



## Telecom Decision CRTC 2017-456

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Ottawa, 20 December 2017

*Public record: 8622-R28-201611781*

### **Rogers Communications Canada Inc. – Allegation of traffic stimulation by Iris Technologies Inc. and Iristel Inc.**

*The Commission finds that Iris Technologies Inc. and Iristel Inc. (collectively, Iristel), by engaging in regulatory arbitrage activities, have given an undue preference to themselves and to several other entities, and have subjected Rogers Communications Canada Inc. to a corresponding undue disadvantage. The Commission therefore **directs** Iristel and any of its affiliates, within **30 days** of the date of this decision, to (a) terminate any agreement that assigns 867 numbering plan area numbers to Free Conference Call Global (FCCG) that are ultimately used by AudioNow, and not re-enter into provisions of such an agreement with FCCG or any of its affiliates, and (b) file a report with the Commission confirming compliance with this directive.*

#### **Application**

1. On 16 November 2016, the Commission received an application by Rogers Communications Canada Inc. (RCCI) alleging that Iris Technologies Inc. and Iristel Inc. (collectively, Iristel) were engaging in traffic stimulation. RCCI submitted that Iristel, by using traffic stimulation to generate excessive toll termination traffic, was conferring an undue or unreasonable preference on itself and subjecting RCCI and its customers to an undue or unreasonable disadvantage, in contravention of subsection 27(2) of the *Telecommunications Act* (the Act).
2. RCCI claimed that Iristel has arrangements with other companies, including a company called AudioNow, whose operations are designed to take advantage of the Canada-wide unlimited calling service offered by RCCI and other carriers in order to profit from the higher call termination charges applicable in certain high-cost serving areas (HCSAs), including the Northwest Territories.<sup>1</sup>
3. RCCI requested the following relief from the Commission:

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<sup>1</sup> An HCSA is a clearly defined geographic area where the monthly costs to provide basic telecommunications service are greater than the associated revenues generated by service rates. HCSAs are generally found in rural areas and in the North, where it is expensive to provision telecommunications service to customers.

- order Iristel to cease providing local telephone service or local telephone numbers to a call-in service (Call-to-Listen)<sup>2</sup> provided by AudioNow and to other inbound calling services;
  - prohibit local exchange carriers (LECs) from rebating or paying customers a share of interconnection revenues (e.g. through a revenue-sharing arrangement) in return for offering call-in services in their local exchanges; and
  - order Iristel to repay RCCI the difference between the cost of terminating toll traffic in the Northwest Territories and the cost of terminating it at the call's ultimate destination.
4. In addition, RCCI requested that the Commission reduce Iristel's competitive local exchange carrier (CLEC) traffic termination rates payable by interexchange carriers<sup>3</sup> and telecommunications service providers (TSPs) for toll traffic destined for local termination on telephone numbers served by Iristel.
  5. RCCI also requested that the Commission issue an order to make the rates charged by Iristel for interexchange traffic termination in the Northwest Territories interim, pending the outcome of the proceeding. RCCI added that if the Commission does reduce Iristel's rates as requested, it should make the new rates applicable retroactively to the date of its interim order.
  6. The Commission received interventions regarding RCCI's application from AudioNow; Bell Canada and Northwestel Inc. (collectively, the Bell companies); Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); the Canadian Network Operators Consortium Inc. (CNOC); Free Conference Call Global (FCCG); Freedom Mobile Inc. (Freedom Mobile); ISP Telecom Inc. (ISP Telecom); Kepler Communications Inc. (Kepler); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); Shaw Telecom G.P. (Shaw); TELUS Communications Inc. (TCI);<sup>4</sup> and Yakfree LLC (Yakfree).
  7. In addition, the Bell companies filed an application with the Commission on 31 January 2017, based on RCCI's application in this proceeding, proposing to establish a traffic stimulation regulatory framework for local network interconnection. The Commission's determinations regarding that application are set out in Telecom Decision 2017-457, issued concurrently with this decision.

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<sup>2</sup> Call-to-Listen provides free, real-time access to international and other radio services.

