



Telecom Decision CRTC 2019-249

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Iristel Inc. – Application for final relief regarding Bell Canada’s rate increases for certain circuits

*The Commission **denies** the request by Iristel Inc. for final relief regarding Bell Canada’s rate increases for transport services provided over certain circuits.*

Application

1. The Commission received an application from Iristel Inc. (Iristel), dated 19 December 2018, in which the company requested both interim and final relief regarding alleged anti-competitive conduct by Bell Canada in relation to the rates that Bell Canada charges to Iristel for circuits associated with certain transport services. In Telecom Decision 2019-86, the Commission denied Iristel’s request for interim relief.
2. With respect to final relief, Iristel requested the following:
 - in the event that the Commission finds that Bell Canada has effectively re-monopolized any or all of the transport services along the routes corresponding to the circuits in question, that the Commission (i) reverse its determinations to forbear from the regulation of the services along those routes, and (ii) require Bell Canada to issue tariffs for those services;
 - in the event that the Commission finds that Bell Canada is engaging in unjust discrimination against Iristel, and not against other customers, with regard to any or all of the transport services along the routes corresponding to the circuits in question, that the Commission issue an order requiring Bell Canada to lease to Iristel the circuits in question on terms and conditions that are no less favourable than those provided to any other similarly situated customer of Bell Canada in terms of demand levels for the same services along the same routes;
 - that the Commission issue an order requiring Bell Canada to provide Iristel with a minimum of 42 months’ notice, starting from the date on which the Commission issues its final determinations in this proceeding, before any of the specific rate increases at issue take effect; and

- that the Commission issue an order requiring Bell Canada to give Iristel reasonable advance notice of any increase in pricing of more than 20% for the circuits in question, and that such reasonable advance notice allow Iristel sufficient time to switch transport service suppliers before the effective date of the increase.

Background

3. Iristel and Bell Canada entered into a Master Communications Agreement – Non-tariffed (Wholesale) (referred to hereafter as the contract), under which Bell Canada provides Iristel with certain digital data interexchange private line (IXPL) services and wholesale competitor digital network (CDN) services (referred to hereafter as the services in question). Under the terms of the contract, Bell Canada may, in certain circumstances, change the fees charged if it provides at least 60 days' notice.
4. In Telecom Decision 97-20, the Commission forbore from much of the regulation of IXPL services.¹ However, the Commission retained certain powers, including those under section 24 (regarding the imposition of conditions of service) of the *Telecommunications Act* (the Act).²
5. In Telecom Decision 2008-17, the Commission forbore from the regulation of certain aspects of CDN services.³ However, the Commission retained certain powers, including those under section 24 of the Act (to impose future conditions upon the forborne services, as warranted), as well as subsections 27(2), (3), and (4), to address any issues of unjust discrimination or undue preference.
6. Under the contract between Bell Canada and Iristel, the agreements for the circuits in question began expiring on 15 January 2019. Representatives of Iristel and Bell Canada had begun negotiations in the spring of 2018 to renew the contract. By letter dated 16 November 2018, Bell Canada had provided Iristel with 60 days' notice regarding rate increases for the services provided over the circuits in question. No new agreement was reached before the contract expired, with the result that the circuits were migrated to month-to-month rates.

¹ Specifically, the Commission determined that it would refrain from the exercise of its powers under certain sections of the *Telecommunications Act* (the Act), including section 25 (regarding the requirement to file tariffs); subsections 27(1) (regarding just and reasonable rates) and 27(2), (4), and (6) (regarding unjust discrimination); and section 31.

² The Commission also retained its powers under subsection 27(3) and section 29 of the Act, but it later forbore from regulation under section 29.

³ The Commission forbore from regulation under sections 25, 29, and 31, and subsections 27(1), (5), and (6) of the Act.

Issues

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

- Should the Commission reverse its determinations to forbear from the regulation of the services in question?
- Do Bell Canada's rate increases result in unjust discrimination against Iristel?
- Is Bell Canada granting itself an undue preference regarding its 60 days' notice of the rate increases?

