



## Telecom Decision CRTC 2021-398

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### **TELUS Communications Inc. – Application to review and vary Telecom Decision 2020-268**

TELUS Communications Inc. (TCI) requested that the Commission review and vary its determinations in Telecom Decision 2020-268. In the present decision, the Commission finds that it did not err in fact or law in that decision and **denies** TCI's application. Specifically, the Commission finds that TCI has failed to demonstrate that there is substantial doubt as to the correctness of its determination that subsection 27(2) of the *Telecommunications Act* applied, and that TCI violated that provision.

The Commission is issuing Telecom Notice of Consultation 2020-269-2 concurrently with this decision to resume the consultation procedure to determine if it would be appropriate to impose an administrative monetary penalty on TCI and, if so, what the appropriate monetary amount would be.

#### **Background**

1. The Commission is responsible for exercising its powers with a view to implementing, among other things, the objective of fostering the orderly development of Canadian telecommunications markets that provide reliable, affordable, and efficient services to Canadians. When deliberating on service provider disputes, the Commission may, where appropriate in the exercise of its powers, determine that regulatory intervention is necessary to mitigate the impact of activities that could have otherwise eroded the development of an efficient and competitive telecommunications market and resulted in increased delivery costs for services to Canadian consumers.
2. In August 2018, the Commission received an application from TELUS Communications Inc. (TCI), requesting relief regarding alleged new traffic stimulation activities involving Iristel Inc.'s (Iristel) 867 Numbering Plan Area (NPA) telephone numbers.<sup>1</sup> The Commission subsequently received an application from Iristel alleging that TCI had reduced capacity on certain toll circuits that carry TCI's traffic to Iristel's 867 NPA telephone numbers.

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<sup>1</sup> An NPA is a three-digit code, commonly called an area code. The 867 NPA covers all of Northwest Territories, Nunavut, and Yukon.

3. In August 2020, the Commission issued Telecom Decision 2020-268 (the Decision), in which it determined that by reducing the capacity of certain of its toll circuits, TCI unjustly discriminated against Iristel, Iristel's customers, and its own customers, in violation of subsection 27(2) of the *Telecommunications Act* (the Act).  
Subsection 27(2) of the Act prohibits Canadian carriers from unjustly discriminating against or giving undue preference to any person, including themselves, or from subjecting any person to an undue or unreasonable disadvantage. The Commission considered that while 9-1-1 calls were not affected by TCI's actions, long distance emergency calls and long distance personal, family, or work-related calls may have been affected, particularly considering the dependence of residents of the North on services offered from elsewhere in Canada.
4. The Commission stated in the Decision that a carrier's concern that a wholesale customer is not using a service as set out in the carrier's tariff or is otherwise violating a Commission provision does not give that carrier licence to affect its customers' traffic. The Commission added that it was not open to TCI to take matters into its own hands; if carriers were permitted to do so, it could easily be done in an anti-competitive manner by carriers that have tariffs in place only because they have market power.
5. The Commission also stated that given its conclusion that TCI violated subsection 27(2) of the Act, it could address TCI's conduct without considering whether its actions contravened section 36 of the Act, which prohibits Canadian carriers from controlling the content or influencing the meaning or purpose of telecommunications carried for the public unless approved by the Commission.

## **Application**

6. The Commission received an application on 6 November 2020 from TCI, requesting that the Commission review and vary the Decision on the basis that the Commission had erred in its conclusion that subsection 27(2) of the Act applied in the circumstances of the dispute.
7. Specifically, TCI argued that there is substantial doubt as to the correctness of the Decision because
  - the Commission erred in law and in fact by finding that in reducing the capacity of its toll circuits that carry its traffic to Iristel, TCI acted in a discriminatory manner towards Iristel and/or Iristel's customers. TCI submitted that subsection 27(2) of the Act applies only in relation to the provision of a telecommunications service or the charging of a rate for it by a carrier. Since TCI was not engaged in the provision of a service to Iristel, there could not be discrimination by TCI towards Iristel and its customers within the meaning of subsection 27(2) of the Act;

- the Commission erred in applying subsection 27(2) of the Act at all, by failing to consider the limits on the application of subsection 27(2) of the Act resulting from previous forbearance orders;
  - even if subsection 27(2) of the Act applied, the Commission erred by finding that TCI discriminated against Iristel and Iristel's customers, and erred in law in finding that it discriminated against its own customers and that any such *de minimis* discrimination was unjust or undue.
8. TCI requested that the Commission review and vary its determination in the Decision. Specifically, it asked that the Commission
- rescind the conclusion that TCI unjustly discriminated against Iristel, Iristel's customers, and its own customers, and substitute it with a conclusion that TCI acted in compliance with subsection 27(2) of the Act;
  - examine the broader question of carrier disputes and the scope of carriers to engage in self-help in an upcoming review of wholesale wireline services and interconnection proceedings; and
  - implement any other relief it deems appropriate.
9. The Commission received an intervention from Iristel.

