



Telecom Notice of Consultation CRTC 2010-165

Ottawa, 19 March 2010

Call for comments

Classification of service providers that light leased dark fibre for subsequent sale

File number: 8665-C12-201004853

In this notice, the Commission initiates a proceeding to determine whether by lighting dark fibre leased from a third party and providing the lit fibre to third parties for compensation, a service provider is "operating" a "transmission facility" and is a "telecommunications common carrier" under the Telecommunications Act.

Introduction

1. On 25 November 2009, AboveNet Communications Inc. (AboveNet) filed a letter requesting that the Commission register its Canadian subsidiary, AboveNet Canada Inc. (AboveNet Canada), as a reseller. AboveNet stated that its initial intention was for AboveNet Canada to sell dark and lit fibre optic services in Canada using transmission facilities leased from TELUS Communications Company (TCC) pursuant to an existing lease agreement. AboveNet stated that AboveNet Canada neither owned nor operated transmission facilities in Canada.
2. By letter dated 7 December 2009, TCC opposed the registration of AboveNet Canada as a reseller. TCC argued that based on the facts presented to the Commission, AboveNet Canada does not qualify to operate as a reseller and should be considered a "telecommunications common carrier" under the *Telecommunications Act* (the Act).
3. In support of its position, TCC stated that AboveNet Canada would be acquiring dark fibre from TCC by way of a lease. TCC stated that given that it would not provide lit services to AboveNet Canada, AboveNet Canada itself would provide the electronics to light the fibre.
4. TCC submitted that once AboveNet Canada attached electronics enabling it to light the fibres in question, it would be operating a transmission facility. TCC also submitted that because AboveNet Canada would be providing lit fibre to the public as per its 25 November 2009 letter, AboveNet Canada would be operating as a telecommunications common carrier, not as a reseller.
5. By letter dated 15 December 2009, AboveNet stated that it did not believe that the provision of lit fibre services in Canada would establish AboveNet Canada as a "telecommunications common carrier" as defined in the Act.
6. By letter dated 26 January 2010, TCC addressed the arguments raised by AboveNet in its 15 December 2009 letter.

Background

Regulatory treatment of resellers

7. In 1993, the Act came into force and introduced a series of definitions to identify the service providers that would be subject to the Commission's regulatory powers under the Act.
8. In *Exemption of resellers from regulation*, Telecom Public Notice CRTC 93-62, 4 October 1993, the Commission determined that based on the definitions in the Act, resellers would not be subject to the provisions of the Act applicable to Canadian carriers. The Commission noted in particular that resellers were typically involved in aggregating and switching their traffic, and, in such cases, determining the routing of their traffic.
9. The Commission has not specifically ruled on the issue raised by TCC as to whether a service provider that does not own transmission facilities "operates transmission facilities" when it lights dark fibre leased from a third party, and whether in providing lit fibre to third parties for compensation, such a service provider is a "telecommunications common carrier" under the Act.

Relevant definitions in the Act

10. Pursuant to section 2 of the Act,

"exempt transmission apparatus" means any apparatus whose functions are limited to one or more of the following:

- (a) the switching of telecommunications,
- (b) the input, capture, storage, organization, modification, retrieval, output or other processing of intelligence, or
- (c) control of the speed, code, protocol, content, format, routing or similar aspects of the transmission of intelligence;

"intelligence" means signs, signals, writing, images, sounds or intelligence of any nature;

"telecommunications common carrier" means 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;

"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;

"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; and

"transmission facility" means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination points, but does not include any exempt transmission apparatus.

Call for comments

11. The Commission calls for comments on whether by lighting dark fibre leased from a third party and providing the lit fibre to third parties for compensation, a service provider is "operating" a "transmission facility" and is a "telecommunications common carrier" as defined in the Act.

Procedure

12. AboveNet, along with its wholly-owned subsidiary AboveNet Canada, and TCC are made parties to this proceeding.
13. AboveNet's letters dated 25 November and 15 December 2009, and TCC's letters dated 7 December 2009 and 26 January 2010, are made part of the record of this proceeding.
14. A copy of this notice of consultation will be provided to each of the 619 resellers of telecommunications services registered on the Commission's website.
15. Parties interested in participating in this proceeding (including receiving copies of all submissions) must notify the Commission of their intention to do so by filling out the online form; or by writing to the Secretary General, CRTC, Ottawa, Ontario, K1A 0N2; or by faxing to: 819-994-0218 by **29 March 2010** (the registration date). Parties are to provide their email addresses, where available. If parties do not have access to the Internet, they are to indicate when they notify the Commission whether they wish to receive disk versions of hard-copy filings.
16. As soon as possible after the registration date, the Commission will post on its website a complete list of interested parties, their mailing addresses, and, if available, their email addresses, identifying those parties who wish to receive disk versions.
17. Any person who wishes merely to file written comments in this proceeding, without receiving copies of the various submissions, may do so by writing to the Commission by **19 April 2010** at the address or fax number noted above, or by filling out the online form.
18. All parties may file comments with the Commission regarding the above-noted issue, serving copies on all other parties, by **19 April 2010**.
19. All parties may file reply comments with the Commission, serving copies on all other parties, by **28 April 2010**.
20. The Commission expects to publish a decision on the issues raised in this notice of consultation within 120 days of the close of record.

21. The Commission will not formally acknowledge comments. It will, however, fully consider all comments and they will form part of the public record of the proceeding.
22. 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.
23. Parties may file their submissions electronically or on paper. Submissions longer than five pages should include a summary.
24. Electronic submissions should be in HTML format. As an alternative, those making submissions may use Microsoft Word for text and Microsoft Excel for spreadsheets.
25. Each paragraph of all submissions should be numbered. In addition, the line ***End of document*** should be entered following the last paragraph. This will help the Commission verify that the document has not been damaged during electronic transmission.
26. The Commission encourages parties to monitor the record of this proceeding and/or the Commission's website for additional information that they may find useful when preparing their submissions.

Important notice

27. Note that all information that parties provide as part of this public process, except information granted confidentiality, whether sent by postal mail, facsimile, email, or through the Commission's website at www.crtc.gc.ca, becomes part of a publicly accessible file and will be posted on the Commission's website. This information includes personal information, such as full names, email addresses, postal/street addresses, telephone and facsimile numbers, and any other personal information parties provide.
28. The personal information that parties provide will be used and may be disclosed for the purpose for which the information was obtained or compiled by the Commission, or for a use consistent with that purpose.
29. Documents received electronically or otherwise will be posted on the Commission's website in their entirety exactly as received, including any personal information contained therein, in the official language and format in which they are received. Documents not received electronically will be available in PDF format.
30. Please note that the information that parties provide to the Commission as part of this public process is entered into an unsearchable database dedicated to this specific public process. This database is accessible only from the web page of this particular public process. As a result, a general search of our website with the help of either our own search engine or a third-party search engine will not link directly to the information that was provided as part of this public process.

Location of CRTC offices

31. Submissions may be examined or will be made available promptly upon request at Commission offices during normal business hours.

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Secretary General

This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>.