



## Telecom Decision CRTC 2009-85

Ottawa, 20 February 2009

### **Public Works and Government Services Canada – Application for a Commission determination regarding telecommunications services provided by Bell Canada**

File number: 8661-P54-200815251

*In this decision, the Commission sets out the reasons for its determination on 30 January 2009 that Bell Canada's Telecommunications Services Renewal Project Extension Proposal #5 is to apply to transition services the company provides to PWGSC.*

### **Introduction**

1. On 10 November 2008, the Commission received an application by Public Works and Government Services Canada (PWGSC) requesting a Commission determination regarding the continued delivery of certain services provided by Bell Canada pursuant to a customer specific arrangement (CSA) that, including all extensions, was to expire on 15 December 2008.
2. PWGSC requested that the Commission determine, as a question of fact, whether Bell Canada's pricing proposal complied with subsections 27(1) and 27(2) of the *Telecommunications Act* (the Act). PWGSC also requested that if the Commission found that the proposal did not comply with the Act, it determine pricing that would be just and reasonable or direct Bell Canada to negotiate with PWGSC in good faith.

### **Background**

3. PWGSC, on behalf of the Department of National Defence (DND), had originally contracted with Bell Nexxia, a Bell Canada subsidiary,<sup>1</sup> for the provision of a managed private telecommunications network that links Canadian military bases, command centres, and radar installations. The network also provides alarm connectivity and connectivity to other networks in the North American Defence Alliance and to Canadian military ships, aircraft, and bases abroad.
4. In response to the Commission's determination in *Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters*, Telecom Decision CRTC 2002-76, 12 December 2002, that the combination of forborne and regulated services provided to PWGSC constituted a regulated bundle, Bell Canada began to provide the services pursuant to an approved tariff.

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<sup>1</sup> Bell Nexxia was a wholly-owned subsidiary of Bell Canada. On 1 April 2003, Bell Nexxia was fully amalgamated into Bell Canada and, as a result, Bell Canada assumed Bell Nexxia's rights and obligations for any established service and/or interconnection agreements.

5. In 2006 PWGSC initiated a competitive bidding process to determine the provider of the services in question upon expiry of the CSA in June 2007. Although the request for proposals provided for a 12-month transition period, the tariff was amended, at PWGSC's request, to provide for 18 month-to-month extensions in case of delays – that is, until 15 December 2008.
6. Following the competitive bidding process, PWGSC selected TELUS Communications Company (TCC) to replace Bell Canada as the service provider. The last of the 18 month-to-month extensions of the CSA with Bell Canada expired on 15 December 2008.
7. In 2008 it became apparent to PWGSC that it would continue to require many of Bell Canada's services after 15 December 2008 in order to operate the vital network described above during the transition period. In October 2008 PWGSC began negotiations with Bell Canada for continued provision of those services during the transition period (the Transition Services).
8. In particular, PWGSC required alarm connectivity via Digital Voice Access Control System (DVACS) services for up to three years. It also required other services, including private lines, digital network access, and high-speed digital services (Other Services), for a limited period until disconnect orders could be issued to Bell Canada.
9. Bell Canada offered to provide the Transition Services with a minimum revenue guarantee for a five-year term. PWGSC found this offer unacceptable and sought relief from the Commission.

### **Process**

10. Following PWGSC's 10 November 2008 application, the Commission received a joint submission by Bell Canada and PWGSC, dated 28 November 2008. In a letter dated 3 December 2008, the Commission outlined a process for written submissions. PWGSC, Bell Canada, TCC, MTS Allstream Inc. (MTS Allstream), and the Coalition of Communications Consumers (the Coalition) filed written submissions, portions of which were filed in confidence.
11. During the proceeding, Bell Canada committed to continue to provide service to PWGSC after the CSA expired on 15 December 2008. On 11 December 2008, the Commission extended, on an interim basis, the rates, terms, and conditions of the existing CSA between PWGSC and Bell Canada until such time as the Commission had made a final determination. The Commission noted that its final determination could be made effective 16 December 2008.
12. In a letter dated 19 December 2008, the Commission established an expedited oral public hearing to resolve the bilateral dispute between Bell Canada, as the provider of the services, and PWGSC, as the purchaser. The Commission stated that only submissions from PWGSC and Bell Canada were needed to provide the required information as to the services required and the rates, terms, and conditions that should apply. The Commission indicated that the written submissions of TCC, MTS Allstream, and the Coalition would be taken into consideration in making the final determination. TCC did not object to this process. Given the confidential nature of many of the matters to be discussed, parties were advised that portions of the oral hearing would be held *in camera*.

