



## Telecom Decision CRTC 2019-86

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Ottawa, 21 March 2019

*Public record: 8661-J64-201811159*

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

*The Commission **denies** the request by Iristel Inc. for interim relief regarding Bell Canada’s rate increases for 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. Iristel submitted that rate increases for these circuits were scheduled to take effect on 15 January 2019.
2. Specifically, Iristel requested that the Commission issue, on an expedited basis, an interim order pursuant to section 24 of the *Telecommunications Act* (the Act) directing Bell Canada not to increase the rates that it charges to Iristel for the circuits listed in Attachment 1 to its application, pending the final disposition of its application.
3. By letter dated 21 December 2018, Commission staff set out an expedited process for the review of the requested interim relief. The letter stated that while Iristel’s request for interim relief would proceed on an expedited basis, in the circumstances it would not be practicable for a decision to be rendered prior to the scheduled effective date for the rate increases on 15 January 2019. Commission staff also stated in that letter that it expected Bell Canada to maintain the current rates charged to Iristel for the circuits in question until the Commission rendered an interim relief decision on this matter.
4. The Commission received an intervention on the request for interim relief from Bell Canada. The company confirmed that it would maintain the status quo with respect to the rates billed to Iristel for the relevant circuits until the Commission makes a determination on Iristel’s request for interim relief. However, Bell Canada stated that, absent a valid Commission order requiring that the pre-15 January 2019 rates remain in effect, Iristel would be responsible for paying the higher rates, retroactive to 15 January 2019, once the Commission makes a determination regarding interim relief.

## The test for interim relief

5. The criteria generally applied by the Commission to assess applications for interim relief are those set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (*RJR-MacDonald*). These criteria (the RJR-MacDonald criteria) are that (i) there is a serious issue to be determined; (ii) the party seeking the interim relief will incur irreparable harm if the relief is not granted; and (iii) the balance of convenience, taking into account the public interest, favours granting the interim relief. To be granted interim relief, an applicant must demonstrate that its application meets all three criteria.

## Is there a serious issue to be determined?

6. Iristel submitted that the threshold for a serious issue to be determined is a low one. It submitted that, in general, the applicant need only demonstrate that the application is neither frivolous nor vexatious, and this standard has been applied by the Commission on several occasions.<sup>1</sup>
7. Iristel submitted that the Commission must decide whether Bell Canada is engaged in anti-competitive conduct by unilaterally and without proper warning increasing its rates for certain forborne circuits (i) by 80% to 250% in the case of the rates set out in Appendix A to Attachment 1 to its application, and (ii) by over 125% for the rates set out in Appendix B.
8. Bell Canada agreed that Iristel's application raises a serious issue; however, it argued that the Commission does not have jurisdiction to grant the interim relief requested because the services associated with the circuits in dispute are all interexchange private line (IXPL) and wholesale transport services that are forborne from regulation. Therefore, the Commission must abide by the IXPL forbearance regime<sup>2</sup> and the wholesale transport services forbearance regime.<sup>3</sup>

## Commission's analysis and determinations

9. If an application is not clearly frivolous, it will generally meet the first interim relief criterion of whether there is a serious issue. Iristel's application raises the issue of possible anti-competitive pricing on the part of Bell Canada. The Commission finds that the application meets the first criterion.

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<sup>1</sup> See, for example, Commission [letter](#) dated 31 August 2015 regarding a request for interim relief from the Canadian Network Operators Consortium Inc.

<sup>2</sup> See Telecom Decision 97-20.

<sup>3</sup> See Telecom Decision 2008-17.