### **Review and vary criteria**

10. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that in order for it to exercise its discretion pursuant to section 62, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

### **Issues**

11. The Commission has identified the following issues to be addressed in this decision:
- Did the Commission err in applying subsection 27(2) of the Act to this situation?
  - If subsection 27(2) of the Act does apply, did the Commission err in law or in fact in its interpretation and application of subsection 27(2) of the Act by determining that TCI unduly discriminated against Iristel, Iristel's customers, and TCI's end-users by reducing the capacity of its toll circuits that carry its traffic to Iristel?
  - Should the Commission consider whether TCI violated section 36 of the Act?

## **Did the Commission err in applying subsection 27(2) of the Act to this situation?**

### **Positions of parties**

#### ***TCI***

12. TCI submitted that when the Commission indicated in the Decision that TCI was providing tariffed services to Iristel, it inverted the actual relationship between the two parties.<sup>2</sup> TCI's Direct Connection Call Termination Services Agreement (DCCTSA) with Iristel makes clear that it was Iristel providing services to TCI, and not vice versa. TCI submitted that the Decision did not identify the applicable TCI wholesale tariff that it deemed applicable because there was no such tariff.
13. TCI argued that because subsection 27(2) of the Act applies only in relation to the provision of a telecommunications service or the charging of a rate for it by a carrier, and that TCI was receiving a service and paying a rate, as a matter of law, there could be no discrimination by TCI towards Iristel's customers.
14. TCI added that the Commission did not give due regard to the phrase "in relation to the provision of a telecommunications service or the charging of a rate for it," which may have contributed to the Commission's misunderstanding of the nature of TCI's relationship with Iristel.
15. TCI also submitted that the Commission did not take into account the scope of forbearance. In Telecom Decision 97-19, the Commission forbore from exercising its powers under subsection 27(2) of the Act with respect to long distance or toll services, except in regard to wholesale services provided by the Stentor companies and basic toll services.<sup>3</sup>
16. The TCI circuits referred to in the Decision carry only toll traffic. TCI argued that in the Decision, the Commission did not acknowledge that neither of the exceptions noted above applied to the toll services TCI was providing, and that there was no evidence on the record of the proceeding that would permit the conclusion that any services were subject to subsection 27(2) of the Act. TCI argued that consequently, the Commission made a critical error in applying subsection 27(2) of the Act.
17. In response to a request for information (RFI), TCI stated that the circuits affected by the reduction in capacity were able to carry the following types of traffic, though they did not necessarily do so: retail and wholesale toll services,<sup>4</sup> basic toll calls,<sup>5</sup> calls

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<sup>2</sup> See paragraph 98 of the Decision.

<sup>3</sup> The relevant Stentor companies consisted, at the time, of BC Tel, Bell Canada, The Island Telephone Company, MTS NetCom Inc., Maritime Tel & Tel Limited, The New Brunswick Telephone Company Limited, NewTel Communications Inc., and TCI.

<sup>4</sup> Retail toll services are provided by a carrier to their residential and business customers. Wholesale toll services are long distance services provided by a carrier to resellers of its toll services.

<sup>5</sup> Basic toll is a wireline service that customers can use to make long distance calls if they are not subscribed to their provider's discount toll service.

placed by TCI mobile wireless customers, Wireless Service Providers – Network Access Service, and non-mandated transit traffic.

