



## Telecom Decision CRTC 2011-499

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Ottawa, 16 August 2011

### **Fibernetics Corporation – Application to review and vary Telecom Decision 2010-787 regarding the treatment of imbalance traffic compensation**

File number: 8662-F27-201104546

*In this decision, the Commission partially denies Fibernetics Corporation's application to modify the determinations in Telecom Decision 2010-787. Concurrent with the release of this decision, the Commission is also issuing a correction to Telecom Decision 2010-787.*

#### **Introduction**

1. The Commission received an application by Fibernetics Corporation (Fibernetics), dated 9 March 2011, requesting that it review and vary its determinations in *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Proposed revision to the treatment of imbalance traffic compensation*, Telecom Decision CRTC 2010-787, 25 October 2010 (Telecom Decision 2010-787). In that decision, the Commission revised the imbalance traffic compensation regime to address specific traffic patterns generated by dial-up Internet and two-stage long distance calling services. The Commission determined that compensation payments would be reduced when such patterns would result in disproportionate traffic imbalance for three consecutive months or more.
2. Fibernetics submitted that there was substantial doubt as to the correctness of the decision, arguing that the Commission had erred when it stated that Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies) proposed to eliminate compensation payments when the total volume of traffic exchanged is at least 10 million minutes per month and the volume of traffic in one direction is more than 80 percent of the total traffic exchanged between local exchange carriers (LECs) for three months or more. More specifically, Fibernetics submitted that the “three-month” period was never proposed by the Bell companies, or any other party to the proceeding.
3. Fibernetics further submitted that the revised tariff pages issued by the Bell companies did not accurately reflect Telecom Decision 2010-787 with respect to the treatment of the three-month period.

4. As such, Fibernetics requested that
  - the Commission’s direction to the Bell companies to issue revised tariff pages to reflect the changes made in Telecom Decision 2010-787 be struck as void *ab initio*;<sup>1</sup>
  - the words “for three months or more” be struck from Telecom Decision 2010-787;
  - the tariff pages issued by the Bell companies and other competitive local exchange carriers (CLECs) as a result of Telecom Decision 2010-787 be quashed as void *ab initio*;
  - the Bell companies be directed to file proposed tariff pages implementing Telecom Decision 2010-787, as amended, and that a follow-up tariff proceeding to consider these tariff pages be directed; and
  - pending the Commission’s determinations from such a follow-up proceeding, the Bell companies’ traffic imbalance tariffs be reinstated as they were on 23 November 2010.
5. The Commission received comments regarding Fibernetics’ application from the Bell companies, Canadian Network Operators Consortium Inc. (CNOC), ExaTEL, Globility Communications Corporation (Globility), Iristel Inc. (Iristel), and Managed Network Systems, Inc. (MNSi). The public record of this proceeding, which closed on 18 April 2011, is available on the Commission’s website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under “Public Proceedings” or by using the file number provided above.
6. The Commission has identified the following issues to be addressed in this decision:
  - I. Does the Commission’s attribution of the three-month requirement to the Bell companies raise substantial doubt as to the correctness of Telecom Decision 2010-787?
  - II. Are the Bell companies’ revised tariff pages contrary to the Commission’s determinations in Telecom Decision 2010-787?
- I. Does the Commission’s attribution of the three-month requirement to the Bell companies raise substantial doubt as to the correctness of Telecom Decision 2010-787?**
7. As noted above, Fibernetics submitted that neither the Bell companies nor any other party to the proceeding that led to Telecom Decision 2010-787 proposed that a reduction in imbalance payments apply when the pre-defined criterion are met for

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<sup>1</sup> *Ab initio* means from the beginning. Fibernetics is therefore requesting that the Commission’s direction and the tariff pages issued by the Bell companies be null and void from the very beginning of their intended existence, not just from the instant they are struck.

three months or more. As such, Fibernetics claimed that the Commission had exercised its power without regard to the material put before it. Furthermore, Fibernetics argued that, since the three-month period was never proposed, parties did not have the opportunity to be heard on that issue.

8. The Bell companies confirmed that they never proposed a three-month period during the proceeding that led to Telecom Decision 2010-787. However, they submitted that the Commission's attribution of this point to the Bell companies was simply a clerical error which was not sufficient to demonstrate substantial doubt as to the correctness of Telecom Decision 2010-787.
9. The Commission notes that, while the Bell companies did not propose a three-month period, it was reasonable for the Commission to impose a three-month time period criterion since such a period was part of the traffic imbalance regime being revised. Furthermore, the Commission has the authority to impose conditions as part of its determinations. Therefore, while the Commission's statement in Telecom Decision 2010-787 that the three-month period was proposed by the Bell companies is inaccurate, this inaccuracy does not render the rest of the decision invalid, nor does it raise substantial doubt as to its correctness.
10. In light of the above, the Commission is issuing, concurrent with the release of this decision, a correction to paragraphs 1 and 16 of Telecom Decision 2010-787 in order to remove the references suggesting that the three-month time period had been proposed by the Bell companies.