## **Will the party seeking the interim relief incur irreparable harm if the relief is not granted?**

10. Iristel submitted that the Commission has described the relevant considerations in an assessment of irreparable harm as follows:

“[I]rreparable” harm requires an analysis of the nature of the harm, rather than its magnitude. Harm is more likely to be irreparable where there is an unquantifiable loss or a loss that the applicant may not be able to recover.<sup>4</sup>

11. Iristel claimed that it will suffer irreparable harm in the absence of interim relief for the following reasons:

- It will be compelled to immediately begin migrating its circuits to alternative suppliers, if available, and reworking its network architecture in order to mitigate its damages. Iristel argued that the magnitude of Bell Canada’s rate increases<sup>5</sup> does not afford it the opportunity to wait for the final disposition of its application before commencing migration work. Iristel submitted that it will have incurred significant costs between now and the time the Commission issues its final decision on the application, including costs related to purchasing equipment and services from alternative suppliers. It submitted that it will not have any ability to recover these costs or any overpayments to Bell Canada for the circuits in question. Finally, Iristel argued that, because the circuits in question are currently forborne, it is doubtful that the Commission would be able to retroactively vary the rates to compensate Iristel should its request for final relief be approved.
- It will be compelled to pass costs on to end-users, inflicting irreparable harm to the company in the form of damage to its reputation in the marketplace. Iristel argued that this will inevitably result in it losing customers to its competitors. Iristel claimed that it will struggle to recover these customers due to the negative reputation it will gain in the marketplace. In addition, its end-users will also suffer irreparable harm in the form of increased prices and a significant lessening of competition in the marketplace for voice services.<sup>6</sup>
- It will be compelled to immediately divert significant labour resources from other projects to complete the migration. Iristel argued that the lost

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<sup>4</sup> See Commission [letter](#) dated 7 July 2016 regarding a request for interim relief by Ice Wireless Inc.

<sup>5</sup> Iristel argued that the impact of these proposed rate changes on its total monthly bill from Bell Canada for these circuits depends on whether the contract is on a month-to-month basis, a one-year term, or a three-year term. Iristel stated that its current monthly costs are based on a three-year contract signed with Bell Canada.

<sup>6</sup> Iristel stated that not only does it supply direct inward dialing (DIDs) for its own voice services, but it is a significant wholesale supplier of DIDs to other telecommunications service providers that provide voice services.

opportunities from not focusing the labour on more productive and innovative projects cannot be recovered or compensated by damages.

- Over the course of the projected 42-month migration period, it will be compelled to invest in rebuilding its network to interconnect with alternative transport suppliers that use fibre technology.<sup>7</sup>

12. Bell Canada argued that neither migrating to a new network nor passing on costs to end-users constitutes irreparable harm, for the following reasons:

- Iristel has provided no evidence supporting its claim that it will be forced to increase retail rates, nor any data on the importance of the circuits in dispute in relation to its overall cost structure. Moreover, especially in the context of the interim relief, Iristel did not justify its claim that the proposed rate increases, for the limited period (likely just a few months) between 15 January 2019 and the issuance of the Commission’s final decision, cannot be absorbed or financed.
- It is only harm to the applicant that must be considered<sup>8</sup> and, in any case, Iristel has failed to support its claims that any of its end-users would be meaningfully worse off should they migrate to a competitor, or that there would be any substantial impact on market dynamics.
- Iristel plans to migrate away from Bell Canada regardless of whether it receives interim relief<sup>9</sup> and, accordingly, the migration costs or inconvenience that Iristel may incur from this migration will not be avoided if it gets interim relief. The costs and inconvenience, therefore, do not constitute irreparable harm.
- All that Iristel will avoid if it is granted interim relief is higher payments to Bell Canada between 15 January 2019 and the date of a final determination, and this “simple pecuniary dispute between commercial parties” does not constitute irreparable harm.

13. Iristel stated that its migration is not a foregone conclusion. Iristel submitted that the 42-month period that it requested would be relevant only in the event that the rate increases proposed by Bell Canada actually took effect. Iristel submitted that it has requested final relief requiring the Commission to re-regulate Bell Canada’s IXPL and wholesale transport services. Assuming that the final rates stemming from

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<sup>7</sup> Iristel submitted it already has a perfectly functioning network built out to conform with Bell Canada’s requirements, and it would be economically wasteful to divert funds that could be used in other areas of its business.