Should the Commission reverse its determinations to forbear from the regulation of the services in question?

Positions of parties

8. Iristel submitted that the rate increases in question are massive and unprecedented. Iristel specified that the magnitude of the increases depends on whether the rate is charged on a month-to-month basis or whether Iristel agrees to a one- or three-year term. Iristel argued that all the increases are unacceptable and that it has no intention of entering into an extended-term agreement.
9. Iristel indicated that the increases led it to suspect that Bell Canada may have re-monopolized the transport services on some or all of the routes corresponding to the circuits in question. Iristel argued that if this has occurred, the conditions for forbearance are no longer met and the Commission should (i) re-regulate the rates charged for those services on those routes, and (ii) require Bell Canada to issue tariffs for the provision of those services.
10. Iristel submitted that this request is consistent with the Policy Direction⁴ in that use of the Commission's regulatory powers to restrain Bell Canada's anti-competitive conduct is a necessary deviation from reliance on market forces to further the telecommunications policy objectives, and is an efficient and proportionate response to the harm that would be caused by the rate increases.
11. Iristel added that even if there are alternative transport service suppliers, Bell Canada's unique technological requirements, network design, and resource provisioning make switching transport service suppliers extremely costly and time-consuming for competitive local exchange carriers (CLECs).
12. Iristel submitted that, unlike alternative wholesale service providers that use fibre transport infrastructure, Bell Canada forces CLECs to interconnect using time division multiplexing (TDM) infrastructure. Iristel indicated that for it to switch to an alternative transport service supplier, it would be required to install multiplexer equipment throughout its network, adding significantly to its associated costs and timelines.

⁴ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

13. Iristel added that for its smaller rate centres, it does not make economic sense for it to use fibre, given the volume of traffic expected on the associated routes. Iristel also argued that Bell Canada is not upgrading its infrastructure to Internet Protocol (IP)-based interconnection aggressively enough.
14. In Iristel's view, another constraint to switching transport service suppliers is that Bell Canada limits the number of ongoing interconnection projects in local interconnection regions (LIRs) per month. It would therefore take an extended period of time for Iristel to complete a switch to an alternative transport service supplier.
15. In response, Bell Canada noted that in Telecom Decision 2012-520, the Commission indicated that to re-establish rate regulation in a forborne market, evidence needs to be filed that is sufficiently persuasive to demonstrate that the circumstances that justified the original forbearance determinations are no longer present. The Commission has consistently found that the wholesale transport service market is competitive.⁵ Further, Iristel has provided no evidence that the number of competitors offering transport services has decreased relative to when the Commission forbore from regulating those services. Bell Canada argued that consequently, Iristel has failed to discharge its burden of proof.
16. With respect to Iristel's submission regarding IP interconnection, Bell Canada stated that the Commission acknowledged in Telecom Regulatory Policy 2012-24 that it would be inefficient to force the ILECs to incur the expense of duplicating conversion equipment that already exists.
17. Bell Canada noted that many other IP-based service providers that interconnect with Bell Canada have conversion equipment in place, and that nothing prevents Iristel from making a commercial arrangement to use these providers' conversion equipment or transport facilities. Bell Canada submitted that regardless of whose transport facilities Iristel uses (Bell Canada's, Iristel's own, or a competitor's), conversion to TDM would be required.
18. Finally, Bell Canada submitted that with respect to the limit on LIR interconnection projects, this is a guideline rather than an inflexible rule, and it applies on a per-province basis, rather than a national basis. Bell Canada submitted that as a result, Iristel has overestimated the amount of time required for it to switch transport service suppliers. Bell Canada stated that this guideline is necessary for it to efficiently manage the numerous interconnection requests it receives in a manner that is fair for all interconnecting carriers.
19. In reply, Iristel indicated that the fact that the LIR guideline applies on a per-province basis was communicated to Iristel only after it had filed its application. Iristel also reasserted that 42 months would be the earliest time frame in which it could migrate to an alternative transport service supplier. Alternatively, Iristel proposed that the Commission should require a minimum notice period of 34 months.

