



Telecom Decision CRTC 2008-85

Ottawa, 8 September 2008

Regulatory policy

Regulation of intra-exchange dark fibre services

Reference: 8640-B2-200806755

In this Decision, the Commission forbears from the regulation of intra-exchange dark fibre services provided by Bell Aliant, Bell Canada, NorthernTe, and Télébec in their serving territories.

Further to the above forbearance determination, the Commission initiates a show cause proceeding to consider whether to forbear from the regulation of intra-exchange dark fibre services provided by MTS Allstream, SaskTel and TELUS in their serving territories.

Introduction

1. The Commission received an application from Bell Aliant Regional Communications, Limited Partnership, Bell Canada, NorthernTel, Limited Partnership, and Télébec, Limited Partnership (collectively, Bell Canada et al.), dated 8 May 2008, and amended on 9 May 2008. Pursuant to section 34 of the *Telecommunications Act* (the Act), Bell Canada et al. requested that the Commission make a determination that it will refrain from exercising its powers and performing its duties under sections 24, 25, 27, 29, and 31 of the Act in relation to intra-exchange dark fibre services provided by Bell Canada et al. in their respective incumbent local exchange carrier (ILEC) serving territories.
2. In particular, Bell Canada et al. submitted that the Commission should forbear from regulating intra-exchange dark fibre services for the same reasons that it forbore from the regulation of interexchange (IX) dark fibre services in Telecom Decision 2008-31.
3. The Commission received comments from la Coalition des Fournisseurs d'accès à Internet inc.; Internetworking Atlantic Inc.; MTO Telecom Inc.; MTS Allstream Inc. (MTS Allstream); TELUS Communications Company, on behalf of itself and Saskatchewan Telecommunications (collectively, TCC et al.); and the Utility Telecom Council of Canada.
4. The public record of this proceeding, which closed on 26 June 2008, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

Positions of parties

5. Parties opposing the application submitted that Bell Canada et al. did not provide sufficient evidence that forbearance was, pursuant to subsection 34(1) of the Act, consistent with the objectives of the Act or to prove that, pursuant to subsection 34(2) of the Act, the provisioning of intra-exchange dark fibre services in their respective incumbent serving territories is or will be subject to competition sufficient to protect the interests of users. Moreover, parties opposing Bell Canada et al.'s application submitted that forbearance would impair unduly the establishment of any developing market and, consequently, would result in a reduction in competition in the intra-exchange dark fibre market, contrary to subsection 34(3) of the Act.
6. Most parties opposing the application submitted that there were important differences between the IX and intra-exchange dark fibre markets that rendered forbearance from the regulation of intra-exchange dark fibre services inappropriate. In particular, it was argued that, contrary to IX dark fibre services, intra-exchange dark fibre services required less capital investment and were less expensive to operate and maintain. Parties opposing the application submitted that these differences encouraged smaller telecommunications service carriers to provide innovative services that included the provisioning of intra-exchange dark fibre services to small to medium sized business, local and regional institutions, and customers in the industrial and educational sectors. These parties submitted that forbearing from the regulation of intra-exchange dark fibre services provided by Bell Canada et al.'s would result in the elimination of this developing market.
7. Several parties opposing the application further submitted that before granting Bell Canada et al. forbearance, the Commission should ensure that barriers to efficient and effective competition in the market for intra-exchange dark fibre services are removed. In particular, these parties submitted that the Commission should correct the inequities in the regulation of access to support structures, multi-dwelling units (MDUs), and rights-of-way.
8. TCC et al. requested that, if the Commission forbore from regulating intra-exchange dark fibre services provided by Bell Canada et al., the Commission should hold a show cause proceeding for why the same should not apply to TCC et al.

Commission's analysis and determinations

9. The Commission's power to forbear stems from section 34 of the Act.
10. With respect to the application of subsection 34(1) of the Act, the Commission notes that the matter to be determined is whether forbearance from the regulation of intra-exchange dark fibre provided by Bell Canada et al. in their serving territories would be consistent with the policy objectives set out in section 7 of the Act.

