



Telecom Decision CRTC 2003-58

Ottawa, 22 August 2003

Xit Télécom v. TELUS Québec – Provision of fibre optic private networks

Reference: 8622-X4-200304387

*In this decision, the Commission **directs** TELUS Communications (Québec) Inc. (TELUS Québec) to file proposed intra-exchange and inter-exchange dark fibre tariffs within 20 days of the date of this decision. The Commission further **directs** TELUS Québec to apply the terms and conditions of the general tariffs, when approved, in its customer-specific special facilities tariffs for dark fibre projects.*

*The Commission also **directs** Saskatchewan Telecommunications (SaskTel), MTS Communications Inc. (MTS), Aliant Telecom Inc. (Aliant Telecom) and Société en commandite Télébec (Télébec) to show cause, within 30 days of the date of this decision, why they should not also provide intra-exchange dark fibre pursuant to a general tariff. In addition, the Commission **directs** TELUS Communications Inc., SaskTel, MTS, Aliant Telecom and Télébec to show cause, within 30 days of the date of this decision, why they should not also provide inter-exchange dark fibre pursuant to a general tariff.*

1. The Commission received an application under Part VII of the *CRTC Telecommunications Rules of Procedure*, dated 2 April 2003, by 4089316 Canada Inc., operating as Xit Télécom, on behalf of itself and its affiliate, Télécommunications Xittel inc., collectively Xit (Xit), requesting that the Commission direct TELUS Communications (Québec) Inc. (TELUS Québec) to file, on an expedited basis, general tariffs for intra-exchange and inter-exchange dark fibre.
2. The Commission received comments from TELUS Québec on 2 May 2003. Reply comments were filed by Xit on 12 May 2003. The Commission received further comments from TELUS Québec on 27 May 2003. Further reply comments were received from Xit on 2 June 2003.

The application

3. Xit submitted that, in response to initiatives such as the Quebec Government's "Villages branchés" program, there had been a significant increase in the number of calls for project tenders for dark fibre¹ private networks in Quebec throughout the operating territories of Bell Canada, Société en commandite Télébec (Télébec) and TELUS Québec. In support of its position, Xit provided information on recent bid openings for several Quebec school boards. It also filed a list of school boards, municipalities and other organizations that had expressed interest in dark fibre projects.

¹The term "dark fibre" is defined in the Computer Desktop Encyclopedia as "optical fibre that spans some geographic area and is sold to carriers and large businesses without any optical or electronic signaling in its path. The customer is responsible for adding the transmission system at both ends." In contrast, "lit fibre" actively carries a signal and is defined in the Computer Desktop Encyclopedia as "optical fibre that is regularly being used to transmit data". The term optical fibre can apply to both dark and lit fibre.

4. Xit submitted that TELUS Québec was providing an undue preference to itself by engaging in the anti-competitive practice of marketing its dark fibre surplus capacity at prices below the cost of new construction, without making the same facilities available to competitors at equivalent rates. Xit argued that TELUS Québec's practice created a barrier to entry for Xit in the dark fibre private network market since it could bid solely on the basis of new construction, while TELUS Québec could submit lower bids by using its surplus capacity.
5. Xit argued that when an incumbent telephone company marketed its surplus capacity in an anti-competitive manner, Xit was unable to compete against the incumbent telephone company and was deprived of access to all construction engineering work. If dark fibre was available through a general tariff, Xit could combine new construction with some of the surplus capacity of the incumbent telephone company.
6. Xit submitted that it could not have used the tariff process for special arrangements to request access to TELUS Québec's surplus capacity. Xit further submitted that only through the availability of a general tariff for this dark fibre sub-infrastructure could Xit gain access to the surplus capacity on TELUS Québec's fibre optic networks in a timeframe that was adequate to respond to public project tenders, thus allowing healthy, equitable competition with TELUS Québec. Xit stated that the best way to ensure that TELUS Québec did not act anti-competitively was to require it to use its own tariffs in its bid submissions to project tenders.
7. Xit alleged that TELUS Québec appeared to be providing prospective clients from two specific school boards in Quebec with engineering services related to the provision of inter-exchange dark fibre, without having filed a tariff for Commission approval.
8. Xit requested, on an urgent and expedited basis, that the Commission direct TELUS Québec to file general tariffs for intra-exchange and inter-exchange dark fibre. Xit also requested that the Commission direct TELUS Québec to use these general tariffs when seeking Commission approval of customer-specific special arrangements for dark fibre projects².
9. Additionally, Xit requested that the Commission direct TELUS Québec to provide detailed information, for the public record, on installed fibre segments, support structures, costing and network plans for all dark fibre private network project tenders awarded to TELUS Québec and subject to Commission approval. Xit also requested that the Commission direct TELUS Québec to cease providing any telecommunications service, including network engineering services in particular, until the Commission approved a tariff for each of the above services.

