



Telecom Decision CRTC 2004-7

Ottawa, 5 February 2004

Application by TELUS Québec for forbearance from regulation of wide area networking services

Reference: 8640-T69-200308595

In this decision, the Commission forbears, with some conditions, from the exercise of its powers and the performance of its duties pursuant to sections 24 (in part), 25, 29 and 31 and subsections 27(1), 27(5) and 27(6) of the Telecommunications Act in relation to the provision of current and future wide area networking services provided by TELUS Communications (Québec) Inc.

1. The Commission received an application from TELUS Communications (Québec) Inc. (TELUS Québec), dated 11 July 2003, under Part VII of the *CRTC Telecommunications Rules of Procedure* and section 34 of the *Telecommunications Act* (the Act). TELUS Québec requested that the Commission refrain from exercising its powers and performing its duties pursuant to sections 24, 25, 27, 29 and 31 of the Act in respect to the company's current and future wide area networking (WAN) services in its operating territory.
2. On 11 August 2003, the Commission received comments from 4089316 Canada Inc., operating as Xit Télécom, on behalf of itself and Télécommunications Xittel inc. (collectively Xit). Reply comments were filed by TELUS Québec on 21 August 2003.

Background

3. The Commission's power to forbear from regulating a telecommunications service or class of services provided by a Canadian carrier originates from section 34 of the Act, which reads as follows:

34. (1) The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class of services provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.

(2) Where the Commission finds as a question of fact that a telecommunications service or class of services provided by a Canadian carrier is or will be subject to competition sufficient to protect the interests of users, the Commission shall make a determination to refrain, to the extent that it considers appropriate, conditionally or

unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to the service or class of services.

(3) The Commission shall not make a determination to refrain under this section in relation to a telecommunications service or class of services if the Commission finds as a question of fact that to refrain would be likely to impair unduly the establishment or continuance of a competitive market for that service or class of services.

(4) The Commission shall declare that sections 24, 25, 27, 29 and 31 do not apply to a Canadian carrier to the extent that those sections are inconsistent with a determination of the Commission under this section.

4. The Canadian telecommunications policy objectives set out at section 7 of the Act include the following:

...

- c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
- f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;
- h) to respond to the economic and social requirements of users of telecommunications services.

5. The Commission established a framework for considering whether or not to forbear in *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19). In that decision, the Commission noted that the first step in assessing whether it is appropriate to forbear involves defining the relevant market. The relevant market is essentially the smallest group of products and geographic area in which a firm with market power can profitably impose a sustainable price increase. The Commission established a number of criteria to be examined when determining whether a market was competitive. These criteria include the market shares of the dominant and competing firms, demand and supply conditions, the likelihood of entry into the market, barriers to entry into the market and evidence of rivalrous behaviour.
6. In *Forbearance granted for telcos' wide area network services*, Order CRTC 2000-553, 16 June 2000 (Order 2000-553), the Commission granted forbearance from regulation of current and future WAN services provided by BC TEL, TELUS Communications (Edmonton) Inc. (both companies are now part of TELUS Communications Inc.), Bell Canada, Island Telecom Inc., Maritime Tel & Tel Limited, NBTel Inc., NewTel Communications Inc. (the last four companies are now Aliant Telecom Inc.) and TELUS Communications Inc. (collectively the former Stentor members). In that order, the

Commission stated that forborne WAN services do not include Asynchronous Transfer Mode (ATM)-based carrier interconnection services, or ATM services which provide public switched telephone network (PSTN) interconnection or call control capabilities equivalent to interconnection with the public switched network. Further, the Commission also clarified that the WAN access is a value-added enhanced service (either ATM, Ethernet or Token Ring protocols) available to WAN customers, and is a part of WAN service. The Commission also noted that the underlying access services were available from the former Stentor members at tariffed rates and from competitors.

