



## Telecom Decision CRTC 2005-12

Ottawa, 9 March 2005

### **Xit Télécom and Télécommunications Xittel Inc. v. TELUS Communications Inc. – Construction of a fibre optic network for the Commission scolaire de la Côte-du-Sud**

Reference: 8622-X4-200409906

1. The Commission received an application from Xit Télécom on behalf of itself and Télécommunications Xittel Inc. (Xit Télécom), dated 10 September 2004, filed pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*, alleging, among other issues, that TELUS Communications Inc. (TCI) had provided or was providing telecommunications services to the Commission scolaire de la Côte-du-Sud (Commission scolaire) related to the Commission scolaire's network, (Network), without an approved tariff, contrary to section 25 of the *Telecommunications Act* (the Act). Xit Télécom requested that the Commission direct TCI to cease offering telecommunications services to the Commission scolaire without an approved tariff and to file a special facilities tariff for the provision of those telecommunications services.
2. On 7 January 2005, the Commission advised the parties that it would adjudicate certain of the issues raised by Xit Télécom, as summarized in paragraphs 34 and 35 of Xit Télécom's reply dated 18 October 2004, on an expedited basis, in accordance with the expedited process established in *Expedited procedure for resolving competitive issues*, Telecom Circular CRTC 2004-2, 10 February 2004.
3. The matter was heard by a panel of three Commissioners on 25 February 2005. In addition to the oral component of the proceeding and the 10 September 2004 application, the Commission considered TCI's answer dated 8 October 2004, Xit Télécom's reply dated 18 October 2004, TCI's letter to the Ministère des affaires municipales du Québec of 26 November 2004, the Ministère de l'Éducation du Québec's letters to TCI dated 26 November 2004 and 10 December 2004, Xit Télécom's and TCI's arguments dated 26 January 2005 and their responses dated 28 January 2005 to Commission interrogatories.

#### **Regulatory framework**

4. Sections 2 and 23 of the Act define "telecommunications services" as follows:
  2. "telecommunications service" means a service provided by means of telecommunications facilities and includes the provision in whole or in part of telecommunications facilities and any related equipment, whether by sale, lease or otherwise;
  23. For the purposes of this Part and Part IV, "telecommunications service" has the same meaning as in section 2 and includes any service that is incidental to the business of providing telecommunications services.

5. Section 25 of the Act states that:

25. 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.

6. In *Regulatory framework for Québec-Téléphone and Télébec ltée*, Telecom Decision CRTC 96-5, 7 August 1996 (Decision 96-5), the Commission refrained, with respect to the sale, lease and maintenance of Competitive Terminal - Other (CT-O) and Competitive Terminal - Multiline and Data (CT-MD) equipment, from the exercise of powers and the performance of duties with respect to sections 24, 25, 31, and subsections 27(1), (2), (4), (5), and (6) of the Act.
7. In *Customer-specific Fibre Maintenance Service (Alberta only)*, Telecom Order CRTC 2005-73, 23 February 2005 (Order 2005-73), the Commission approved TCI's Tariff Notice 148 for a customer specific fibre maintenance service in Alberta. TCI proposed to provide maintenance services on both the fibre strands and the support structures that were built and owned by the customer.
8. In *Shaw Communications G.P. v. TELUS Communications Inc. – Violation of bundling safeguards*, Telecom Decision CRTC 2004-23, 2 April 2004, the Commission found that to constitute a bundle, there must not only be a single rate or single rate structure, but also a benefit, financial or otherwise, arising from the aggregation of the services.

**Issue 1: Whether TCI must file tariffs in respect of the services it is providing or has provided to the Commission scolaire**

9. Xit Télécom submitted that the services provided or being provided by TCI to the Commission scolaire were all telecommunications services under the Act and should only be provided pursuant to an approved tariff. Xit Télécom submitted that TCI had provided or was continuing to provide the following services, (the Services) without an approved tariff:
  - the sale and maintenance of equipment used in the Network;
  - the maintenance of the fibre optic cable in the Network; and
  - the engineering services associated with the construction of the Network.
10. Xit Télécom agreed that access to TCI's support structures was being provided pursuant to TCI's General Tariff but questioned whether the General Tariff was being properly applied.
11. Alternatively, Xit Télécom submitted that if any of the Services were not subject to tariff regulation on their own, then they were nonetheless subject to tariff regulation as part of a "bundle" of regulated and non-regulated services.

12. TCI submitted that it had assigned to Électro Saguenay Ltée (Électro) its obligations to the Commission scolaire regarding the construction of the Network, pursuant to an assignment agreement dated 14 September 2004 (the Assignment Agreement). Accordingly, TCI submitted that it would only provide the Services to the Commission scolaire. TCI also submitted that it was not required to file any tariffs for the Services on the basis that:
- the sale and maintenance of equipment had been forborne by the Commission pursuant to Decision 96-5;
  - the maintenance of the fibre optic cables was not a telecommunications service under the Act as the fibres were being used in a private network, not connected to the public switched telephone network (PSTN) and was for the sole use of its owner, the Commission scolaire; and
  - the engineering services for the construction of the Network were not a telecommunications service under the Act as they were provided for the construction of a private fibre optic network by a non-affiliated third party that would transfer ownership to the Commission scolaire.