TELUS Québec's comments

10. TELUS Québec submitted that Xit's application was unjustified and premature given that the Commission had not yet ruled on the follow-up proceeding initiated in *TELUS Communications Inc. – Fibre Use and Management Agreement*, Telecom Decision CRTC 2003-4, 31 January 2003 (Decision 2003-4)³.

²The Commission notes that special facilities tariffs developed using general tariffs to impute specific cost elements are also referred to as Type 2 customer-specific arrangements, in contrast to Type 1 arrangements which merely impute incremental costs.

³In Decision 2003-4, the Commission initiated a proceeding to consider whether it would be appropriate for TELUS Communications Inc. to provide inter-exchange dark fibre pursuant to a general tariff.

11. TELUS Québec submitted that the majority of the facilities required to service the school boards in question involved new construction rather than the use of surplus facilities. TELUS Québec argued that Xit's assertion that TELUS Québec provided engineering services to the school boards without approved tariffs was wrong. TELUS Québec further indicated that it would file special facilities tariffs (SFTs), for approval by the Commission, as soon as the contracts were signed.
12. TELUS Québec submitted that Xit implied that if a general tariff was in place, TELUS Québec would build networks with large surplus capacity, in order to afford Xit the ability to meet future commitments. TELUS Québec submitted that its role was not to act as a sub-contractor.
13. TELUS Québec noted that its surplus capacity of unused fibre was practically non-existent and was not continuous from one telephone exchange to another. TELUS Québec submitted that even if general tariffs were in place, any offering of the services would still be subject to the availability of facilities. TELUS Québec noted that in *Tariff filings related to the installation of optical fibres*, Telecom Decision CRTC 97-7, 23 April 1997 (Decision 97-7), the Commission agreed that the provision of intra-exchange optical fibre under a general tariff should be subject to the availability of facilities.
14. TELUS Québec argued that the act of responding to a bid is an administrative step distinct from providing the service. In TELUS Québec's view, this step is not subject to section 24 of the *Telecommunications Act* (the Act) that states that 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. TELUS Québec noted that in *GT Group Telecom Services Corp. v. Aliant Telecom Inc. – Tariff violations and contraventions of the Telecommunications Act*, Telecom Decision CRTC 2003-23, 10 April 2003 (Decision 2003-23), the Commission concluded that the offering of Provincial Centrex Service (PCS), as distinct from its provision, was not subject to any conditions.

Xit's replies

15. Xit reiterated that an urgent resolution of its application was necessary in order to restore the competitive equity in the fibre optic private network market to meet the submission dates for the "Villages branchés" program.
16. Xit submitted that the follow-up initiated in Decision 2003-4 was not intended to serve as the basis to render a decision that would apply to TELUS Québec. Xit argued that the facts and circumstances of its application differed from those considerations, which pertained to rural Alberta and were of a lesser anti-competitive nature.
17. In regard to TELUS Québec's concerns about being used as a sub-contractor, Xit reiterated that it would not generally, and possibly never, be advantageous for Xit to use TELUS Québec's facilities since Xit's revenues were primarily derived from construction and engineering of new networks. In fact, Xit envisioned using TELUS Québec's dark fibres only in circumstances where TELUS Québec used its spare facilities in an anti-competitive way.

