



## Telecom Decision CRTC 2006-39

Ottawa, 29 June 2006

### **Application by Groupe D-Tech Inc. regarding the construction of a fibre optic network for Commission scolaire des Rives-du-Saguenay**

Reference: 8622-G31-200504995

*In this Decision, the Commission **denies** Groupe D-Tech Inc.'s application. The Commission determines that with regard to certain commercial transactions between Bell Canada and Électro Saguenay Ltée for the construction of a private fibre optic network for Commission scolaire des Rives-du-Saguenay, Bell Canada has not violated the Commission's bundling rules and is not required to file additional tariffs for the provision of technical and maintenance services, the sale of terminal equipment, or to file agreements pursuant to section 29 of the Telecommunications Act.*

#### **The application**

1. On 22 April 2005, Groupe D-Tech Inc. (D-Tech) filed an application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* regarding certain commercial transactions between Bell Canada and Électro Saguenay Ltée (Électro Saguenay) for the construction of a private fibre optic network (the Network) for Commission scolaire des Rives-du-Saguenay (the Commission scolaire).
2. D-Tech submitted that Électro Saguenay was acting as an affiliate of Bell Canada for the construction of the Network. In D-Tech's view, the technical services provided by Électro Saguenay to the Commission scolaire were therefore provided by Bell Canada and required a tariff.
3. D-Tech further submitted that Bell Canada was also required to file tariffs for Commission approval for the maintenance of fibre optics, and the sale, maintenance and management of non-terminal equipment.
4. According to D-Tech, pursuant to section 29 of the *Telecommunications Act* (the Act), Bell Canada was required to obtain prior Commission approval to purchase fibre optic cables from Électro Saguenay.
5. D-Tech requested that the Commission order Bell Canada to provide the following information:
  - (a) all contracts between itself and Électro Saguenay;
  - (b) the number of kilometres of support structures Bell Canada sold to Électro Saguenay to build the Network;
  - (c) the rate Bell Canada charged to Électro Saguenay to access its support structures;

- (d) evidence that Bell Canada was charging Électro Saguenay the tariff rate for support structure access;
- (e) the price Bell Canada paid to acquire fibre optic strands from Électro Saguenay; and
- (f) evidence that the terminal equipment Bell Canada sold to Électro Saguenay was forborne from regulation.

## **Process**

- 6. On 24 May 2005, Bell Canada filed comments. D-Tech filed its reply on 3 June 2005.
- 7. On 10 August 2005, the Commission issued interrogatories to Bell Canada. Bell Canada responded on 24 August 2005 and D-Tech filed a reply on 29 August 2005.
- 8. On 5 January 2006, the Commission issued additional interrogatories to Bell Canada. Bell Canada responded on 16 January 2006.

## **Positions of parties**

### **Bell Canada's comments**

- 9. Bell Canada submitted that D-Tech's allegations were unfounded and should be rejected by the Commission.
- 10. Bell Canada denied that Électro Saguenay was its affiliate. Bell Canada indicated that it had neither ownership interest in Électro Saguenay nor any control over its activities. Bell Canada noted that it did not bid on the contract to build the Network which had been awarded to Électro Saguenay.
- 11. Bell Canada indicated that it had been retained by Électro Saguenay to provide maintenance services for the Network. In its response to a Commission interrogatory, Bell Canada indicated that it provided the maintenance services in accordance with General Tariff item 4960.2(b).
- 12. Bell Canada argued that the terminal equipment it sold to Électro Saguenay was forborne from regulation because it was located on the Commission scolaire's premises and on the Commission scolaire's side of the demarcation point. Bell Canada submitted that the equipment was not integral to Bell Canada's network, and the Commission scolaire had control over, and ownership of the equipment. In response to a Commission interrogatory, Bell Canada indicated that the terminal equipment it sold to Électro Saguenay was available from a number of different manufacturers and suppliers at very competitive prices.
- 13. Bell Canada submitted that access to its support structures was provided in accordance with its tariff. In response to a Commission interrogatory, Bell Canada indicated that Électro Saguenay was, and would remain, the licensee responsible to pay the tariff rate for support structure access.
- 14. In Bell Canada's view, it was not required by section 29 of the Act to file an agreement for the construction of facilities. It further argued that as a non-dominant carrier, Électro Saguenay also did not have to file an agreement.