18. TCI argued that the only calls not subject to forbearance under subsection 27(2) of the Act that could possibly have been affected by the reduction in toll capacity would have been calls made by TCI customers subscribed to a basic toll plan. No evidence or facts demonstrate that any basic toll customers experienced difficulty completing calls to the 867 NPA.
19. TCI submitted that its response to the RFI does not give the Commission insight as to whether any subscribers were negatively affected, nor does it provide insight into the type of service subscribed to by any such customers, which is necessary information to determine whether subsection 27(2) of the Act is forborne in respect of those services. Even if the response did provide that information, it would not be open to the Commission to uphold its initial finding on the basis of such evidence.
20. TCI argued that the Commission erred by basing a finding in respect of subsection 27(2) of the Act on a hypothetical state of affairs, and added that it cannot remedy the error by making fresh findings of fact about the impact on customers in this proceeding to justify the original determination. TCI further argued that it would similarly be improper to conclude that any such impacts were in respect of any particular subclass of toll service. Moreover, it is not open to the Commission to canvass for evidence of different types of traffic that were not within the scope of the Commission's findings in the Decision; to do so would constitute re-hearing the case, which is not permitted under section 62 of the Act.
21. In its reply to Iristel's submission, TCI submitted that Iristel did not dispute TCI's description of the contractual relationship between the parties, with TCI as the customer, or that TCI acted in accordance with the terms of its contract in reducing its use of Iristel's services.
22. TCI reiterated the arguments made in its application and submitted that the Commission must reject Iristel's position that unjust discrimination existed regardless of whether any TCI customers did in fact make use of basic toll service.
23. TCI acknowledged that under section 62 of the Act, applicants may attempt to demonstrate errors or fundamental changes in facts that could result in new findings of fact by the Commission, but submitted that the basis for its application was not a fundamental change in facts. TCI argued that the Commission did not initiate a proceeding to consider a review and vary of the Decision, nor did it attempt to re-hear the matter prior to rendering its decision. Therefore, the Commission cannot introduce new facts or evidence (i) that were not before the parties in either the original proceeding or at any stage of the present proceeding, and (ii) that the parties have no further opportunity to assess or comment on.

## ***Iristel***

24. Iristel submitted that TCI's argument that subsection 27(2) of the Act does not apply because it was receiving, rather than providing, a telecommunications service from Iristel is irrelevant, given that TCI was providing a service to its own end-users who relied on TCI to place calls to Iristel's 867 NPA numbers. Iristel further submitted that even if that argument were correct, it would not affect the Commission's conclusion in the Decision that TCI violated subsection 27(2) of the Act in its conduct towards its own customers, for whom its actions had significant consequences.
25. Regarding TCI's argument about forbearance, Iristel argued that TCI admitted that one of the exceptions where subsection 27(2) of the Act continues to apply is TCI's basic toll services. Iristel submitted that any TCI customer could have used the company's basic toll service to try and call one of Iristel's 867 NPA numbers. Iristel further argued that TCI has not provided any evidence demonstrating that none of its customers affected by its decision to reduce capacity on toll circuits made use of basic toll service to call Iristel's 867 NPA numbers. Therefore, the Commission was justified in finding that TCI had breached subsection 27(2) of the Act by reducing its toll circuit capacity in a manner that prevented the calls from being reliably completed.
26. Iristel submitted that TCI was incorrect regarding the Commission's jurisdiction to make additional findings of fact during a proceeding initiated pursuant to section 62 of the Act. Iristel suggested that if TCI's arguments were accepted, the Commission's review and vary power would be unduly constrained in a manner that is inconsistent with Parliament's intent regarding section 62, and that the ability of parties to exercise their rights pursuant to that section would be limited.
27. Iristel argued that subsection 52(1) of the Act empowers the Commission to make any findings of fact during a proceeding initiated pursuant to section 62 of the Act, and that subsection 52(1) therefore gives the Commission the jurisdiction to issue the RFI and to make any findings of fact that it deems necessary based on TCI's response.
28. Iristel further argued that demonstrating an error in fact or a fundamental change in facts since the original decision, which are both grounds on which an applicant may demonstrate that the Commission should exercise its powers under section 62 of the Act, must involve reaching new findings of fact. Iristel submitted that Telecom Information Bulletin 2011-214 provides further authority for the proposition that the Commission acted within its jurisdiction in issuing the RFI, and that the Commission is entitled to make any new findings of fact it deems necessary based on TCI's response.

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

29. The Commission has reviewed the DCCTSA between TCI and Iristel and agrees that under that agreement, TCI is Iristel's customer for the purpose of terminating calls from TCI's end-users to Iristel's customers in the 867 NPA. Given that TCI was receiving a service from Iristel, not providing one, the Commission's statement in the

Decision that “a carrier’s concern that a wholesale customer is not using the service as set out in the tariff” was incorrectly applied to TCI in the circumstances.

