Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2004-20

Ottawa, 23 March 2004

Optical fibre service arrangements

Reference: Tariff Notices 6734, 6740, 6740A, 6757, 6761, 6762 and 8622-C73-200314469

In this decision, the Commission sets out the reasons for its dispositions in Optical fibre service arrangements, *Telecom Orders CRTC 2003-482, 2003-483 and 2003-484, all of which were issued on 28 November 2003, and also disposes of a Part VII application from Câble-Axion Digitel inc. v. Bell Canada. Dissenting opinions by Commissioners Cram and Langford are attached.*

1. On 14 March 2003, the Commission received an application by Bell Canada proposing to add item N2(a)(1), Optical Fibre Service Arrangements, to its Special Facilities Tariff (SFT), in Tariff Notice 6734. Bell Canada stated that its application was filed pursuant to *Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters,* Telecom Decision CRTC 2002-76, 12 December 2002 (Decision 2002-76).

2. On 1 April 2003, 14 April 2003 and 23 July 2003, the Commission received applications by Bell Canada proposing to add items N2(a)(1)a.5, N4(a)(1)a. and N3(a)(1)a. Optical Fibre Service Arrangements, to its SFT, in Tariff Notices 6740, 6761 and 6762.

3. On 4 July 2003, the Commission received an application by Bell Canada proposing to add items N4(a)(1)a.1, N4(a)(1)a.2. and N4(a)(1)a.3. to its SFT, in Tariff Notice 6757.

4. In the above applications, Bell Canada requested Commission approval of various customer-specific arrangements (CSAs) for optical fibre (hereinafter referred to as optical fibre or dark fibre) network solutions. All except one of the CSAs pertained to network arrangements associated with the "Villages branchés du Québec" program (the Program), a Quebec government initiative aimed at supporting the construction of broadband networks for municipalities, school boards and other public institutions. The other arrangement pertained to an optical fibre network arrangement in Ontario.

5. Comments were received with respect to one or more of the referenced tariff notices from 4089316 Canada Inc., operating under the business name of Xit télécom (Xit), Vidéotron Télécom ltée (Vidéotron) and Allstream Corp. (Allstream), formerly AT&T Canada Corp. Reply comments were received from Bell Canada.

6. Comments were also received from la Commission scolaire des Découvreurs, la Commission scolaire de la Rivière-du-Nord, le Conseil régional de concertation et de développement du Bas-Saint-Laurent, la Commission scolaire de la Riveraine, la Commission scolaire des Hauts-Cantons and la Commission scolaire des Rives-du-Saguenay (collectively, the Boards).

7. On 16 April 2003, Commission interrogatories were addressed to Bell Canada regarding Tariff Notices 6734 and 6740. Bell Canada filed responses on 14 May 2003.

8. On 9 September 2003, additional Commission interrogatories were addressed to Bell Canada with respect to the referenced tariff notices, to which Bell Canada provided responses on 30 September 2003.

9. On 24 September 2003, Câble-Axion Digitel inc. (Câble-Axion) filed an application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* (the Rules) requesting that the Commission deny Tariff Notice 6761. In its application, Câble-Axion requested additional relief, including that Bell Canada: (a) be directed to compensate Câble-Axion for the costs incurred in the development of its request for proposal (RFP) response and the lost revenue stemming from its inability to implement its business plan in this territory; and (b) be subject to various conditions under section 24 of the *Telecommunications Act* (the Act), such as a requirement that Bell Canada obtain tariff approval prior to tendering bids in response to RFPs.

10. In its answer to Câble-Axion's application, Bell Canada submitted that the relief sought should be denied, arguing, among other things, that the application was based on flawed or irrelevant allegations. In its reply, Câble-Axion reiterated its arguments and the relief claimed.

11. On 24 October 2003, the law firm of Langlois Kronstrom Desjardins filed an application on behalf of la Fédération des commissions scolaires du Québec, l'Association des commissions scolaires anglophones du Québec, la Société de gestion du réseau informatique des commissions scolaires, le Conseil régional de concertation et de développement du Bas-St-Laurent, la Commission scolaire du Pays-des-Bleuets and la Commission scolaire de la Riveraine (collectively, la Fédération), requesting that, pursuant to section 62 of the Act and Part VII of the Rules, the Commission review and vary *Xit Télécom v. TELUS Québec – Provision of fibre optic private networks*, Telecom Decision CRTC 2003-58, 22 August 2003 (Decision 2003-58) and *Xit Télécom v. Bell Canada – Provision of fibre optic private networks*, Telecom Decision CRTC 2003-59, 22 August 2003 (Decision 2003-59).

