that required TCC to apply its approved tariff rates with respect to the fibre facilities provided to Vidéotron Télécom ltée (Vidéotron).[3] TCC noted that in Telecom Order 2005-387, the Commission had denied TELUS Communications (Québec) Inc.'s two applications for approval, pursuant to section 29 of the *Telecommunications Act* (the Act), of agreements with Vidéotron related to a fibre swap and to a long-term lease of intra-exchange and IX dark fibre facilities. TCC indicated that the Commission had considered that these agreements did not come within section 29 of the Act because their essence was the provision of a telecommunications service that, pursuant to section 25 of the Act, required the application of an approved tariff. TCC added the Commission had directed the company to apply the approved GT rates with respect to the provision of dark fibre provided to Vidéotron.

3. Subsequently, the Commission received an application by TCC, dated 1 June 2006, wherein the company applied, pursuant to section 34 of the Act for forbearance from the regulation of IX dark fibre in its Alberta and B.C. serving territories. TCC indicated that it had filed its application for forbearance without prejudice to its 19 December 2005 application, as amended on 23 January 2006, where the company argued that the Commission did not have jurisdiction to regulate dark fibre.

The proceeding

4. By way of a Commission letter dated 20 June 2006, parties were informed that TCC's forbearance application of 1 June 2006 would be considered in the proceeding initiated by TCC's application of 19 December 2005 that was amended on 23 January 2006.

5. The Commission received comments from Aliant Telecom Inc. (now part of Bell Aliant Regional Communications, Limited Partnership) (Bell Aliant),[4] Bell Canada, Columbia Mountain Open Network (CMON), enTel Communications Inc. (enTel), MTS Allstream Inc. (MTS Allstream), Rogers Communications Inc. (RCI), Saskatchewan Telecommunications (SaskTel), and Xit télécom inc. on behalf of itself and Télécommunications Xittel inc. (Xit télécom). The record closed with the receipt of TCC's reply comments dated 21 July 2006. The public record of this proceeding is available on the Commission's Web site at www.crtc.gc.ca under "Public Proceedings".

6. The Commission has identified the following issues to be addressed in its determinations:

    1. Does the Commission have the jurisdiction to regulate dark fibre and, if so, is the provision of IX dark fibre by TCC subject to Commission jurisdiction?

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[3] Vidéotron ltée and Vidéotron Télécom ltée merged effective 1 January 2006. The merged entity is continuing operations under the name of Vidéotron ltée. Vidéotron ltée is a wholly-owned subsidiary of Quebecor Media Inc.

[4] On 7 July 2006, Bell Canada's regional wireline telecommunications operations in Ontario and Quebec were combined with, among other things, the wireline telecommunications operations of Aliant Telecom Inc., Société en commandite Télébec (now referred to as Télébec, Limited Partnership), and NorthernTel, Limited Partnership to form Bell Aliant Regional Communications, Limited Partnership.

2. Should the Commission forbear from regulating the provision of IX dark fibre by TCC in its Alberta and B.C. serving territories?

3. Is there substantial doubt as to the correctness of Telecom Decision 2005-63 with respect to the Commission's direction to TCC to file a GT for the provision of IX dark fibre in Alberta and B.C.?

4. Is there substantial doubt as to the correctness of the Commission's determination in Telecom Order 2005-387 directing TCC to apply the approved GT rates with respect to the provision of dark fibre provided to Vidéotron?

1. Does the Commission have the jurisdiction to regulate dark fibre and, if so, is the provision of IX dark fibre by TCC subject to Commission jurisdiction?

7. The positions of parties and the Commission's analysis and conclusions with respect to this issue are set out in the Appendix to this Decision. In summary, the Commission finds that, contrary to TCC's submissions,

- dark fibre is a "telecommunications facility" and hence, a "telecommunications service," within the meaning of the Act, and that, accordingly, the Commission has the legal authority to regulate dark fibre; and

- the provision of IX dark fibre by TCC is subject to Commission jurisdiction by virtue of TCC's status as a "Canadian carrier" within the meaning of the Act or, in the alternative, that TCC has provided IX dark fibre "to the public" within the meaning of the Act, and that in doing so, TCC was acting as a "telecommunications common carrier," and hence a "Canadian carrier," within the meaning of the Act.

2. Should the Commission forbear from regulating the provision of IX dark fibre by TCC in its Alberta and B.C. serving territories?

TCC's application

8. In its 1 June 2006 forbearance application, TCC argued that regulation of IX dark fibre not only failed to respond to the requirements of IX dark fibre users, but it also harmed users' interests. TCC was of the view that forbearance would not impair the establishment or continuance of a competitive market. TCC argued that regulation of IX dark fibre undermined competition, prevented the establishment of a competitive market, and was inconsistent with the Canadian telecommunications policy objectives. Hence, TCC considered that forbearance from the regulation of IX dark fibre was justified pursuant to either subsection 34(1) or 34(2) of the Act.