18. In Xit's view, the best way to ensure that TELUS Québec did not act anti-competitively was to direct that TELUS Québec file general tariffs for dark fibre and to use these tariffs to impute its fibre costs in its project tender submissions and customer-specific special arrangements for dark fibre projects. Xit requested that the Commission suspend TELUS Québec's proposals for dark fibre networks until TELUS Québec follows this requirement.
19. According to Xit, the filing of general tariffs for dark fibre would not disadvantage the incumbent telephone companies. Xit further submitted that the use of general tariffs need not result in tariffs that were broadly averaged, and removed from real costs, thus preserving the incumbent telephone companies' competitive ability.
20. Xit submitted that, in Decision 97-7, the Commission established that a general tariff should be filed with the Commission for approval, where there was sufficient demand for a service. Xit further submitted that since Decision 97-7 was issued, Bell Canada and TELUS Québec had respectively filed 12 and two tariff notices for dark fibre special arrangements. In Xit's view, there was a high enough demand for the provisioning of dark fibre to justify the requirement for TELUS Québec to file general tariffs. In Xit's view, the demand was substantially higher than was required to justify general tariffs for intra-exchange optical fibre in Decision 97-7.
21. Xit reiterated that TELUS Québec was providing engineering services without having filed a tariff for Commission approval, thereby contravening section 25 of the Act. In regards to TELUS Québec's argument that Decision 2003-23 established that the act of responding to a bid was not subject to section 24 of the Act, Xit submitted that TELUS Québec provided, and was continuing to provide, services such as the acquisition of rights-of-way, the analysis of surplus capacity and the reorganization of facilities to free fibre already in use, that were not included in Decision 2003-23. Xit submitted that TELUS Québec should be prevented from providing any engineering services between the time it filed a bid response and the time the Commission approved the tariff.

Commission's analysis and determinations

22. The three principal issues raised in Xit's application are whether dark fibre should be provided under a general tariff; whether TELUS Québec's bid information should be disclosed; and how engineering services provided by the incumbent local exchange carriers should be treated. The Commission also addresses the relevance of inter-exchange private line (IXPL) forbearance.

Provision of dark fibre under a general tariff

23. In Decision 97-7, the Commission determined that the provisioning of optical fibre is a "telecommunications service" as defined by the Act and that the Commission has jurisdiction to order the tariffing of optical fibre on a general tariff basis. In Decision 2003-4, the Commission determined that the provision of inter-exchange dark fibre is a "telecommunications service" and that tariff approval of the proposed service is, therefore, required pursuant to section 25 of the Act.

24. In Decision 97-7, the Commission determined that general tariffs were required for intra-exchange optical fibre on the basis of three factors:
- the actual and potential demand for optical fibre;
 - the need to minimize any potential unjust discrimination contrary to subsection 27(2) of the Act; and
 - the fungibility of optical fibre.

The Commission notes that TELUS Québec was not a party to Decision 97-7.

25. With respect to the first criterion, the Commission notes that several SFT applications filed by TELUS Québec reflect actual demand for dark fibre facilities, comprising both intra-exchange and inter-exchange segments. Some of these projects are seeking funding from the \$75M "Villages branchés" initiative.
26. With regard to the potential for unjust discrimination, the Commission considers that under the current arrangement, whereby TELUS Québec makes facilities available under SFT, this potential is minimized. These SFT arrangements allow dark fibre to be provided to certain TELUS Québec customers and not to others who may be competitors, or to be made available to competitors under less favourable terms and conditions. The Commission notes also that tendering processes often involve timeframes that make it difficult, if not impossible, for a competitor to seek dark fibre facilities from an incumbent under an SFT.
27. With respect to the fungibility criterion, the Commission determined, in Decision 97-7, that optical fibre facilities within major centres had alternate economic uses for the telephone company, and, therefore, were not likely to be stranded. The Commission considered that in such circumstances, the fungibility criterion for the general tariffing of such facilities had been met. However, the Commission also determined that where construction had to be undertaken to provide facilities to a particular customer, such facilities were likely to have little economic reuse value, and would, therefore, not likely be fungible. The Commission accordingly determined that the provision of dark fibre service under the General Tariff should be subject to the availability of facilities.
28. The Commission is of the view that similar considerations apply in the present case. The Commission considers that TELUS Québec's existing optical fibre facilities have a variety of uses including addressing the demand by customers or competitors for dark fibre, or serving as an underlying facility for TELUS Québec's other telecommunications services. The Commission therefore finds that, where fibre currently exists, the dark fibre facilities are fungible. However, as in Decision 97-7, where new construction has to be undertaken to provide facilities, the facilities would be likely to have little economic reuse value and, would accordingly, not be fungible.
29. In summary, the Commission finds that, in respect of the dark fibre facilities of TELUS Québec, the criteria of demand, minimizing the potential for unjust discrimination, and fungibility, support the provisioning of intra-exchange and inter-exchange dark fibre facilities under the company's general tariffs.