12. In the proceeding initiated by la Fédération's review and vary application, comments were received from Xit, TELUS Communications (Québec) Inc. (TELUS Québec), Allstream, Bell Canada, as well as from various school boards, municipal and regional organizations, and other public organizations.

13. In *Optical fibre service arrangements*, Telecom Order CRTC 2003-482, 28 November 2003 (Order 2003-482), the Commission approved, on an interim basis, Bell Canada's application, dated 14 March 2003, to add SFT item N2(a)(1), Optical Fibre Service Arrangements. In *Optical fibre service arrangements*, Telecom Order CRTC 2003-484, 28 November 2003 (Order 2003-484), the Commission also approved, on an interim basis, Bell Canada's application, dated 4 July 2003, to add SFT items N4(a)(1)a.1. and N4(a)(1)a.2.

14. In *Optical fibre service arrangements*, Telecom Order CRTC 2003-483, 28 November 2003 (Order 2003-483), the Commission denied Bell Canada's applications, dated 1 April 2003 and amended on 14 April 2003 and 23 July 2003 respectively, to add SFT items N2(a)(1)a.5, N4(a)(1)a. and N3(a)(1)a. In Order 2003-484, the Commission also denied Bell Canada's application to add SFT item N4(a)(1)a.3.

15. In the above noted orders (the Orders), the Commission stated that reasons would be issued at a later date. This decision sets out those reasons and disposes of the above noted application from Câble-Axion.

Relevant Commission determinations

16. In *Review of regulatory framework,* Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), the Commission noted that there were two general types of customer-specific tariffs:

- those providing, via an SFT, a service that involves features or technology that differ from those covered by the General Tariff; and

- those providing a bundle of services tailored to a particular customer's needs, primarily involving elements available from the General Tariff, where the purpose is to customize the offering in terms of rate structure or levels (for example, distance sensitive/insensitive, usage sensitive/insensitive, one-time charges, etc.).

17. The Commission stated that an arrangement of the first type (Type 1 CSA) would continue to be permitted, subject to certain conditions, including the provision of a study demonstrating that the imputation test is met and the telephone company demonstrating in its tariff application that there is not sufficient demand to offer the service through the General Tariff. The Commission stated that it would also permit the second type of arrangement (Type 2 CSA) subject to, among other things, (1) the telephone company demonstrating in its tariff application that there is not sufficient demand to offer any customer-specific elements of the service through the General Tariff; and (2) provision of a study demonstrating that the present worth of revenues under the customer-specific contract equals or exceeds the sum of: (a) the present worth of revenues under General Tariff rates for those service components available under General Tariff; and (b) the present worth of causal costs for those components not covered by the General Tariff rates.

18. In *Tariff filings related to the installation of optical fibres,* Telecom Decision CRTC 97-7, 23 April 1997 (Decision 97-7), the Commission established the regulatory framework applicable to intra-exchange optical fibre. The Commission stated that optical fibre should generally be provided under General Tariffs. However, the Commission was also of the view that SFTs for optical fibre would be appropriate where construction had to be undertaken to provide facilities to a particular customer and where facilities could have little economic reuse value. The Commission found that, where SFTs would be appropriate, the rates for optical fibre should not be less than General Tariff rates for the same facility distance. The Commission directed companies to justify in their SFT applications why such a tariff was necessary, provide facility distances and provide details for any extraordinary costs. The Commission was also of the view that in the case of customer-specific tariffs that include the use of optical fibre, the cost should reflect General Tariff rates for optical fibre and that if no General Tariff rates were available, such rates should be filed at the same time as the filing of the proposed customer-specific tariff.

19. In Decision 2002-76, the Commission directed Bell Canada to file proposed tariffs and to provide the Commission with information regarding all contracts for single source and packaged arrangements involving Bell Canada tariffed service elements, whether offered directly by Bell Canada or through Bell Nexxia Inc. (Bell Nexxia) or any other Bell Canada affiliate under common control of Bell Canada.

20. In *TELUS Communications Inc. − Fibre Use and Management Agreement*, Telecom Decision CRTC 2003-4, 31 January 2003 (Decision 2003-4), the Commission approved, on an interim basis, a Fibre Use and Management Agreement between TELUS Communications Inc. (TELUS) and Axia SuperNet Ltd., which pertained to the provision of inter-exchange dark fibre by TELUS, as a special facilities arrangement pursuant to section 25 of the Act. In *Use of inter-exchange dark fibre in Alberta*, Telecom Decision CRTC 2003-22, 7 April 2003 (Decision 2003-22), the Commission approved, on a final basis, tariff item 447 of TELUS's SFT relating to the provision of inter-exchange dark fibre for use in the Alberta SuperNet project.