9. TCC submitted that it was not a regular supplier of IX dark fibre and consequently it did not have significant market power in its incumbent serving territory of Alberta and B.C. TCC also submitted that it was primarily a purchaser of IX dark fibre from other suppliers. TCC stated that, in the past five years, it had supplied IX dark fibre in only one case, to Axia SuperNet Ltd

(Axia). In one other case, TCC had offered to swap IX dark fibre for new fibre facilities with enTel, another telecommunications company, but noted that the proposed transaction had not yet proceeded. TCC further submitted that it had no economic interest in being a regular participant in the provision of IX dark fibre. Instead, TCC submitted that it constructed transmission facilities for the provision of full telecommunications services to its customers, and that the company did not generally construct fibre facilities that were spare to its current requirements.

10. TCC argued that a GT cannot capture the route-specific nature of the costs applicable to IX dark fibre arrangements and, hence, would prevent TCC from being able to compete effectively for customers because the rate to be applied would either be too low or too high. Furthermore, TCC submitted that a GT rate for IX dark fibre would be inconsistent with the telecommunications policy objective set out in paragraph 7*(f)* of the Act because it would not foster increased reliance on market forces, nor would it constitute efficient or effective regulation given that TCC did not generally supply or have the capacity to supply IX dark fibre. Conversely, TCC was of the view that forbearance from regulation of IX dark fibre would be consistent with paragraph 7*(f)* of the Act.

Positions of parties

11. Bell Canada supported TCC's forbearance request and submitted that the Commission should extend such forbearance to IX dark fibre provided by Bell Canada in its incumbent serving territories in Ontario and Quebec. Bell Canada argued that, like TCC, it did not have significant market power in the provision of dark fibre and that there were numerous suppliers of IX dark fibre-based services operating in its incumbent serving territory. Bell Canada requested that the Commission initiate a proceeding to permit parties to show cause why any relief granted to TCC should not extend to Bell Canada.

12. CMON submitted that the fact that with forbearance TCC could choose to provide IX dark fibre anytime in Alberta and B.C., even for free, would cause more distortion to the IX dark fibre market than would be caused by directing TCC to file a GT for IX dark fibre for the same territory.

13. MTS Allstream submitted that TCC had failed to make a case for forbearance under section 34 of the Act. More particularly, MTS Allstream submitted that TCC did in fact possess significant market power in the provision of dark fibre, and there was a significant potential for unjust discrimination in TCC's provision of these services to customers in Alberta and B.C.

Commission's analysis and determinations

14. The Commission's power to forbear stems from section 34 of the Act, which states as follows:

> 34. (1) The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class of services provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.

> (2) Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the service or class of services.
>
> (3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services.

15. The Commission notes that TCC submitted that forbearance was justified pursuant to either subsection 34(1) or 34(2) of the Act. With respect to the application of subsection 34(1) of the Act, the Commission notes that the matter to be determined is whether forbearance would be consistent with the objectives set out in section 7 of the Act.

16. The Commission notes that TCC has provided IX dark fibre service in its Alberta and B.C. serving territories on one occasion only, and only in a very special circumstance, namely with respect to the provincial government-led Axia SuperNet program in Alberta. In addition, as previously noted, TCC has proposed a fibre swap arrangement with enTel, which is also characterized by special circumstances as its objective is, among other things, to enable the provision of broadband services to a remote region of B.C.

17. The Commission agrees with TCC that the provision of IX dark fibre is characterized by special circumstances in that each arrangement reflects different characteristics occasioned by differences in geographic topography, availability of existing IX dark fibre facilities and support structures, different economic/business circumstances, and applicable construction costs.

18. The Commission accepts TCC's submission that the company is not a regular supplier of IX dark fibre and has no economic incentive to do so because it wishes to concentrate on higher-value services such as broadcasting and enhanced Internet services. Further, the Commission accepts TCC's submission that it has little or no surplus IX dark fibre capacity and that the limited instances in which TCC may choose to provide IX dark fibre will likely be rare in light of the economic incentive to use the fibre to provide higher value services.

19. In light of the above, the Commission considers that, pursuant to subsection 34(1) of the Act, forbearance from regulation of IX dark fibre in TCC's Alberta and B.C. serving territories would be consistent with the following policy objectives of the Act:

    - 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 (paragraph 7*(a)*);

- to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada (paragraph 7*(b)*);

- to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services (paragraph 7*(g)*); and

- to respond to the economic and social requirements of users of telecommunications services (paragraph 7*(h)*).

20. The Commission is persuaded that in the circumstances of this case, with respect to subsection 34(3) of the Act, forbearance will not likely impair unduly the establishment or continuance of a competitive market for the provision of IX dark fibre in TCC's Alberta and B.C. serving territories.