30. Nevertheless, the Commission does not accept TCI’s argument that the finding that it discriminated against Iristel must be rescinded because it was not providing a service to Iristel. The service obtained from Iristel was used by TCI to provide telecommunications services to its customers. The connection of a call often involves innumerable services provided by multiple carriers to both their own end-customers and to each other. More specifically, TCI was in fact providing a telecommunications service to its wireline and wireless customers who were trying to reach Iristel’s customers in the 867 NPA. Both the Commission and the courts have interpreted subsection 27(2) of the Act (or its predecessors) to apply not only in relation to the customers receiving the service from the carrier, but also to any other person that is impacted by the conduct in question concerning that service.<sup>6</sup>
31. On a number of occasions, the Commission has applied subsection 27(2) of the Act in the context where the actions of a carrier, in providing services to its own customers, negatively impacted other carriers or their customers. For example, in Telecom Decision 2003-26, the Commission confirmed that its powers pursuant to subsection 27(2) of the Act were sufficiently broad to consider the allegations made in that proceeding that the carrier in question unjustly discriminated against a competitor in relation to a telecommunications service provided to the carrier’s customers. In so finding, the Commission explicitly rejected the argument that it was necessary to demonstrate that the carrier had unjustly discriminated against the competitor in relation to a telecommunications service provided by the carrier to the competitor.
32. Similarly, in Telecom Decision 2003-49, the Commission explicitly concluded that the incumbent local exchange carriers, including TCI, unjustly discriminated against competitors who were not themselves customers of the service in question.
33. Accordingly, while the Commission agrees that subsection 27(2) of the Act is only triggered in relation to the provision of a service by a carrier, this does not preclude the Commission from considering the impact of a carrier’s actions in providing the telecommunications service on any person, not only its customers. The Commission is therefore of the view that it did not err by (i) considering the impact of TCI’s actions on Iristel and Iristel’s customers, in addition to the impact on the customers of its service, and (ii) applying subsection 27(2) of the Act to the facts of the case.
34. With regard to TCI’s argument about the scope of forbearance, the Commission notes that in Telecom Decision 97-19, the Commission determined that it would forbear from regulating the rates for basic toll service. However, the Commission retained its powers pursuant to subsection 27(2) of the Act in relation to basic toll service. The Commission also retained its powers under subsection 27(2) of the Act for the

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<sup>6</sup> For example, *Bell Canada v. Challenge Communications Ltd.*, [1979] 1 F.C. 857 (FCA).

purpose of ensuring that continued access to the incumbent telephone companies' toll and toll-free services would be available on a non-discriminatory basis for resale and sharing. Further, in Telecom Order 99-991, regarding forbearance from the regulation of mobile wireless services, the Commission retained its powers pursuant to subsection 27(2) of the Act in relation to the public switched mobile voice services described in that order.

35. TCI argued that the Commission's finding of unjust discrimination related to its provision of long distance services to its customers, which are not basic toll services, and that therefore the Commission lacked the jurisdiction to apply subsection 27(2) of the Act to long distance services. The fact that the Commission referred to long distance services, and not basic toll services specifically, does not mean that it lacked jurisdiction to apply subsection 27(2) of the Act to the facts of the case. The term "long distance services" is generally understood to include any type of interexchange telecommunications service, and the Commission does not use this term to refer to a categorization of services used for tariff purposes. Indeed, had the Commission intended to exclude basic toll services from its consideration and determinations, it would have referred only to discount toll and toll-free services.
36. Similarly, had the Commission intended to exclude mobile wireless services from its determinations, it would have stated so and referred only to wireline services, particularly given that the record included evidence that mobile wireless services were affected by TCI's actions. For example, the intervention by Marc Lange regarding the problems he encountered calling to the 867 NPA on his TCI mobile phone, coupled with the Public Interest Advocacy Centre's intervention—both of which were specifically referenced in the Decision—related to the impact of TCI's actions on customers with wireless nationwide calling. The Commission also notes that under the TCI-Iristel agreement in question, which was on the record of the proceeding, the traffic carried was "TDM [time division multiplexing] Traffic," defined in the agreement to include "direct distance dialed calls or voice minutes ... over a TDM network." This could include both basic toll as well as mobile wireless traffic.
37. The Commission therefore rejects TCI's argument that the Commission has forborne from exercising its powers under subsection 27(2) of the Act in relation to all of the services in question in the proceeding leading to the Decision. The Commission specifically retained the power to apply subsection 27(2) of the Act in relation to basic toll services and wireless services.
38. In light of the above, the Commission finds that it did not err in fact or in law by exercising its jurisdiction to inquire into whether TCI, by reducing its toll circuit capacity, unjustly discriminated against Iristel and its customers, as well as TCI's own customers.