21. In Decision 2003-58, the Commission directed TELUS Québec to file proposed intra-exchange and inter-exchange dark fibre tariffs, and to apply the terms and conditions of the General Tariff in its customer-specific SFTs for dark fibre projects.

22. In Decision 2003-59, the Commission directed Bell Canada to file a proposed inter-exchange dark fibre General Tariff and to apply the terms and conditions of the tariff for the provision of existing dark fibre facilities, in its customer-specific SFTs for dark fibre projects. The Commission also directed that, where facilities were not available and construction had to be undertaken to provide service to a particular customer, the rates for dark fibre should not be less than the General Tariff rates.

23. In *Review of Bell Canada's customer-specific arrangements filed pursuant to Telecom Decision 2002-76*, Telecom Decision CRTC 2003-63, 23 September 2003 (Decision 2003-63), the Commission directed Bell Canada to file amendments to certain proposed tariffs referenced in that decision, which included Tariff Notice 6734 and Tariff Notice 6740, consistent with the specific directives set out in Decision 2003-63.

Positions of parties

24. Bell Canada stated, among other things, that it was not prepared to offer the types of service arrangements captured by the referenced tariff notices on a General Tariff basis because once the Program was completed, the company expected that any significant demand for further dark fibre SFTs would end. The company further stated that the projects in question were one-time only, were targeted at a specific market segment for a limited period of time, and generally involved new construction, and that each network had been developed on a project-by-project basis.

25. With respect to the costing studies used to support the referenced tariff notices, Bell Canada submitted that it would not be appropriate to apply item 960 of the company's General Tariff pertaining to the provision of intra-exchange dark fibre because the networks in question were provided to the customers on an outright sale basis, with ongoing maintenance provided by the company for a fixed contract period. The company submitted that the outright sales costs

associated with these facilities were fully expensed at the time of installation and that there was no ongoing revenue associated with the capital cost of these facilities, because the customer had purchased the facility up front and assumed title of the facility.

26. Bell Canada further submitted that the costing applied to these projects was based on the causal costs associated with the particular configuration applicable to each customer. By contrast, Bell Canada stated that item 960 of its General Tariff provided for the lease, as distinct from the sale, of optical fibre service for a fixed contract duration, with monthly lease payments and service charges.

27. Bell Canada stated that the CSA involving facilities located in Ontario involved primarily the lease and resale of facilities provided by another fibre facilities provider. Bell Canada stated that the customer had acquired an Indefeasible Right to Use arrangement and was providing payment up front for the right to use the facility over its useful life. Bell Canada argued that the application of the General Tariff rates would not be appropriate since these rates were developed for customers who required the use of dark fibre for up to a five-year time horizon. Bell Canada argued that, by contrast, the customer in the proposed CSA applicable to Ontario was providing payment up front for the right to use the facility over its useful life, and therefore had agreed to assume the majority of the risk in this investment.

28. The Boards submitted that because the Program had a pre-determined budget and was a unique and time-limited initiative, the Commission should give expeditious approval to the referenced tariff notices in order to: (a) permit the incumbent local exchange carriers (ILECs) to pursue their participation in the bidding process and, thereby, ensure that the recipients of the Program obtain the benefits of a fully competitive bidding process; and (b) avoid delays in the deployment of broadband services across the region.

29. With respect to Tariff Notices 6734 and 6740, Xit, Vidéotron and Allstream (the competitors) requested that the Commission either deny the tariff notices or delay approval pending the resolution of other issues identified by the competitors. Among other things, Vidéotron and Allstream submitted that Bell Canada should be directed to re-file the tariff notices with separate and detailed descriptions of the rates, terms, and conditions of each service provided in each CSA. Allstream also submitted that Bell Canada had failed to justify confidential treatment for the rates, terms and conditions of the CSAs subject to Tariff Notices 6734 and 6740. Allstream submitted that with respect to tariff notices addressing similar CSAs, Bell Canada had provided a full description of the rates, terms and conditions, including the minimum annual billing commitments, monthly rates and one-time service charges. Xit submitted that, by contrast with Tariff Notices 6734 and 6740, Bell Canada had provided more detailed information in the proposed tariff pages associated with Tariff Notices 6761 and 6762, and that this demonstrated that Bell Canada had accepted that the proposed tariff pages associated with Tariff Notices 6734, 6740 and 6757 were deficient.