21. Accordingly, the Commission declares that sections 24, 25, 29 and 31, and subsections 27(1), 27(2), 27(5), and 27(6) of the Act do not apply to TCC with regard to the provision of IX dark fibre in the company's Alberta and B.C. serving territories.

22. Given the above determination, it is not necessary to consider the matter of forbearance pursuant to section 34(2) of the Act.

Follow-up proceeding

23. As a result of the above, the Commission initiates a proceeding inviting parties to show cause why it should not forbear from regulating IX dark fibre, to the same degree as in this Decision, for Bell Aliant, Bell Canada, MTS Allstream, SaskTel, TCC (in Quebec) and Télébec, Limited Partnership.

24. Parties are to file their comments with the Commission, serving copies on other parties to the proceeding that led to Telecom Decision 2005-63, by **26 November 2007**.

25. Parties are to file reply comments with the Commission, serving copies on those parties that filed comments, by **11 December 2007**.

26. Where a document is to be filed or served by a specific date, the document must be actually received, not merely sent, by that date.

3. Is there substantial doubt as to the correctness of Telecom Decision 2005-63 with respect to the Commission's direction to TCC to file a GT for the provision of IX dark fibre in Alberta and B.C.?

27. Given the Commission's determination to forbear from the regulation of IX dark fibre in TCC's Alberta and B.C. serving territories, it is not necessary to address the above issue.

4. Is there substantial doubt as to the correctness of the Commission's determination in Telecom Order 2005-387 directing TCC to apply the approved GT rates with respect to the provision of dark fibre provided to Vidéotron?

Positions of parties

28. TCC submitted that there was serious doubt as to the correctness of Order 2005-387 with respect to the Commission's direction to TCC that the company apply its GT items 2.07 and 3.09 to its agreements with Vidéotron. TCC also submitted that, contrary to the Commission's statements in Telecom Order 2005-387, one of the services provided to Vidéotron was a sale of dark fibre, not a lease, and items 2.07 and 3.09 of its GT were designed and tariffed for one-year, three-year, and five-year terms and were not adequate in cases where there was a sale of dark fibre or a dark fibre swap.

29. Xit télécom submitted that TCC already had a GT for the provision of IX dark fibre for its serving territory in Quebec and that TCC should comply with the direction set out in Telecom Order 2005-387.

Commission's analysis and determinations

30. In Telecom Order 2005-387, the Commission determined that TCC's dark fibre agreements did not fall within section 29 of the Act because their essence was the provision of a telecommunications service, namely dark fibre, rather than primarily addressing matters falling within section 29 of the Act. Accordingly, the Commission considered that, pursuant to section 25 of the Act, TCC must apply approved tariff rates with respect to the fibre facilities provided to Vidéotron, rather than dispose of the applications pursuant to section 29 of the Act. The Commission directed TCC to apply, within 60 days of this Order, the rates, terms, and conditions approved under GT items 2.07 and 3.09, to the provision of dark fibre to Vidéotron.

31. The Commission disagrees with TCC that the arrangement described in Telecom Order 2005-387 as a lease is, in fact, a sale. In any event, the Commission considers that the question of whether there is substantial doubt as to the correctness of Telecom Order 2005-387 does not turn on whether the arrangement in question between Vidéotron and TCC is a sale or a lease. The Commission further notes that TCC did not argue that there was substantial doubt as to the correctness of Telecom Order 2005-387 on this ground.

32. The Commission notes that both arrangements with Vidéotron involve intra-exchange and IX dark fibre. The Commission also notes that both arrangements are for initial 20-year periods and that TCC does not have a 20-year rate in its GT.

33. Given that the existing GT in TCC's territory in Quebec does not specifically contemplate 20-year arrangements, the Commission is persuaded that there is substantial doubt as to the correctness of the Commission's direction in Telecom Order 2005-387 that TCC be required to apply the existing GT IX dark fibre tariff to the arrangements that are subject to Telecom Order 2005-387. Further, and in light of the Commission's decision to initiate a proceeding to consider whether to forbear from the regulation of IX dark fibre in the serving territory of TCC in Quebec, the Commission suspends the direction in Telecom Order 2005-387 to apply the existing GT rates to the two arrangements with Vidéotron pending the outcome of this

proceeding. Should a determination be made in that proceeding to not forbear from regulating IX dark fibre for TCC in its Quebec operating territory, TCC will be given the opportunity to file proposed 20-year GT rates for the Commission's approval, which TCC would be required to apply with respect to the two arrangements with Vidéotron.