⁵ See, for example, Telecom Decisions 2008-17, 2008-118, and 2012-520, and Telecom Regulatory Policy 2015-326.

Commission's analysis and determinations

20. The Commission's forbearance decisions are governed by section 34 of the Act, which sets out circumstances where the Commission may forbear (where forbearance would be consistent with the telecommunications policy objectives), where it must forbear (where the service in question is or will be subject to competition sufficient to protect the interests of users), and where it cannot forbear (where doing so would be likely to impair unduly the establishment or continuance of a competitive market for the service in question).
21. In the present case, the Commission has already forborne from regulating the services in question on the basis of determinations it has made under section 34 of the Act. Accordingly, to re-establish rate regulation, there must be evidence that is sufficiently persuasive to demonstrate that the circumstances that justified the original forbearance determinations are no longer present.⁶
22. The Commission finds that Iristel has not provided evidence demonstrating that the conditions justifying the original forbearance determinations have changed to the extent that forbearance is no longer consistent with the criteria set out in section 34 of the Act. Iristel has asserted that Bell Canada may have re-monopolized the transport services on some or all of the routes corresponding to the circuits in question, but has not provided evidence regarding, for example, (i) the presence or absence of competitors, or (ii) its own efforts to obtain alternative services. In particular, Iristel has not provided any evidence that the number of competitors offering similar services has decreased relative to when the Commission forbore from regulating those services.
23. The principal pieces of evidence relied upon by Iristel are that Bell Canada has implemented rate increases that, in Iristel's view, are substantial, and that switching transport service suppliers would involve, in Iristel's view, significant time and costs.
24. However, the Commission does not consider evidence of rate increases for forborne services, in the circumstances, to be sufficient to warrant the reintroduction of Commission oversight of rate-setting for those services. Prices can reasonably be expected to fluctuate in a forborne market.
25. With respect to the time required for Iristel to switch transport service suppliers, Iristel appeared to concede that a shorter window might be feasible. In any event, Iristel has not sufficiently explained the potential connection between any time or costs involved and (i) a change in circumstances from the time when the Commission made its original forbearance determinations, or (ii) the criteria that the Commission is to take into account, under the Act, when considering forbearance.

⁶ The Commission notes that, in this case, neither party addressed the criteria established in Telecom Decision 94-19, which the Commission may use to determine whether, among other things, market power exists with respect to a given service.

26. With respect to Iristel's concerns about Bell Canada's TDM infrastructure, this issue does not in itself justify re-regulating forborne services. The Commission addressed the transition from TDM networks to IP networks across Canada in Telecom Regulatory Policy 2012-24, and, to the extent that Iristel is seeking a re-examination of that policy, the Commission considers such re-examination to be outside the scope of this proceeding.
27. In light of the above, the Commission **denies** Iristel's request for the Commission to reverse its determinations to forbear from the regulation of the services in question.

Do Bell Canada's rate increases result in unjust discrimination against Iristel?

Positions of parties

28. Iristel stated that Bell Canada may be charging Iristel rates that are far above what Bell Canada charges its other customers for the same transport services on some or all of the routes in question. Iristel proposed that the Commission issue requests for information to gather additional insight into the rates Bell Canada charges those other customers.
29. Iristel indicated that it would expect the rates charged for the services in question to be influenced by certain factors related to its position as Canada's largest CLEC.⁷ In Iristel's view, Bell Canada's rate increases did not reflect these factors and constitute *prima facie* evidence of discrimination. As well, Iristel argued that Bell Canada should be required to justify why this discrimination is not unjust.
30. Iristel further submitted that when negotiations to renew the contract took place in the spring of 2018, it acted under the reasonable belief that the parties had reached an agreement on the rates and material terms of a new contract. Iristel stated that there followed a period of several months during which it did not hear from Bell Canada. In October 2018, Iristel became aware that it was facing the prospect of rate increases from Bell Canada, since there was a disagreement over certain matters.⁸ However, Iristel submitted that even at that stage, Bell Canada never indicated that Iristel would face rate increases of the magnitude set out in its 16 November 2018 letter.
31. Bell Canada submitted that there is no legal basis for the Commission to consider a complaint about unjust discrimination under subsection 27(2) of the Act with respect to IXPL services, since the Commission has refrained from the exercise of its powers under that provision for those services. Bell Canada nonetheless responded to Iristel's allegations of unjust discrimination for both CDN and IXPL services.