**If subsection 27(2) of the Act does apply, did the Commission err in law or in fact in its interpretation and application of subsection 27(2) of the Act by determining**

**that TCI unduly discriminated against Iristel, Iristel's customers, and TCI's end-users by reducing the capacity of its toll circuits that carry its traffic to Iristel?**

**Positions of parties**

***TCI***

39. TCI argued that even if subsection 27(2) of the Act did apply in the circumstance, it acted within its contractual rights in taking action to limit losses incurred as a result of Iristel artificially stimulating traffic. Under the DCCTSA, TCI was at liberty to deliver as much or as little traffic as it wished; accordingly, it had the right to configure its network to reduce the volume of traffic flowing over its toll circuits to Iristel.
40. TCI submitted that the measures it took to limit its losses were reasonable and careful. The alternative measures proposed by the Commission in the Decision, including cancellation of the agreement or disconnection of a service, demonstrate that the Commission misapprehended the facts before it. Specifically, it points to the Commission's view that exercising contractual remedies, even extreme ones like cancellation or disconnection, are open to a carrier without prior approval and by implication, do not create problems under subsection 27(2) of the Act. Given that the alternative responses available to TCI would have had worse outcomes for consumers (e.g. increasing retail rates to offset the costs associated with stimulated traffic, excluding 867 NPA numbers from calling plans, terminating TCI's arrangement with Iristel altogether), it is incongruous for the Commission to conclude that TCI unjustly discriminated when it exercised valid contractual remedies, which had a lesser impact on other parties.
41. TCI submitted that it was seeking to protect itself from harm within the scope of its agreement with Iristel, not seeking to sanction Iristel for its contravention of the law. TCI argued that the Commission's determination in the Decision that it was not for TCI to take matters into its own hands is inconsistent with several prior decisions in which the Commission endorses carrier self-help actions aimed to ensure compliance with Commission policies where those policies are being undermined by illegal actions by competitors and customers.<sup>7</sup>
42. TCI argued that there was no evidence on the record of the proceeding that supports the conclusion that its action had an anti-competitive effect. The Commission did not define the relevant market and thus can neither assess competition in that market nor draw any conclusions about the effect of an action alleged to have harmed competition.
43. TCI submitted that the Commission made an error in fact when it determined in the Decision that carriers that have tariffs in place only because they have market power could act in an anti-competitive manner if they were allowed to take matters into their

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<sup>7</sup> TCI referenced Telecom Decisions 2005-13, 2006-33, 2017-457, and 2020-355.

own hands. Specifically, the supposition that the existence of market power could be inferred from the existence of a tariff is unwarranted in this situation because there was in fact no applicable tariff.

44. TCI further submitted that the Commission also erred in law in concluding that TCI had unjustly discriminated against its own customers in contravention of subsection 27(2) of the Act. TCI argued that the Commission based its determination on concerns about potential outcomes, rather than factual findings of actual discrimination. The company added that even if there was an impact on customers, it was not the result of discrimination. In the absence of a finding that any customers were actually negatively impacted, there was no basis for the Commission's finding that subsection 27(2) of the Act had been violated.
45. TCI argued that discrimination can occur as a matter of law only if a carrier engages in an act or practice that treats comparable entities or persons differently. TCI submitted that in the present case, there were no comparable entities. The reduction of toll circuit capacity did not directly target or impact any particular end-customer or group of customers. All customers placing calls to the 867 NPA were affected in the same way, with the same chance of successful call completion at any given time; therefore, as a matter of law, there was no discrimination of any kind, according to TCI.
46. TCI further argued that if a customer was affected at all by TCI's reduced trunk capacity, they would simply have had to redial the number they were calling. Even if this had occurred, the impact on the customer is *de minimis* and therefore cannot be considered undue or unjust. A minor, trivial impact cannot constitute unjust discrimination. It is a long-standing legal principle that the law does not concern itself with trivialities.
47. TCI submitted that the Commission also erred in law in its reason for dismissing the application of the modem hijacking precedent. Specifically, the Commission's assumption that the controls put in place to combat modem hijacking did not affect legitimate callers was incorrect.<sup>8</sup> TCI argued that legitimate callers were affected in both the case leading to Telecom Decision 2005-13 and in the case leading to the Decision. By dismissing the relevance of the precedent on erroneous grounds, there is substantial reason to doubt the correctness of the Commission's determinations in the Decision.
48. TCI argued that the Commission's concerns regarding self-help measures are better addressed through prospective legislation, rather than applying subsection 27(2) of the Act. TCI proposed that the concerns regarding self-help remedies be addressed in the course of either the upcoming wireline wholesale services review proceeding or in the interconnection review proceeding.

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<sup>8</sup> See paragraph 97 of the Decision.