Secretary General

Related documents

- *TELUS Communications (Québec) Inc. fibre agreements with Vidéotron Télécom Itée*, Telecom Order CRTC 2005-387, 24 November 2005
- *Issues with respect to the provision of optical fibre*, Telecom Decision CRTC 2005-63, 21 October 2005
- *Regulatory framework for voice communication services using Internet Protocol*, Telecom Decision CRTC 2005-28, 12 May 2005, as amended by Telecom Decision CRTC 2005-28-1, 30 June 2005
- *Xit Télécom v. TELUS Québec – Provision of fibre optic private networks*, Telecom Decision CRTC 2003-58, 22 August 2003
- *Applications for review and variance of Telecom Decision CRTC 97-7 and follow-up matters relating to the requirement for the Atlantic companies to file general tariffs for optical fibre*, Telecom Decision CRTC 98-10, 16 July 1998
- *Tariff filings related to the installation of optical fibres*, Telecom Decision CRTC 97-7, 23 April 1997

1. Does the Commission have the jurisdiction to regulate dark fibre and, if so, is the provision of IX dark fibre by TCC subject to Commission jurisdiction?

A1. TCC submitted that the Commission lacked jurisdiction to regulate the provision of dark fibre because

a) dark fibre was not a "telecommunications service" within the meaning of the Act; and

b) the provisioning of IX dark fibre by TCC was not subject to Commission jurisdiction.

i) Whether dark fibre is a "telecommunications service"

Positions of parties

TCC

A2. TCC submitted that dark fibre was not a "telecommunications service" within the meaning of the Act because it did not satisfy the definition in the Act of a "telecommunications facility," or the statutory definition of a "transmission facility."

A3. TCC noted that relevant definitions in the Act are as follows:

"telecommunications service" means

> a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise;

telecommunications facility" means

> any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications, and includes a transmission facility.

"transmission facility" means

> any wire, cable, radio, optical or other electro-magnetic system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.

A4. TCC submitted that dark fibre was inert glass and until an opto-electronic apparatus was engineered, installed and turned on, was not used, or capable of being used, for telecommunications. Relying on the dictionary definition of "capable" as "having the ability or fitness for," TCC argued that, at the moment of sale, dark fibre was no more "used" or "capable of being used" for telecommunications than fibre sitting in an equipment manufacturer's warehouse, a construction company's truck, or a trench. TCC submitted that, to

date, the Commission had not asserted jurisdiction over companies that own, and make available for sale dark fibre, but that this would be the result of claiming jurisdiction over the disposition of dark fibre.

A5. Further, TCC argued that dark fibre could not be reasonably regarded as a "transmission facility" because there could be no "network termination points" in existence in the case of dark fibre as the fibre was not yet part of any network. The company submitted that it was not until opto-electronic transmission apparatuses were attached to the ends of the fibre, and turned on, that network termination points existed.

A6. Accordingly, TCC submitted that dark fibre was not a "telecommunications service" as defined in the Act.

enTel

A7. enTel submitted that the issue of whether the provision of dark fibre to end-users constituted the provision of a "telecommunications service" depended on whether the carrier selling the dark fibre was in the business of selling dark fibre. If the carrier in question made such sales part of its suite of business services, enTel was of the view that such sales likely constituted the provision of a telecommunications service.

MTS Allstream

A8. MTS Allstream submitted that TCC's interpretation of "telecommunications facility" was contrary to the ordinary meaning of the words used in the definitions of "telecommunications service" and "telecommunications facility" in the Act and ignored the purpose of building a dark fibre route. MTS Allstream argued that dark fibre, including dark fibre installed by TCC or any other carrier, was a "telecommunications facility" because the one and only use of that dark fibre was for telecommunications. While dark fibre, by definition, was unlit and not in current use, MTS Allstream submitted that it remained "capable of being used" for telecommunications. MTS Allstream further submitted that it was only because dark fibre was "capable of being used for telecommunications" that a carrier such as TCC was able to sell or swap its excess dark fibre to other carriers or end-customers who required additional telecommunications facilities to deliver their telecommunications services.

A9. In MTS Allstream's submission, the dark fibre provisioned by TCC and other carriers was closely integrated with the dark fibre used by the carrier itself and could not be compared to fibre sitting in an equipment manufacturer's warehouse, as suggested by TCC. Rather, the dark fibre provisioned by TCC was contained in a single optical cable, comprised of many optical strands that were all packaged together, some of which may be used and lit directly by TCC, while the excess dark fibres that TCC did not require were sold to other competitors. In MTS Allstream's view, it was impossible to divorce the strands used by TCC from the unlit strands or strands used by another carrier. It was for this reason, MTS Allstream argued, that TCC retained responsibility for the maintenance of its optical cables and for any associated access and right-of-way issues.