30. Xit disagreed with Bell Canada's submission that the demand for the provision of the facilities subject to the referenced tariff notices was limited and submitted that Bell Canada should be required to develop a general tariff applicable to the provision of optical fibre facilities contemplated by the referenced tariff notices. Xit further submitted that the rates proposed by Bell Canada failed to comply with the Commission's regulatory requirements with respect to

arrangements of this kind. Xit submitted that Bell Canada should be required to provide each CSA under General Tariffs, i.e., based on a new general tariff for the inter-exchange dark fibre service and by revising its current intra-exchange dark fibre General Tariff by including an outright sale option or a 20-year term option.

31. Xit requested that the Commission suspend the approval of these dark fibre CSAs until competitive equity had been established, and that if the Commission determined that it was appropriate that Bell Canada provide the service on an SFT basis, that each proposed arrangement be treated as a Type 2 CSA, and that the inter- and intra-exchange General Tariff dark fibre rates should be imputed as costs in the imputation test.

32. In its application, Câble-Axion requested that the Commission deny Tariff Notice 6761 on the basis that, consistent with the application of a Type 2 CSA, the dark fibre General Tariff rates should be imputed in the imputation test.

33. In reply to intervenor comments, Bell Canada submitted, among other things, that Tariff Notices 6734 and 6740 satisfied the applicable regulatory requirements and requested expeditious approval of these tariff notices. Bell Canada submitted that the inclusion of more than one CSA on the same tariff page did not alter the fact that each tariff sub-item was specific to a single customer arrangement. Bell Canada further submitted that the rates, terms and conditions had been specified for each arrangement and that a separate tariff sub-item applied to each CSA. Bell Canada also stated that the generic issue regarding the appropriate level of detail for CSAs filed following Decision 2002-76 was before the Commission, and that the final disposition of the referenced tariff notices may require due consideration of the Commission's generic determinations with respect to the amount of detail that should be included in the tariff pages applicable to CSAs generally.

34. In response to Xit's request that the Commission delay its disposition of Tariff Notices 6734 and 6740 pending its determinations in other proceedings associated with inter-exchange dark fibre arrangements, Bell Canada noted that only one of its customer arrangements in Tariff Notices 6734 and 6740 involved inter-exchange facilities. Bell Canada submitted that the connection between these other proceedings, involving the appropriate tariff detail associated with inter-exchange dark fibre arrangements, and the company's CSAs, which involved mostly intra-exchange facilities, was tenuous. Bell Canada further submitted that it was not reasonable for the disposition of this proceeding to be contingent upon these other proceedings.

35. In its review and vary application, la Fédération, with support from interventions filed by school boards, regional municipalities, Bell Canada and TELUS Québec, requested, among other things, that the Commission: (a) recognize the CSAs associated with the Program as Type 1 CSAs as defined in Decision 94-19; and (b) grant expeditious approval to the referenced tariff notices. La Fédération submitted that there was substantial doubt as to the correctness of Decisions 2003-58 and 2003-59, based on errors of law and fact, with respect to what la Fédération submitted was the Commission's requirement that the dark fibre CSAs filed by Bell Canada, Société en commandite Télébec (Télébec) and TELUS Québec, be treated as Type 2 CSAs.

36. La Fédération submitted that the CSAs subject to the referenced tariff notices fully complied with the Commission's definitions of a Type 1 CSA as they were unique and specifically tailored to the particular requirements of the customer in question. La Fédération further submitted that the fact that payment was to be made up front for each customer's network was an additional element that caused the arrangements associated with the Program to be different from those contemplated by the General Tariff. In support of its position, la Fédération relied on, among other things, the Commission's dispositions in Decision 2003-4 and Decision 2003-22, noting that in Decision 2003-22, the Commission had found the provision of dark fibre with respect to the Alberta SuperNet project to be a Type 1 CSA.

37. In addition, la Fédération submitted that the application of the principles set out in Decision 2003-59 would be inconsistent with the objectives set out in section 7 of the Act as it would, among other things, constrain the incumbents from being in a position to respond to the call for tenders pertaining to the Program. In la Fédération's view, the withdrawal of the incumbents from the bidding process would result in very few bidders, if any. La Fédération argued that a significantly less competitive bidding process would undermine the goals of the Program, particularly in remote or rural regions.

38. La Fédération stated that some of the arrangements had been negotiated between the school boards and Bell Nexxia and that construction with respect to these networks had now been completed and the networks were operational.