49. TCI submitted that it had no obligation to route stimulated traffic to Iristel in statute, regulation, or contract, and added that subsection 27(2) of the Act should not be interpreted to require a carrier to facilitate another carrier's illegal actions. Finally, TCI argued that by sanctioning TCI, it would be condoning Iristel's illegal behaviour.

***Iristel***

50. Iristel argued that the effect of TCI's conduct on Canadians living in the North and those who tried to contact them was very significant and negative, and not *de minimis*, as TCI claimed. Iristel highlighted evidence on the record of the proceeding leading to the Decision of calls failing to complete, and indicated that it had received numerous complaints from its customers who were unable to receive calls from TCI customers. This included a situation in which a hospital in Alberta was unable to contact a cancer patient in the Northwest Territories regarding her upcoming surgery.
51. Iristel submitted that the Commission was justified in finding that TCI had breached subsection 27(2) of the Act by reducing its toll circuit capacity such that those calls could not be reliably completed. Given that TCI's customers could have used the company's basic toll service to call Iristel's 867 NPA numbers, the unjust discrimination existed irrespective of whether any customers actually used that service. Iristel further submitted that TCI did not provide evidence showing that affected customers did not use basic toll services to call Iristel's 867 NPA numbers.
52. Iristel also rejected TCI's argument that TCI did not unjustly discriminate against its own customers, and that there was no discrimination at all because the reduction in its toll circuit capacity applied to all of its customers. Iristel argued that TCI's actions clearly discriminated against TCI customers needing to call Iristel's 867 NPA numbers.
53. Iristel argued that it was doing nothing to stimulate traffic to the 867 NPA,<sup>9</sup> and that as a result, TCI's argument that reducing the capacity of its toll circuits was a justified response to traffic stimulation by Iristel was invalid.
54. Iristel argued that self-help remedies cannot be employed if they violate the Act, which TCI did when it reduced capacity on its toll circuits. Iristel suggested a number of other actions it believes TCI could have taken to address any concerns it had with its own customers' calling behaviours, including (i) constructing facilities in the North; (ii) using Northwestel's services instead of Iristel's; (iii) enforcing its acceptable use policies; and (iv) applying additional charges to traffic of customers that it believes are making excessive calls to 867 NPA numbers.

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<sup>9</sup> See the Decision and Telecom Notice of Consultation 2020-269.

55. Iristel did not agree that the decisions TCI cited were comparable to the situation at hand because in none of those cases was the carrier acting unilaterally, and in all cases, the effects on customers were minimal and were fully compliant with the Act.

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

#### ***Discrimination***

56. TCI argued that it did not treat customers differently because all customers placing calls to the 867 NPA were affected in the same way, with the same chance of successful call completion at any given time. The Commission considers that TCI's concept of discrimination is unduly narrow and inconsistent with past Commission decisions. For example, the Commission has found discrimination where a carrier did not permit customers of one service provider to roam on its network, while it permitted subscribers of other service providers to roam.<sup>10</sup> In this case, the Commission considers that TCI's actions in question did result in differential treatment of similarly situated TCI customers and were discriminatory: TCI's conduct impaired the ability of some customers to consistently complete calls to Iristel customers in the 867 NPA, relative both to those customers who could reliably place calls to 867 NPA telephone numbers belonging to non-Iristel customers, and to customers whose ability to complete calls to Iristel customers in the 867 NPA was not impaired.

57. Further, TCI's actions specifically targeted Iristel with the result that Iristel, its affiliates and its customers were discriminated against relative to other service providers and customers of other service providers.

58. The evidence on the record of the Decision that mobile wireless voice service was affected by TCI's conduct is sufficient to support the Commission's finding of discrimination. Moreover, customers making basic toll calls could also have been affected by TCI's conduct, given that this type of traffic was eligible to be carried over the circuits in question. The Commission is therefore of the view that it properly exercised its power under subsection 27(2) of the Act, combined with its general powers under paragraph 32(g) and sections 48 and 51 of the Act, to make orders to prevent unjust discrimination.<sup>11</sup>

59. The Commission notes that subsection 27(2) of the Act prohibits a Canadian carrier from conferring an undue or unreasonable preference or disadvantage on persons, and a preference or disadvantage does not necessarily entail differential treatment of similarly situated persons. The Commission has stated that the terms "advantage" and "disadvantage" refer to the nature, extent, and result of favourable or unfavourable

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<sup>10</sup> See Telecom Decision 2006-33.