### **Commission analysis and determination**

13. The Commission notes that, pursuant to the Assignment Agreement, non-forborne services and bundles comprising non-forborne services must be provided pursuant to tariffs approved by the Commission.
14. With regard to the sale and maintenance of equipment, the Commission notes that in Decision 96-5, it only forbore from the sale, lease and maintenance of terminal equipment, classified as CT-O and CT-MD. The Commission also notes that under the Act, the sale of equipment used in a telecommunications network, unless forborne, is a telecommunications service and can only be provided subject to an approved tariff.
15. Although the Commission received a list of equipment supplied to the Commission scolaire by TCI, it is unclear which pieces of the equipment, if any, fall within the definition of the forborne terminal equipment as set out in Decision 96-5. The Commission notes that TCI had the onus of providing evidence that the equipment supplied to the Commission scolaire was forborne, and considers that TCI did not discharge this onus.
16. The Commission considers that the maintenance of the equipment sold to the Commission scolaire also constitutes a telecommunications service as it is incidental to the provision of a telecommunications service in accordance with section 23 of the Act.
17. With respect to the maintenance of the fibre optic cable used in the Network, the Commission notes that in Order 2005-73, the Commission approved TCI's application for a customer specific fibre maintenance service in Alberta thereby demonstrating that TCI itself recognizes that maintenance of fibre optic cables is a telecommunications service for which a tariff is required. The Commission notes TCI's assertion that a tariff is not required in this case because the maintenance services are not being provided to a telecommunications common carrier as

it was in the case of Order 2005-73. Rather, the maintenance services are provided to a school board that intended to operate a private network only for its own users' needs, as opposed to offering service to the public. TCI also argued that the Network would not be connected to the PSTN.

18. The Commission notes that under section 25 of the Act, all Canadian carriers such as TCI must file tariffs for all non-forborne telecommunications services and considers that it is not relevant whether the services are provided to the operators of a private network or a public network or whether or not they are connected to the PSTN.
19. Accordingly, the Commission considers that TCI's provision of maintenance service to the Commission scolaire for fibre optics cables is a telecommunications service within the meaning of section 23 of the Act.
20. Similarly, the Commission notes that TCI provided engineering services and will provide additional engineering services to the Commission scolaire once the construction of the Network is completed. The Commission considers that these stand-alone engineering services are necessary to the construction of the Network and considers that the engineering services provided by TCI are telecommunications services within the meaning of section 23 of the Act.
21. As a result, the Commission **directs** TCI to file the following tariffs, within 45 days of the date of this Decision:
  - A tariff for the sale of equipment to the Commission scolaire;
  - A tariff for the maintenance of equipment sold to the Commission scolaire;
  - A tariff for the TCI's maintenance of fibre optics for the Network; and
  - A tariff for the engineering services that have been provided and that will be provided, by TCI to the Commission scolaire.
22. In the event that TCI can demonstrate that a portion of the equipment sold to the Commission scolaire is terminal equipment within the meaning of Decision 96-5, and is therefore forborne, then the onus would be on TCI, at the time of the tariff filing, to demonstrate that the sale of the forborne and non-forborne equipment to the Commission scolaire is not a bundle within the meaning of the Commission's bundling rules. In the alternative, TCI must demonstrate to the Commission, at the time of the tariff filing, that the bundle meets the imputation test.

**Issue 2: Whether TCI is correctly applying its tariff for access to TCI's support structures**

23. Xit Télécom submitted that TCI was charging the Commission scolaire a non-tariff, lower rate for access to its support structures, as TCI was charging only a portion of the tariff rate. Further, Xit Télécom submitted that competitors requesting access to TCI's support structures were required to pay the full tariff rate when accessing TCI's support structures. Xit Télécom submitted that TCI conferred an undue preference to itself and the Commission scolaire and unjustly discriminated against competitors, in violation of section 27(2) of the Act.

24. TCI submitted that it had provided and will continue to provide access to its support structures in accordance with its General Tariff Item 4.12. First, TCI submitted that it was charging Électro the tariff rate for access to its support structures. Second, following the completion of the Network, TCI submitted that it would acquire some of the fibre strands from Électro and it would co-occupy the fibre sheath with the Commission scolaire. Therefore, TCI submitted that, in accordance with its tariff for access to support structures and with industry practice for joint users, the Commission scolaire would be charged only its prorated share of the tariff rate to access TCI's support structures.

### **Commission analysis and determination**

25. The Commission notes that TCI's General Tariff Item 4.12 allows for the joint use of support structures. Tariff Item 4.12.01 (e) defines joint-user as "a party, such as an electric utility company, which has executed a joint-use or joint-ownership agreement with the Company providing for either the reciprocal right to use the Support Structures of the other party or joint-ownership of the Support Structure." However, the Commission notes that there is no reference in the tariff allowing a joint-user to be charged a different rate than the full tariff rate to access TCI's support structures. Therefore, the Commission considers that TCI is in violation of its tariff when it charges a rate that is different than the tariff rate. Accordingly, the Commission **directs** TCI to charge the Commission scolaire the full tariff rate for access to its support structures.

Secretary General

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*