<sup>3</sup> Interexchange carriers, commonly called long-distance telephone companies, provide connections between local exchanges in different geographic areas.

<sup>4</sup> In this proceeding, submissions were received from TELUS Communications Company (TCC). However, effective 1 October 2017, TCC's assets were legally transferred to TCI and TCC ceased to exist. For ease of reference, "TCI" is used in this decision.

## Background

8. A toll, or long-distance, call is a telephone call from a user in one exchange to a user in a different exchange that is not local. Generally, the call is routed from the caller's telephone company through an interexchange carrier to the recipient's telephone company.
9. In Telecom Decision 97-19, the Commission established the current toll interconnection regime, forbearing from regulating the rates for toll services on the basis that such services were subject to a level of competition sufficient to protect the interests of users. The Commission refrained from requiring incumbent local exchange carriers (ILECs) [i.e. the Stentor companies]<sup>5</sup> to obtain its approval for tariffs and rates for toll services, pursuant to section 25 of the Act. In addition, non-Stentor companies did not have to request approval from the Commission prior to giving effect to any agreement or arrangement, pursuant to section 29 of the Act.
10. In subsequent decisions and orders, the Commission refined the toll interconnection regime. It has forborne from regulating toll services and from requiring prior approval of interconnection agreements between carriers, and it has extended its determinations to other types of carriers, such as the small ILECs. As such, while regulatory mechanisms still exist in the local interconnection regime, rates and agreements with respect to the toll termination regime are commercially negotiated between companies. The Commission has not forborne, however, from the possibility of imposing conditions under section 24 of the Act or continuing to regulate Canadian carriers under section 24 and subsections 27(2) to (4).
11. Traffic stimulation, also known as traffic pumping, is a practice by which a telephone carrier inflates, or allows to be inflated, the volume or minutes of calls beyond an anticipated threshold. Such practices may be acceptable; however, depending on the circumstances, they may give certain parties an undue preference and subject others to a corresponding undue or unreasonable disadvantage, in contravention of subsection 27(2) of the Act. Applications alleging that traffic stimulation is taking place have not often come before the Commission and are addressed on a case-by-case basis when they do arise.

## Context

12. RCCI offers an unlimited calling package across Canada that includes calls to HCSAs (e.g. Yukon, Northwest Territories), where the cost to terminate calls is higher than the cost in non-HCSAs (e.g. Toronto). RCCI and Iristel have a commercially negotiated Outbound Termination Services agreement (OTS agreement) for Iristel to

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<sup>5</sup> Stentor was an ILEC association that existed from 1992 to 1999. It included Stentor Resource Centre Inc., which represented Bell Canada and some of the current ILECs' predecessors.

carry and terminate RCCI customers' toll calls to the 867 numbering plan area (NPA) in Northern Canada.<sup>6</sup> The 867 NPA is located in an HCSA.

13. Some of Iristel's 867 NPA telephone numbers are assigned for use by AudioNow via two other entities: FCCG and Yakfree. AudioNow provides listeners with access to audio broadcasts via its Call-to-Listen platform, which is based in Virginia in the United States and enables listeners to connect to the broadcaster of their choice through a telephone call.
14. As a result, when an RCCI customer with an unlimited calling package in Toronto, for example, calls AudioNow's Call-to-Listen service in Virginia, the call is carried to the address of the dialed number in the 867 NPA and is subsequently connected to AudioNow's streaming service in Virginia. Iristel charges RCCI per minute while this call is active (i.e. for as long as the Toronto caller listens to AudioNow's streaming service).

## **Issues**

15. The Commission has identified the following issues to be addressed in this decision:

- Is Iristel in violation of any Commission regulatory mechanisms?
- If so, what measures, if any, should the Commission take to address Iristel's violation?
- Should the Commission modify Iristel's traffic termination rates?