RCI

A10. RCI submitted that TCC was ascribing the same meaning to "capable of being used" as to "being used." RCI argued that dark fibre was capable of being used for telecommunications because all that was required to change that capability into actual use was to attach optical electronics on both ends. To suggest otherwise would, in RCI's submission, lead to absurd conclusions, such as, for example, that the Commission would have no jurisdiction to regulate metallic loops unless the loops attach to customer premises equipment because, without such attachment, the loop was nothing but a dormant pair of wires.

TCC's reply

A11. TCC submitted that the interpretations of MTS Allstream and RCI would lead to the sale of every conceivable asset being subject to Commission jurisdiction.

Commission's analysis and determinations

A12. The Commission notes TCC's submission that dark fibre is not a "telecommunications facility" within the meaning of the Act because it is not capable of being used for telecommunications until an opto-electronic apparatus is engineered, installed and turned on.

A13. In the Commission's view, TCC's interpretation of the word "capable" with respect to the definition of "telecommunications facility" in the Act is unduly narrow and would effectively render the word meaningless in the context of this definition.

A14. The Commission considers that underlying TCC's proposed interpretation is that the word "capable" means "immediately capable" as distinct from a capability achieved through adaptation, such as through the attachment of optical electronics at both ends of the facility.

A15. The Commission notes that the interpretation of the word "capable" was considered by the Supreme Court of Canada (SCC) in *R v. Hasselwander* [1993] 2 S.C.R. 398 (*Hasselwander*), which involved a forfeiture order of a submachine gun by a Provincial Court judge who held that since the gun was readily convertible from semi-automatic to fully automatic, it was a prohibited weapon under the Criminal Code.

A16. In a majority judgment, the Ontario Court of Appeal set aside the order, concluding that the word "capable" meant "capable in its present condition" rather than a capability which could be achieved by adaptation of the weapon.

A17. The Ontario Court of Appeal's ruling was reversed by a majority of the SCC. Relying on dictionary definitions, the Court found that the word "capable" included a potential capability for conversion, and should not be restricted to the narrow meaning of immediately capable or capable in its present condition. In the Court's view, such a narrow construction would defeat Parliament's intention to protect the public from such weapons.

A18. At the same time, the SCC noted that the potential reach of the capability in question must be given some reasonable restriction. On the facts before it, the Court held that it should mean capable of conversion to an automatic weapon in a relatively short period of time with relative ease. In the above case, the Court found that the weapon in question satisfied such criteria.

A19. In the Commission's view, the Court's reasoning in *Hasselwander* is applicable to the matter of whether dark fibre is "capable" of being used for telecommunications within the meaning of the definition of "telecommunications facility" in the Act. As stated by the Court, and contrary to TCC's submission in this proceeding, the ordinary meaning of the word "capable" includes an aspect of potential capability for conversion. Further, the Commission considers that the Court's restriction in *Hasselwander* with respect to the reach of the capability is satisfied in the case of dark fibre given the relative ease with which it is possible to transform dark fibre into lit fibre through the attachment of optical electronics at both ends of the facility. In addition, consistent with the Court's view that a narrow interpretation of the word "capable" would be inconsistent with the goals and objectives of the Criminal Code with respect to the matter of prohibited weapons, the Commission considers that the narrow construction urged by TCC in this proceeding would be inconsistent with the objectives of the Act as it would effectively remove from the ambit of the Act not only dark fibre but also potentially a wide range of significant telephone network components, such as metallic loops and in-building wire.

A20. In light of the above, the Commission considers that dark fibre is a facility that is capable of being used for telecommunications. Similarly, the Commission considers that dark fibre is capable of being used "for any operation directly connected with telecommunications." Given this, the Commission finds that dark fibre is a "telecommunications facility" within the meaning of the Act, and hence that the provision of dark fibre is the provision of a "telecommunications service" within the meaning of the Act. Accordingly, the Commission finds that it has the necessary legal authority to regulate dark fibre.

A21. In light of the above findings, the Commission considers that it is not necessary to rule on whether dark fibre constitutes a "transmission facility" within the meaning of the Act.

ii) Whether the provisioning of IX dark fibre by TCC was subject to Commission jurisdiction

Positions of parties

TCC

A22. TCC submitted that even if dark fibre could be considered a "telecommunications service," in order for the Commission to have jurisdiction to order TCC to file tariffs for dark fibre, it must be found that TCC was acting as a "telecommunications common carrier" within the meaning of the Act when it disposed of dark fibre. TCC noted that "telecommunications common carrier" was defined in the Act as

> a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation

A23. TCC argued that unless dark fibre was provided "to the public," the company was not acting as a telecommunications common carrier and was, contrary to the Commission's direction in Telecom Decision 2005-63, not required to file a GT for IX dark fibre.

A24. TCC noted that, in Telecom Decision 97-7, the Commission had rejected TCC's argument at the time that the provision of intra-exchange dark fibre only in response to customer-initiated requests did not constitute service "to the public."