### **D-Tech's reply comments**

15. D-Tech noted that in *Part VII application by Vidéotron Télécom ltée against Bell Canada and BCE Nexxia Inc. relating to the provision of fibre optic private network*, Telecom Decision CRTC 2005-8, 28 February 2005, the Commission determined that maintenance of a private fibre optic network by Bell Canada was a telecommunications service for which a tariff was required. D-Tech submitted that, similarly, Bell Canada was required to file tariffs for Commission approval for technical services required in the construction of the Network, for the maintenance of fibre optics, and for the sale, maintenance and management of terminal equipment.
16. D-Tech noted that in *Attachment of subscriber-provided terminal equipment*, Telecom Decision CRTC 82-14, 23 November 1982, the Commission forbore from regulating terminal equipment when it was located in contiguous buildings in the same telephone exchange. D-Tech submitted that terminal equipment sold by Bell Canada to Électro Saguenay was not forborne from regulation because it did not meet these criteria. In D-Tech's view, Bell Canada was therefore required to file a tariff for the sale, maintenance and management of the terminal equipment it sold to Électro Saguenay.
17. D-Tech submitted that Bell Canada had contravened the Commission's bundling rules by bundling the following services without a tariff:
  - (i) technical services;
  - (ii) dark fibre below the tariff rate;
  - (iii) maintenance of fibre optic cables;
  - (iv) access to Bell Canada's support structures; and
  - (v) sale, maintenance and management of terminal equipment.
18. D-Tech submitted that Bell Canada contravened subsection 27(2) of the Act by: (1) allowing Électro Saguenay to purchase equipment through Bell Canada, at a rate which Électro Saguenay would not have been able to pay if it had purchased the equipment itself; and (2) not offering to purchase D-Tech's excess dark fibre capacity at the same terms as it offered Électro Saguenay.
19. D-Tech submitted that, pursuant to section 29 of the Act, profit sharing between an incumbent local exchange carrier (ILEC) and a non-dominant carrier must be approved by the Commission. D-Tech submitted that Bell Canada and Électro Saguenay shared the grant from the Government of Quebec for the construction of the Network. In D-Tech's view, as Bell Canada shared the grant with Électro Saguenay by having its facilities built with the Network, it shared in the profit and should have received Commission approval to do so.

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

### **Affiliate**

20. The Commission notes that in *Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters*, Telecom Decision CRTC 2002-76, 12 December 2002 (Decision 2002-76), the Commission changed the definition of "affiliate" to include only those persons who are not Canadian carriers and who control or are controlled by an ILEC or who are controlled by a person who also controls the ILEC. The Commission indicated that in all cases, control means direct or indirect control in fact.
21. With regard to non-Canadian carriers subject to the common control of the ILEC (an affiliate), the Commission found that, from a regulatory perspective, in situations of common control there was no meaningful distinction between the actions of the affiliate and those of the ILEC. In the same way, the activities of a Canadian carrier subject to the common control of the ILEC (affiliated carrier) were equivalent to those of the ILEC and therefore subject to the same regulatory regime, since the actions of both entities were ultimately subject to control by a single person. The Commission thus found that affiliated carriers should be subject to the same rules as are applicable to activities of the ILEC.
22. The Commission notes that Électro Saguenay is registered with the Commission as a non-dominant Canadian carrier and is not subject to the common control of Bell Canada or any person that also controls Bell Canada. The Commission concludes that Électro Saguenay is neither an affiliate nor an affiliated carrier of Bell Canada, as defined in Decision 2002-76, and therefore, any technical services provided by Électro Saguenay to the Commission scolaire to build the Network were not directly or indirectly provided by Bell Canada.
23. Accordingly, the Commission finds that Bell Canada is not required to file a tariff for the provision of technical services by Électro Saguenay for construction of the Network.

### **The maintenance of fibre optic cables**

24. In *TELUS Communications Inc. – Applications to review and vary and to stay Telecom Decision CRTC 2005-12*, Telecom Decision CRTC 2006-3, 18 January 2006 (Decision 2006-3), the Commission found that maintenance of a private fibre optic network was a telecommunications service for which a tariff is required to be filed.
25. The Commission notes that Bell Canada General Tariff item 4960.2(b) prescribes the hourly rate charged for cable repairs/inspections, which is the type of service that Bell Canada will provide to Électro Saguenay for the maintenance of its fibre optic cables. The Commission considers that Bell Canada General Tariff item 4960.2(b) is the appropriate tariff for the provision of this service. Accordingly, the Commission concludes that Bell Canada is not required to file a separate tariff for the maintenance of the Network.