## **II. Are the Bell companies' revised tariff pages contrary to the Commission's determinations in Telecom Decision 2010-787?**

11. Fibernetics submitted that, based on a plain reading of Telecom Decision 2010-787, for the reduction of imbalance payments to apply, the pre-defined criterion (i.e. a minimum of 10 million minutes, with more than 80 percent of total traffic in one direction) must be present for three months or more every time a reduction of imbalance payments is to be applied. However, Fibernetics noted that the Bell companies' revised tariff pages state that a LEC must meet the compensation reduction criterion for three consecutive months only once for the reduction of imbalance payments to apply; the criterion does not need to be met again for any subsequent reduction of imbalance payments between the same two LECs. Fibernetics further submitted that the Bell companies' tariff pages should not have been approved and made effective prior to a tariff notice proceeding, giving all parties the opportunity to comment.
12. CNOC, ExaTEL, Globility, Iristel, and MNSi supported Fibernetics' position.
13. The Bell companies argued against the need for a tariff notice proceeding, since their revised tariff pages did not create new rules, terms, or conditions that would warrant a separate round of comments from those provided during the proceeding leading to

Telecom Decision 2010-787. They further submitted that the issuance of tariff pages without a separate round of comments is common practice.

14. The Commission notes that, in Telecom Decision 2010-787, it directed parties to issue revised tariff pages to reflect the changes made in that decision. In practice the Commission will ask parties to issue tariffs, instead of file them and allow for a proceeding, to reflect the determinations in a decision when the modifications required do not substantially change the tariff pages, and any issues regarding the implementation of the tariff have been addressed in the decision.
15. The Commission notes that, having clearly identified in Telecom Decision 2010-787 the modifications that were to be made to the imbalance traffic compensation regime, and, accordingly, to the related tariff pages of the concerned parties, it found that the issuance of revised tariff pages was appropriate and the most efficient approach to take in that instance.
16. The Commission further notes that all CLECs who were required to issue revised tariff pages to reflect the changes made in Telecom Decision 2010-787 used the wording found in the CRTC Interconnection Steering Committee's (CISC) *Competitive Local Exchange Carrier Model Tariff*, Version 33 (Model Tariff v.33), dated November 2010, which incorporates the Commission's determinations in Telecom Decision 2010-787.
17. The Commission notes, however, that while the Bell companies' revised tariff pages also include the wording from Model Tariff v.33, they also added, at the end of the wording from Model Tariff v.33, that "the three month eligibility rule is relevant only to the initial application of discounts, not for any subsequent re-application between the same Company and the same CLEC." The Commission further notes that Model Tariff v.33 makes no reference to the three-month period being relevant only to the initial application of the discount.
18. The Commission finds that the last section of the Bell companies' revised tariff pages does not reflect the Commission's intent with respect to how the three-month period is to be applied, as demonstrated by the wording used in Model Tariff v.33.
19. In light of the above, the Commission orders, pursuant to paragraph 32(d) of the *Telecommunications Act*, that the following section at page 37.15.0 of the Bell companies' Access Services Tariff, item 105.4.(d)(1) be quashed as void *ab initio*:

*whether or not those conditions have been met in the immediately preceding month(s). That is, the three month eligibility rule is relevant only to the initial application of discounts, not for any subsequent re-application between the same Company and the same CLEC.*
20. The Commission further directs the Bell companies to issue revised tariff pages within five days of the date of this decision to reflect the removal of the above-mentioned section from its Access Services Tariff, item 105.

## Conclusion

21. In light of the above, the Commission finds that it did not err in law or in fact with respect to the tariff process. The Commission further finds that, while it mistakenly attributed the proposal for a three-month requirement to the Bell companies, Fibernetics did not raise substantial doubt as to the correctness of the Commission's determinations in Telecom Decision 2010-787.
22. Accordingly, in light of the above analysis, the Commission's correction to Telecom Decision 2010-787, and the order at paragraph 20 of this decision directing the Bell companies to issue new tariff pages, the Commission **partially denies** Fibernetics' application.

Secretary General