39. Allstream and Xit filed comments in opposition to la Fédération's review and vary application. Xit submitted, among other things, that the circumstances in the present proceeding were readily distinguishable from those addressed in the proceeding that led to Decision 2003-22. Xit stated that based on la Fédération's argument, all customized arrangements would be treated as Type 1 CSAs. Contrary to la Fédération's submission, Xit argued that to deny the referenced tariff notices would make any new tendering process more competitive by attracting more bidders.

Commission analysis and determination

Applications from la Fédération and Câble-Axion

40. The Commission notes that la Fédération's application requested that the Commission review and vary Decisions 2003-58 and 2003-59 and grant expeditious approval to tariff notices respecting the Program arrangements filed by Bell Canada, TELUS Québec, Télébec and any other incumbent telephone company involved in the Program. As already noted, Decision 2003-58 pertained to the provision of fibre optic private networks by TELUS Québec, while Decision 2003-59 addressed the rules regarding the provision of dark fibre networks by Bell Canada. Given that the Commission's dispositions in Orders 2003-482, 2003-483 and 2003-484 were limited to Bell Canada tariff notices, the Commission notes that the relief sought by la Fédération with respect to the disposition of the tariff notices filed by companies other than Bell Canada in connection with the Program will be examined and addressed separately.

41. Further, the Commission considers that in light of the specific relief sought by la Fédération in its application with respect to the disposition of the referenced tariff notices, la Fédération's arguments addressing the referenced tariff notices are properly intervenor comments and have been treated as such in the proceeding leading to the Orders.

42. With respect to Câble-Axion's application, the Commission notes that Tariff Notice 6761 was denied in Order 2003-483. In this decision, the Commission **denies** the additional relief sought by Câble-Axion. In this respect, the Commission notes that it does not have the jurisdiction to award damages. Further, the Commission is not persuaded that it would be appropriate to impose the requested conditions under section 24 of the Act with respect to the offer of service by Bell Canada in response to RFPs.

Whether the proposed arrangements are Type 1 CSAs

43. The Commission notes that when filing the referenced tariff notices, Bell Canada did not characterize the proposed arrangements as Type 1 CSAs. However, the Commission notes that Bell Canada took the position in this proceeding that the imputation test for the proposed arrangements should be based on the application of the causal costs associated with each customer configuration, as distinct from General Tariff rates, because the arrangements pertained to a one-time program, were unique and designed to respond to the particular needs of the relevant communities, and involved outright sales of the facilities that had been fully expensed.

44. The Commission notes the subsequent arguments made by Bell Canada and la Fédération as part of la Fédération's review and vary application that the proposed arrangements should be treated as Type 1 CSAs because they were unique and were designed to respond to the particular needs of the relevant communities. While these characteristics may be relevant to the classification of a proposed arrangement as a Type 1 CSA, the Commission does not consider that they are determinative of such a classification.

45. In Decision 94-19, a Type 1 CSA is described as a CSA that provides, via an SFT, a service that involves features or technology that differ from those covered by the General Tariff. The Commission considers that the manner in which the cost of a particular service is to be recovered, whether through non-contractual month-to-month rates, a leased arrangement or an outright sale, does not constitute a different service "feature" from those characterizing services provided pursuant to a General Tariff. Moreover, the Commission considers that, if adopted, Bell Canada's interpretation would render meaningless the distinction between a Type 1 CSA and other customer-specific arrangements.

46. The Commission considers that the proposed SFT arrangements involve, either exclusively or principally, the provision of intra-exchange dark fibre, and that this service includes the provision of associated maintenance services and the use of support structures. The Commission considers that the intra-exchange dark fibre service proposed by Bell Canada in these SFTs involves the same service features and technology as the service described in item 960, Optical Fibre, of Bell Canada's Intra-Exchange Distance Charges General Tariff, which also includes the provision of dark fibre, associated maintenance and the use of support structures.

47. The Commission notes that la Fédération and Bell Canada placed significant reliance on the Commission's determination in Decision 2003-22 to support their submission that the proposed arrangements should be treated as Type 1 CSAs. In Decision 2003-22, the Commission found that, among other things, the provision of dark fibre by TELUS in connection with the Alberta SuperNet project was a Type 1 CSA.

48. The Commission is of the view that the CSA considered in Decision 2003-22 was significantly different from the CSAs proposed by Bell Canada in the proceedings that led to the Orders. Unlike the CSAs proposed by Bell Canada, the CSA examined in the proceeding that led to Decision 2003-22 consisted exclusively of inter-exchange dark fibre in respect of which no General Tariff was in place. By contrast, in this proceeding, the intra-exchange provision of dark fibre service is the subject of an existing tariff.