### **The sale, maintenance and management of equipment sold to Électro Saguenay**

26. In Decision 2006-3, the Commission found that the terminal equipment sold by TELUS Communications Inc. (TCC)<sup>1</sup> to the Commission scolaire de la Côte-du-Sud was forborne from regulation. The Commission notes that the terminal equipment sold by Bell Canada to Électro Saguenay is of the same nature and is used for the same purpose as the terminal equipment examined in Decision 2006-3. The Commission also notes that the terminal equipment provided to the Commission scolaire is located on the customer's premises, and on the customer's side of the demarcation point, and is not integral to the operation of Bell Canada's network.
27. In *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994 (Decision 94-19), the Commission forbore from regulating the sale and maintenance of Competitive Terminal – Multiline and Data (CT-MD), and Competitive Terminal – Other (CT-O) equipment. The Commission considers that the equipment sold by Bell Canada to Électro Saguenay is CT-MD and CT-O equipment, and is therefore forborne from regulation, pursuant to Decision 94-19. Accordingly, the Commission finds that Bell Canada is not required to file a tariff for the sale and maintenance of this equipment.
28. With regard to the management of the terminal equipment, the Commission notes that there is no evidence on the record of this proceeding indicating that Bell Canada will manage any equipment for Électro Saguenay. Accordingly, the Commission considers that Bell Canada is not required to file a tariff for the management of the equipment it sold to Électro Saguenay.

### **Support structure access arrangement**

29. The Commission notes that under Bell Canada's support structure tariff, a non-exclusive licence can be granted by the company to a licensee to use support structures for the placement of its facilities under the terms and conditions of this tariff and the support structure licence agreement. A licensee is defined as a cable television undertaking duly licensed or exempted by the Commission or a Canadian carrier as defined in the Act, that has been granted a licence pursuant to the terms and conditions of Bell Canada's support structure tariff.
30. Under the terms and conditions of Bell Canada's support structure tariff, the licensee may not assign, sub-let, sub-lease or otherwise transfer its access to support structures to third parties without the company's prior written consent, which consent shall not be unreasonably withheld. The licensee may share ownership of its facilities with a third party. In all such cases, the licensee remains fully responsible for compliance with the rates, terms and conditions of support structure access as if it remained sole owner of the facilities for which it shares an ownership interest.

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<sup>1</sup> Effective 1 March 2006, TELUS Communications Inc. assigned and transferred all of its assets and liabilities, including all of its service contracts, to TELUS Communications Company (TCC).

31. The Commission notes that in the proceeding that led to Decision 2006-3, Bell Canada and Société en commandite Télébec (Télébec), submitted that it was standard industry practice for the licensee and third parties with ownership interest in the facility to share the support structure access fee based on the number of parties sharing access or the number of fibre strands owned by each party. The Commission found that a licensee could share the applicable support structure access fee with a third party on a *pro rata* basis. In the Commission's view, the practice permitted an efficient and cost-effective use of support structures.
32. The Commission has reviewed the support structure access arrangement between Bell Canada and Électro Saguenay. The Commission is satisfied that Bell Canada is correctly applying its support structure tariff and that Électro Saguenay, as licensee, will be fully responsible for regulatory compliance in respect of allowing access to Bell Canada's support structures by third parties. The Commission considers that the arrangement allows for the efficient and cost-effective use of Bell Canada's support structures as Bell Canada will not need to build separate facilities from those of Électro Saguenay.

#### **Bundling of services**

33. The Commission notes that D-Tech submitted that Bell Canada had contravened the Commission's bundling rules by bundling the following services without a tariff:
  - (i) technical services;
  - (ii) dark fibre below the tariff rate;
  - (iii) maintenance of fibre optic cables;
  - (iv) access to Bell Canada's support structures; and
  - (v) sale, maintenance and management of terminal equipment.
34. The Commission notes that in *Review of price floor safeguards for retail tariffed services and related issues*, Telecom Decision CRTC 2005-27, 29 April 2005, the Commission restated the definition of a tariffable bundle as follows:

A tariffable bundle is an arrangement under which a subscriber is provided two or more service elements, at least one of which is a tariffed service element, under a single rate, a set of rates or other rate structure, and which provides a financial or other readily measurable benefit to any customer or identifiable group of customers that is contingent on the use, consumption of, or subscription to any or all service elements.
35. With respect to the provision of technical services, the Commission finds as a question of fact that Bell Canada is not providing technical and management services to Électro Saguenay, and therefore these services cannot be part of a tariffable bundle.

