



## Telecom Decision CRTC 2003-59

Ottawa, 22 August 2003

### **Xit Télécom v. Bell Canada – Provision of fibre optic private networks**

Reference: 8622-X4-200304379

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

1. The Commission received an application under Part VII of the *CRTC Telecommunications Rules of Procedure*, dated 1 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 Bell Canada to file, on an expedited basis, a general tariff for inter-exchange dark fibre.
2. The Commission received comments from Bell Canada on 1 May 2003. Reply comments were filed by Xit on 12 May 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 fibre<sup>1</sup> private networks in Quebec throughout the operating territories of Bell Canada, Société en commandite Télébec and TELUS Communications (Québec) Inc. 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.
4. Xit submitted that Bell Canada 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 Bell Canada'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 Bell Canada could submit lower bids by using its surplus capacity.

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<sup>1</sup>The 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.

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 all access to 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 Bell Canada'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 Bell Canada's fibre optic networks in a timeframe that was adequate to respond to public project tenders, thus allowing healthy, equitable competition with Bell Canada. Xit stated that the best way to ensure that Bell Canada did not act anti-competitively was to require it to use its own tariffs in its bid responses to project tenders.
7. Xit alleged that Bell Canada appeared to be providing prospective clients from 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 Bell Canada to file a general tariff for inter-exchange dark fibre. Xit also requested that the Commission direct Bell Canada to use this general tariff and its existing general tariff for intra-exchange dark fibre when seeking Commission approval of customer-specific special arrangements for dark fibre projects<sup>2</sup>.
9. Additionally, Xit requested that the Commission direct Bell Canada 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 Bell Canada and subject to Commission approval. Xit also requested that the Commission direct Bell Canada to cease providing any telecommunications service, including network engineering services in particular, until the Commission approved a tariff for each of the above services.

### **Bell Canada's comments**

10. Bell Canada submitted that the Commission should reject Xit's application.
11. Bell Canada argued that Xit displayed a misunderstanding of the nature of competition in general and of matters related to the competitive provisioning of surplus fibre in particular. Bell Canada noted that it did not undertake reserve fibre construction projects with the sole purpose of allowing resellers to resell these installations at average rates. However, once the installations were constructed and service assured, the resale of service was mandated with the goal of guaranteeing that there was no discrimination in the provision of service to certain clients on certain routes.

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<sup>2</sup>The 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.

12. According to Bell Canada, Xit's argument was founded on a misunderstanding of what general tariff rates meant for regions where new construction was required. Bell Canada noted that, although there might have been unused fibre in some sections to fill the demand for some of the "Villages branchés" projects, there was not one case where unused fibre formed the majority of the required installation. Bell Canada noted that it believed Xit expected that a general tariff would enable competitors to have access to fibre in sections where there was currently no installation. Bell Canada indicated that it would not undertake such construction work without being certain that it could recoup the appropriate construction charges. Bell Canada also indicated that Xit's notion of surplus capacity was equally false, since such surplus capacity did not exist.
13. Bell Canada submitted that Xit's argument that general tariffs were required could result in a situation where Bell Canada was treated as a sub-contractor for new construction projects. In that case, Bell Canada noted, Xit could choose to construct the less costly installations itself, depending on Bell Canada to provide the most costly installations.
14. In Bell Canada's view, the requirement for a general tariff for inter-exchange surplus fibre with broadly averaged rates would constitute a substantial competitive disadvantage for Bell Canada. Bell Canada noted that construction costs, particularly in remote and rural locations, varied widely based upon the location and desired network configuration of each customer. Bell Canada stressed its view that such an arrangement would favour non-economic entry of competition in the market, discourage investments and harm the development of facilities-based competition, counter to the objectives of the *Telecommunications Act* (the Act) and in conflict with the regulatory framework introduced in *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002.
15. With respect to Xit's request that Bell Canada be directed to use general tariff rates when seeking Commission approval of customer-specific special arrangements for dark fibre projects, Bell Canada noted that in *TELUS Communications Inc. – Use of inter-exchange dark fibre in Alberta*, Telecom Decision CRTC 2003-22, 7 April 2003, the Commission rejected an allegation that the special facilities arrangement did not meet all the requirements of a Type 1 customer-specific arrangement, and hence, that a general tariff should be developed upon which the special arrangement would be based. Bell Canada noted that the Commission, in that decision, also considered that the special facilities arrangement was unique in both scale and scope, and due to the unique nature of the arrangement, the Commission considered that granting final approval would not be unjustly discriminatory. In Bell Canada's opinion, the "Villages branchés" program equally provided Quebec communities and its users uniqueness in scale and scope.
16. According to Bell Canada, the listing of school boards, municipalities and other organizations included in Xit's application served, at least, to illustrate the healthy and rigorous competition in the dark fibre market.
17. Bell Canada submitted that the request for bid specific information by Xit would involve confidential commercial documents in a highly competitive environment and that the request was an attempt by Xit to obtain useful, competitive information that was not pertinent to the present application.

