



## Telecom Decision CRTC 2004-29

Ottawa, 6 May 2004

### Access to TELUS Communications Inc.'s support structures in the City of Kamloops

Reference: 8690-C121-200306127

*In this decision, the Commission finds that, where spare capacity is not available, subducting is make-ready work for which TELUS Communications Inc. (TCI) can charge the City of Kamloops (Kamloops) to access the company's support structures. In those segments where TCI has no anticipated future service requirements and it is incurring additional costs solely to meet Kamloops' request, TCI can charge Kamloops for all the associated make-ready work. In those segments where TCI has planned to add fibre optic cables, it can charge Kamloops the company's cost of capital for advancing future relief facilities. TCI, through its assurances, has agreed that Kamloops can perform most of the work itself. Where Kamloops chooses to do so, TCI cannot charge Kamloops for it.*

#### The application

1. On 7 May 2003, the Commission received an application dated 2 May 2003<sup>1</sup> from the City of Kamloops (Kamloops), filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*. In its application, Kamloops requested a Commission order setting out the terms and conditions under which TELUS Communications Inc. (TCI) would grant Kamloops access to conduit support structures owned by TCI within its rights-of-way. More specifically, Kamloops requested that the Commission not allow TCI to continue to place an undue barrier on obtaining access to TCI's support structures by way of requiring unnecessary and unjustified make-ready charges. To that end, Kamloops requested that TCI be directed to:
  - a) reveal the number of free ducts that TCI owns on each segment of Kamloops' Community Network Project (the Project);
  - b) issue forthwith all permits sought by Kamloops, without make-ready charges where there is spare capacity<sup>2</sup>;
  - c) modify its support structure access engineering standards to make at least the next free duct available without make-ready charges for the installation of inner ducts (subducts);

<sup>1</sup> Documentation attached to the covering letter was dated 18 April 2003.

<sup>2</sup> As defined in TCI's General Tariff (Tariff) item 404.1, spare capacity means "the difference between unused capacity of the Support Structure, where unused capacity is the difference between the capacity of the Support Structure based upon design limitations and the capacity used by TCI to meet its current service requirements and any capacity previously allocated to the Licensee, and the capacity required by TCI to meet its anticipated future service requirements".

- d) accept Kamloops' contractor to perform make-ready work in accordance with TCI's engineering standards, as long as they were compatible with today's market standards; and
- e) inform Kamloops when TCI intended to perform routine maintenance on its structures as depicted in its three-year and five-year plans so that Kamloops could synchronize the installation of its facilities with TCI's routine maintenance.

### **Process**

- 2. By letter dated 4 June 2003, TCI responded to Kamloops' application. Kamloops' reply comments were filed under letter dated 12 June 2003<sup>3</sup>.
- 3. On 26 June 2003, Commission staff requested that TCI provide information regarding its current and projected support structure requirements and current and projected level of spare capacity on each segment of the Project, over both a three-year and five-year planning horizon. TCI filed most of the information in confidence, providing a complete copy of the information to Kamloops, on 14 July 2003. Kamloops filed its reply comments in confidence on 13 August 2003<sup>4</sup>.
- 4. On 3 October 2003, Commission staff requested that Kamloops and TCI provide further information regarding the Project and the availability of spare capacity. Kamloops and TCI provided the requested information on 16 and 20 October 2003, respectively. Kamloops and TCI filed further comments on 10 November 2003. TCI filed reply comments on 17 November 2003, while Kamloops made no further submission.

### **Issues to be addressed**

- 5. Kamloops disputed TCI's make-ready charges for subducting and overbuilding segments 2, 3, 5, 7, 9, 17a, 24, 30a, 35 and 50 of the Project. Kamloops indicated that it was not disputing the remaining segments of the Project.
- 6. In order to respond to Kamloops' application, the Commission will address the following issues:
  - a) whether TCI can require the placement of subducts;
  - b) whether Kamloops can use its own contractor to do the make-ready work;
  - c) the extent to which Kamloops must pay for make-ready work performed by TCI;
  - d) provision of information;
  - e) whether Kamloops can make temporary use of TCI's support structures; and
  - f) other issues.