## **Is Iristel in violation of any Commission regulatory mechanisms?**

16. RCCI submitted that Iristel, using agreements with two other entities, had taken deliberate steps to artificially stimulate toll traffic to the 867 NPA by routing calls to AudioNow's Call-to-Listen service through that NPA in order to take advantage of the high rate to terminate toll traffic in that area. RCCI noted that Iristel revealed that FCCG is the party to which it provides the 867 NPA telephone numbers in question. RCCI argued that this routing made no sense from a network efficiency perspective, and had the effect of "dipping" the traffic into one of the highest-cost toll termination locations in Canada.
17. In addition, RCCI noted that even if it used an alternative interexchange carrier rather than Iristel, the traffic in question would still be destined for Iristel's local exchange network in the 867 NPA and the alternative interexchange carrier would still ultimately have to pay Iristel, a cost which would then be passed on to RCCI.

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<sup>6</sup> An NPA is a three-digit code, commonly called an area code. The 867 NPA covers all of the Northwest Territories, Nunavut, and Yukon.

18. RCCI indicated that its toll traffic destined for some telephone numbers assigned to Iristel in the 867 NPA began increasing significantly in 2015: between September 2015 and September 2016, this traffic increased by 24,246%.
19. RCCI submitted that customer traffic patterns for calls destined to AudioNow's Call-to-Listen service were very different from patterns for other calls destined to alternative 867 numbers. It noted that some of the longest calls to the Call-to-Listen service exceeded 450 minutes, and in January 2017, 7 unique customers each generated over 10,000 minutes. RCCI noted that it had a customer that spent 37,212 minutes on the telephone out of a possible 43,200 minutes in January 2017. The company also noted apparent simultaneous calling to more than one AudioNow number; for example, one customer generated 1,288 minutes of calling time during a period of 840 minutes.
20. RCCI indicated its belief that revenue sharing was at the root of the alleged traffic stimulation. RCCI argued that profit was the only logical incentive for AudioNow and the other implicated companies to use telephone numbers in Canada's North in connection with a service located in Virginia. The company therefore proposed that the Commission prohibit LECs from rebating or paying their customers a share of interconnection revenues (e.g. through a revenue-sharing arrangement) in return for offering call-in services in their local exchanges.
21. Freedom Mobile and TCI also provided evidence of unusual calling patterns involving AudioNow. TCI submitted that, based on such patterns, there appeared to be a deliberate and ongoing practice by one of its retail customers to artificially generate minutes to AudioNow numbers.
22. The Bell companies voiced concerns about the use of artificial traffic stimulation in the local network interconnection regime in order to generate call termination revenue. They submitted that, overall, traffic stimulation jeopardizes the telecommunications system's efficiency by introducing needless costs into the system, artificially inflating demand in remote areas, and forcing telecommunications carriers to augment facilities beyond what would otherwise be necessary.
23. Iristel stated that it was not engaged in any form of traffic stimulation and argued that RCCI had failed to demonstrate that Iristel had conducted itself in a manner that was contrary to subsection 27(2) of the Act. Iristel expressed the view that the traffic increase experienced by RCCI was fully attributable to uncompetitive pricing for mobile wireless data services in Canada and natural consumer behaviour, as consumers were choosing to use their voice minutes to consume audio services in order to avoid the exorbitant prices associated with streaming mobile wireless data services.
24. With respect to traffic routing and termination, Iristel submitted that it assigned the telephone numbers used by AudioNow to its customer, FCCG, and that it has no information regarding how, where, or to whom its wholesale/resale customers provide their services. Iristel stated that it does not meddle in its customers' business affairs, nor would doing so be consistent with its obligations as a common carrier. The company submitted that, from its perspective, the traffic destined to the numbers assigned to this customer was terminated in the 867 NPA.