49. In light of the above, the Commission finds that it would not be appropriate to treat the CSAs proposed by Bell Canada as Type 1 CSAs.

Appropriate rating criteria

50. As previously noted, the CSAs proposed by Bell Canada consist principally or exclusively of intra-exchange dark fibre. The regulatory framework with respect to the provision of intra-exchange dark fibre was established in Decision 97-7.

51. In Decision 97-7, the Commission directed that, where SFTs for intra-exchange optical fibre were appropriate, the rates for dark fibre should not be less than General Tariff rate for the same facility distance. The Commission further notes that, in Decision 97-7, it determined that if no General Tariff rates were available, such rates were to be filed at the same time as the proposed tariffs for the customer-specific tariff offering.

52. The Commission further notes that, by letter from Commission staff dated 9 September 2003, Bell Canada was given the option to file proposed General Tariff rates for intra-exchange and inter-exchange dark fibre for arrangements in excess of five years. In response, the company stated that it would evaluate the possibility of seeking approval for such tariffs. The Commission notes, however, that Bell Canada chose not to file such tariffs with respect to arrangements in excess of five years.

53. The Commission notes that the rate comparisons submitted in confidence by Bell Canada in its response to the Commission staff's letter of 9 September 2003 demonstrated that for each CSA, the effective monthly rate per metre was less than the corresponding weighted average of the General Tariff rate of item 960, Intra-exchange Optical Fibre service, and the proposed General Tariff item 3780, Inter-exchange Optical Fibre service. Moreover, the Commission notes that if the causal costs were to be imputed for the inter-exchange component, as suggested by la Fédération and Bell Canada, the effective monthly rate per metre of each CSA would still be less than the corresponding weighted average of the General Tariff rate for the intra-exchange component and the causal costs for the inter-exchange component.

54. In light of the above, the Commission finds that the proposed CSAs fail to comply with the rating criteria set out in Decision 97-7.

55. The Commission notes that a strict application of the above findings would have resulted in the denial of each and every referenced tariff notice proposed by Bell Canada. However, the Commission considers that a number of the arrangements are characterized by exceptional circumstances that render such a blanket result inappropriate.

56. The Commission notes that Tariff Notice 6734 pertains to CSAs in respect of which the contract negotiations and nearly all of the service provisioning were completed prior to 12 December 2002, the date of issuance of Decision 2002-76, pursuant to which Bell Canada filed the arrangements in question for the Commission's approval. The Commission further notes la Fédération's statement that some of the arrangements were negotiated between the school boards and Bell Nexxia, that construction of certain networks covered under Tariff Notice 6734 has been completed and that the networks are operational. The Commission considers that denial of the CSAs subject to Tariff Notice 6734 would lead to significant disruption of existing service, dislocation of complex equipment and facility configurations, at a significant cost and to the detriment of school boards and municipalities in the relevant areas. In these circumstances, the Commission considers that it would not be appropriate to apply the findings set out in this decision to the arrangements proposed under cover of Tariff Notice 6734.

57. In addition, the Commission notes that for two of the three CSAs contained in Tariff Notice 6757, Bell Canada was the only qualified bidder. In those particular circumstances, the application of the findings set out above would very likely result in the communities concerned being left without the benefit of dark fibre network service. The Commission considers that such a consequence would be contrary to the public interest. Accordingly, the Commission finds that it would not be appropriate to apply the findings set out in this decision to the two CSAs subject to proposed SFT items N4(a)(1)a.1. and N4(a)(1)a.2.

58. The Commission underscores the exceptional nature of its treatment of the SFTs approved on an interim basis in the Orders.

Contents of tariff pages

59. The Commission notes that in Decision 2003-63, among other things, Bell Canada was directed in paragraph 66 to file for the public record amendments to certain proposed tariffs referenced in that decision, which included Tariff Notice 6734 and Tariff Notice 6740, consistent with the specific directives set out in paragraph 66. These amendments would have resulted in making the company's proposed tariff pages more meaningful. The Commission further notes that on 21 November 2003, the Federal Court of Appeal issued a ruling staying the implementation of the Commission's direction in Decision 2003-63 pending disposition of Bell Canada's application for leave to appeal Decision 2003-63 and, if leave were granted, the merits of the appeal itself. On 18 December 2003**,** the Federal Court of Appeal granted leave to appeal Decision 2003-63. In addition, the Commission notes that Bell Canada filed an application with the Commission requesting that the Commission review and vary the Commission's direction in paragraph 66 of Decision 2003-63 and also requested that the Commission stay implementation of its direction pending disposition of the merits of the company's review and vary application.