<sup>11</sup> *CNCP Telecommunications v. Canadian Business Equipment Manufacturers Association et al*, [1985] F.C.J. No. 79; [1985] 1 F.C. 623 at 636, leave to appeal to SCC dismissed [1985] S.C.C.A. No. 50.

treatment<sup>12</sup> by the carrier providing the service. TCI's conduct was targeted at Iristel and placed it at a disadvantage as the only telecommunications services provider targeted with reduced capacity. TCI's conduct subjected TCI's customers who were unable to complete their calls to Iristel customers in the 867 NPA to a disadvantage because they either had to continue to redial the number or miss connecting with the called party altogether.

60. In light of the above, the Commission considers that it did not err in fact or in law in concluding that TCI discriminated against its customers, as well as Iristel, its affiliates, and their customers.

***Unjust discrimination***

61. TCI argued that any possible discrimination against Iristel was not undue because when TCI reduced the capacity of its circuits to limit losses that it claims were due to Iristel's action to stimulate traffic to the 867 NPA, TCI was acting within the terms of its contract with Iristel. TCI added that the Commission should have accepted TCI's actions as an acceptable form of self-help, consistent with past decisions. Further, with regard to discrimination against its own customers, TCI argued that any such discrimination was *de minimis* and therefore neither undue nor unjust.
62. Under subsection 27(4) of the Act, the burden of establishing that any discrimination is not unjust is on the Canadian carrier that discriminates.
63. The Commission considers that it did not err in fact or in law in concluding that TCI failed to meet the onus of demonstrating that the discrimination was not unjust. TCI has not demonstrated that its self-help measure was justified in the circumstances, particularly given that it was aimed at a competitor and sought to remedy what the carrier considered to be a breach of contract. While the Commission inaccurately described TCI's actions as that of a carrier pursuant to a tariff, the concern remains the same. TCI chose to take actions that were only open to it because it is a carrier providing service to its customers in order to address what it considered contractual or statutory wrongs that can be addressed through the provisions of the agreement or through Commission intervention.
64. The decisions cited by TCI as precedent supporting its self-help conduct are not pertinent because they are not analogous to the facts in the Decision. In any event, they did not create any binding precedent for the Commission in its decision making leading to the Decision. Accordingly, the Commission considers that it has not established any principles regarding self-help that it failed to apply in the Decision.

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<sup>12</sup> See, for example, Telecom Decision 89-5.

65. With regard to TCI's proposal to consider the general issue of self-help remedies in a policy proceeding, the Commission considers that the matter is beyond the scope of the review and vary application.
66. Regarding TCI's argument that any discrimination against its own customers was *de minimis* and therefore could not be unjust, the Commission considers that TCI did not present any evidence to support its argument that any discrimination was *de minimis*. In any event, the Commission considers that evidence of significant harm to customers is not necessarily required to determine that discrimination is unjust.
67. In considering matters of discrimination, the Commission can weigh multiple factors as well as the public interest in general. The Commission notes that the courts have confirmed that subsection 27(2) of the Act confers a wide discretion to the Commission to determine in the circumstances of any case what discrimination is "unjust" or what preference or advantage is "undue" or "unreasonable." In addition, the Act requires the Commission to exercise its powers and perform its duties with a view to implementing the Canadian telecommunications policy objectives. The broad policy objectives, which raise policy issues of a polycentric nature, also support a broad interpretation of the Commission's discretion to determine what constitutes a violation of subsection 27(2) of the Act.<sup>13</sup>
68. In light of the above, the Commission is of the view that it was within its power to determine the discrimination that resulted from TCI's conduct was unjust. The Commission therefore considers that it did not err in law or in fact in concluding that TCI's actions unduly discriminated against Iristel, its customers, and TCI's own customers, in contravention of subsection 27(2) of the Act.
69. In light of all of the above, the Commission finds that there is no substantial doubt as to the correctness of the conclusion in the Decision that TCI acted in violation of subsection 27(2) of the Act. However, the Commission confirms that those determinations relate only to TCI's provision of basic toll and mobile wireless services.

### **Should the Commission consider whether TCI violated section 36 of the Act?**

#### **Positions of parties**

70. Iristel submitted that regardless of any finding that the Commission may have reached regarding subsection 27(2) of the Act, TCI clearly violated section 36 of the Act by not obtaining Commission approval to reduce capacity on certain toll circuits, thereby preventing some calls to Iristel's 867 NPA numbers from being completed. Iristel submitted that section 36 is an unambiguously clear prohibition on a Canadian carrier controlling the content or influencing the meaning or purpose of telecommunications carried for it by the public without Commission authorization. The Commission

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<sup>13</sup> *Allstream Corp. v. Bell Canada*, 2005 FCA 247, para. 29

cannot forbear from the exercise of its powers under section 36. Therefore, regardless of the Commission's determinations with respect to TCI's arguments regarding the scope of previous forbearance orders relating to toll services, the Commission should consider whether TCI's reduction of capacity on certain toll circuits violated section 36.