7. In Order 2000-553, the Commission also found that the WAN services market in the operating territory of the former Stentor members was sufficiently competitive to protect the interests of users, in that there were numerous competitive suppliers, low barriers to entry, aggressive pricing and knowledgeable customers that could readily switch WAN service providers. Further, competitive WAN service providers could obtain the essential underlying access and transport services from alternate facilities-based service providers or from the incumbent telephone companies at tariff rates and non-discriminatory terms where there was no alternative source of supply. The Commission also considered that the former Stentor members had no incentives to engage in anti-competitive below-cost pricing, because they would lose market share if they tried to raise prices.
8. Accordingly, in Order 2000-553, the Commission forbore from its powers under sections 24 (in part), 25, 29 and 31 of the Act and subsections 27(1), 27(5) and 27(6) of the Act with respect to the provision of WAN services by the former Stentor members. The Commission retained its powers under section 24 of the Act to ensure that the conditions regarding disclosure of confidential customer information to third parties continue to apply, and to impose conditions as may be needed in the future. The Commission also retained its powers under subsections 27(2), 27(3) and 27(4) of the Act to ensure that the former Stentor members do not unjustly discriminate against other service providers or customers, or confer an undue or unreasonable preference with respect to the provision of WAN services.
9. In *Forbearance granted to wide area networking services provided by SaskTel*, Order CRTC 2001-118, 6 February 2001 (Order 2001-118), the Commission forbore from regulating the WAN services provided by Saskatchewan Telecommunications (SaskTel) to the same extent as it did for the former Stentor members in Order 2000-553. In reaching its determination in Order 2001-118, the Commission found that SaskTel's market for WAN services was sufficiently competitive to protect the interests of WAN service users, based on the evidence submitted by the company.

TELUS Québec's application

10. TELUS Québec argued that there was evidence of sufficient competition in the WAN services market for the Commission to forbear from the exercise of its powers and the performance of its duties under sections 24, 25, 27, 29 and 31 of the Act in respect to the company's current and future WAN services in its service territory.

11. TELUS Québec indicated that WAN services are used to interconnect local area networks installed in premises owned by medium or large enterprises, governments and associations. The WAN service market was comprised of two sub-services:
 - a) traditional WAN services established using Ethernet protocols or cell-based networks; or
 - b) WAN services established using ATM protocols.
12. TELUS Québec submitted that, in all cases, WAN services are offered to customers at an all-inclusive price for all the elements of the WAN service. TELUS Québec identified the following key elements of the WAN service:
 - a) equipment and software usually installed at the customer's premises that offer Ethernet, ATM or other cell network interfaces;
 - b) access facilities to transport facilities or services; and
 - c) transport services between the customer's distinct locations.
13. TELUS Québec submitted that until now, it had offered these services on a non-regulated basis through its subsidiary, TELUS (Solutions) Québec Inc. (TELUS Solutions) and now wished to directly offer and distribute these services.¹ TELUS Québec stated that it was seeking forbearance to the same extent as granted by the Commission in Orders 2000-553 and 2001-118.
14. TELUS Québec argued that the level of competition for WAN services was well established in Canada and in its operating territory, and that it was not a dominant player. TELUS Québec indicated that there are no significant barriers to market entry in the WAN services market, as evidenced by the number of active competing providers. In support of its position, TELUS Québec provided a list of several well-established competitors in its operating territory. In Appendix 1 of its submission, the company filed in confidence the names of WAN service customers which it had lost to competitors. TELUS Québec submitted that while it was possible for WAN service subscribers to sign long-term contracts, the market for WAN services was so competitive that long-term contracts were not popular with WAN services subscribers who preferred to retain a better bargaining position to benefit from pricing promotions, ultra-competitive pricing and constantly evolving technical features. TELUS Québec affirmed that all the market conditions present when former Stentor members requested WAN service forbearance existed in the market for TELUS Québec's WAN services, submitting that the rivalry between competing providers for market share was quite aggressive.
15. TELUS Québec submitted that, for existing WAN services subscribers, the service migration to a competitive WAN service provider would be relatively simple, with no major obstacles. The migration to a new provider of WAN services represented a low level of effort and costs for the

¹ In its submission, Xit asked TELUS Québec to clarify under which legal entity it provided WAN services. TELUS Québec confirmed that since 1 July 2003, the WAN services previously provided by TELUS Solutions had been transferred to TELUS Québec.

transferring subscriber. The inconveniences of migrating services are minimized by building parallel facilities to execute the transfer and by having the subscriber select the most appropriate timing for the service migration.

16. TELUS Québec also noted that it offered, via its Carrier Service Group, tariffed services and unbundled network elements allowing WAN service competitors to extend services in physical locations where WAN service competitors do not have the required facilities.

