



Telecom Decision CRTC 2011-486

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Ottawa, 12 August 2011

Shaw Communications Inc. – Application to review issues regarding access to TELUS Communications Company support structures

File number: 8690-S9-201104447

In this decision, the Commission finds that TCC has not complied with its mandated support structure service obligations, and reminds TCC that it must adhere to those obligations. The Commission denies Shaw's request for additional regulation beyond TCC's mandated obligations, but requires TCC and Shaw to form a joint committee to resolve any specific issues that Shaw may raise, including technical and safety issues, and to report back to the Commission on that committee's progress. The Commission also determines that if TCC continues to fail to meet its mandated obligations despite the directives in this decision, further measures may have to be taken to enforce compliance.

Introduction

1. On 3 March 2011, Shaw Communications Inc. (Shaw) filed an application seeking access to TELUS Communications Company's (TCC) support structures, in accordance with TCC's obligations mandated by its General Tariff (the tariff), its Support Structure License Agreement (SSLA), and various Commission decisions.
2. In its application, Shaw claimed that it had been attempting to resolve a number of issues with TCC with regard to accessing TCC's support structures, and that those issues have negatively affected Shaw's competitiveness. Shaw alleged that TCC refused to engage in a joint committee process to resolve those issues and submitted that the only effective way to resolve them was to seek relief from the Commission.
3. The Commission received comments on Shaw's application from TCC. The public record of this proceeding, which closed on 18 April 2011, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.
4. The Commission has identified the following issues to be addressed in this decision:
 - I. Is TCC failing to meet its mandated obligations for support structure services?
 - II. Should the Commission increase regulation beyond TCC's mandated obligations?

III. Should the Commission make any determinations with regard to safety and/or technical issues?

I. Is TCC failing to meet its mandated obligations for support structure services?

5. Shaw claimed that TCC has routinely failed to comply with its mandated support structure service obligations. Shaw alleged that, for example, TCC has failed to
 - comply with support structure service permit application response times;
 - provide details when it denied a permit based on having “no spare capacity”;¹
 - provide a breakdown of make-ready² cost estimates; and
 - provide notification of what portions of make-ready work can be performed by a licensee.
6. Shaw submitted that TCC, by failing to comply with its mandated obligations, has denied and delayed access to its support structures. Shaw argued that this denial and delay of access have allowed TCC to confer upon itself an undue competitive advantage, to the detriment of Shaw.
7. TCC submitted that Shaw enjoys non-discriminatory access to TCC’s support structures. TCC argued that Shaw’s application included many allegations of misconduct on the part of TCC, yet provided limited specific examples or substantive evidence.
8. TCC acknowledged that in some circumstances it had failed to adhere to its mandated obligations, such as providing a breakdown of make-ready cost estimates, and claimed that it is taking steps to improve its processes.

Commission’s analysis and determinations

9. Based on all the evidence filed in this proceeding, including the fact that TCC itself acknowledged having failed to meet its mandated obligations in some circumstances, the Commission finds that TCC has not complied with its mandated support structure service obligations. In addition, the Commission notes that TCC’s failure to adhere to its mandated obligations has delayed Shaw’s access to TCC’s support structures.

¹ Spare capacity is the difference between the unused capacity of the support structure and the capacity required by the support structure owner to meet its anticipated future service requirements. Unused capacity is the difference between the capacity of the support structure, based upon its design limitations, and the capacity used by the support structure owner to meet its current service requirements plus any capacity previously allocated to a licensee.

² Make-ready work is any work done where a support structure owner constructs or reinforces support structures for the use of a customer.

10. The Commission reminds TCC that it must adhere to its mandated obligations.³ At the same time, the Commission notes that TCC is taking steps to improve its processes in order to meet its mandated obligations, and considers that such steps are necessary and appropriate.

Other matters

11. In its allegations, Shaw also submitted specific concerns that (i) TCC had inappropriately removed Shaw's facilities from TCC's support structures on one occasion and that (ii) TCC did not properly define what constituted a remote area for the purpose of determining the appropriate support structure service permit application response time. These concerns are addressed below.

i) Did TCC inappropriately remove Shaw's facilities from TCC's support structures?

12. Shaw submitted that the removal of its facilities from TCC's support structures was in violation of Shaw's entitlement to maintain its facilities on support structures in accordance with the terms of the tariff and of the SSLA.

13. TCC argued that Shaw's facilities were not authorized by permit and were therefore considered as unauthorized attachments, subject to removal following the procedure set out in item 10.1 of the SSLA.

14. The Commission notes that the evidence provided by TCC and Shaw is conflicting, but considers that better communication between the two parties could have resolved this particular dispute. In the circumstances, the Commission finds that, based on the conflicting evidence, it is unable to determine that TCC's removal of Shaw's facilities against Shaw's wishes was contrary to TCC's regulatory obligations.

ii) What constitutes a remote area for the purpose of determining permit application response times?