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<sup>3</sup> Documentation attached to the covering letter was dated 13 June 2003.

<sup>4</sup> Confidential documentation attached to the covering letter was dated 5 August 2003.

**a) Whether TCI can require the placement of subducts**

*Position of parties*

*Kamloops*

7. Kamloops submitted that TCI's make-ready charges, in particular TCI's charges for subducting where spare capacity was available, were not necessary. Kamloops submitted that TCI's systematic requirement of placing subducts prior to providing access to its support structures was not compatible with the company's definition of spare capacity set out in item 404 of TCI's Tariff<sup>5</sup>. In Kamloops' view, the requirement by TCI that competitors seeking access to its support structures continue to pay unnecessary and unjustified make-ready charges placed an undue barrier to entry on competitors.
8. Kamloops submitted that in order to demonstrate that TCI had no spare capacity, TCI should indicate, through the preparation of three-year and five-year plans, the anticipated use by TCI of the spare capacity sought by Kamloops. Kamloops noted that the general test for spare capacity applied by Bell Canada in its four-inch conduit bank structures is that of keeping one spare duct to meet its anticipated needs and providing the next available duct without restriction. Kamloops submitted that Bell Canada's practice, even though it does not comply with the notion of demonstrating the use of spare capacity, does constitute a company policy that allows third parties to forecast with more certainty whether their request for access to such capacity would be accepted without additional costs.
9. Kamloops was of the view that subducting was no longer required, given recent technological advances and the preference for fibre optic cables instead of new copper cables. Kamloops submitted that greater reliance on fibre optic cables had freed capacity and subducting was no longer consistent with industry standards.

*TCI*

10. TCI submitted that its make-ready charges complied with its Tariff item 404 dealing with support structure service. TCI submitted that the charges were for the construction of new support structures and for the work to be performed on, in, or in proximity to, its support structures. This construction was required to maximize capacity and to ensure that space continued to be available to current and future users.
11. TCI indicated that it had taken into account a number of activities in estimating the make-ready charges for Kamloops. TCI submitted that its final estimated make-ready charges for Kamloops reflected the work related to, among other things:

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<sup>5</sup> As defined in TCI's Tariff item 404.4.1(c), a make-ready charge is a non-recurring charge that "is calculated on a time and charge basis including material and labour for any work performed on, or in proximity to TCI's Support Structures or on the Company's or Joint User's facilities, including, but not limited to, any additional investment or advanced planned investment or reinforcement required, in order to meet the Licensee's requirements for Support Structure Service. In individual cases, with the mutual agreement of TCI and the Licensee, the Licensee may perform make-ready work at its own expense."

- a) creating spare capacity, including subducting, on TCI's support structures. TCI submitted that Kamloops could do some of that work, subject to Tariff item 404, the Support Structure License Agreement (SSA) and TCI's construction standards;
  - b) building new structures, where none existed. TCI separated out this portion to stress the fact that this work was solely at the discretion of Kamloops and that the latter could pursue other options; and
  - c) subducting empty ducts. Since TCI did not need to place or remove copper cables in those ducts, it was willing to assign them to Kamloops without requiring the latter to subduct and pay the associated costs.
12. TCI submitted that, notwithstanding the number of empty ducts, it considered several factors in determining whether there was spare capacity in a support structure, including:
- a) the future growth requirement for distribution, feeder and trunking cables;
  - b) the requirement to maintain and provide for legacy services;
  - c) the planned implementation of new services;
  - d) the current use of ducts (e.g., whether the duct is for feeder or distribution cables);
  - e) the duct maintenance requirement (TCI keeps one duct or subduct empty for maintenance);
  - f) the ability to acquire easement to overbuild; and
  - g) the technical complexities of placing second or subsequent cables in a duct.
13. TCI indicated that Tariff item 404 required the company to set and enforce construction standards based on safety and technical requirements for support structures. TCI submitted that its construction standards were set to: (i) ensure the maximum capacity of support structures; (ii) preserve the integrity of TCI's existing facilities and those of third parties; and (iii) ensure the co-ordinated and safe use between all parties that may be using the support structures. TCI added that the construction standards had to apply to all users, including itself, in order to be effective. TCI submitted that subducting was a construction standard, pursuant to its General System Practice 624-628-901, issued 2 October 1995 (the Practice). TCI submitted that it had been placing subducts in main-way duct systems prior to placing fibre optic cables since 1995, in accordance with the Practice. TCI also submitted that, in segments of Kamloops' Project where it did not require placement or removal of a heavy copper cable, it was prepared to assign empty ducts to Kamloops without requiring it to subduct.