60. In light of the stay granted by the Federal Court of Appeal, the Commission notes that Bell Canada is not required to comply with the Commission's direction set out in paragraph 66 of Decision 2003-63 at this time.

61. The dissenting opinions of Commissioners Cram and Langford are attached.

Secretary General

Dissenting opinion of Commissioner Barbara Cram

The mandate given the Commission under the *Telecommunications Act* is to bring about competition in telecommunications in Canada, whilst assuring affordable and universal telephone service to the people of Canada. To have competition, telephone prices must be based on cost as closely as possible, recognizing that a balance must be made to ensure affordable and universal telephone service in High Cost Service areas.

I agree with the majority that these tariff applications are not Type 1 CSAs (paragraph 49) and that the tariffs request rates below their General Tariff rate and that they fail to comply with the rating criteria set out in Telecom Decision CRTC 97-7 (paragraphs 53 and 54). This really means that these applications are for prices both below the amount Bell Canada had previously said reflected their costs for dark fibre and below the rate competitors are required to pay Bell for their dark fibre. Secondly, this means Bell filed costing criteria that did not comply with a decision of 7 years standing.

I disagree with granting an exception in principle and also secondly in these circumstances.

With the advent of competition, the Commission has undertaken 12 years in a continuing painstaking process of wringing out the cross subsidization between the various classes of ratepayers. This has involved increasing rates, most notably for residential users, and reducing costs of the telephone companies. For some, this has been a difficult process, however, the eventual goal of competition and the consequent reduction of prices, has justified the means. To step back from cost based rates and reintroduce hidden cross subsidization, as in this decision, is a retrograde and chilling step.

Even with telephone rates to public services, the Commission has been assiduous in insisting that these rates not be discounted from costs. In Telecom Decision CRTC 96-9, preferential rates below General Tariff rates/costs were not allowed for educational and health services entities (including libraries, hospitals and schools). The decision stated:

> . , the Commission continues to be of the view that it would not be appropriate to require subscribers to pay more for other services to finance preferential tariffs for the EH sectors. The Commission therefore considers that a mandated uniform discount from general tariff rates would not be appropriate.

And most recently TELUS Québec was refused the ability to discount rates for universities and hospitals.

My colleagues in the majority use three reasons for the exception. The first reason involves the date of issuance of Telecom Decision CRTC 2002-76 (Decision 2002-76) and the fact that the contract negotiations and 'nearly' all of the service provisioning were completed prior to that date. It is difficult to believe that an in-region affiliate of an incumbent operating totally in the region of the incumbent did not believe it must comply with tariffing rules, this especially when the issue of this affiliate and its activities were thoroughly examined at the Price Cap proceeding. This latter proceeding was conducted in September of 2001, 14 months before the issuance of Decision 2002-76.

Secondly, my colleagues state these cases are exceptional in that they are completed. In other words, it is better to seek forgiveness than permission. I simply cannot accept this concept.

My colleagues concern themselves that non approval would lead to significant disruption of service to the detriment of schools and municipalities. As the projects appear to be long completed one must assume this means the infrastructure is now in place. I cannot imagine that anyone would expend monies to extract this infrastructure. The issue then becomes one of money and who should pay for what. Given Bell's assertion, as in paragraph of 25 of the majority decision, one must further assume that the outright sale of the infrastructure has taken place and that title to the facility has passed and further, if it has not, there are contracts that give that entitlement. It would further appear, if the assertions of various school boards and groups are to be believed, it is possible that the proposal and contract documents in this specific Tariff Notice did not state any precondition as to approval of tariffs by the Commission, if the documentation is similar to those in other proposals and contracts (see *Le Quotidien*, March 11, 2004, Contrats avec les Commissions Scolaires . . .). Given this it would appear that the detriment would otherwise be to the shareholders of Bell Canada.

Finally, my colleagues in the majority state that Bell Canada was the only qualified bidder for two of the CSAs and that denial would very likely result in the communities concerned being left without the benefit of a dark fibre network service. First it should be noted that this particular tariff notice was among the last to be filed, on July 4, 2003. It is clear that Bell Nexxia had been, in the main, underbidding all other bidders in the earlier contracts. Why then would any competitors choose to bid? More significantly, if this were a valid reason it is an invitation for every incumbent in the country to do exactly as Bell Canada has done.

Our mandate at the Commission is competition and affordable, universal telephone service for Canadians. While I acknowledge and applaud the connectivity agenda, when it conflicts with our statutory mandate, I believe we must stay within our mandate.

