

# CRTC Clears Path for Resellers to Light Dark Fiber

December 14, 2010

The Canadian Radio-television and Telecommunications Commission ("CRTC") has given the green light to service providers that wish to attach their own optical equipment to dark fiber leased from third parties and provide services in Canada. The decision preserves the business operations of many foreign-owned entities providing service in Canada.

## History

Canadian law requires that a telecommunications carrier seeking to use its own network facilities to provide services within that country must be majority owned and controlled by Canadians to operate network facilities.<sup>1</sup> This requirement was preserved when Canada entered the World Trade Organization and the North American Free Trade Agreement (NAFTA). It has prevented full-scale, facilities-based entry by US carriers into Canada. Those carriers seeking entry had to seek out a joint venture partner or operate as a reseller.

In November 2009, AboveNet Communications Inc. (AboveNet), a US telecommunications carrier, registered its AboveNet Canada subsidiary as a reseller. In its application, AboveNet stated that it would use its own optical equipment to light the dark fiber that it would procure under an existing facilities lease agreement with TELUS Communications. In its objection to the registration, TELUS argued that by lighting the dark fiber AboveNet was transformed into a "telecommunications common carrier" which would require it be Canadian owned and controlled.

The CRTC sought comment in March 2010 on whether a service provider operates a "transmission facility" and "becomes a telecommunication carrier" when it lights dark fiber from a third party that it then uses to sell services for compensation to another party.

## Analysis

In its decision of December 9, 2010, the CRTC focused its analysis in two areas.<sup>2</sup> The first was whether optical equipment used by a service provider to light leased dark fiber fell within the category of exempt transmission apparatus (ETA) or was it a "transmission facility". The second analyzed whether a service provider operates a transmission facility when it leases dark fiber and attaches optical equipment to offer telecommunication services to third parties.

Working within the statutory definitions, the CRTC found that optical equipment did not by itself "transmit intelligence between network termination points"<sup>3</sup> and thus could not be an "electromagnetic system, or any other technical system, for the transmission of intelligence between network termination points."<sup>4</sup> The CRTC noted that the ability to transmit intelligence between termination points is required under the Act.

The CRTC then drew a distinction between the operation of optical equipment from a transmission facility. "In the Commission's view, a service provider that attached ETA equipment to leased dark

fiber operates the ETA equipment, not a transmission facility."<sup>5</sup> The Commission noted that in many instances, the provider of the dark fiber remains responsible for maintaining, repairing, providing access and even replacing the fiber.<sup>6</sup>

## Impact

The CRTC's decision eliminates confusion about whether lighting dark fiber required the entity doing so to be majority-owned and controlled by Canadians. It should provide certainty for those foreign service providers seeking to offer services in Canada or any other provider considering using that model today. The CRTC noted in its decision that many entities have been providing services under the challenged model for years. An adverse ruling would have caused significant disruption in the Canadian market as service providers were forced to bring their systems into compliance.

The opportunities for foreign carriers to enter the Canadian market may increase since Parliament is considering proposals that would ease the foreign ownership restrictions or eliminate them. While Kelley Drye & Warren does not have an office in Canada or practice there, please contact a member of the Kelley Drye Communications practice group if you would wish to discuss further.

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<sup>1</sup> See *Telecommunications Act of 1993*

<sup>2</sup> *Classification of service providers that light leased dark fibre for subsequent sale*, Telecom Decision CRTC 2010-930, File Number: 8665-C12-201004853, Canadian Radio-television and Telecommunications Commission ("Decision"), Dec. 9, 2010.

<sup>3</sup> Decision at 25

<sup>4</sup> Id.

<sup>5</sup> Id at. 35

<sup>6</sup> Id.