



Telecom Order CRTC 2004-439

Ottawa, 23 December 2004

TELUS Communications Inc.

Reference: TCQ Tariff Notices 350 and 351

Special facilities tariffs for optical fibre arrangements

1. The Commission received applications by TELUS Communications (Québec) Inc. (TCQ),¹ dated 14 May 2003, to introduce special facilities tariffs (SFTs) associated with optical fibre network service. TCQ requested that the Commission approve Tariff Notices (TNs) 350 and 351.
2. TNs 350 and 351 pertain to customer-specific arrangements (CSAs) involving intra-exchange and inter-exchange dark fibre that have been in place since 2001.

Process

3. The Commission received comments from 4089316 Canada Inc., operating as Xit télécom, on behalf of itself and Télécommunications Xittel inc. (collectively, Xit), dated 13 June 2003, and reply comments from TCQ dated 20 June 2003.
4. On 5 September 2003, the Commission requested further information from TCQ. TCQ filed its reply on 30 October 2003.

Background

5. 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 CSAs:
 - those providing, via an SFT or special assembly tariff, 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.).
6. 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 had been met and the telephone company demonstrating in its tariff application that there was not sufficient demand to offer the service through the general tariff.

¹ Effective 1 July 2004, TELUS Communications Inc. has assumed all rights, entitlements, liabilities, and obligations relating to the provision of telecommunications services in the territories previously served by TCQ.

7. The Commission stated that it would also permit the second type of arrangement (Type 2 CSA) subject to, among other things:
 - the telephone company demonstrating in its tariff application that there was not sufficient demand to offer any customer-specific elements of the service through the general tariff; and
 - provision of a study demonstrating that the present worth of revenues under the customer-specific contract equalled or exceeded 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.
8. 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 directed TCQ to file a proposed general tariff for intra-exchange and inter-exchange optical fibre. The Commission considered that these general tariffs should be subject to the availability of existing unused and unallocated facilities. The Commission further directed TCQ 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. It also stated that where facilities were not available and construction had 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.

Positions of parties

9. Xit requested that the Commission treat the arrangements proposed under TNs 350 and 351 as Type 2 CSAs and submitted that the proposed rates were inconsistent with the price floor established in Decision 94-19 and *Bundling framework developed for customer-specific arrangements*, Order CRTC 2000-425, 19 May 2000. Xit further submitted that TCQ should be required to unbundle the optical fibre service, and to file separate tariffs for the fibre and for services such as engineering services.
10. Xit also requested that the Commission suspend the approval of TNs 350 and 351 until the Commission had disposed of Xit's Part VII application, dated 2 April 2003, in which it had requested that the Commission direct TCQ to file a general tariff for intra-exchange and inter-exchange optical fibre service.
11. TCQ submitted that the imputation tests supporting the arrangements subject to TNs 350 and 351 included all necessary elements associated with the installation and maintenance of the networks.
12. TCQ also submitted that it would be unfair to give retroactive effect to the findings in Decision 2003-58 with respect to the arrangements subject to TNs 350 and 351, given that the facilities had been installed and completed in 2001, well before Decision 2003-58 was issued.

Commission's analysis and determination

13. The Commission notes that it approved TCQ's proposed General Tariff for intra-exchange optical fibre service and inter-exchange optical fibre service in *TELUS Communications Inc. – General tariff for intra-exchange and inter-exchange optical fibre service in Quebec*, Telecom Order CRTC 2004-438, 23 December 2004 (Order 2004-438).
14. Accordingly, the Commission considers that Xit's request to suspend the approval of TNs 350 and 351 until it had approved a general tariff for optical fibre service has been addressed.
15. The Commission notes that TCQ filed an economic study demonstrating that the proposed arrangements were based on the application of the causal costs associated with each customer configuration. The Commission further notes that this would be consistent with the costing methodology for Type 1 CSAs. Consequently, the Commission considers that TCQ is essentially requesting that TNs 350 and 351 be treated as Type 1 CSAs.
16. The Commission considers that the intra-exchange and inter-exchange dark fibre service customer-specific SFTs proposed by TCQ in TNs 350 and 351 involve the same service features and technology as the service described and approved in Order 2004-438.
17. In light of the above, the Commission considers that it would not be appropriate to treat the SFTs proposed by TCQ as Type 1 CSAs.
18. As previously noted, TCQ's proposed SFTs consist of intra-exchange and inter-exchange dark fibre. The Commission notes, further, that the regulatory framework applicable to TCQ in this matter was set out in Decision 2003-58, in which the Commission directed that where SFTs for optical fibre were appropriate, the rates for dark fibre should not be less than the General Tariff rates.
19. The Commission notes that the proposed rates are less than the corresponding General Tariff rates for TCQ's intra-exchange and inter-exchange optical fibre service approved by the Commission in Order 2004-438, when applied to the same facility distance. Accordingly, the Commission finds that the proposed CSAs are inconsistent with the rating criteria established in Decision 2003-58.
20. The Commission considers, however, that these CSAs are characterized by exceptional circumstances.
21. As previously noted, the arrangements subject to TNs 350 and 351 have been in place since 2001.
22. The Commission considers that the denial of the CSAs filed under TNs 350 and 351 would lead to significant disruption of existing service and dislocation of complex equipment and facility configurations – at a significant cost and to the detriment of the customers in question. Moreover, the Commission is of the view that denial of TNs 350 and 351 would very likely result in the customers being left without the benefit of dark fibre network service. The Commission considers that this would be contrary to the public interest.

23. Given the exceptional circumstances of this case, the Commission considers that it would be inappropriate to apply the findings set out in Decision 2003-58 to the arrangements proposed under TNs 350 and 351.
24. As noted above, TCQ provided an economic study in support of TNs 350 and 351. The Commission notes that TCQ's imputation test results show that the proposed intra-exchange and inter-exchange rates exceed the associated causal costs. The Commission finds, as it did in *Optical fibre service arrangements*, Telecom Decision CRTC 2004-20, 23 March 2004, with respect to certain CSAs proposed by Bell Canada for approval, that the proposed rates are just and reasonable.
25. In light of the above, the Commission **approves** TNs 350 and 351 as filed.
26. The dissenting opinion of Commissioner Barbara Cram is attached.

Secretary General

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Dissenting Opinion of Commissioner Barbara Cram

This is the second exception granted by my colleagues and I reiterate my grave concerns as stated in my dissent in Decision 2004-20.

Another exception is being given for unexceptional circumstances. Moreover, this is being done despite the specific direction given by the Commission to TCQ in Decision 2003-58.

Further, Decision 2004-20 is presently under appeal with the Federal Court with leave already granted to appeal. I disagree with the decision to consider this application at this time given this circumstance.

The regulatory bargain is a construct of objectivity. The injection of subjectivity, as in the majority decision, continues what I fear to be the unravelling of the bargain.

I would not have entertained this application until the Federal Court has dealt with Decision 2004-20.