25. Iristel disclosed that it has a revenue-sharing arrangement with FCCG, but not with AudioNow. It argued that revenue-sharing arrangements reflect a long-standing approach that has been used in different forms throughout the telecommunications industry to reduce costs for TSPs and customers alike.
26. Iristel argued that in the proceeding, RCCI failed to demonstrate any evidence of bad faith that would render Iristel's revenue-sharing arrangement offside of industry norms or of the Commission's regulatory obligations. Iristel submitted that the Commission should therefore refuse a far-reaching prohibition on all forms of customer compensation arrangements.
27. CNOC submitted that the outcome of this proceeding should not result in new obligations that would require TSPs to monitor how customers use their services or new allocations of responsibility to TSPs with respect to such usage. CNOC argued that TSPs should not be required to scrutinize or monitor the business models of their customers or to implement restrictions on the use of their services beyond ensuring compliance with applicable laws and Commission rulings.
28. FCCG submitted that it has no contractual or strategic relationship with AudioNow but understands that AudioNow is a customer of Yakfree, which is in turn FCCG's customer.
29. Yakfree stated that it has an agreement with AudioNow that contemplates revenue sharing. According to the terms of this agreement, calls to AudioNow are routed to Yakfree's equipment, which is co-located with Iristel in Whitehorse, Yukon, at which point an Internet Protocol (IP) connection is established with AudioNow's streaming services.
30. AudioNow submitted that its mission is to provide listeners with access to audio via its Call-to-Listen platform, which allows listeners to connect to the broadcaster of their choice through a simple telephone call and listen to live or on-demand programming. AudioNow has been in business since 2008 and serves more than 5,000 radio broadcast partners around the world. AudioNow stated that it is a service provider to broadcasters and does not actively target its marketing to individual consumers. It also stated that it is not affiliated with the service providers mentioned in this proceeding.

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

31. The Commission's forbearance from the regulation of toll interconnection (with the exception of section 24 and subsections 27(2) to (4) of the Act) was intended to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective and, in effect, designed to facilitate interconnection practices that would compensate carriers for terminating calls for the natural routing of traffic.

32. Considering subsection 27(2) and certain policy objectives set out in section 7 of the Act (specifically, paragraphs 7(a), (b), (c), and (h)), the Commission does have an interest in ensuring that traffic is efficiently routed and that its regulatory rules are not being used for arbitrage purposes, contrary to the Act. Arbitrage activities can take several forms, including practices whereby parties use existing regulatory mechanisms, in a manner they were not intended to be used, in order to benefit financially.
33. Based on the information provided on the record of this proceeding, some of which was filed in confidence, traffic for calls made by RCCI customers to 867 NPA telephone numbers associated with AudioNow's Call-to-Listen service is routed as follows:
- RCCI routes the call to its point of interconnection with Iristel;
  - Iristel routes the call to the destination address of the telephone number in Whitehorse, where Yakfree's equipment is installed (this address is co-located in Iristel's facility in Whitehorse); and
  - Yakfree uses its equipment to establish an IP connection with AudioNow's streaming services in Virginia.
34. In addition, the Commission notes the following:
- as noted above, certain telephone numbers assigned to Iristel in the 867 NPA are provided to AudioNow via FCCG and Yakfree;
  - Iristel has a revenue-sharing arrangement with FCCG based on the volume of calls to those numbers; and
  - Yakfree and AudioNow have a revenue-sharing arrangement based on the volume of calls to those numbers.
35. As a result of these arrangements, the revenue generated by the termination of these calls in the 867 NPA, based on Iristel's OTS agreement with RCCI, is shared, directly and indirectly, with FCCG, Yakfree, and AudioNow.
36. With respect to traffic efficiency, although calls to AudioNow's Call-to-Listen service may technically be terminating in the 867 NPA, further traffic related to such calls is relayed over IP, connecting callers to AudioNow's services in Virginia, which is located in a different NPA. While there may be justifications for using an 867 NPA phone number when the called services are located in a different NPA, the facts raised on the record do give rise to concerns in this particular instance. There is no clear reason for the use of these 867 numbers by FCCG, Yakfree, and AudioNow, absent the revenue-sharing arrangements in place.