⁷ Iristel filed the information regarding these factors in confidence.

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32. Bell Canada acknowledged that the rates it charges wholesale customers vary widely. Regarding Iristel's argument that its rates should reflect its status as Canada's largest CLEC, Bell Canada submitted that many other customers have a much larger overall volume of business with Bell Canada.
33. Bell Canada also argued that the process through which it reaches final, negotiated rates with its wholesale customers is important. Bell Canada described this process as follows:
- Bell Canada establishes a price list, the "rack rates," which represents its starting offer. Bell Canada stated that its pricing strategy takes into account the rates of its competitors, such as Allstream Business Inc., TELUS Communications Inc., and certain cable carriers that offer transport service options over their own facilities.
 - Certain wholesale customers that are uninterested in engaging in negotiations (e.g. because they purchase only a few services) subscribe to services directly at the rack rates. However, most customers make counter-offers, triggering a back-and-forth negotiation period until the parties settle upon a commercial rate.
 - Bell Canada offers lower rates when the wholesale customer makes a longer-term commitment, or long-term volume, revenue, or growth commitments.
34. Bell Canada indicated that in the present case, it provided Iristel with 60 days' notice, in November 2018, as provided for in the contract, of the revised rack rates for the IXPL services. Iristel then offered to reopen negotiations, but insisted that the starting point had to be the discounted rates in force since 2016. Bell Canada proposed to instead negotiate off the current rack rates. Bell Canada stated that no agreement was reached and that Iristel's service agreements under the contract began expiring, starting in January 2019. As a result, Bell Canada migrated to the revised month-to-month rack rates.
35. In response to an 8 February 2019 Commission staff request for information, Bell Canada provided information on the rates it charges to wholesale customers (excluding Iristel) for a sample range of services of the same type, and over the same circuits, as those provided to Iristel. Bell Canada also provided additional background information, significant portions of which it filed in confidence, to explain why the rate increases may appear to be potentially discriminatory and unjust, but in its view are not. According to Bell Canada, Iristel had no ongoing right to continue benefitting from the previously charged rates beyond the expiry of the contract term, which had been especially favourable to Iristel on the basis of circumstances that had been in place at the time.

36. In reply, Iristel indicated that it could not comment on the information Bell Canada filed in confidence, but it urged the Commission to carefully consider the rates that Bell Canada charges to competitors with similar characteristics to Iristel and not to be misled by irrelevant justifications for the differences.
37. Iristel also disputed Bell Canada's characterization of Iristel's previous rate structure and explanation for the increases.
38. Further, Iristel argued that even though the Commission has refrained from the exercise of its powers under subsection 27(2) of the Act in respect of IXPL services, the Commission could grant Iristel's requested relief. In Iristel's view, the Commission could order Bell Canada to provide the services in question to Iristel using rates, terms, and conditions that are equivalent to those of similarly situated wholesale customers under section 24 of the Act. Iristel also argued that the facts of this case make clear that the Commission is no longer justified in forbearing from the regulation of the services in question under subsection 27(1) or 27(2) of the Act.

Commission's analysis and determinations

39. The Commission has forborne from the exercise of its powers under subsection 27(2) of the Act with respect to IXPL services while retaining those powers with respect to CDN services. The Commission has considered the arguments of both parties regarding unjust discrimination relating to both IXPL and CDN services and, for the reasons set out below, does not consider that there is a situation of unjust discrimination for either type of service. Accordingly, there is no need for the Commission to make a determination with respect to Iristel's requested remedy.
40. Under the Commission's general approach to allegations of unjust discrimination or undue preference against a carrier, the party making the allegation must first establish the discrimination or preference. Once this is done, the onus then shifts to the respondent carrier to establish that the discrimination or preference is not unjust or undue, as required by subsection 27(4) of the Act.
41. In this case, however, a more flexible approach to the first step is warranted, given that Iristel does not have access to some of the confidential information filed by Bell Canada. In particular, the Commission would have been prepared to move to the second step even if the information provided by Bell Canada (rather than that provided by Iristel) established discrimination.
42. In accordance with this flexible approach, to assess whether there is discrimination, the Commission compared the highest rates paid to Bell Canada by other competitors for the services in question to the highest (i.e. month-to-month) rates offered to Iristel for those services. The Commission's assessment of the confidential information on the record confirms what Bell Canada acknowledged on the public record, namely that there is wide variation in the rates it charges to wholesale customers.