A25. TCC further argued that the Commission had failed to take into account relevant jurisprudence, including the Alberta Court of Appeal's decision in *Ajax Alberta Pipeline Limited v. Canadian Chemical Company Limited* (1954), 14 W.W.R 193 (Alta. S.C.A.D.) (*Ajax*), where the Court held that a single customer receiving services on an oil pipeline did not constitute members of the "public" for the purposes of public utility legislation.

A26. TCC also relied on the SCC's finding in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (*CCH Canadian*), that fax transmissions of court decisions from the Law Society of Upper Canada (the Law Society) to a single individual were not communications to the public.

A27. TCC noted that, in Telecom Decision 2005-63, the Commission referred to the provision by TCC of IX dark fibre under a Special Facilities Tariff from TCC to Axia as part of the construction of the Alberta SuperNet project and the proposed fibre sale from TCC to enTel in the Nass Valley of B.C., as evidence that TCC was offering IX dark fibre to the public. The company argued that these situations were two separate and unrelated situations, negotiated under unique circumstances, and did not constitute evidence of a service being offered "to the public" within the meaning of the Act.

enTel

A28. enTel argued that the tariff filing function was related to the provision of services to the public, not the purchase and sale of underlying transmission facilities, unless the carrier in question was in the business of selling those transmission facilities to the public. In enTel's view, the sale by a carrier to another carrier of its interest in fibre optic transmission facilities did not engage common carrier functions of providing services "to the public." The sales occurred at an earlier stage in the production process when carriers were constructing their networks in order to put themselves in a position where they could provide telecommunications services to the public.

MTS Allstream

A29. MTS Allstream submitted that TCC had entered into a number of transactions to provision dark fibre and was clearly in the practice of provisioning dark fibre "to the public" in any instance where it suited TCC's purposes.

RCI

A30. RCI submitted that TCC's argument that it was not providing dark fibre "to the public" was flawed because it was based on the assumption that in order for a service or facility to be provided to "the public," the service or facility must actually be consumed simultaneously by a multitude of users. RCI submitted that a transmission facility was used to provide telecommunications services to the public if there was a demand in the public for that service which the owner/operator satisfied, regardless of whether the demand was concentrated or dispersed, random, or frequent. RCI further submitted that, under the scheme of the Act, the words "to the public" were to be read and interpreted in contrast to "private" use of a

telecommunications facility by its owner. RCI argued that TCC's dark fibre facilities were not built exclusively for TCC's own private use and were not used by a small closed group. Accordingly, in RCI's submission, it was immaterial that there had been only two transactions involving the disposition of dark fibre by TCC to third parties.

TCC's reply

A31. TCC submitted that RCI's argument that Parliament only intended to allow "private" use of a telecommunications facility by its owner would make the phrase "to the public" in the Act meaningless. In the company's submission, the "private" use interpretation would also have made the words "for compensation" superfluous, since companies did not compensate themselves.

A32. TCC submitted that Parliament was deemed to have understood the state of the law when enacting legislation and that it was presumed that the legislature did not intend to change existing law or depart from established principles, policies or practices. TCC argued that *Ajax* was part of Canadian jurisprudence at the time that the Act was enacted in 1993. Accordingly, by using the word "public" in the context of public utility legislation, TCC argued that Parliament could reasonably be taken to have intended that a single party does not constitute a member of the "public."

A33. With respect to RCI's submission, TCC asserted that it was clear that the company had only provided dark fibre to other carriers in unique and rare circumstances. TCC argued that speculation as to what TCC might do in the future could not be used to fit TCC within the definition of a "telecommunications common carrier" in the provisioning of dark fibre. TCC noted that the statutory definition was expressed in the present tense, and submitted that there was no suggestion in the definition that a person who could in future provide service "to the public" was subject to Commission regulation as a "telecommunications common carrier."

Commission's analysis and determinations

A34. The Commission notes that while TCC framed its arguments in terms of whether or not the company was acting as a "telecommunications common carrier", the relevant provisions of the Act apply to Canadian carriers. "Canadian carrier" is defined in the Act to mean

> a telecommunications common carrier that is subject to the legislative authority of Parliament;

As previously noted, a "telecommunications common carrier" is defined as

> A person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation.

A35. The Commission further notes that except to the extent that they are subject of an exemption or a forbearance order, pursuant to section 9 or section 34 of the Act respectively, services provided by Canadian carriers are subject to prior tariff approval as a result of the operation of section 25 of the Act which provides that

> No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

A36. In addition, services provided by Canadian carriers are, except to the extent that they are the subject of an exemption or a forbearance order, required to conform to, among other provisions, subsection 27(1) and 27(2) of the Act, which read as follows:

> (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.
>
> (2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

A37. The Commission considers that the thrust of TCC's argument is that the company is not acting as a Canadian carrier with respect to the provision of IX dark fibre, and that, accordingly, the obligations set out in section 25 and subsections 27(1) and 27(2) of the Act do not apply in these circumstances.