37. Accordingly, the Commission considers that calls from RCCI customers destined to AudioNow are ultimately being routed extremely inefficiently to Virginia via the 867 NPA. This inefficient routing of traffic within the forborne toll interconnection regime is not consistent with the policy objectives cited above and, according to RCCI, it is unclear whether the use of an alternative interexchange carrier would sufficiently address this situation.
38. The dramatic increases in toll traffic over a short period noted by RCCI, coupled with the existence of revenue-sharing arrangements involving Iristel, FCCG, Yakfree, and AudioNow, indicate clearly that the parties engaging in revenue sharing are benefitting from an additional revenue stream based on the rate in the OTS agreement between RCCI and Iristel to terminate calls in the 867 NPA. The Commission notes that such negotiated termination rates for numbers located in HCSAs are generally much higher than those in non-HCSAs. These parties therefore have an incentive to stimulate traffic to AudioNow's Call-to-Listen service simply for the higher revenues that can be garnered from call termination.
39. As such, in light of the circumstances as a whole with regard to the use of 867 NPA numbers to inefficiently route calls to Virginia, the extreme increase in associated call volumes, and the existence of volume-based revenue-sharing arrangements between certain parties, the Commission considers that Iristel has been involved in regulatory arbitrage activities. While the evidence in this proceeding does not demonstrate that Iristel had direct knowledge at the outset that traffic stimulation practices to artificially generate minutes to AudioNow's services would occur, the effects have now become clear and Iristel has knowledge of the situation, at least as of the date of RCCI's application.
40. The Commission must consider whether these regulatory arbitrage activities are in contravention of subsection 27(2) of the Act, which states: "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." The Commission must first examine whether Iristel's conduct resulted in discrimination, conferred a preference toward a person, or subjected any person to a disadvantage. It then must determine whether any preference or disadvantage was undue or unreasonable.
41. Iristel's assignment of 867 NPA numbers to FCCG, in combination with its applicable revenue-sharing arrangement, has created the conditions for the regulatory arbitrage activities described above to take place. As a result, the Commission finds that Iristel has (a) conferred a preference upon itself, FCCG, Yakfree, and AudioNow in the form of the revenue generated by these activities, and (b) subjected RCCI to a disadvantage in the form of the costs RCCI incurred as a result of the activities. The Commission considers that consumers could be disadvantaged in the longer term as the efficiency and affordability of the telecommunications system are affected by the inefficiency in the way traffic is routed as a result of these arbitrage activities.

42. Based on the enormous volume of traffic stimulated, the excessive duration patterns of certain calls, and the financial cost resulting from the arbitrage activities described above, the Commission finds, under subsection 27(2) of Act, that (a) the preference that Iristel has given to itself, FCCG, Yakfree, and AudioNow is undue, and (b) the corresponding disadvantage to which Iristel has subjected RCCI is also undue.

**What measures, if any, should the Commission take to address Iristel's violation?**

43. While Iristel denied any involvement in traffic stimulation practices, it did offer, with a view to improving the affordability of Canadian mobile wireless services and increasing consumers' level of choice, to ensure that within six months, all its current and future revenue-sharing customers are also provided non-HCSA telephone numbers for terminating traffic originating outside of HCSAs. Iristel also stated that it would comply with any additional measures the Commission deemed necessary, including terminating its applicable revenue-sharing arrangement if the Commission ordered it to do so.

44. RCCI replied that simply offering customers the option of using local numbers does not mean those customers will use those numbers, particularly considering the economics of the situation. With regard to Iristel's applicable revenue-sharing arrangement, RCCI submitted that termination of that arrangement would not stop Iristel from entering into other revenue-sharing arrangements.

**Commission's analysis and determinations**

45. The Commission considers that Iristel's proposed remedy would not sufficiently address the issues raised by RCCI. Specifically, the offer to also provide non-HCSA numbers would be unlikely to provide appropriate relief to RCCI, since the 867 NPA numbers implicated in this proceeding could continue to be used for AudioNow's services.

46. Although the Commission has forborne from regulating toll interconnection, it has not forborne from imposing conditions under section 24 of the Act, which may include applying a specific remedy to deal with situations of undue preference. In this case, the use of a section 24 condition in order to achieve the policy objectives set out in paragraphs 7(a), (b), (c), and (h) of the Act would be consistent with the Policy Direction,<sup>7</sup> which states, among other things, that the Commission should use regulatory measures that are efficient and proportionate to their purpose, that interfere minimally with competitive market forces, and that specify which telecommunications policy objectives they are intended to advance.