30. The Commission **directs** TELUS Québec to file proposed intra-exchange and inter-exchange dark fibre tariffs within 20 days of the date of this decision. The Commission considers that these general tariffs should be subject to the availability of existing unused and unallocated facilities.
31. The Commission also **directs** TELUS Québec to apply the terms and conditions of the general tariffs to the provision of existing dark fibre facilities, in its customer-specific SFTs, for dark fibre projects. Where facilities are not available and construction has to be undertaken to provide service to a particular customer, the rates for dark fibre facilities should not be less than the General Tariff rates.

Bid information disclosure

32. Xit has requested that TELUS Québec provide detailed information, for the public record, on installed fibre segments, support structures, costing and network plans for all fibre optic private network bid responses awarded provisionally to TELUS Québec.
33. Section 24 of the Act states that the Commission can impose conditions on the offering and provision of any telecommunications service. Section 25 of the Act prohibits a Canadian carrier from providing a telecommunications service except in accordance with an approved tariff.
34. In Decision 2003-23, the Commission specifically addressed information provided in a bid response. The Commission found that the offering by Aliant Telecom Inc. of PCS, as distinct from its provision, was not subject to any conditions. In the case of these dark fibre network bids, the Commission notes that SFTs must be filed with and approved by the Commission before TELUS Québec can provision the network.
35. The Commission considers that Xit's request pertains to information related to the bid offering, rather than the provisioning, of the networks. As the offering of telecommunications services for dark fibre projects is not subject to any conditions imposed by the Commission, it **denies** Xit's request for the disclosure of bid information.

Treatment of engineering services

36. Xit requested that the Commission direct TELUS Québec to cease providing any telecommunications service, including network engineering service in particular, without an approved tariff.
37. The Commission notes that it initiated a follow-up proceeding in *Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters*, Telecom Decision CRTC 2002-76, 12 December 2002, to address the regulatory treatment of services, including engineering services, that are provided by incumbent telephone carriers to their affiliates. The Commission notes that TELUS Québec is a party to this proceeding. The Commission considers that the treatment of engineering services will be determined in the broader context of this proceeding and the Commission will then determine what, if any, further action is required in this matter.