*Kamloops' reply*

14. Kamloops submitted that TCI's support structures located in Kamloops had sufficient capacity to meet the anticipated needs of TCI and the spare capacity sought by Kamloops. Kamloops submitted that TCI's requirement to place subducts implied an underlying policy of refraining from the sharing of ducts, regardless of whether spare capacity existed. Kamloops also submitted that, contrary to TCI's claim, Tariff item 404 only required TCI to ensure that it meets its and third parties' current needs and TCI's own anticipated future service requirements, not third parties' anticipated future service requirements.
15. Kamloops submitted that subducting does not reduce costs, noting that the costs to install cables also had to be added to the costs to place subducts. Kamloops also submitted that if there was sufficient capacity to place subducts, there was sufficient capacity to install cables, regardless of whether the segment was subducted beforehand.
16. Kamloops did not object to TCI placing additional subducts for TCI's own needs. However, Kamloops was of the view that it did not need subducts, and that it would not benefit from their installation.
17. Kamloops rejected TCI's claim that subducting was a construction standard. Although it agreed that subducting was meant to protect cables from other cables, Kamloops submitted that subducting actually reduced capacity by taking space within a duct. Kamloops also submitted that TCI had failed to produce any internal engineering standard that proved that subducting was a construction standard. Kamloops further submitted that TCI should not be allowed to claim that subducting was a construction standard because the work unreasonably impeded access to TCI's support structures by forcing costs on Kamloops that were unwarranted or, if warranted, were excessive in comparison to the going market rates.

*TCI's reply*

18. TCI submitted that, because of the significant start-up costs of building support structure capacity, it was prudent and standard practice to build capacity beyond the specific needs of the next planned cable installation. Therefore, duct systems were typically built to meet both TCI's and other parties' foreseeable long-term requirements. TCI also submitted that it usually installed three subducts when placing fibre optic cables to ensure efficient placing operation and to reduce any impact on existing cables. TCI further submitted that the overall additional costs of placing three subducts were minimal.
19. TCI submitted that subducting was not obsolete and was becoming the recommended and growing industry practice for maximizing duct capacity and reducing the costs of installing fibre optic cables. TCI argued that subducting had the following advantages:
  - a) it facilitates the use of new and evolving technologies, such as micro-ducts;
  - b) it facilitates the practical installation of fibre optic cables in duct systems designed for copper cables, thus reducing the building of new structures;

- c) it reduces placing costs and minimizes work at intermediate manhole locations;
  - d) it reduces the possibility of damaging existing cables in a structure;
  - e) it confirms that space is available;
  - f) it certifies the presence of a continuous link through different structure types; and
  - g) it allows a licensee to use its own labour force to place its cables.
20. TCI submitted that subducting might not be required in certain circumstances. In particular, TCI submitted that it would not subduct relatively short sections of a particular project unless:
- a) the adjoining spans on either end were already subducted and subducting would provide a continuous duct connection;
  - b) the pulling tensions would impede conventional pulling methods and cable jetting through subducts was the only viable installation method; and
  - c) the maintenance and removal of copper cable was contemplated in a partially-filled duct.
21. TCI submitted that Kamloops, in its efforts to justify the fact that it had underestimated the costs of its Project, dismissed any standard that impacted on its costs. TCI submitted that Kamloops' underestimation was the result of its failure to consult with TCI, its minimal understanding of Tariff item 404 and its failure to take into account sound technical standards and to consider future support structure users. TCI submitted that its make-ready charges and standards should not be ignored or compromised to satisfy Kamloops' flawed business case and to meet short-term objectives. TCI submitted that to do so would constitute an inconsistent and preferential application of Tariff item 404 that would have other TCI customers subsidizing Kamloops' Project and would undermine the Commission's National Support Structure tariff.