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<sup>7</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

47. The Commission therefore imposes a condition under section 24 of the Act and **directs** Iristel and any of its affiliates, within **30 days** of the date of this decision, to
- terminate any agreement that assigns FCCG any 867 NPA numbers that are ultimately used by AudioNow, and not re-enter into provisions of such an agreement with FCCG or any of its affiliates; and
  - file a report with the Commission confirming compliance with this directive.
48. A combination of several factors over a period of time led to a violation of subsection 27(2) of the Act, and Iristel was not necessarily aware of the situation when it entered into the applicable revenue-sharing arrangement. As such, the Commission does not consider it appropriate to grant RCCI's request for a repayment from Iristel, nor does it intend to pursue administrative monetary penalties (AMPs) at this time. Future remedies, such as AMPs, are available if Iristel or any of its affiliates do not comply with the directives set out in this decision.

### **Should the Commission modify Iristel's traffic termination rates?**

49. RCCI argued that Iristel is making unjust profits both as an interexchange carrier (through toll termination rates) and as a CLEC (through its local termination or direct connection (DC) rate) operating in the 867 NPA. While Iristel's toll termination rate is forborne from regulation, its local termination, or DC, rate is regulated. Iristel's DC rate in Northern Canada uses Northwestel Inc.'s (Northwestel) approved rate for the same area as a proxy.
50. RCCI submitted that although its commercial OTS agreement with Iristel refers only to the overall toll termination rate that Iristel charges, that rate is made up of a transport rate per minute and a DC rate per minute. RCCI considered that what it deems to be the transport portion is fair, but that the DC rate is inappropriate and should be adjusted because Iristel's cost structure is significantly different from Northwestel's. RCCI submitted that there is a direct link between Iristel's DC rate and the overall toll termination rate in the companies' commercial OTS agreement. RCCI considered that even though Iristel's overall toll termination rate is forborne from regulation, if the Commission reduces Iristel's DC rate, the negotiated overall toll termination rate would come under competitive pressure and would drop by an amount comparable to the DC rate drop.
51. Iristel argued that its toll termination rate is the product of a mutual agreement between two sophisticated business entities and that Commission intervention in the rates set out in its commercial OTS agreement with RCCI would (a) inappropriately broaden the Commission's jurisdiction to include the authority to review matters of a purely contractual nature, and (b) threaten the inviolability of commercially negotiated agreements for forborne services throughout the telecommunications industry.

52. The Bell companies submitted that the Commission has long forborne from the regulation of toll traffic termination rates and should exercise its limited jurisdiction over forborne contracts only in exceptional circumstances. The Bell companies considered that this is not one of those circumstances.
53. CNOC argued that the Commission's decision on RCCI's application should not modify the long-standing ability of CLECs to use the applicable ILEC rate for call termination and other services in their CLEC tariffs.

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

54. Because the Commission has forborne from regulating the termination rates set out in OTS agreements between companies, the termination rate applicable in the 867 NPA for Iristel and RCCI is the one agreed upon in their OTS agreement. Iristel's DC rate is independent of that negotiated rate. Additionally, the toll termination rate agreed upon by Iristel and RCCI in their OTS agreement makes no reference to the DC rate or to any other underlying cost elements that may have been incorporated into the agreed-upon rate.
55. In light of the above, the Commission will not modify Iristel's termination rate for the 867 NPA as agreed upon between RCCI and Iristel, or any components of that rate, nor will it modify Iristel's DC rate. As such, RCCI's request for the Commission to make Iristel's interexchange traffic termination rates interim is moot.

Secretary General

#### **Related documents**

- *Bell Canada and Northwestel Inc. – Request for implementation of a traffic stimulation regulatory framework*, Telecom Decision CRTC 2017-457, 20 December 2017
- *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