<sup>8</sup> See *RJR MacDonald*, page 341.

<sup>9</sup> Iristel’s final relief request includes that the proposed rate increases do not take effect for a minimum of 42 months from the issuance of the Commission’s final decision. Bell Canada stated that this request can only make sense if Iristel is migrating away from Bell Canada anyway, and that Iristel is therefore simply requesting lower rates until its migration is complete.

tariffs or an order under subsection 27(2) of the Act were appropriate, Iristel would not transition away from Bell Canada's network.

14. Iristel submitted that in the absence of interim relief, it would be compelled to immediately commence transitioning away from Bell Canada's network prior to the Commission's final decision, and that this opportunity cost could not be compensated in the event that it is successful in the final determination.
15. Iristel disputed Bell Canada's claim that Iristel will not be forced to pass on higher costs to end-customers. Iristel submitted that it would be ludicrous to think that a competitive local exchange carrier could absorb such rate increases with no negative impact on its business operations, and indicated that the harm to its business reputation as a result would be unquantifiable.

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

16. With respect to the second criterion, the Commission has stated that the threshold for irreparable harm is high.<sup>10</sup> The Commission considers that Iristel would not suffer irreparable harm absent the granting of the interim relief, for the following reasons:

- There is no evidence to indicate, without the interim relief, (i) whether Iristel's retail rate increases would be sustained after the company has started the migration process away from Bell Canada, (ii) that Bell Canada's rate increases could not be absorbed or financed, or (iii) how much the retail rates would increase, given that Iristel's monthly rates would increase only for the time that Iristel remains a customer of Bell Canada.
- There is no evidence that (i) Iristel's retail customers would switch to other service providers, because Iristel may or may not increase rates depending on the amount of time that it remains a customer of Bell Canada, or (ii) the amount of any retail rate increase would be sufficient to cause Iristel's retail customers to change service providers.
- There is no evidence that, if Iristel increased its retail rates as a result of Bell Canada's rate increases, its reputation in the marketplace would be damaged more than it would in a situation where, absent Bell Canada's rate increases, other competitors offered better rates to Iristel's retail customers and caused them to switch service providers. Further, there is no evidence that Iristel offers the most competitive rates.
- There is no evidence that an alternative supplier is available or that Iristel would obtain more favourable rates from a new supplier.

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<sup>10</sup> See Commission [letter](#) dated 15 December 2015 regarding request for interim relief from TekSavvy Solutions Inc.

- While Iristel estimated the costs of a transition, these were the costs over a three-and-a-half-year period, and not the costs of migration prior to the Commission's final decision if interim relief is not granted.
- While Iristel has provided a dollar figure reflecting the impact of Bell Canada's rate increases and an estimate of migration costs over a three-year period, the company has not quantified the overall impact this would have on its business operations.
- There is no evidence of what resources, such as labour, would have to immediately be diverted from other projects without the interim relief.

17. With respect to Iristel's argument that end-users and market dynamics will be harmed, the Commission notes that under the irreparable harm criterion, it is only harm to the applicant that must be considered. Those elements may be more properly considered under the third criterion as constituting elements of the public interest.

### **Does the balance of convenience favour granting the requested relief?**

18. Iristel argued that the balance of convenience strongly favours the granting of the interim relief requested. Iristel noted that the Commission has found that where irreparable harm is very likely to occur, the presumption is that the balance of convenience favours the granting of interim relief and that it would require special circumstances to rebut this presumption.<sup>11</sup>

19. Iristel argued that moreover, given that all that Bell Canada would be required to do if interim relief is granted is maintain the status quo, whereas Iristel would be required to undertake massive network modifications to transition to alternative suppliers, the balance of convenience clearly favours Iristel.

20. Iristel submitted that the magnitude of the harm is a relevant factor to consider at the balance of convenience stage of the test for interim relief.<sup>12</sup> In the present case, according to Iristel, the magnitude of the potential harm to Iristel is extremely high, because it will be compelled to incur massive costs associated with reworking its network architecture and to pay anti-competitive rates to Bell Canada until such time as the transition process is complete.

