



Telecom Order CRTC 2008-74

Ottawa, 13 March 2008

TBayTel

Reference: Tariff Notice 138

Withdrawal of Partial Cable-Distribution System offering

In this Order, the Commission denies TBayTel's application to withdraw its Partial Cable-Distribution System offering.

The Commission also directs the parties to file a signed Partial System Agreement for the Commission's approval no later than 30 days from the date of this Order.

Introduction

1. The Commission received an application by TBayTel dated 28 November 2007, in which it proposed to withdraw its General Tariff section TB1200, sub-section 2 – Partial Cable-Distribution System (Partial System Offering (PSO)). TBayTel's PSO is currently used by a single customer, Shaw Communications Inc. (Shaw), to provide local exchange, Internet, and cable services. TBayTel proposed to withdraw its PSO in order for it to use the PSO coaxial cable facilities to provide its own emerging video strategy.¹ TBayTel submitted that there was a general understanding between Shaw and itself that the use of the said asset by TBayTel for its purposes would preclude any other party from using it.
2. Shaw filed comments on this application. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Positions of parties

3. TBayTel submitted that Shaw had both the necessary human resources and the technical capacity to develop and/or acquire alternate cable assets in Thunder Bay. The company also submitted that it believed that any alternate asset developed or acquired by Shaw would be comparable, if not identical, to the assets it currently uses under the existing PSO tariff.
4. TBayTel submitted that any initial outlay costs that Shaw might have to incur would constitute reasonable capital investment costs as part of the normal course of business. With respect to ongoing costs, TBayTel submitted that Shaw would no longer be required to make any payments to TBayTel for use of the PSO cable.

¹ In its reply comments dated 7 February 2008, TBayTel indicated that on 31 January 2008, in a separate proceeding, it filed an application seeking Commission approval to operate a Class 1 broadcasting distribution undertaking and a video-on-demand programming undertaking.

5. Shaw indicated that TBayTel's argument that it required the PSO plant to provide its own video strategy was not credible. According to Shaw, without connection to a head-end and subscriber drops – both of which Shaw owns – the PSO plant was useless. Moreover, if TBayTel were truly interested in rolling out competitive video services, it could do so using its end-to-end telephone service network and digital subscriber line (DSL) technology. Shaw submitted that this technology has been available for several years and is what every other telephone company in North America is using, or proposing to use, to offer competitive video services.
6. Shaw indicated that TBayTel's repeated suggestion that Shaw should build a new cable distribution network was unreasonable given that Shaw had paid for the PSO plant.² According to Shaw, TBayTel was not seeking to compete; it was seeking to take advantage of the capital investments of others and to force existing competitors from the market.
7. Shaw further indicated that construction of a new distribution network could not possibly qualify as an available or reasonable substitute to PSO. According to Shaw, TBayTel's application was deficient in that it failed: (1) to establish that construction of a new PSO network was economically or technically feasible; (2) to assess capacity constraints on municipal rights-of-way and support structures; (3) to make any reasonable assessment of a timetable for this kind of construction which it submitted would, even in a best case scenario, take years rather than months; and (4) to consider the customer outages and inconvenience that would necessarily occur. Shaw emphasized that TBayTel had failed to provide any cost estimate to construct a new PSO network.
8. TBayTel originally proposed that a transition period would end in September 2008. In its response to the Commission staff's interrogatories, it submitted that it was prepared to extend the transition period to 31 December 2008.

Commission's analysis and determinations

9. In Telecom Decision 2008-22, the Commission revised its procedures for the disposition of applications dealing with the destandardization and/or the withdrawal of tariffed services. The Commission has accordingly assessed TBayTel's application in light of these revised procedures.
10. In assessing applications for the withdrawal of tariffed services, the Commission seeks to address the needs of the service provider while ensuring that customers' telecommunications needs are not frustrated.

² TBayTel originally provided PSO pursuant to an agreement between Maclean Hunter Cable TV (Maclean Hunter) and the City of Thunder Bay (the Maclean Hunter agreement). Under the terms of this agreement, Maclean Hunter was required to pay all the capital costs of the PSO plant, including supply and installation costs, all costs associated with rearrangement, rehabilitation, removal, and repair and maintenance of the PSO plant, as well as a monthly lease charge to use these facilities to provide its cable service in Thunder Bay. The agreement also required Maclean Hunter to pay all the costs associated with making changes to support structures that TBayTel deemed necessary to support PSO attachments. Following Shaw's purchase of Maclean Hunter's cable operations in Thunder Bay, the Maclean Hunter agreement was assigned to Shaw.

11. The Commission is of the view that TBayTel did not provide sufficient details with respect to substitute services for PSO given the impact that the withdrawal of this service could have on Shaw and, by extension, on Shaw's end-customers. While TBayTel proposed that Shaw could develop or acquire its own cable assets, the Commission notes that it did not identify any provider from which Shaw could potentially acquire alternate cable assets in Thunder Bay, nor did it describe any existing facilities that could be used to replace the PSO. The Commission also notes that TBayTel did not support its submission with any estimates of the capital and/or ongoing costs that Shaw would incur to develop its own cable assets.
12. In this regard, the Commission notes that any new construction would require city permits, which in this case would most likely not be issued until the City of Thunder Bay had signed a municipal access agreement with Shaw. Further, the Commission notes that replacement of the PSO would involve the installation of a significant amount of cable. Finally, the Commission notes the geography and difficult climate of the area. The Commission considers that, as a result, it would take several years for Shaw to develop its own cable assets or to acquire them from an alternate source.
13. Accordingly, the Commission concludes that withdrawal of the PSO within the time frame proposed by TBayTel would not allow Shaw to develop alternatives such that it could continue to provide services to its end-customers in Thunder Bay without interruption.
14. Furthermore, the Commission is also of the view that approval of the application as filed would weaken or otherwise stifle competition for telecommunications services in TBayTel's territory, contrary to the Commission's policy of encouraging competition as the favoured means of attaining the telecommunications policy objectives set out in section 7 of the *Telecommunications Act*.
15. Finally, the Commission is not persuaded by the record of this proceeding that TBayTel would require the PSO facilities in their entirety in order to implement its proposed video strategy, particularly in those parts of its network where DSL is available. The Commission notes that allowing use of the unused portion of the PSO facilities, while the PSO customer is developing an alternate network, would help reduce the cost of the substitute service for the customer and minimize service disruption to its end-customers.
16. In light of the above, the Commission **denies** TBayTel's application.
17. The Commission notes that Shaw filed a related application under Part VII of the *CRTC Telecommunications Rules of Procedure* (Shaw's Part VII application) requesting modifications to the rates charged by TBayTel for the PSO. In Shaw's view, it is already paying support structure costs to Thunder Bay Hydro and those support structure costs are part of the monthly PSO rate. By Commission letter dated 14 December 2007, the parties were advised that consideration of Shaw's Part VII application would be suspended pending the outcome of this proceeding. In light of the above determinations, the Commission will now proceed with its review of Shaw's Part VII application. In the event that TBayTel and Shaw engage in bilateral negotiations with respect to the possible sale of cable assets forming the subject matter of Tariff Notice 138, the parties are requested to inform the Commission.

18. The Commission directs the parties to file a signed Partial System Agreement for the Commission's approval no later than 30 days from the date of this Order.

Secretary General

Related document

- *Mandatory customer contract renewal notification and requirements for service destandardization/withdrawal*, Telecom Decision CRTC 2008-22, 6 March 2008

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