***Commission analysis and determination***

22. The Commission notes that, pursuant to Tariff item 404.1, spare capacity is the difference between unused capacity of the support structure and the capacity required by TCI to meet its anticipated future service requirements. Unused capacity is the difference between the capacity of the support structures based on design limitations and the capacity used by TCI and that TCI previously allocated to licensees. The Commission also notes that, pursuant to Tariff item 404.2.2, TCI is only required to provide spare capacity where spare capacity is available. TCI is not required to provide spare capacity where doing so will unduly interfere with the rights of any joint-user or other licensees.
23. Pursuant to Tariff item 404.3.5, where spare capacity is not available, TCI may elect to create the necessary spare capacity, in which case TCI will estimate the necessary make-ready charges and forward them to the licensee for approval. Tariff item 404.3.6 provides that the necessary make-ready work will be initiated if the licensee authorizes it. Pursuant to Tariff item 404.4.1(c),

a make-ready charge is a non-recurring charge calculated on a time and charge basis, for any work performed on, in or in proximity to TCI's support structures, including any additional investment or advanced planned investment in order to meet the licensee's requirement for support structure service. Item 404.4.1(c) also provides that with the mutual agreement of TCI and the licensee, the licensee may perform make-ready work at its own expense.

24. The Commission notes that Kamloops disputes TCI's claim that placing subducts is make-ready work necessary to meet Kamloops' requirement for support structure service.
25. The Commission understands that, in this case, the work required to place subducts was calculated on a time and charge basis and would be charged for on a non-recurring basis. The Commission also notes that the subducting would be work performed on, in, or in proximity to, TCI's support structures.
26. The Commission notes that in *Rates set for access to telephone companies' support structures*, Order CRTC 2000-13, 18 January 2000, the Commission stated that the support structure owner had the onus to manage the structures for itself and other users. The Commission also stated that it considered that an incumbent local exchange carrier (ILEC) had to be able to protect other users of support structures.
27. The Commission notes that telephone companies determine how to best manage their networks and choose the technology they consider best suited to their needs, subject to Commission review.
28. The Commission continues to be of the view that telephone companies should be able to take reasonable measures to manage their network and protect their and other licensees' facilities. The Commission considers that subducting allows TCI the flexibility to manage its support structures. The Commission also considers that placing subducts in TCI's support structures facilitates the safe and practical installation of additional cables and certifies the presence of a continuous link through TCI's support structures. Subducting further provides the licensee with the flexibility to use its own labour force. Furthermore, the Commission considers that placing subducts in TCI's support structures allows TCI to create additional capacity, maximizes the use of its network and prevents damage to its as well as other users' facilities.
29. In light of the above, the Commission considers that subducting is make-ready work necessary to meet Kamloops' requirement for support structures where spare capacity is not available. Accordingly, the Commission finds that, where spare capacity is not available, TCI can require the placement of subducts.

**b) Whether Kamloops can use its own contractor to do the make-ready work**

*Position of parties*

*Kamloops*

30. Kamloops submitted that it should be allowed to use its own contractor to do the make-ready work, including the make-ready work to install strands on poles, if the Commission was to find that subducting was necessary. Kamloops submitted that it was common practice for contractors to do make-ready work and that they could do it in a more cost-effective manner than could TCI.

*TCI*

31. TCI submitted that Tariff item 404 permitted Kamloops to place its facilities in ducts not already occupied by TCI's facilities, or in ducts that had not already been subducted. TCI stated that, in those situations, it did not object to Kamloops undertaking installation work itself, as long as it complied with TCI's Tariff item 404, the SSA and TCI's Construction Standards. TCI added that Kamloops could perform most of the subducting and placing itself. TCI stated that it would do the make-ready work in the large diameter pipe and any Asbestos concrete pipe for safety reasons. TCI also stated that it would perform the installation work in assigned ducts occupied by its facilities.

