



Telecom Decision CRTC 2023-182

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Reference: Part 1 application posted on 18 November 2022

Ottawa, 15 June 2023

Public record: 8663-T133-202209452

TerreStar Solutions Inc. – Request for a declaration that subordination of spectrum licence is not a telecommunications service

Summary

The Commission **denies** TerreStar Solutions Inc.'s (TerreStar) application requesting that the Commission find that companies can deduct spectrum sale and subordination revenues from their total Canadian operating revenues when determining their contribution eligible revenues for the purposes of the National Contribution Fund.

The Commission determines that spectrum sale and subordination is a telecommunications service as defined by the *Telecommunications Act*, and, therefore, the associated revenues cannot be deducted as Canadian non-telecommunications service revenues.

The Commission **directs** TerreStar to file revised monthly contribution reports with the Central Fund Administrator by **17 July 2023**.

Introduction

1. On 16 November 2022, TerreStar Solutions Inc. (TerreStar) submitted an application requesting the Commission to make a declaration that subordination (leasing) of spectrum licence is not a telecommunications service. The issue arose when TerreStar, in its annual filing, attempted to deduct spectrum sale and subordination revenues from its total operating revenues. Prior to this, no other company had attempted to deduct revenues from the sale or lease of spectrum, despite these being common industry services.
2. Commission staff issued a letter to TerreStar to inform it that these were not eligible deductions and were therefore rejected. TerreStar filed an application in response and submitted both legal and practical arguments in support of its position, which are discussed in detail in this decision.

Commission decisions and the *Telecommunications Act*

3. In Decision 2000-745, the Commission introduced a revenue-based contribution regime. Under this regime, telecommunications service providers (TSPs) with annual Canadian telecommunications services revenues greater than \$10 million are required to contribute to the National Contribution Fund (NCF), based upon their contribution-eligible revenues. Contribution-eligible revenues are calculated by subtracting Commission-approved deductions from Canadian telecommunications service revenues.
4. In the same decision, the Commission determined that the starting point for TSPs reporting would be total operating revenues, followed by the identification of allowable deductions for non-Canadian revenues, Canadian non-telecommunications revenues, terminal equipment revenues, and inter-carrier payments made to other TSPs (for a telecommunications service and incurred to earn contribution-eligible revenues).
5. In Order 2001-288, the Commission issued the following definition for Canadian non-telecommunications service revenues:

“Canadian non-telecommunications service revenues” include all Canadian revenues that are derived from services other than telecommunications service as defined in section 23 of the *Telecommunications Act*, i.e. “telecommunications service” has the same meaning as in section 2 [of the *Telecommunications Act*] and includes any service that is incidental to the business of providing telecommunications services.
6. Under subsection 2(1) of *Telecommunications Act* (the Act), a telecommunications service is defined as “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.”
7. The Act also defines a telecommunications facility as “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.”

TerreStar’s objections and Commission’s determination

8. On 30 March 2022, TerreStar filed its annual revenue report with the Commission, as required under the revenue-based contribution regime. In its annual revenue report, TerreStar listed a deduction for ancillary terrestrial component spectrum sub-lease and for the sale of spectrum.
9. On 22 June 2022, the Commission issued a staff letter to inform TerreStar that the deduction was not eligible and was therefore rejected.

10. The Commission informed Terrestrial that generating revenue from a spectrum licence is a telecommunications service within the meaning of the Act. The Commission added that, accordingly, the related revenues, whether from lease, sale, or subordination, would not be eligible for deduction as Canadian non-telecommunications service revenues for the purposes of determining contribution-eligible revenues within the contribution regime.
11. TerreStar disagreed with the Commission's assessment, and in response, TerreStar filed an application with the Commission on 16 November 2022, requesting that it make a declaration that subordination of spectrum licence is not a telecommunications service under the Act.

Issue

12. TerreStar submitted an application requesting that the Commission declare that subordination of spectrum licence should not be deemed a telecommunications service under the Act. If spectrum subordination is not considered a telecommunications service, it would then be eligible for deduction from TerreStar's (and any other contributor's) Canadian telecommunications revenues for the purposes of NCF reporting and payments. Whether or not spectrum subordination is considered a telecommunications service affects the amounts a company contributes to the NCF, and in some cases, whether it contributes to the NCF at all.

Positions of parties

13. No interventions were received on the record for this application. The positions listed below are the applicant's.
14. TerreStar submitted that the subordination of a spectrum licence is not a telecommunications service within the meaning of the Act. Therefore, revenues received from such a subordination agreement are not considered Canadian telecommunications services revenues for the purposes of the Annual Telecommunications Survey and the Commission's revenue-based contribution regime.
15. TerreStar argued that because the use of the spectrum in question pursuant to the Subordinated Licence is separately authorized and regulated by Innovation, Science and Economic Development Canada (ISED), the arrangement between TerreStar and its subordinate licensees is markedly different from other services that the Commission has had to consider under the Act.
16. TerreStar further argued that spectrum should not be considered a telecommunications facility under the Act because the definition refers to "any facility, apparatus or other thing that is used or is capable of being used for telecommunications."
17. TerreStar submitted that spectrum is not a facility or apparatus, so the only area it could fall into is "other thing." TerreStar stated that "other thing" should have a

narrow interpretation. It added that according to the *ejusdem generis* rule of statutory interpretation, where there are general words following particular and specific words, the general words must be confined to things of the same kind as the more particular words. Both the terms “facility” and “apparatus” refer to tangible items; the word “thing” should accordingly also be interpreted to refer to tangible objects.