21. Iristel added that a consideration of the public interest also favours the granting of interim relief. Absent interim relief, Iristel will be compelled to pass on significant costs to consumers and will face lost opportunity costs and reputational damage, which will have the effect of reducing competition for voice services.

22. Iristel submitted that, as noted above, absent interim relief, it will be required to spend funds and redirect labour resources towards rebuilding its network to interconnect

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<sup>11</sup> See Commission [letter](#) dated 7 July 2016 referred to in footnote 4.

<sup>12</sup> See Commission [letter](#) dated 15 December 2015 referred to in footnote 10.

with fibre-based transport suppliers, as opposed to focusing on continuing to expand its footprint in rural and remote areas. Iristel submitted that all of these outcomes are contrary to the public interest.

23. Bell Canada submitted that there was no support for the Commission's previously expressed view that where an applicant establishes irreparable harm, there is a presumption that the balance of convenience favours the applicant. Bell Canada argued that in any event, Iristel has not shown that it would suffer irreparable harm absent interim relief.
24. Bell Canada reiterated its view that Iristel clearly plans to migrate its network regardless of the outcome of its request for interim relief. As a result, this migration is not an "inconvenience" that weighs in Iristel's favour.
25. Bell Canada submitted that insofar as the public interest is concerned, Iristel provided no evidence in support of the view that competition would be lessened in the absence of interim relief.
26. Bell Canada submitted that, if interim relief is granted, it will be inconvenienced by not being able to charge Iristel market rates from January forward. Iristel will therefore be unfairly benefitting from discounted rates to which it is not entitled under contract. Bell Canada added that, if interim relief is granted, Bell Canada's revenues will be decreased, with a negative impact on its investment and marketing initiatives. Bell Canada argued that there is no basis to conclude that financially favouring Iristel over Bell Canada via interim relief is more (or less) convenient under this criterion.
27. Bell Canada also submitted that, absent very compelling evidence to the contrary, the public interest is best served by leaving forborne services to commercial forces.
28. Iristel reiterated that it is not a foregone conclusion that it will migrate away from Bell Canada's network and that it would prefer not to have to do so. With respect to the public interest, Iristel submitted that Bell Canada's "bad faith" and "anti-competitive" conduct should not be rewarded, because for months Bell Canada led Iristel to believe that the two sides had reached an agreement on all the essential terms of a renewed contract.
29. Iristel asserted that the rate increases in question amounted to a "rounding error" for Bell Canada, but were "massive" for Iristel.

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

30. With respect to Iristel's argument that the public interest favours the granting of interim relief, as noted above, Iristel has provided no evidence that it will be forced to increase its retail rates as a result of Bell Canada's rate increases, nor has it indicated the amount of its potential retail rate increases. In addition, Iristel has not provided evidence of how its reputation in the marketplace as a provider of competitively priced voice services would be damaged if it passed on its costs, particularly if it continues to purchase Bell Canada's services for only a limited period of time until it

migrates to an alternative supplier. Iristel has assumed that it will obtain more favourable rates from an alternative supplier than from Bell Canada. Further, the assertion of an adverse impact on competition is, at this point, unsubstantiated and speculative.

31. Further, in the Commission's view, Iristel has failed to demonstrate how the diversion of resources would harm the public interest.
32. With respect to Iristel's argument regarding Bell Canada's conduct while negotiating the contract extension, Iristel has not clearly demonstrated that this is an appropriate factor to consider in determining the balance of convenience.
33. Further, until the Commission has made a determination on whether to re-regulate certain forborne services, as proposed by Iristel as part of its request for final relief, it is in the public interest to let market forces operate.
34. Therefore, in view of the above with respect to the third criterion, the Commission finds that the balance of convenience favours the denial of the relief request.

## **Conclusion**

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

Secretary General

## **Related documents**

- *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