11. The Commission considers that it is primarily only those customers that have a need to connect distinct locations using their own facilities and that have the significant financial and technical resources needed to operate such facilities that would require dark fibre services. Furthermore, the Commission notes the small number of examples on the record of this proceeding where intra-exchange dark fibre services have been provisioned by either ILECs or competitors. Consequently, the Commission concludes that the provision of intra-exchange dark fibre services is characterized by customer specific requirements that are designed to reflect local conditions.
12. The Commission considers that with a few exceptions noted on the record of this proceeding,¹ Bell Canada et al. have not participated in the provisioning of intra-exchange dark fibre services. The Commission considers that even in situations where spare intra-exchange dark fibre may be available, Bell Canada et al. have an economic incentive to provide higher-value lit services over these facilities instead of provisioning these facilities to potential competitors. As a result, the Commission considers that contrary to the concerns expressed by several parties opposing this application, granting forbearance would not result in Bell Canada et al. providing significantly more intra-exchange dark fibre services than they have in the past.
13. Consequently, the Commission finds that market forces can be relied upon to achieve the telecommunications policy objectives set out in paragraphs 7(a), 7(b), 7(f), 7(g), and 7(h) of the Act.
14. In light of the finding above, the Commission finds, pursuant to subsection 34(1) of the Act, that forbearing to the extent specified below from the regulation of intra-exchange dark fibre services provided by Bell Canada et al. in their serving territories would be consistent with the telecommunications policy objectives.
15. With regard to arguments that forbearance from the regulation of intra-exchange dark fibre services provided by Bell Canada et al. would be contrary to subsection 34(3) of the Act, the Commission notes that the record of this proceeding establishes that competitors have succeeded in provisioning intra-exchange dark fibre services within an environment characterized by the existence of regulatory frameworks for resolving issues regarding access to support structures, MDUs, and rights-of-way.
16. The Commission finds that in the circumstances of this case, with respect to subsection 34(3) of the Act, forbearance to the extent specified below from the regulation of intra-exchange dark fibre services provided by Bell Canada et al. in their serving territories will not likely impair unduly the establishment or continuance of a competitive market for those services.

¹ Provided by Bell Canada via Commission approved customer-specific arrangements.

17. In light of the foregoing, the Commission further finds that to forbear to the extent specified below from the regulation of intra-exchange dark fibre services provided by Bell Canada et al. in their serving territories would be consistent with the Governor in Council's Policy Direction² which states that the Commission should rely, to the maximum extent feasible, on market forces as the means to achieving the telecommunications policy objectives.
18. Accordingly, the Commission declares that sections 24, 25, 29, and 31, and subsections 27(1), 27(2), 27(4), 27(5), and 27(6) of the Act do not apply to Bell Canada et al. with regard to the provision of intra-exchange dark fibre services in their serving territories.
19. The Commission directs Bell Canada et al. to modify their tariff pages accordingly within 30 days of the date of this Decision.

Follow-up proceeding

20. As a result of the above, the Commission initiates a proceeding inviting parties to show cause why it should not forbear to the same degree as in this Decision from regulating intra-exchange dark fibre services provided by MTS Allstream and TCC et al. in their serving territories.
21. Interested parties are to file their comments with the Commission, serving copies on parties that participated in this proceeding and on other parties to the proceeding that led to Telecom Decision 2005-63, by **8 October 2008**.
22. Interested parties may file reply comments with the Commission, serving copies on those parties that filed comments, by **22 October 2008**.
23. Where a document is to be filed or served by a specific date, the document must be actually received, not merely sent, by that date.

Secretary General

Related documents

- *Regulatory issues with respect to the provision of interexchange dark fibre – Follow-up to Telecom Decision 2007-101, Telecom Decision CRTC 2008-31, 10 April 2008*

² *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006.

- *Issues with respect to the provision of optical fibre*, Telecom Decision CRTC 2005-63, 21 October 2005

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