43. In certain previous cases, the Commission has determined that a wide variation in rates is sufficient to constitute discrimination and/or preference within the meaning of the Act. For instance, in Telecom Decision 2014-398, the Commission made such a determination where rates charged to new entrant wireless carriers for wholesale mobile wireless roaming services varied widely.
44. In that case, the Commission concluded that this was unjust in the circumstances since, among other things, one specific incumbent carrier had imposed exclusivity clauses in its wholesale roaming agreements with certain new entrants.
45. The Commission considers that the circumstances are different in the present case. Iristel is a well-established and relatively large CLEC, not a new entrant; the markets for the services at issue are well established; there is no evidence of a lack of alternative transport service suppliers in the market; and there is no evidence of exclusivity.
46. The Commission considers that in the present situation, Bell Canada has provided evidence that there are many factors that influence the variation in rates for IXPL and CDN services, including, significantly, negotiations between parties, which are sophisticated commercial actors operating in a forborne environment.
47. Iristel has not challenged Bell Canada's assertion that, in general, rack rates will be periodically established and offered to wholesale customers, after which negotiations may take place. The Commission accepts that lower rates may result when, for instance, the wholesale customer makes a longer-term commitment, or long-term volume, revenue, or growth commitments.
48. In this case, the evidence indicates that before Bell Canada notified Iristel of the revised rack rates, some negotiations took place regarding proposed rates that were comparatively lower. However, it is clear from the materials filed that there was no agreement between the parties with respect to those rates. The Commission considers that, in this context, it was open to Bell Canada to increase the proposed rates.
49. Iristel also based its allegations of unjust discrimination on what it called the "massive and unprecedented" rate increases. However, Bell Canada has provided an explanation for the increases to the proposed rates, including that Iristel previously enjoyed specific favourable terms under the contract and that Bell Canada was in the course of updating its standard rack rates. The Commission notes that further negotiations with respect to those rates were, and remain, possible in the circumstances.
50. Accordingly, the Commission concludes that while the rates Bell Canada offered to Iristel for the IXPL and CDN services in question vary both from the rates it charges to other wholesale customers and from previous rates it charged to Iristel, this does not establish discrimination in the circumstances, including those of a forborne market.

51. However, even if the Commission had determined, on a *prima facie* basis, that some of the rates in question were discriminatory, it would have found that Bell Canada has discharged its burden of establishing that any such discrimination is not unjust.
52. In light of the above, the Commission determines that unjust discrimination has not been established in this case.

Is Bell Canada granting itself an undue preference regarding its 60 days' notice of the rate increases?

