



## **Telecom Order CRTC 2004-356**

Ottawa, 29 October 2004

### **NorthernTel, Limited Partnership**

Reference: 8340-N51-200401430

#### **Fibre swapping agreement**

1. The Commission received an application by NorthernTel, Limited Partnership (NorthernTel), dated 17 February 2004, for approval of a fibre swapping agreement between NorthernTel and Bell Canada, dated 30 March 1999, and an amendment to that agreement, dated 11 February 2004 (together, the Agreement).
2. NorthernTel stated that while developing the amendment, the parties had discovered that, through an administrative oversight, neither party had filed the original NorthernTel / Bell Canada fibre swapping agreement for Commission approval in 1999.
3. NorthernTel stated that the Agreement covers the exchange of equal lengths of fibre located in the region between Haileybury and Fraser River in Ontario. NorthernTel indicated that on 30 November 2003, the amount of fibre exchanged by NorthernTel and Bell Canada (the companies) had decreased from 1276 linear fibre-km to 984 linear fibre-km, necessitating an amendment to the original agreement.

#### **Process**

4. The Commission received comments from O.N.Telcom, now known as Ontera, dated 4 March 2004. On 29 March 2004, NorthernTel filed reply comments on behalf of itself and Bell Canada. O.N.Telcom filed additional comments on 2 April 2004 and 21 April 2004. NorthernTel replied to these comments on 16 April 2004 and 3 May 2004.

#### **Position of parties**

##### **O.N.Telcom's comments**

5. O.N.Telcom argued that NorthernTel's submission regarding an administrative oversight to support filing the Agreement five years late lacked credibility.
6. O.N.Telcom submitted that the Agreement was virtually identical in text and principle to a fibre swapping agreement between Bell Mobility Cellular Inc. (Bell Mobility) and Bell Canada, which the Commission had denied in Telecom Order CRTC 99-346, 13 April 1999 (Order 99-346).
7. O.N.Telcom stated that the Agreement was entered into by the companies less than two weeks before the Commission's denial of a similar agreement in Order 99-346 and argued it was highly unlikely that Bell Canada would have failed to make the connection and have forgotten to file the Agreement for approval. In O.N.Telcom's view, Bell Canada and NorthernTel should have immediately adjusted their arrangements to reflect the Commission's determinations in Order 99-346.

8. O.N.Telcom submitted that it appeared likely that the fibres provided by NorthernTel to Bell Canada under the Agreement were contained within the same sheath as those fibres used by NorthernTel to provide local service. O.N.Telcom submitted that, in accordance with long standing regulatory policy, NorthernTel's utility segment should have obtained a contribution from its competitive segment for the use of these facilities for purposes other than providing local service. O.N.Telcom noted that to the extent that no contribution or insufficient contribution was obtained from the competitive segment, the shortfall was borne by the utility segment.
9. O.N.Telcom noted that, in 1999, NorthernTel's local access shortfall was recovered through carrier access tariff (CAT) rates paid by O.N.Telcom. The company argued that to the extent that NorthernTel's costs to build, operate, and maintain its facilities were higher than Bell Canada's, NorthernTel should have obtained compensation for that difference. O.N.Telcom submitted that the local access shortfall was inappropriately inflated, to the extent that the local rates included costs that should have been borne by NorthernTel's competitive segment and should have been contributed to by Bell Canada through tariff payments for the use of the fibre included in the Agreement. O.N.Telcom therefore submitted that it had been overcharged through the resulting CAT, Direct Toll (DT), and Direct Connection (DC) rates.
10. O.N.Telcom requested that the Commission:
  - deny the fibre swap agreement;
  - initiate a public proceeding to conduct a detailed review of the appropriate Bell Canada and NorthernTel tariffs for the facilities in question, as well as the resulting regulatory and financial issues raised by O.N.Telcom;
  - make any required adjustments to NorthernTel's ongoing revenue requirement;
  - determine the quantum of any overpayment that O.N.Telcom had made to NorthernTel through CAT, DT and DC payments;
  - establish terms for repayment of that amount; and
  - establish terms for any other relief that the Commission determined was appropriate in the circumstances, including but not limited to, interest owing on any overpayments.

**NorthernTel's reply comments**

11. In response to O.N.Telcom's submission regarding the fact that the original agreement was not filed in 1999, NorthernTel indicated that as soon as it became apparent that the original agreement had not been filed with the Commission for approval, the companies had taken the necessary steps to file the Agreement.
12. NorthernTel submitted that the intent behind the Agreement was to provide each company with diversity in the event of a catastrophic occurrence in its own fibre network, and further submitted that the Agreement saved the company the cost of building additional facilities. In NorthernTel's

view, the benefits of the Agreement, in particular the avoidance of redundant investments, precluded the need for any associated settlement process. NorthernTel submitted that the companies did not understand how this could cause or have caused harm to O.N.Telcom.