Xit's comments

17. Xit requested that the Commission reject TELUS Québec's application for WAN forbearance. In support of its position, Xit argued that this forbearance application raised greater concerns than the forbearance provisions in *Forbearance from Retail Internet Services*, Telecom Order CRTC 99-592, 25 June 1999 and Order 2000-553, because TELUS Québec was seeking complete forbearance, including forbearance from sections 24 and 27 of the Act which the Commission has retained in previous forbearance orders.
18. Xit also submitted that the industry patiently awaited a more precise definition for the WAN and retail Internet services in respect of which forbearance was granted.
19. Xit noted that Ethernet services were established, in part, over fibre optic facilities. Xit argued the only equitable forbearance regime for WAN forbearance was on a route-specific basis as established for private line service in *Stentor Resource Centre Inc. – Forbearance from Regulation of Interexchange Private Line Services*, Telecom Decision CRTC 97-20, 18 December 1997, and in *Forbearance from regulating additional interexchange private line services*, Telecom Decision CRTC 2003-29, 9 May 2003. The route-specific forbearance could be applied both in regards to WAN services and to the provision of dark fibre service.
20. With regard to the list of customers supplied by TELUS Québec in Appendix 1 of its submission, Xit indicated that TELUS Québec did not provide information to assess what percentage of their expenditures (including those for telephony services) each of the customers migrated from TELUS Québec to a competitive WAN service provider.

TELUS Québec's reply

21. TELUS Québec submitted that Xit restated arguments put forward in another proceeding², which, according to TELUS Québec, had no linkage with this application.
22. In response to Xit's argument that TELUS Québec sought complete forbearance for the provision of WAN services, TELUS Québec noted that it sought the same forbearance as that granted to other major incumbent local exchange carriers (ILECs) in Orders 2000-553 and 2001-118.

² Xit filed a Part VII application against TELUS Québec on 2 April 2003. The Part VII application was disposed of by the Commission in *Xit Télécom v. TELUS Québec – Provision of fibre optic private networks*, Telecom Decision CRTC 2003-58, 22 August 2003. In that decision, the Commission directed TELUS Québec to file proposed intra-exchange and inter-exchange dark fibre tariffs and apply the terms and conditions of the general tariffs, when approved, in its customer-specific special facilities tariffs for dark fibre projects.

23. TELUS Québec noted Xit's comment that Ethernet services were offered in part over fibre optic facilities. TELUS Québec emphasized that, like for other Canadian ILECs provisioning Ethernet services, the fibre optic networks are used as an underlying telecommunications facility and are not transferred to customers.
24. With regard to Xit's proposal that forbearance should be route-specific, TELUS Québec submitted that it supported the Commission's previous forbearance decisions for WAN services, for X.25 packet switching service, for frame relay service and for toll service all of which granted forbearance to Canadian carriers based on the total geographical territory they served.
25. With regard to Xit's submission that TELUS Québec should have supplied information about the migration of total service revenues (including telephony service revenues), TELUS Québec argued that it was only seeking forbearance for WAN services in its operating territory and thus provided the Commission with relevant information normally expected in support of such applications.

Commission analysis and determination

26. In Order 2000-553, the Commission set out the following service definition:

WAN services are purchased mainly by medium- and large-sized businesses, governments and associations. WAN customers typically possess large internal information processing infrastructures, based on Ethernet, token ring or asynchronous transfer mode (ATM) protocols, usually at several locations. WAN services link the customer's local area networks (LANs) at the various locations. Often WAN services are used as replacements for older dedicated interexchange and intra-exchange private lines, such as Megaplan, and traditional frame relay services, such as Hyperstream.

WAN services consist of interfaces to customer-provided equipment at the customer's various locations, along with the ability to exchange information among locations. WAN services include the following elements:

- any of the service provider's network hardware and software which may be located on the customer's premises in order to provide Ethernet, token ring or ATM protocols at the interface to the customer's network;
- access transport (i.e. transport of packets and/or cells between the interface at the customer's premises and the service provider's network); and
- transport and routing or switching of packets or cells within the service provider's network for the purposes of transmitting data among the access points of a single customer.