Positions of parties

53. Iristel argued that by providing only 60 days' notice of the rate increases in question, Bell Canada granted itself an undue preference, which is contrary to subsection 27(2) of the Act, by effectively removing any ability Iristel has to mitigate any damages by switching transport service suppliers prior to the rate increases taking effect.
54. In particular, Iristel submitted that Bell Canada attempted to leverage its contractual ability to provide 60 days' notice of the rate increases to force Iristel to accept Bell Canada's terms and conditions, recognizing that it would take Iristel at least 42 months to switch to an alternative transport service supplier. Iristel stated that it would never have agreed to Bell Canada having the ability to unilaterally increase rates with 60 days' notice if it had contemplated the specific increases at issue. Iristel stated that under the initial offer in April 2018, the majority of IXPL circuits in Appendix A of Attachment 1 to its application were being offered at a decreased rate.
55. Iristel requested that the Commission issue an order requiring Bell Canada to give Iristel reasonable advance notice of any increase in pricing of more than 20%, and that such reasonable advance notice allow Iristel sufficient time to switch transport service suppliers before the effective date of the increase.
56. Bell Canada submitted that Iristel's request is out of step with industry practice. Bell Canada stated that its standard master agreement for wholesale services governs (i) its relationship with most of its wholesale customers, and (ii) most of its forborne services (not just interconnection transport services such as IXPL services). That standard agreement features a 60-day notice period before Bell Canada or the wholesale customer can advise the other that a contract will not be renewed under the same terms.
57. Bell Canada added that it does not require Iristel to subscribe to all its transport services under a single global term length. Different contracts could be negotiated with different start and end dates, which could help minimize any effects of simultaneous price changes.
58. In reply, Iristel disputed whether 60 days' notice is the industry standard. The company argued that it could not have reasonably foreseen Bell Canada abusing the 60-day notice clause to implement rate increases on this scale. This is particularly the case given the direction of the negotiations that preceded the rate increases.

59. Iristel stated that it is significant that Bell Canada did not provide any examples of instances in which it has required a CLEC to either accept rate increases of this magnitude or switch to an alternative transport service supplier on a mere 60 days' notice, despite having had the opportunity to provide such evidence.

Commission's analysis and determinations

60. Given the Commission's forbearance from regulation of many aspects of the services in question, parties are responsible for negotiating commercial contract terms and conditions, including any notice period for rate changes.
61. The record of this proceeding indicates that Bell Canada and Iristel entered into the contract, which permitted either party to provide 60 days' notice to advise the other that the contract would not be renewed under the same terms. Bell Canada provided Iristel with 60 days' notice of rate increases for the circuits in question on 16 November 2018.
62. As noted above, this agreement was executed by two sophisticated commercial entities in a largely forbore regulatory environment.
63. Iristel filed, in confidence, some correspondence between representatives of the two companies demonstrating that some negotiations took place respecting the rates, terms, and conditions of a potential new contract several months before Bell Canada gave the 60 days' notice. Iristel did not substantively respond to Bell Canada's assertion that negotiations could have continued but did not.
64. Unless and until the Commission makes a determination to re-regulate forbore services, on the basis of compelling evidence, the Commission considers that its intervention regarding such services could have a negative impact on commercial negotiations, for instance by disrupting the competition that has taken place since the services were forbore from regulation.⁹
65. The Commission finds that the evidence on the record of this proceeding does not establish that Bell Canada's provision of 60 days' notice, consistent with the contract between Bell Canada and Iristel, constitutes a preference. Accordingly, the Commission determines that undue preference has not been established in this case.

Conclusion

66. In light of all the above, the Commission **denies** Iristel's request for final relief.

⁹ In the present case, Bell Canada filed evidence indicating that some of the services in question are now offered at lower rates than when they were last tariffed, e.g. Metro IX service.

67. The Commission reminds wholesale service suppliers and wholesale customers that in a competitive market, they are expected to negotiate and otherwise conduct themselves in a manner consistent with the competitive conditions present in the market.

Secretary General

Related documents

- *Iristel Inc. – Application for interim relief regarding Bell Canada’s rate increases for certain circuits*, Telecom Decision CRTC 2019-86, 21 March 2019
- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015; as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, Telecom Decision CRTC 2014-398, 31 July 2014
- *Bell Aliant Regional Communications, Limited Partnership / Bell Canada and MTS Allstream Inc. – Applications regarding Ethernet services*, Telecom Decision CRTC 2012-520, 27 September 2012
- *Network interconnection for voice services*, Telecom Regulatory Policy CRTC 2012-24, 19 January 2012
- *MTS Allstream Inc. – Application to review and vary certain determinations in Telecom Decision 2008-17 regarding the classification of wholesale Ethernet services*, Telecom Decision CRTC 2008-118, 11 December 2008
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- *Stentor Resource Centre Inc. – Forbearance from regulation of interexchange private line services*, Telecom Decision CRTC 97-20, 18 December 1997
- *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994