13. NorthernTel submitted that although Bell Canada had an approved general tariff for intra-exchange dark fibre, it had no such tariff for inter-exchange dark fibre facilities, nor did it have such a tariff at the time of the original agreement. NorthernTel indicated that the vast majority of the facilities provided by Bell Canada under the Agreement were inter-exchange in nature. NorthernTel noted that, as a result, the vast majority of the Bell Canada facilities involved in the Agreement were not subject to a general tariff. Further, NorthernTel indicated that the facilities being provided by NorthernTel, under the Agreement, were not subject to a general tariff.
14. NorthernTel was of the view that Order 99-346 had no relevance in terms of determining the appropriate dispositions of the arrangements in the Agreement.
15. NorthernTel submitted that the determinations made by the Commission over the past years would not have changed significantly whether the original agreement had been approved or rejected.

#### **O.N.Telcom's additional comments**

16. O.N.Telcom noted that the companies had submitted that the Agreement was to provide NorthernTel with diversity in the event of a catastrophic occurrence in its own fibre network.
17. O.N.Telcom argued that such intent was not reflected in the Agreement nor was there any apparent intent to preclude the use of these facilities for any other purpose. O.N.Telcom stated that the companies did not identify what the benefit to Bell Canada was under the Agreement nor that its use would have been restricted to the provision of diversity in the event of a catastrophic event.
18. O.N.Telcom submitted that the Agreement differed from the Bell Canada / Bell Mobility agreement denied in Order 99-346 only in that one party to the Agreement was a different affiliate of Bell Canada and that the fibre routes were in Northern Ontario. O.N.Telcom further submitted that the determinations made in that Order five years ago were even more relevant at this time, given the Commission's directives relating to affiliates and their activities.

#### **NorthernTel's additional reply comments**

19. NorthernTel noted that the Commission had, in the past, approved fibre swap arrangements between Bell Canada and affiliated companies. Bell Canada noted, for example, that in Telecom Order CRTC 97-373, 18 March 1997, the Commission approved such an arrangement between Bell Canada and Télébec.

#### **Commission's analysis and determinations**

20. The Commission notes that NorthernTel filed the Agreement with the Commission nearly five years after its execution by the companies.
21. In *Tariff filings related to the installation of optical fibres*, Telecom Decision CRTC 97-7, 23 April 1997 (Decision 97-7), the Commission found that the provisioning of optical fibre was a telecommunications service as defined by the *Telecommunications Act* (the Act).

The Commission notes that pursuant to subsection 25(1) of the Act, 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.

22. The Commission notes that the fibre routes covered by the Agreement are inter-exchange routes and that it has approved Bell Canada's inter-exchange fibre tariff under Tariff Notice 6769 in Telecom Order CRTC 2004-355, 29 October 2004. The Commission also notes that NorthernTel currently has no tariff in place for inter-exchange fibres and that it has never been directed to file one.
23. In light of the foregoing, the Commission **denies** the Agreement and directs NorthernTel to file for approval an inter-exchange fibre tariff within 30 days. The Commission directs the companies to use the applicable tariffs, once they are in place, to charge for the fibres used by parties.
24. The Commission notes that O.N.Telcom requested that the Commission review certain regulatory and financial issues and that NorthernTel argued, in reply, that the determinations made by the Commission over the past years would not have changed significantly whether the Agreement had been approved or rejected.
25. The Commission notes that neither company provided a cost study to support its argument.
26. From 1999 to 2001, NorthernTel received a contribution subsidy and DT reimbursement from long distance service providers, under a per-minute CAT mechanism. The contribution subsidy served to offset the shortfall on local services. From 2002 onwards, NorthernTel received a contribution subsidy from the National Fund and DT reimbursement from long distance service providers.
27. The Commission notes that any benefit that could have accrued to NorthernTel, pursuant to the Agreement, would have impacted the contribution subsidy for the years 1999-2001, but not the DT reimbursement from 2002 onwards, as submitted by O.N.Telcom.
28. O.N.Telcom paid NorthernTel \$9.4 million in contribution in 1999.<sup>1</sup> The Commission notes that any benefit deemed to have accrued to NorthernTel from 1999 to 2001 relative to this Agreement would be immaterial in comparison to the contribution subsidy it received from O.N.Telcom during that period. The Commission finds that the level of materiality does not warrant further process. Accordingly, the Commission **denies** O.N.Telcom's request to address the regulatory and financial issues raised in its submission.

Secretary General

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<sup>1</sup> Telecom Order CRTC 99-1068, 16 November 1999.

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