27. As noted earlier in this decision, the Commission further clarified in Order 2000-553 that forborne WAN services do not include ATM-based carrier interconnection services, or ATM services which provide PSTN interconnection or call control capabilities equivalent to interconnection with the public switched network. Further, the Commission also clarified that the WAN access is a value-added enhanced service (either ATM, Ethernet or Token Ring protocols) available to WAN customers, and is a part of WAN service. The Commission also noted that the underlying access services are available from the former Stentor members at tariffed rates and from competitors.
28. The Commission considers that the definition of services included in Order 2000-553 was sufficiently precise and is also applicable for this forbearance application. To address concerns expressed by Xit that TELUS Québec seeks unconditional forbearance, the Commission notes that the level of forbearance requested by TELUS Québec is identical to that granted in Orders 2000-553 and 2001-118 where the Commission has retained powers under section 24 and subsections 27(1), 27(2) and 27(3) of the Act.
29. The Commission notes that in Order 2000-553 it determined that the market for WAN services was national or regional in scope (rather than route-specific as in the case of private line services). In that order, the Commission observed that, although in certain situations WAN services may be an alternative to private line services, WAN services are considerably different than private line services. Unlike private lines, WAN services are neither priced nor offered on a route-specific basis. There are also technological differences in that private line services involving dedicated lines on specific routes for the physical transport of voice and data traffic between sites, whereas WAN services involve networking amongst interconnected sites on lines that are not dedicated.
30. For the reasons set out in paragraph 7 above, the Commission also found in Order 2000-553 that the WAN service market was competitive. Further, the Commission considered that the applicants had no incentives to engage in anti-competitive below-cost pricing, because they would lose market share if they tried to raise prices.
31. The Commission notes that, while subsection 34(1) of the Act provides that the Commission may refrain from regulating a service or class of services when it finds that such forbearance is consistent with the Canadian telecommunications policy objectives, subsection 34(2) of the Act requires it to forbear where it finds that the market for the service in question is, or will be, subject to sufficient competition to protect the interests of users. The Commission also notes, however, that subsection 34(3) of the Act provides that the Commission shall not forbear if it finds that to do so would be likely to impair unduly the establishment or continuance of a competitive market for that service.
32. Based on the evidence filed by TELUS Québec in this proceeding, the Commission considers that the market for WAN services is competitive in its territory. Accordingly, the Commission finds, pursuant to subsection 34(2) of the Act, as a question of fact, that the provision of WAN services in TELUS Québec's territory is sufficiently competitive to protect the interests of users so as to warrant forbearance to the extent set out in this decision.

33. The Commission finds, pursuant to subsection 34(1) of the Act, as a question of fact, that to refrain from the exercise of its powers and the performance of its duties, to the extent set out in this decision, with respect to the provision of WAN services in TELUS Québec territory, is consistent with the Canadian telecommunications policy objectives set out in section 7 of the Act.
34. The Commission also finds, pursuant to subsection 34(3) of the Act, as a question of fact, that refraining from regulating WAN services to the extent set out in this decision, is unlikely to impair unduly the continuance of a competitive market for that class of services.
35. The Commission determinations on the extent to which it is appropriate to refrain, in whole or in part, and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 of the Act are set out below.

Section 24

36. Section 24 of the Act provides:

24. The offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission or included in a tariff approved by the Commission.

37. The Commission considers that it is appropriate to retain its powers pursuant to section 24 of the Act, to ensure that the confidentiality of customer information continues to be protected. Because TELUS Québec's Terms of Service, which ensure the confidentiality of customer information for regulated services, do not apply to forborne services, the Commission directs TELUS Québec, as a condition of providing WAN services, to abide by the existing conditions regarding disclosure of confidential customer information to third parties with respect to the services forborne from regulation in this decision. The Commission also directs TELUS Québec, on a going-forward basis, as a condition of providing WAN services, to incorporate, where appropriate, the existing conditions regarding disclosure of confidential customer information to third parties into all contracts and any other arrangements for services forborne from regulation in this decision.
38. Finally, the Commission considers that it is also appropriate to retain sufficient powers under section 24 of the Act to specify possible future conditions relating to the provision of WAN services, where circumstances so warrant.

Section 25

39. Section 25 of the Act provides:

25. (1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.