***Commission analysis and determination***

32. Tariff item 404.4.1(c) states that a licensee may perform make-ready work at its own expense with the mutual agreement of TCI and the licensee.
33. The Commission notes that TCI has assured the Commission and Kamloops in this proceeding that the latter could place its facilities in ducts not already occupied by TCI's facilities and in ducts that have already been subducted, and that Kamloops could perform the subducting and placing labour itself.
34. The Commission considers that TCI, through its assurances, gave its agreement to Kamloops to perform most of the make-ready work, as contemplated in Tariff item 404.4.1(c). The Commission requires TCI to fulfill those assurances.

**c) The extent to which Kamloops must pay for make-ready work performed by TCI**

***Position of parties***

*Kamloops*

35. Kamloops submitted that, assuming that subducting was necessary, in other contexts, such as co-location in ILEC central offices, the advancement of facilities was typically accompanied with a competitor rebate process. Kamloops submitted that in the absence of a competitor rebate process, it would be impossible to ensure that ILECs do not take advantage of facilities fully paid by competitors. Therefore, Kamloops submitted that if TCI insisted on the installation of subducts, Kamloops should only have to pay one-third of the costs, since it would only be using one of the three subducts.

*TCI*

36. TCI submitted that, pursuant to Tariff item 404.2.14, it was not required to provide support structures where none existed. TCI submitted that where it elected to provide support structures at the request of the licensee, it estimated the make-ready charges required to meet the licensee's requirements. TCI submitted that installing three subducts into an empty duct at the same time was prudent and standard practice to ensure maximum use of the duct initially. TCI further submitted that, because all subducts must be placed at the same time so as to not compromise the remaining duct capacity, Tariff item 404.4.1(c) permitted it to charge Kamloops for the



make-ready work beyond that which Kamloops requires where any additional investment or advanced planned investment or reinforcement was required to meet Kamloops' requirement for support structures. TCI also submitted that it had reserved capacity on certain of Kamloops' segments to meet its anticipated future service requirements, starting in 2004.

*Commission analysis and determination*

37. The Commission notes that, pursuant to Tariff item 404.3.5, where spare capacity is not available, TCI may elect to create the necessary spare capacity, in which case TCI will estimate the necessary make-ready charges and forward them to the licensee for approval. Pursuant to Tariff item 404.4.1(c), TCI may also charge for any additional investment or advanced planned investment or reinforcement required to meet Kamloops' requirement. The Commission also notes TCI's submission that it needs to incur additional investments and to advance its planned investment or reinforcement to subduct and meet Kamloops' requirement for support structure service because it must install all three subducts at the same time so as to not compromise the remaining duct capacity. The Commission further notes TCI's submission that it installs three subducts to ensure maximum use of the duct initially. Therefore, the Commission finds that, where subducting is necessary to create spare capacity, it is reasonable for TCI to maximize use of the subduct at that time so as to not compromise the remaining duct capacity and, where TCI does the necessary work itself, to charge Kamloops accordingly.
38. The Commission notes that on those segments where TCI has no anticipated future service requirements, Kamloops' requirement for access to TCI's support structures causes a need for TCI to make additional investment which it would not otherwise have to make. The Commission, therefore, finds that TCI can require Kamloops to pay all the causal costs incurred by TCI to create the spare capacity required by Kamloops to access those segments.
39. The Commission notes that TCI has no anticipated future service requirements in segments 3, 17a, 24 and 30a of the Project. As noted above, TCI, where it elects to create spare capacity to meet Kamloops' requirements, can charge Kamloops make-ready charges, provided that it is TCI that does the necessary work. Subducting and overbuilding are make-ready works for which TCI may charge Kamloops. Since TCI has no planned service additions on those segments, it is incurring the additional investment solely to accommodate Kamloops' request for access. Accordingly, the Commission finds that TCI can charge Kamloops for its estimated make-ready work on those segments, provided TCI performs the necessary work. With regard to that portion of segment 3 located on private property, the Commission notes that Kamloops may require the private property owner's consent to access TCI's support structure on the owner's property.
40. The Commission notes that TCI has anticipated future service requirements and has planned to add fibre optic cables on certain segments of Kamloops' Project. The Commission considers that the phrase "advanced planned investment or reinforcement" in Tariff item 404.4.1(c) does not allow TCI to charge Kamloops all additional investments but rather only the causal costs, in this case, the costs of advancing future relief facilities. The Commission thus finds that TCI

can only charge Kamloops for the costs of advancing its planned investment or reinforcement. The Commission considers that the costs of advancing the associated investment equate to TCI's cost of capital<sup>6</sup>.