18. Furthermore, TerreStar noted that because the definition of telecommunications facility also refers to transmission facility, the definition of a transmission facility¹ under the Act also does not apply to spectrum subordination. This is because, even though it refers to radio systems, the word “system” means, in TerreStar’s view, a set of connected things or devices that operate together, and spectrum cannot function as a telecommunications system without other pieces of equipment.
19. Finally, TerreStar submitted that the overall impact of such a decision would have minimal to no impact on the percentage or dollar amount collected under the revenue-based contribution regime. The burden would shift from primary licensees to subordinate licensees that would no longer be able to claim an intercarrier payment deduction from their total operating expenses. TerreStar added that this is how ISED approaches spectrum fees: requiring the subordinate licensee to pay annual spectrum fees as a part of the spectrum agreement.

Commission’s analysis

20. Sound statutory interpretation requires the Commission to apply a purposive approach, where the Commission must look not only at the wording, but also the context and the purpose that Parliament intended to achieve with the legislation. It must start with the text of the statute in its ordinary and grammatical sense, and then also look at its context and purpose and the intent of Parliament.² While there are numerous principles that the courts use to point out specific elements of this process, such as the *ejusdem generis* rule cited by TerreStar, those principles are simply part of this larger, more fundamental approach.
21. The Commission, in creating its rules around which revenues will count when deciding whether and how much companies must pay into the NCF, relied upon the definition found in the Act. In particular, it referred to section 23 of the Act, which states that “telecommunications service has the same meaning as in section 2 and includes any service that is incidental to the business of providing telecommunications services.”

¹ Subsection 2(1) of the Act: “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.”

² Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), p. 185.

22. The Commission stated in Order 2001-288 that for the purposes of calculating contribution eligible revenues pursuant to Decision 2000-745, services that are incidental to the business of providing telecommunications services are services that the Commission has treated as or determined to be telecommunications services, in accordance with section 23 of the Act. Furthermore, the Commission had previously stated in Order 2001-221 that in its view, it is consistent with the objectives of the Act to require TSPs to contribute to the fund an amount calculated with reference to their revenues from Canadian telecommunications services, as the term is defined in section 23 of the Act.
23. TerreStar took a narrow view when constructing its argument and relied solely on subsection 2(1) of the Act for the definition of telecommunications service. This definition does not account for the inclusion in section 23 of “[...] any service that is incidental to the business of providing telecommunications services.”
24. Due to this narrow interpretation, TerreStar argued that spectrum would need to be considered a telecommunications facility to meet the definition as set out in the Act for the purposes of the contribution regime. TerreStar added that spectrum cannot be classified as an “other thing” under this definition as per the *ejusdem generis* rule.
25. However, the Commission concludes that such an interpretation is not consistent with a broad and purposive analysis that considers the contribution regime in its proper and full context. It also does not address the definition of telecommunications service found in section 23 of the Act, which includes services incidental to the business of providing telecommunications services.
26. The interpretation of revenues from the sale and subordination of spectrum used for telecommunications services is consistent with past Commission decisions as to what may constitute a telecommunications service as per section 23 of the Act on the basis that it is incidental to a telecommunications service as per subsection 2(1) of the Act. Spectrum is a scarce resource, diligently allocated for specific purposes. Revenues derived from spectrum allocated for the purpose of providing telecommunications services must at least be incidental to the business of providing telecommunications services.
27. The Commission considers that revenues derived from the sublicensing or sale of spectrum are not eligible for the Canadian non-telecommunications service revenues deduction. Consequently, the Commission also considers that payments made to other TSPs for purchase or sublicense of spectrum are eligible for deductions as inter-carrier payments.

Conclusion

28. In light of all of the above, the Commission **denies** TerreStar’s application and determines that spectrum sale and subordination is a telecommunications service as defined by the Act, and, therefore, the associated revenues cannot be deducted as Canadian non-telecommunications service revenues.

29. The Commission **directs** TerreStar to file revised monthly contribution reports with the Central Fund Administrator by **17 July 2023**.

Secretary General

Related documents

- *Definition of Canadian non-telecommunications service revenues for the purpose of the contribution regime*, Order CRTC 2001-288, 11 April 2001
- *Disputed issues submitted by the Contribution Collection Mechanism (CCM) Implementation Working Groups*, Order CRTC 2001-221, 15 March 2001
- *Changes to the contribution regime*, Decision CRTC 2000-745, 30 November 2000