A38. The Commission notes that TCC is a Canadian carrier within the meaning of the Act. The Commission considers that TCC is essentially asking the Commission to accept the proposition that the company may or may not be acting as a Canadian carrier, and hence may or may not be subject to the Act, depending on whether the service in question is being provided to the public.

A39. The Commission considers that TCC's position is inconsistent with Parliament's intention, as expressed through the language and legislative scheme of the Act.

A40. With respect to the language of the Act, the Commission notes that neither section 25, nor subsections 27(1) and 27(2), refers to telecommunications services being provided to the public, but merely to the provision of telecommunications services.

A41. With respect to the legislative scheme, the Commission considers that once a service provider has brought itself within the definition of a "Canadian carrier" within the meaning of the Act (which clearly is the case with respect to TCC), Parliament intended that the service provider's status remain that of a Canadian carrier, even though it may choose in certain circumstances to provide certain telecommunication services in a manner not necessarily captured by the definition of a "telecommunications common carrier."

A42. The Commission notes that the issue of whether Canadian carriers should, in certain circumstances, be treated otherwise than as Canadian carriers arose in the proceeding that led to Telecom Decision 2005-28. In Telecom Decision 2005-28, the Commission stated that the fact that a Canadian carrier may resell certain services and functionalities of other carriers in the provision of their local voice over Internet Protocol services does not transform them into resellers. The Commission went on to state that all of the telecommunications services provided by a Canadian carrier were subject to the provisions of the Act, including the obligation to file tariffs in the absence of a forbearance order.

A43. The Commission considers that the consistency of this view with the legislative scheme of the Act is reinforced when the implications of the interpretation urged upon the Commission by TCC are examined.

A44. The Commission notes that the definition of a "telecommunications common carrier" contemplates, among other things, that the telecommunications services in question are provided for compensation. If the TCC interpretation were accepted, a service provider could avoid the obligation to provide just and reasonable rates and not engage in unjust discrimination simply by providing telecommunications services for no compensation. If the carrier were to provide services on this basis to some customers but not to others, the Commission notes that under TCC's interpretation, the Commission would not have the legal authority to address issues such as unjust discrimination and whether the rates being charged were just and reasonable. In the Commission's view, Parliament cannot have intended such a consequence as it would undermine the Commission's statutory obligation to ensure that rates charged by Canadian carriers are just and reasonable and not unjustly discriminatory. Moreover, such an interpretation would effectively make subsection 27(6) of the Act, which reads as follows, meaningless:

> Notwithstanding subsections (1) and (2), a Canadian carrier may provide telecommunications services at no charge or at a reduced rate;
>
> a) to the carrier's directors, officers, employees or former employees; or
>
> b) with the approval of the Commission, to any charitable organization or disadvantaged person or other person.

A45. In light of the above, the Commission disagrees with TCC's position that the Commission lacks jurisdiction to regulate the provision of IX dark fibre by the company in circumstances when such fibre is not provided to the public.

A46. In the alternative, the Commission considers that, in the circumstances of this case, TCC has provided IX dark fibre to the public.

A47. The Commission notes that TCC relied on two court decisions to support its interpretation that the company is not providing IX dark fibre to the public.

A48. The first decision is *Ajax*, in which the Alberta Court of Appeal held that the Alberta Board of Public Utility Commissioners (ABPUC) did not have jurisdiction with respect to a pipeline company which was established in order to supply natural gas to a single customer, a chemical company.

A49. The facts of that case were that the pipeline company sought to bring itself within the ABPUC's jurisdiction as a public utility in order to apply for an increase in the gas transportation charge, which, because of a downturn in the chemical company's business, resulted in less revenue to the pipeline company than originally envisaged when the transportation charge formula was originally set between the parties.

A50. The Court, by majority, held that the chemical company did not constitute a "member of the public" on two grounds: (1) that those words were not apt to describe a corporation, and (2) the fact that the company was not a monopoly meant that the legislature would have had to have used very clear words to give the ABPUC the power to set aside a contract privately entered into between two corporations. Porter, J.A. dissented in part, holding that "member of the public" included the chemical company.