41. The Commission notes that TCI plans to add cables in segment 2 of the Project in 2004. The Commission also notes that there are currently two empty ducts in segment 2 of the Project, one of which is reserved for maintenance. The Commission further notes that TCI, as part of its planned investment or reinforcement, will be subducting the remaining free duct with three subducts prior to placing its fibre optic cables in 2004, thereby creating sufficient capacity for itself and Kamloops. The Commission considers that, since TCI has already planned to invest or reinforce segment 2 of the Project in 2004, it is not advancing any investment or reinforcement. The Commission therefore directs TCI to provide Kamloops access to segment 2 of the Project without make-ready charges.
42. The Commission notes that TCI plans to add cables in segments 35, 44, 50 and 51 of the Project in 2005. The Commission also notes that TCI has provided Kamloops its estimate of the make-ready charges to create sufficient spare capacity to meet Kamloops' support structure requirement and TCI's planned investment or reinforcement on those segments. The Commission further notes that TCI, in order to provide Kamloops access to its support structures in 2004, is advancing this planned investment or reinforcement to 2004 from 2005. The Commission finds that TCI can charge Kamloops its cost for advancing the future relief facilities for segments 35, 44, 50 and 51 of the Project, which, in this case, is TCI's cost of capital to advance its estimated make-ready charges for those segments from 2005 to 2004.
43. The Commission notes that TCI also plans to add cables in segments 5, 7 and 9 of the Project in 2004 and 2005. The Commission notes that, pursuant to Tariff item 404.2.4, TCI has, in all circumstances, priority access to its support structures in order to meet its current and anticipated future service requirements. The Commission also notes that TCI plans to add fibre optic cables and is keeping a spare subduct for maintenance purposes in those segments. The Commission further notes that TCI will exhaust the existing spare capacity when it adds its fibre optic cables in those segments to meet its anticipated future service requirements. Furthermore, the Commission notes that TCI would not need to create more spare capacity to meet its current and anticipated future service requirements if Kamloops did not request access to those segments. The Commission therefore finds that TCI is incurring the additional investment solely to accommodate Kamloops' request for access. Accordingly, TCI can charge Kamloops the estimated make-ready charges for those segments.

#### **d) Provision of information**

##### ***Position of parties***

##### ***Kamloops***

44. Kamloops submitted that TCI had not provided a breakdown of the estimated make-ready charges to be paid by Kamloops in TCI's 8 January and 10 April 2003 forecasts. Kamloops

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<sup>6</sup> The Commission notes that TCI's estimated cost of capital, as utilized by the company in recent tariff filings, is 9.81%.

also submitted that it only learned that it could perform portions of the make-ready work after TCI provided its breakdown at the Commission's request.

45. Kamloops requested that it be advised when TCI intends to perform routine maintenance of its network over the next three to five years. Kamloops submitted that this would allow it to synchronize the installation of its cables with TCI's planned maintenance and identify where planned maintenance was required. Kamloops also requested that TCI provide it with engineering details of the aerial to underground transitions to bypass certain segments of the Project.

*TCI*

46. In response to Kamloops' request, TCI filed its three-year and five-year plan (the Plan) in confidence with the Commission and with Kamloops. The Plan described TCI's planned service expansion for the Project but did not provide TCI's planned routine maintenance.