71. TCI argued that section 36 of the Act is not relevant to the issues it raised in its review and vary application, which relates to the Commission's interpretation and application of subsection 27(2) of the Act. Section 36 engages distinct issues, and it is inadmissible to bring them in when considering the merits of TCI's application.

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

72. In the Decision, the Commission determined that it was not necessary to address the question of compliance with section 36 of the Act given that it had determined that TCI violated subsection 27(2) of the Act. Neither TCI nor Iristel filed a review and vary application pertaining to the Commission's determination that it was not necessary to address section 36 of the Act.
73. In the Commission's view, it had the discretion in the proceeding leading to the Decision to determine that it was not necessary to address whether TCI was in violation of section 36 of the Act, given the Commission's finding that the activity in question was in violation of subsection 27(2) of the Act. The Commission considers that it is also not necessary to address the matter of section 36 of the Act in this proceeding.

#### **Conclusion**

74. In light of all of the above, the Commission **denies** TCI's request to review and vary the Decision.

#### **Policy Directions**

75. The 2019 Policy Direction<sup>14</sup> states that the Commission, in exercising its powers and performing its duties under the Act, must implement the Canadian telecommunications policy objectives set out in section 7 of the Act, in accordance with paragraphs 1(a) and (b) of the 2019 Policy Direction.
76. The Commission considers that denying TCI's application to review and vary its determination in the Decision that TCI unduly discriminated against Iristel, Iristel's customers, and TCI's own customers when it reduced the capacity of its toll circuits to Iristel's customers located in the 867 NPA will advance its objectives to (i) render reliable and affordable telecommunications services of high quality accessible to

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<sup>14</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives to Promote Competition, Affordability, Consumer Interests and Innovation*, SOR/2019-227, 17 June 2019

Canadians in both urban and rural areas in all regions of Canada; and (ii) enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications. Further, the Commission's determinations will enhance and protect the rights of consumers in their relationships with telecommunications service providers, including rights related to accessibility. By denying TCI's application, the Commission is confirming that Canadian carriers are not permitted to use unauthorized self-help actions that hinder the ability of Canadian consumers to successfully initiate or receive telephone calls placed from or destined to locations within Canada, and thus affect the reliability, efficiency, and quality of telecommunications services in Canada.

Secretary General

### **Related documents**

- *Canadian Network Operators Consortium Inc. – Application for relief regarding conduct relating to Technicolor cable modems by Bragg Communications Incorporated, carrying on business as Eastlink*, Telecom Decision CRTC 2020-355, 21 October 2020
- *Call for comments – Imposition of Administrative Monetary Penalties on Iristel Inc. and TELUS Communications Inc. in relation to the routing and termination of phone calls to the 867 area code in Northern Canada*, Telecom Notice of Consultation CRTC 2020-269, 14 August 2020; as amended by Telecom Notices of Consultation CRTC 2020-269-1, 11 September 2020; and 2020-269-2, 1 December 2021
- *Iris Technologies Inc. and TELUS Communications Inc. – Applications for final relief regarding the termination of traffic to certain 867 numbering plan area telephone numbers*, Telecom Decision CRTC 2020-268, 14 August 2020
- *Bell Canada and Northwestel Inc. – Request for implementation of a traffic stimulation regulatory framework*, Telecom Decision CRTC 2017-457, 20 December 2017
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Part VII application by Superior Wireless Inc. against TBayTel alleging unjust discrimination*, Telecom Decision CRTC 2006-33, 25 May 2006
- *Union des consommateurs, Public Interest Advocacy Centre and Option Consommateurs – Automatic dialers and modem hijacking*, Telecom Decision CRTC 2005-13, 9 March 2005

- *Call-Net Enterprises Inc. – Request to lift restrictions on the provision of retail digital subscriber line Internet services*, Telecom Decision CRTC 2003-49, 21 July 2003
- *Application by Microcell regarding alleged contraventions of section 27(2) of the Telecommunications Act by Rogers Wireless and Bell Mobility*, Telecom Decision CRTC 2003-26, 28 April 2003
- Telecom Order CRTC 99-991, 13 October 1999
- *Forbearance – Regulation of toll services provided by incumbent telephone companies*, Telecom Decision CRTC 97-19, 18 December 1997; as amended by Telecom Decision CRTC 97-19-1, 9 March 1998