## **Xit's reply**

18. Xit noted that its request was for the Commission to direct Bell Canada to file a general tariff for the provision of all inter-exchange optical fibre, whether it was part of unused surplus capacity or part of new construction. In addition, Xit noted that it wanted to ensure that Bell Canada submitted special arrangements using the general tariff rates for both surplus fibre and fibre to be constructed in order to re-establish competitive equity.
19. In regard to Bell Canada's concerns about being used as a sub-contractor, Xit submitted that its revenues were primarily derived from construction of new networks. It was, therefore, not usually advantageous to have Bell Canada complete the construction. In fact, Xit envisioned using Bell Canada's inter-exchange dark fibres only in circumstances where Bell Canada used its facilities in an anti-competitive way. In Xit's view, the best way to ensure that Bell Canada stopped using its sub-infrastructure as a way to limit competition was to direct that Bell Canada file a general tariff for inter-exchange dark fibre and to use the tariff to impute its inter-exchange fibre costs in its submissions for the provision of dark fibre networks.
20. Xit responded to Bell Canada's submission that it could be left to provide only the most expensive installations by noting that, for competitive equity, Bell Canada must provide the same service to its competitors that it was willing to provide to its privileged clients. Xit added that it was unlikely that Bell Canada would provide the service at a loss, as Bell Canada could charge additional preparatory work charges similar to those in Bell Canada's general tariff for intra-exchange dark fibre.
21. In response to Bell Canada's argument that the fibre optic market was highly competitive, Xit noted that it was the only new bidder on recent project tenders, which was not a sign of a highly competitive market. Xit argued that, if the market were really highly competitive, Bell Canada would have responded to the application by asking for forbearance in the dark fibre market.
22. Xit submitted that, as the list of dark fibre project tenders demonstrated, there was a high enough demand for the provisioning of dark fibre to justify the requirement for a general tariff.
23. Xit argued that Bell Canada must have provided engineering services associated with the tender for the Commission Scolaire des Découvreurs, in breach of section 25 of the Act, during the three months between the time it won the bid and the time it filed the tariff notice. Xit submitted that Bell Canada should be prevented from providing any engineering services between the time it presents the bid response to the time the tariff was approved by the Commission.
24. Xit noted that it did not consider any of the information it was requesting regarding the bid responses awarded provisionally to Bell Canada as confidential because this information must be identified in all the special arrangements that use dark fibre, in order to meet the requirements of the imputation test.

## Commission's analysis and determinations

25. The three principal issues raised in Xit's application are whether inter-exchange dark fibre should be provided under a general tariff; whether Bell Canada'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*

26. In *Tariff filings related to the installation of optical fibres*, Telecom Decision CRTC 97-7, 23 April 1997 (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 *TELUS Communications Inc. – Fibre Use and Management Agreement*, Telecom Decision CRTC 2003-4, 31 January 2003, 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.
27. 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 Bell Canada was a party to Decision 97-7 and subsequently filed general tariffs for intra-exchange optical fibre.

28. With respect to the first criterion, the Commission notes that recent Special Facilities Tariff (SFT) applications filed by Bell Canada 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.
29. With regard to the potential for unjust discrimination, the Commission considers that under the current arrangement, whereby Bell Canada makes inter-exchange facilities available under SFT, this potential is not minimized. These SFT arrangements allow dark fibre to be provided to certain Bell Canada 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.

30. 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.
31. The Commission is of the view that similar considerations apply in the present case. The Commission considers that Bell Canada'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 other Bell Canada telecommunications services. The Commission therefore finds that, where fibre currently exists, the inter-exchange 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.
32. In summary, the Commission finds that, in respect of the inter-exchange dark fibre facilities of Bell Canada, the criteria of demand, minimizing the potential for unjust discrimination, and fungibility, support the provisioning of inter-exchange dark fibre facilities under the company's general tariffs.
33. The Commission **directs** Bell Canada to file a proposed inter-exchange dark fibre tariff within 20 days of the date of this decision. The Commission considers that the general tariff should be subject to the availability of existing unused and unallocated facilities.
34. The Commission also **directs** Bell Canada to apply the terms and conditions of the General Tariff for 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*

35. Xit has requested that Bell Canada 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 Bell Canada.
36. 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.
37. 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 specifically addressed information

provided in a bid response. The Commission found that the offering by Aliant Telecom Inc. of Provincial Centrex Service, as distinct from its provision, was not subject to any conditions. In the case of Bell Canada's dark fibre network bids, the Commission notes that SFTs must be filed with and approved by the Commission before Bell Canada can provision the network.

38. 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*

39. Xit requested that the Commission direct Bell Canada to cease providing any telecommunications service, including network engineering service in particular, without an approved tariff.
40. 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 Bell Canada 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*

41. The Commission notes that in *Xit Télécom v. TELUS Québec – Provision of fibre optic private networks*, Telecom Decision CRTC 2003-58, 22 August 2003 (Decision 2003-58), the Commission considered, on a preliminary basis, 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. Bell Canada is invited to participate, along with the other incumbent local exchange carriers, according to the procedures set out in Decision 2003-58.

Secretary General

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