***Commission analysis and determination***

47. The Commission notes that in *Access to telephone company support structures*, Telecom Decision CRTC 95-13, 22 June 1995, it set out the basic principles regarding access to telephone company support structures. In order to maximize the availability of spare capacity, the Commission encouraged all parties to continue to participate in joint planning regarding the use of support structures. The Commission notes that more recently, in *Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001, it had indicated that it favoured increased reliance on joint planning and co-ordination arrangements to settle disputes involving underground facilities.
48. The Commission considers that TCI's failure to provide a breakdown of its make-ready charges with its 8 January and 10 April 2003 estimates contributed in part to this dispute. The Commission reminds TCI that it should, as a matter of practice, provide a sufficiently detailed breakdown of its costs, in response to a licensee's application for access to TCI's support structures in order to allow the licensee to understand what make-ready work is required and to assess the validity of the make-ready charges. Such a breakdown should include a statement as to what portions of the work can be performed by the licensee.
49. The Commission notes that TCI, as part of this proceeding, has disclosed its anticipated future service requirements over the next three to five years to Kamloops but has not provided its planned routine maintenance. The Commission reiterates its encouragement that parties participate in joint planning regarding the use of support structures. Accordingly, the Commission considers that parties should, on a timely basis, exchange all relevant information, such as planned routine maintenance and engineering details of aerial to underground transitions, to maximize the use of support structures and the availability of spare capacity.

**e) Whether Kamloops can make temporary use of TCI's support structures**

***Position of parties***

*Kamloops*

50. Kamloops submitted that in letter decision *Part VII application by Câble-Axion Digitel Inc. regarding access to the support structures of Vidéotron Communications Inc.*, 1 June 2000 (*Câble-Axion v. Vidéotron*), the Commission established that, where the incumbent planned to use spare capacity to meet its anticipated requirements and such spare capacity was available for a limited period of time, the spare capacity had to be made available without make-ready charges to the party requesting it. Kamloops stated its readiness and willingness to make temporary use of TCI's support structures in accordance with the conditions and principles set out in *Câble-Axion v. Vidéotron*.

*TCI*

51. TCI submitted that it would consider advancing capacity that was not deemed spare if the advanced capacity could be replaced. TCI also submitted that costs, prepayment terms and scheduling for the make-ready work to replace the advanced capacity would need to be agreed to beforehand.

***Commission analysis and determination***

52. The Commission notes that Kamloops has stated its readiness and willingness to make temporary use of TCI's support structures in accordance with the conditions and principles set out in *Câble-Axion v. Vidéotron*. In that decision, the Commission ruled that it was appropriate that *Câble-Axion* be granted access to poles and ducts at the established national rates, terms and conditions for access to support structures. The rates, terms and conditions were to be included in a contract to be executed by *Vidéotron* and *Câble-Axion*. For those locations where spare capacity existed for a limited time, the contract was to stipulate that *Câble-Axion* had to remove its facilities from the affected support structures before the roll-out of *Vidéotron's* head-end lock up program. *Vidéotron* had to provide six months prior notification in order to terminate the contract.
53. The Commission finds that, where Kamloops chooses to do so, it is appropriate that it be granted access to TCI's poles and ducts at the established national rates, terms and conditions, in accordance with a contract to be executed between the parties. The contract is also to stipulate that, for those locations where spare capacity exists for a limited time, Kamloops is to remove its facilities from the affected support structures before the roll-out of TCI's planned fibre optic cable additions. TCI is to provide six months prior notification.

**f) Other issues**

54. The Commission notes that Kamloops filed new permit requests with TCI in October 2003 seeking further access to TCI's support structures. In its 31 October 2003 response, TCI

advised Kamloops that its internal requirements might take priority over the scheduling of any make-ready work that TCI elected to perform.

55. The Commission considers that TCI, if it gives priority to its internal requirements, absent sufficient justification, would confer an undue preference on itself, contrary to subsection 27(2) of the *Telecommunications Act*.
56. The Commission notes that Tariff item 404.2.5 encourages TCI and a licensee to attempt to resolve support structure disputes in accordance with the dispute resolution procedures established in the SSA. Paragraph 11.1 of TCI's SSA sets out an escalating process to resolve such disputes, from endeavouring to resolve the dispute at the level at which it arose, to the possibility of escalating the dispute to higher management, to setting up a joint committee and, lastly, to referring the matter to the Commission for resolution. The Commission strongly encourages parties to avail themselves of the dispute resolution procedures established in the SSA before referring matters to the Commission for resolution.

Secretary General

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