(2) A joint tariff agreed on by two or more Canadian carriers may be filed by any of the carriers with an attestation of the agreement of the other carriers.

(3) A tariff shall be filed and published or otherwise made available for public inspection by a Canadian carrier in the form and manner specified by the Commission and shall include any information required by the Commission to be included.

(4) Notwithstanding subsection (1), the Commission may ratify the charging of a rate by a Canadian carrier otherwise than in accordance with a tariff approved by the Commission if the Commission is satisfied that the rate

(a) was charged because of an error or other circumstance that warrants the ratification; or

(b) was imposed in conformity with the laws of a province before the operations of the carrier were regulated under any Act of Parliament.

40. Based on the record of this proceeding, the Commission considers it appropriate that TELUS Québec no longer be required to file tariffs and obtain the Commission's approval in respect of the services in this decision. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under section 25 of the Act with respect to WAN services provided by TELUS Québec.

Section 27

41. Section 27 of the Act provides:

27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.

(2) No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

(3) The Commission may determine in any case, as a question of fact, whether a Canadian carrier has complied with section 25, this section or section 29, or with any decision made under section 24, 25, 29, 34 or 40.

(4) The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

(5) In determining whether a rate is just and reasonable, the Commission may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise.

(6) Notwithstanding subsections (1) and (2), a Canadian carrier may provide telecommunications services at no charge or at a reduced rate

(a) to the carrier's directors, officers, employees or former employees; or

(b) with the approval of the Commission, to any charitable organization or disadvantaged person or other person.

42. The Commission considers that there is no need to apply the regulatory standards for "just and reasonable" rates to rates that are set in a competitive market. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under subsection 27(1) of the Act with respect to WAN services provided by TELUS Québec. The Commission also forbears from the exercise of its powers under subsections 27(5) and 27(6) of the Act since they relate to subsection 27(1) of the Act with respect to which forbearance is granted.

43. However, in view of the dominant position of TELUS Québec for access and transport services/facilities in its operating territory, the Commission considers it necessary to retain its powers under subsections 27(2) and 27(4) of the Act in order to ensure that TELUS Québec does not unjustly discriminate against other service providers or customers, or confer an undue or unreasonable preference with respect to the provision of WAN services. The Commission also considers it necessary to retain its powers under subsection 27(3) of the Act with respect to compliance with powers and duties not forborne from in this decision.

Section 29

44. Section 29 of the Act provides:

29. No Canadian carrier shall, without the prior approval of the Commission, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting

(a) the interchange of telecommunications by means of their telecommunications facilities;

(b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or

(c) the apportionment of rates or revenues between the carriers.

45. Based on its finding that the market for WAN services is competitive in TELUS Québec's operating territory, the Commission considers it appropriate that TELUS Québec no longer be required to obtain the Commission's approval to enter into agreements with other telecommunications common carriers regarding WAN services. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under section 29 of the Act with respect to WAN services provided by TELUS Québec.

Section 31

46. Section 31 of the Act provides:

31. No limitation of a Canadian carrier's liability in respect of a telecommunications service is effective unless it has been authorized or prescribed by the Commission.

47. The Commission considers it appropriate that TELUS Québec be able to limit its liability in respect of WAN services in the same way as may an unregulated service provider. Accordingly, the Commission will refrain from the exercise of all of its powers and the performance of all of its duties under section 31 of the Act with respect to WAN services provided by TELUS Québec.

Declaration pursuant to subsection 34(4) of the Act

48. In light of the above, the Commission declares, pursuant to subsection 34(4) of the Act, that effective two weeks from the date of this decision, sections 24, 25, 27, 29 and 31 of the Act do not apply to TELUS Québec's current and future WAN services, except with respect to:

- the conditions pursuant to section 24 of the Act set out in this decision with respect to the confidentiality of customer information;
- any future condition that the Commission may impose, pursuant to section 24 of the Act, with respect to WAN services;
- the Commission's powers under subsections 27(2) and (4) of the Act with respect to unjust discrimination and undue preference in respect to the provision of WAN services; and
- the Commission's powers under subsection 27(3) of the Act with respect to compliance with powers and duties not forborne from in this decision.

Tariff filings

49. The Commission directs TELUS Québec to issue forthwith revised tariff pages.

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>