15. The Commission notes that item 404.3.1 of TCC's tariff states that the response time for applications to access the company's support structures in remote areas will be determined based on the specifics of the request.

16. Shaw submitted that it had been advised by TCC that TCC's "remote" areas were getting larger as it concentrated its resources in fewer regional offices. Shaw argued that the tariff could not have intended that a support structure service provider could arbitrarily decide when tariff timelines would apply to specific portions of its territory.

17. TCC submitted that in Decision 2000-746, the Commission defined a remote community as a community where (a) there are fewer than two full-time technicians normally based there; and (b) the community is accessible only by air, or a technician

³ For example, TCC's tariff items 404.3.1 and 404.3.5, and Telecom Decision 2004-29, paragraph 48

travelling to the community by road would normally take three hours or more for the round trip from where the technician is based. TCC noted that its technicians charged with reviewing licensee support structure applications are based in six regional engineering offices in British Columbia and six in Alberta. TCC submitted that, per the definition provided in Decision 2000-746, any community that requires more than one hour of travel from a TCC engineering office would be considered remote.⁴

18. The Commission notes that Decision 2000-746 applies to Northwestel Inc. (Northwestel), the incumbent carrier in northern Canada, with regard to one of its quality of service (Q of S) indicators. The Commission further notes that the decision specifically applies to Northwestel's unique situation: it has limited resources and provides service over a large geographic area to very remote communities, some of which are quite small and can only be reached by air.
19. The Commission considers that while TCC serves remote locations in British Columbia and Alberta, it would not be appropriate to extend the Commission's findings and determinations in Decision 2000-746 to TCC given that, as discussed above, that decision is specific to the exceptional challenges and conditions applicable to Northwestel. Further, the Commission notes that, according to TCC's interpretation of Decision 2000-746, many large communities with populations in excess of 10,000 would be considered remote simply because they are located more than one hour from TCC's consolidated engineering offices. The Commission notes that TCC's interpretation would result in longer response times for many support structure permit applications, which would in turn hinder competition.
20. Accordingly, the Commission determines that the definition of "remote community" provided in Decision 2000-746 applies exclusively to Northwestel and its Q of S framework, and does not apply to TCC's tariff for the purposes of determining the appropriate response time for support structure service permit applications.

II. Should the Commission increase regulation beyond TCC's mandated obligations?

21. Shaw submitted that further regulation beyond TCC's mandated obligations is required. For example, Shaw requested that TCC be required to
 - provide licensees additional information, such as: internal spare capacity guidelines; planned maintenance schedules; construction records; and internal policies, procedures, and guidelines related to third-party access to support structures;

⁴ In TCC's view, a three-hour round trip would be comprised of one hour of travel each way, plus a one-hour site visit.

- permit licensees to use spare capacity reserved by TCC for future use on a temporary basis, provided that the licensee vacates the space upon receiving six months' notice by TCC of its requirement to use that capacity;⁵
 - provide licensees an estimated date of completion for make-ready work;
 - permit licensees to perform make-ready work if TCC cannot provide an estimated completion date and/or is unable to commit to completion of make-ready work within a reasonable period of time, which shall not exceed 90 days; and
 - pay interest on the amount paid by a licensee for make-ready work, in the event that TCC does not complete the make-ready work within 90 days of receiving payment.
22. Shaw also proposed that the Commission initiate a proceeding to consider implementing a Q of S framework for support structure services.
23. TCC argued that a few selected examples raised by Shaw do not indicate TCC's systemic non-compliance with its mandated obligations. TCC submitted that the issues raised by Shaw were intended to provide Shaw with easier or cheaper access to TCC's support structures, and to impose further costs and burden on TCC, to the benefit of Shaw.
24. TCC submitted that the establishment of a Q of S framework for support structure services would only add to the parties' administrative burden, as well as increase costs for licensees and incumbent local exchange carriers.

Commission's analysis and determinations

25. As noted above, TCC has failed to meet its mandated support structure service obligations. The Commission considers, however, that there is no evidence of systemic non-compliance with its mandated obligations by TCC, nor does the evidence indicate that mandatory support structure service obligations for the telecommunications industry as a whole are insufficient to promote efficient competition. Further, the Commission agrees with TCC that establishing, maintaining, and tracking a Q of S framework would increase costs for support structure service providers and licensees.

⁵ Shaw submitted that Telecom Decision 2004-29 established a precedent whereby a third party could receive support structure services when the spare capacity for that support structure was only available for a temporary period of time.