A51. The Commission notes that the *Ajax* decision has not been cited on the "to the public" issue in subsequent cases. In addition, the Commission considers that the Court's finding is specific to the facts of that case, which included, as backdrop, that in bringing the matter before the ABPUC, the pipeline company was endeavouring to avoid a contract that had been freely entered into with the chemical company, and was trying to bring itself within a regulatory regime to which it was not otherwise subject. By contrast, TCC is a regulated entity and, in contradistinction to the facts at issue in *Ajax*, in this proceeding, TCC is seeking to remove itself from complying with regulatory obligations, to which it would otherwise be subject. Further, the Commission considers that the Court's view that a corporation is not part of the public should be viewed in the particular context of the facts before the Court, namely that the chemical company was the only customer of the entity seeking to bring itself within the ABPUC's jurisdiction. By contrast, TCC provides telecommunications services to a multitude of customers, consisting of individuals and corporate entities alike.

A52. The second case relied on by TCC is *CCH Canadian* and specifically the SCC's finding that fax transmission of copies of legal materials by the Law Society were not communications to the public by telecommunication and, hence, did not infringe subsection 3(1)(f) of the *Copyright Act.*

A53. The Commission considers that the facts relating to TCC's provision of IX dark fibre are very different from the facts that gave rise to the Court's finding in *CCH Canadian*. The Commission notes that *CCH Canadian* concerned the interpretation of the *Copyright Act*, which has as one of its implicit purposes the striking of an appropriate balance between the interests of owners of copyright and users. In this respect, the Commission notes that the recipients of the fax transmissions at issue in *CCH Canadian* were confined to a closed group. The Commission also notes the Court's finding was preceded by a finding that the Law Society's practice of making available individual copies of the legal materials constituted fair dealing and, hence, did not infringe the publisher's copyright.

A54. Further, the Commission considers that if *CCH Canadian* stands for the proposition put forward by TCC in this proceeding, it could equally be argued that the provision of any telecommunications service by any incumbent local exchange carrier to any single customer is not subject to the requirement to file tariffs and to not act in an unjustly discriminatory manner. In the Commission's view, such an interpretation would be inconsistent with Parliament's intention as expressed through the Act.

A55. The Commission notes that TCC's argument with respect to the matter of "to the public" is primarily based on the fact that, to date, there has been only one customer for IX dark fibre, namely Axia. In the Commission's view, TCC is urging that the Commission adopt an essentially quantitative approach to determine the meaning of "to the public."

A56. The Commission notes that the relevant case law indicates that the meaning to be given to the expression "to the public" is to be determined on a case-by-case basis and depends upon the context in which that expression is used.

A57. Further, the Commission notes that the SCC has rejected a quantitative approach to the matter of defining "the public" in the context of the interpretation of human rights legislation, as articulated through cases such as *University of British Columbia v. Berg* [1993] 2 S.C.R. 353 and *Gould v. Yukon Order of Pioneers* [1996] 1 S.C.R. 571. The Courts have also rejected a quantitative approach to defining the public in cases addressing the trading of securities, such as *Regina v. McKillop* [1972] 1 O.R. 164, and in decisions addressing broadcasting matters, such as *R. v. Communicomp Data Ltd.* (1975), 6 O.R. (2d.) 680.

A58. Consistent with the approach adopted by the Courts, the Commission considers that the words "to the public" should be interpreted in a manner that most closely accords with the purpose of the legislation and its context. In the Commission's view, it would be unreasonable to conclude that Parliament contemplated that a regulated carrier could avoid its statutory obligations merely because the services in question were provided to one entity. In the Commission's view, TCC's interpretation would frustrate the purposes of the Act, pursuant to which the provision of telecommunications services by Canadian carriers are to be, except when forborne, at tariffed rates, which are just and reasonable and do not unjustly discriminate or give an undue preference to any person. In this regard, the Commission notes that it would be without legal authority to address issues of just and reasonable rates and unjust discrimination.

A59. The Commission considers that the above view is reinforced when the consequences of TCC's interpretation with respect to the company's arrangement with Axia are examined. The Commission notes that the Axia arrangement involved the provision of up to 19,100 dark fibre kilometres, linking more than 400 communities in Alberta, and constituted a significant element of the Alberta SuperNet project established by the Government of Alberta. The Commission notes that the Government of Alberta chose to structure the project in such a way that the dark fibre was provided by TCC to one customer, i.e., Axia. However, the arrangement could have been structured in such a way to have yielded a multitude of customers (e.g. municipalities) that could have contracted in their own right for the dark fibre in question. The Commission notes that this was the model established by the Government of Quebec in the context of the Villages branchés program, which had similar objectives to the Alberta SuperNet project, namely to allow rural and remote communities to have access to broadband services.

A60. In the Commission's view, TCC's interpretation would be an invitation to structure arrangements to avoid statutory obligations.

A61. In light of the above, the Commission considers that TCC has provided IX dark fibre to the public within the meaning of the Act, and in doing so, TCC was acting as a "telecommunications common carrier," and hence a "Canadian carrier," within the meaning of the Act.

A62. In light of the above, the Commission finds that the provision of IX dark fibre by TCC is subject to Commission jurisdiction.