Relevance of IXPL forbearance

38. The Commission considers that dark fibre facilities are closely linked to the provision of IXPL services. The Commission notes that IXPL services are forborne on specific routes in TELUS Québec territory where there are competitive services offered on these routes. As such, the Commission considers that it is relevant to examine whether forbearance applies to the underlying dark fibre facilities.
39. The Commission granted forbearance with respect to the provision of IXPL services for specific routes, in *Stentor Resource Centre Inc. – Forbearance from regulation of interexchange private line services*, Telecom Decision CRTC 97-20, 18 December 1997 (Decision 97-20), and in *Follow-up Proceeding to Telecom Decision CRTC 97-20: Establishment of criterion and process for considering further forbearance for High Capacity/ DDS interexchange private line services*, Telecom Order CRTC 99-434, 12 May 1999 (Order 99-434). The Commission determined that the process established in Order 99-434 applied to TELUS Québec in Telecom Order CRTC 99-905, 17 September 1999. Subsequently, there have been further Commission determinations that have expanded the list of forborne routes.
40. The Commission determined in Decision 97-20 that it would grant forbearance on a particular high capacity/digital data system route upon being satisfied that one or more competitors of the Stentor companies were offering or providing, on that route, the equivalent of DS-3 bandwidth (or greater) on a private line basis to at least one customer, using terrestrial facilities from a company other than a Stentor company or an affiliate of such a company.
41. The Commission in Order 99-434 modified the above criterion to address the situation where a former Stentor company was competing in another former Stentor company's territory and confirmed that forbearance was appropriate, on a specific route, if there was at least one competitor that provided, or offered to provide, IXPL services at DS-3 or greater bandwidth.
42. The Commission recognizes that there are several reasons why the same forbearance rules could apply to the dark fibre facilities on forborne IXPL routes.
43. First, the Commission considers that DS-3 bandwidth for IXPL services are typically provided over fibre installation. These routes often include unused and unallocated dark fibre facilities. In the IXPL routes where the Commission has forborne, there will likely be dark fibre facilities available from a competitor other than the incumbent local telephone carrier.
44. Second, the Commission notes that the primary building block for IXPL services is the underlying fibre facility. The Commission is of the view that if the service is forborne on a particular route, then the underlying fibre facility could also be forborne.
45. Third, the Commission notes that there is an established process whereby the Commission and the service providers disclose and administer forborne route information. The Commission considers that the same list of forborne routes could apply to the dark fibre market to simplify overall administration.

46. The Commission considers, on a preliminary basis, that forbearance, to the extent granted in Decision 97-20, should be expanded to include the dark fibre facilities on IXPL routes that have been forborne.

Further process

47. In view of the findings of this decision and Decision 97-7 in regard to the provision of intra-exchange dark fibre, the Commission **directs** Saskatchewan Telecommunications (SaskTel), MTS Communications Inc. (MTS), Aliant Telecom Inc. (Aliant Telecom) and Télébec to show cause, within 30 days of the date of this decision, why they should not also provide intra-exchange dark fibre pursuant to a general tariff.
48. In view of the findings of this decision and *Xit Télécom v. Bell Canada – Provision of fibre optic private networks*, Telecom Decision CRTC 2003-59, 22 August 2003, in regard to the provision of inter-exchange dark fibre, the Commission **directs** TELUS Communications Inc. (TCI), SaskTel, MTS, Aliant Telecom and Télébec to show cause, within 30 days of the date of this decision, why they should not provide inter-exchange dark fibre pursuant to a general tariff.
49. The Commission notes that, in Decision 2003-4, it initiated a proceeding to consider whether it would be appropriate for TCI to provide inter-exchange dark fibre pursuant to a general tariff. The Commission notes that final comments were required by 19 March 2003. The Commission is of the view that there is benefit in considering this information in the broader context of this follow-up proceeding. The Commission, therefore, considers it appropriate that all information filed pursuant to Decision 2003-4 be placed on the record of this proceeding. The Commission hereby concludes the proceeding initiated in Decision 2003-4.
50. TELUS Québec, TCI, SaskTel, MTS, Aliant Telecom and Télébec are also invited to file comments on the Commission's preliminary view that the dark fibre facilities market should be forborne on the same routes and to the same extent as has already been forborne for IXPL services. These parties may file comments, serving copies with the Commission and on all other parties, within 30 days of this decision.
51. Other parties wishing to participate fully in this proceeding must notify the Commission of their intention to do so, within 10 days of the date of this decision. They should contact the Secretary General by mail at CRTC, Ottawa, Ontario, K1A 0N2, by fax at (819) 953-0795, or by email at procedure@crtc.gc.ca. They are to indicate in the notice their email address where available. If parties do not have access to the Internet, they are to indicate in their notice whether they wish to receive disk versions of hard copy filing.
52. The Commission will issue, as soon as possible after the registration date, a complete list of interested parties and their mailing address (including their email address, if available), identifying those parties who wish to receive disk versions.

53. All parties may file reply comments with the Commission, serving a copy on all other parties, within 40 days of the date of this decision.

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>