26. The Commission notes that the SSLA sets out an escalating dispute resolution process that is intended to help parties resolve disputes related to support structures,⁶ but that, in this instance, the parties did not follow this process.
27. The Commission considers that the parties should make proper use of the dispute resolution process set out in the SSLA. Accordingly, the Commission requires TCC and Shaw to form a joint committee, consisting of representatives of both companies, to resolve any specific issues that Shaw may raise. The Commission encourages the parties to make use of the joint committee to participate in joint planning regarding the use of support structures. The Commission notes that the sharing of information beyond that mandated by the tariff, the SSLA, and Commission decisions could be beneficial to both parties, particularly for planning purposes, and that the joint committee represents an opportunity for both parties to facilitate such sharing of information.
28. The Commission directs TCC to
- provide to the Commission the names of the TCC and Shaw representatives on the joint committee, within three weeks of the date of this decision;
 - conduct the first meeting of the joint committee within four weeks of the committee's formation; and
 - provide a report to the Commission within two weeks after every meeting, summarizing the progress made by the joint committee.
29. This joint committee is to remain in place, conduct meetings, and provide reports on the progress of those meetings until Commission staff provides notice that the meetings and/or the reports are no longer required.
30. In addition, if Shaw continues to experience any problems gaining reasonable access to TCC's support structures as prescribed by the tariff and the SSLA, and if the joint committee is unable to resolve those problems, Shaw may apply to the Commission

⁶ Item 11.1 of the SSLA states:

The Company and the Licensee agree to attempt to resolve any disputes arising under this Agreement, the Tariff or the Construction Standards in an expedient manner. Where possible, the Company and the Licensee shall endeavor to resolve any disputes between themselves, at the level at which the dispute arose. If the dispute cannot be so resolved, the Company and the Licensee agree that either party may escalate the matter to higher management. In the case of the Company, this shall be the manager of the business unit responsible for provision of Support Structure services under the Tariff. In the case of the Licensee, this shall be a manager having sufficient authority to determine the matter on behalf of the Licensee, designated by the Licensee. If the dispute cannot be resolved at this level, the Company and the Licensee agree to establish, upon the request of either party, a joint committee consisting of representatives of the Company and the Licensee to attempt to resolve the dispute. If the dispute cannot be resolved by such a joint committee, then either party may refer the matter to the Commission for settlement.

for mediation or for an expedited hearing, pursuant to Broadcasting and Telecom Information Bulletin 2009-38.

31. With regard to Shaw's request⁷ to permit licensees to use, on a temporary basis, spare capacity reserved by TCC for future use, the Commission notes that such access is provided on a case-by-case basis.⁸ The Commission notes that if Shaw wishes to access TCC's support structures on a temporary basis and is unable to reach an agreement with TCC to do so, it may file an application with the Commission requesting such access.
32. Accordingly, the Commission considers that with the additional measures to be taken as directed above, the existing mandated support structure service obligations continue to be appropriate. The Commission therefore **denies** at this time Shaw's request to impose additional mandated obligations, including initiating a proceeding to consider implementation of a Q of S framework.
33. If, despite the directives in this decision, Shaw continues to experience problems gaining reasonable access to TCC's support structures as prescribed by the tariff and the SSLA, the Commission may implement further measures to enforce compliance, including but not limited to
 - imposition of tracking and report obligations for TCC's support structure services, on a monthly basis;
 - establishment of a public hearing process; and
 - implementation of a Q of S framework for TCC's support structure services.

III. Should the Commission make any determinations with regard to safety and/or technical issues?

34. Shaw raised a number of issues with regard to TCC's Construction Standards and its guidelines on the capacity of support structures and strands.
35. TCC submitted that its Construction Standards and guidelines are intended to ensure that the maximum capacity of a support structure is made available to third parties, thus preserving the integrity of existing TCC and third-party facilities, ensuring safe and reliable use among all parties sharing the structures, and helping assure the safety of the general public. TCC submitted that those standards and guidelines must apply equally to all users in order to be effective.

⁷ See paragraph 21 of this decision.

⁸ See Telecom Decision 2004-29.

Commission's analysis and determinations

36. The Commission notes that according to the tariff, TCC is required to set and enforce its Construction Standards based on safety and technical requirements for support structures. Further, the Commission considers that the industry and individual parties are in the best position to establish their own safety and technical standards and guidelines.
37. The Commission also notes that TCC has already agreed to implement some changes to its safety and technical standards and guidelines in response to some of the issues raised in Shaw's application.
38. Accordingly, the Commission concludes that it would not be appropriate to make determinations with regard to safety and/or technical issues, at this time. The Commission considers that any such issues that Shaw has with TCC's safety and technical standards and guidelines would be best resolved by the joint committee established pursuant to this decision. If the Shaw and TCC impasse with regard to these issues continues, the parties may request that the issues be considered by the CRTC Interconnection Steering Committee or by the Commission.

Secretary General

Related documents

- *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*, Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009, as amended by Broadcasting and Telecom Information Bulletin CRTC 2009-38-1, 26 April 2010
- *Access to TELUS Communications Inc.'s support structures in the City of Kamloops*, Telecom Decision CRTC 2004-29, 6 May 2004
- *Long-distance competition and improved service for Northwestel customers*, Decision CRTC 2000-746, 30 November 2000