36. With respect to the acquisition of dark fibre from Électro Saguenay, the Commission notes that it regulates the provision of telecommunications services by Canadian carriers, not the acquisition of telecommunications services by Canadian carriers. Accordingly, Bell Canada is not subject to regulatory oversight when it acquires dark fibre and therefore this activity cannot be part of a tariffable bundle.
37. Finally, the Commission notes that Bell Canada did provide a combination of forborne telecommunications services (i.e. sale and maintenance of terminal equipment), and regulated telecommunications services (i.e. maintenance of fibre optic cables and access to Bell Canada's support structures) to Électro Saguenay. However, for the provision of these services to constitute a tariffable bundle, it must satisfy the definition above.
38. The Commission notes that the maintenance of the fibre optic cables and the access to Bell Canada's support structures were negotiated separately from the sale and maintenance of the terminal equipment. The Commission considers that there is no evidence that the rates charged for the sale and maintenance of the equipment were contingent on the use, consumption of, or subscription to any or all of the other service elements.
39. In light of the findings above, the Commission considers that the provision of the above-noted combination of forborne and regulated telecommunications services did not provide a financial or other readily measurable benefit to Électro Saguenay, and consequently does not constitute a tariffable bundle.
40. Accordingly, the Commission finds that Bell Canada did not violate the Commission's bundling rules.

#### **Unjust discrimination**

41. The Commission notes that D-Tech submitted that Bell Canada contravened subsection 27(2) of the Act by: (1) allowing Électro Saguenay to purchase equipment through Bell Canada, at a rate which Électro Saguenay would not have been able to pay if it had purchased the equipment itself; and (2) not offering to purchase D-Tech's excess dark fibre capacity at the same terms as it offered Électro Saguenay.
42. Subsection 27(2) of the Act states that:

No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.
43. The Commission notes that in Decision 94-19, it refrained from regulating the sale of CT-MD and CT-O equipment and from exercising its powers and duties with respect to subsection 27(2) of the Act because it found these markets to be competitive. As Bell Canada sold CT-MD and CT-O equipment to Électro Saguenay, the Commission considers that it does not have jurisdiction over this equipment.

44. As mentioned above, the Commission does not exercise regulatory oversight in respect of purchases of telecommunications services by ILECs. Consequently, Bell Canada's decision to purchase dark fibre capacity from Électro Saguenay rather than from D-Tech is a private commercial transaction between those parties.

**Filing of the agreement pursuant to section 29 of the Act**

45. The Commission notes that D-Tech submitted that, pursuant to section 29 of the Act, profit sharing between an ILEC and a non-dominant carrier must be approved by the Commission and that Bell Canada and Électro Saguenay had shared a grant from the Government of Quebec for the construction of the Network. In D-Tech's view, as Bell Canada shared the grant with Électro Saguenay by having its facilities built at the same time as the Network, Bell Canada shared in the profit and the agreement should be subject to approval under section 29 of the Act.

46. Section 29 of the Act states that:

No Canadian carrier shall, without the prior approval of the Commission, give effect to any agreement or arrangement, whether oral or written, with another telecommunications common carrier respecting

- (a) the interchange of telecommunications by means of their telecommunications facilities;
- (b) the management or operation of either or both of their facilities or any other facilities with which either or both are connected; or
- (c) the apportionment of rates or revenues between the carriers.

47. The Commission has reviewed the agreement for the construction of facilities by Électro Saguenay filed by Bell Canada. The Commission considers that the essence of this agreement is for the construction of telecommunications facilities and does not relate to matters falling within section 29 of the Act. The Commission therefore finds that approval of the agreement pursuant to section 29 of the Act is not required.

**Conclusion**

48. In view of its findings above, the Commission **denies** D-Tech's application. The Commission determines that Bell Canada is not required to provide the information requested by D-Tech at paragraph 5 above.

Secretary General

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