Taxpayers, both provincial and federal, have paid significant funds to promote connectivity. With this decision, my colleagues have accepted that another class of payers, telephone subscribers in Ontario and Quebec, will pay. To say that anyone other than subscribers will pay for the difference between the General Tariff (ostensibly the cost) and the price is to say that the shareholders of Bell Canada will pay or subsidize these dark fibre installations. I do not believe the shareholders intend to pay.

Given the constraints of the Price Cap, this may well mean increases to business rates in the higher rate bands where competition is unlikely (coincidentally the same areas as those receiving the dark fibre but also other similar areas which will not) and increases in business optional services and possibly forborne services. This may very well contradict our mandate of providing affordable service and reduce universality. In and of itself this would not be wrong, if, on balance the decision would promote competition.

However, this decision further has the impact of decreasing competition. If the Commission grants an 'exception' in these circumstances, what competitor will even provide a bid when the incumbent can bid under its own General Tariff rates, and therefore ostensibly its costs, and receive regulatory approval?

If I were inclined to return to system of hidden cross subsidization, I would approve applications for tariffs by incumbents for reduced rates for individuals on Social Assistance in provinces in which the governments do not pay for these individuals to have telephones. At least, in assisting the taxpayer, subscribers would be paying for and the Commission would be promoting universal and affordable telephone service, one of our mandates under the *Telecommunications Act*.

With this decision, my colleagues in the majority have taken a giant leap backwards, back into the murky world of hidden cross subsidization where value judgments, rather than cost based pricing, reigned in the regulatory world. By creating an exception, for unexceptional and perhaps dangerous reasons, they have created chaos where regulatory certainty should be paramount.

I would deny these applications.

Dissenting opinion of Commissioner Stuart Langford

I disagree with paragraphs 55, 56, 57, and 58 of the majority decision and, consequently, would have denied all the Bell Canada customer-specific arrangements (CSAs) at issue. To do otherwise, is to disregard a decade of Commission decisions intended to eradicate the sort of non-competitive behaviour allowed by the majority today.

Against all odds

For ten years, against extremely long odds, the Commission, mandated to do so by Parliament, has struggled to transform a highly regulated, monopolistic, telecommunications industry into one where consumer interests would be protected by market forces working freely in a truly competitive environment. The struggle has had its rewards – long distance rates have plummeted and are no longer controlled by the Commission, but the results overall have been disheartening. While there has been progress in the long distance market, the "former" monopolies continue to maintain a stranglehold on the local business (91.9% of total revenues) and the local residential (98.9% of revenues) wireline markets.[1]

Over the years, would-be new service providers have been frustrated by their inability to gain ready access to the existing infrastructure required to operate a phone company (central offices, multi-unit building conduits, local loops) at reasonable prices, and by their ongoing suspicion that when bidding on major contracts the former monopolies have not complied with pricing rules. In an effort to resolve these access and pricing problems, competitive local exchange carriers (CLECs) have filed multiple applications in the last few years alleging that incumbent local exchange carriers (ILECs) have broken clear Commission directives. In the case of many of these applications, the Commission has found that ILECs have breached rules designed to encourage competition.

The road to hell

The record underlying today's majority decision and my dissent is instructive. Despite the existence of a clear line of decisions dating back to 1994 (Telecom Decision 94-19) to the contrary, Bell Canada has still maintained the position in this proceeding that it has complied with the rules governing the pricing of CSAs. The record demonstrates quite the opposite, that the successful bids to provide services to various school boards and municipalities in Ontario and Quebec contain clear evidence of non-compliance.

Bell Canada has broken the rules. It set tariffs for providing services to competitors that were higher than the prices it quoted when bidding to sell those same services to would-be customers. The actual numbers are protected by a confidentiality blanket but suffice it to say that there were two price lists, one for Bell Canada's competitors and the other for its retail customers. Against this unfair competition advantage, the competition never stood a chance.

---

[1] CRTC, *Report to the Governor in Council*, November, 2003.

Nevertheless, the majority has decided to allow Bell Canada to profit from its non-compliance with clear Commission rules. Out of context, its intentions are perhaps understandable – to deny the specific arrangements now might lead to "significant disruption of existing service". In the context of the Commission's ten year initiative to enforce pricing rules, however, good intentions seem a poor substitute for proper limits and regulatory certainty. "The road to hell," the old timers used to say, "is paved with good intentions."

If a competitive environment truly is in the best interests of Canadian telecommunications service users, then this is a black day for consumers. A few school boards and municipalities have been treated to cut-rate services in the short term. In the long run, the future of a competitive market place has been dealt a significant setback and ILECs have been sent the unfortunate message that non-compliance pays.