13. The Commission issued interrogatories to Bell Canada and PWGSC to help evaluate their proposals and submissions. These included interrogatories to Bell Canada regarding its costs for providing the Transition Services.
14. The initial oral hearing session was held on 22 January 2009 before a panel of three Commissioners. One portion of the session dealt with the Commission's jurisdiction and the other portion dealt with the appropriate rates and terms for provision of the Transition Services. At the conclusion of the session, the parties were encouraged to negotiate a settlement rather than have the Commission render a judgment. The Commission considered that the parties were in a better position to resolve this matter and suggested the two "bookends" between which a solution should be found. The Commission noted that if the matter could not be resolved by the two parties, it would choose between the two bookends mentioned at the conclusion of that session.
15. Further sessions of the oral hearing took place on 27, 29, and 30 January 2009. Bell Canada and PWGSC each filed two revised proposals during this period.
16. Late on 28 January 2009, TCC filed a letter with the Commission requesting that the proceedings be adjourned for one week and that TCC be permitted to file evidence on DVACS services costs and the transition, which could be tested by the Commission and other parties.
17. By letter dated 29 January 2009, the Commission denied TCC's request. The Commission noted, among other things, that
  - TCC had had ample opportunity to comment, and had provided fulsome submissions, on PWGSC's application;
  - TCC had not contested the Commission's decision of 19 December 2008 that further evidence from TCC was not required;
  - TCC had had ample opportunity to comment on the process followed in the proceeding, but its request came well over a month after the process was established and after two sittings of the oral public hearing; and
  - TCC is a sophisticated and experienced participant in Commission proceedings.
18. The Commission concluded that it was incumbent upon TCC to make any objections known at the earliest possible opportunity and not on the eve of the Commission's decision.
19. In its letter, the Commission also rejected TCC's assertion that its participation was necessary to correct the record of the proceeding regarding DVACS services and the transition.
20. The final oral hearing session took place on 30 January 2009. The two parties had not reached a negotiated settlement by that time. Having considered the parties' final proposals, the Commission selected the one submitted by Bell Canada. The Commission considered it to be the appropriate choice under the circumstances and noted that it would provide written reasons for its decision within three weeks. The Commission stated that this decision is effective as of 16 December 2008.

21. The public record of this proceeding, which closed on 30 January 2009, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."

### **Issues considered**

22. At the 22 January 2009 session of the public hearing, the Commission stated that the issues to be considered were the following:
- Does the Commission have jurisdiction to make a determination with respect to the forborne elements of the Transition Services?
  - What is the appropriate pricing, including terms and conditions, for provision of the Transition Services by Bell Canada?
23. Bell Canada questioned the Commission's jurisdiction to grant the relief requested by PWGSC in this proceeding. However, the Commission considers that Bell Canada accepted the Commission's jurisdiction in this proceeding by submitting its proposals without objection, after the 22 January session of the oral hearing, knowing that the Commission would, if necessary, make a final determination on the appropriate pricing for all the Transition Services.

### **What is the appropriate pricing, including terms and conditions, for provision of the Transition Services by Bell Canada?**

#### **The parties' proposals<sup>2</sup>**

24. PWGSC provided three proposals: one in its original application, and two additional proposals dated 29 and 30 January 2009. These proposals are summarized in Appendix 1.
25. PWGSC argued, among other things, that
- i. Bell Canada's proposed prices are excessive and submitted that in the circumstances there is no alternative provider other than Bell Canada to ensure service continuity;
  - ii. while Bell Canada would incur additional costs to continue to provide the Transition Services, it would be inappropriate to allow the recovery of opportunity costs, and the full recovery of capital investments or costs already covered as part of the initial pricing of the contract;
  - iii. the contract length should reflect the period of time that the services are required; and
  - iv. Bell Canada's concerns regarding the amount of time that it would take to fully disconnect from the Bell Canada network are unfounded.

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<sup>2</sup> PWGSC's and Bell Canada's proposals were filed in confidence, either in whole or in part, with copies served on each other.

26. Bell Canada summarized three alternative proposals in its 11 December 2008 submission and submitted two additional proposals dated 27 and 29 January 2009. These proposals are summarized in Appendix 1.
27. Bell Canada argued, among other things, that
  - i. PWGSC had the opportunity to make alternative arrangements for the Transition Services but had failed to do so<sup>3</sup> and, therefore, Bell Canada should not be penalized for the lack of practical alternatives at this time;
  - ii. PWGSC's proposals fail to recognize the extent of costs that Bell Canada would incur to maintain the infrastructure, replace or upgrade equipment where necessary, and support the stringent service levels necessary to ensure national security;
  - iii. PWGSC's proposals fail to recognize the increase in Bell Canada's costs due to the tail-end loading of disconnects associated with the service migration delays; and
  - iv. past performance and the amount of work remaining to be done indicate that PWGSC's transition schedule is unrealistic and Bell Canada should not be required to assume the risk associated with delays in the transition schedule.

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

28. The Commission considers that this proceeding involves unique circumstances that include 1) national security considerations that both parties agreed make service interruption untenable; 2) a custom-designed integrated network that Bell Canada admitted is inseparable at this time; and 3) the fact that there is no alternative provider that can deliver the Transition Services without an interruption in service delivery.
29. The Commission recognized that the Transition Services were necessary due to delays not occasioned by Bell Canada and that it would incur additional costs to provide such services. Accordingly, at the conclusion of the 22 January 2009 session of the oral hearing the Commission determined that the pricing for the Transition Services should result in monthly revenues that are at least as high as those that would have been provided under the existing CSA. However, the Commission determined that it would be inappropriate for Bell Canada to treat PWGSC as a new customer whose infrastructure would have to be built from scratch and questioned whether Bell Canada's costs would remain constant over the full period for which the Transition Services were required.<sup>4</sup>
30. In response to the concerns expressed at the 22 January 2009 session of the oral hearing, both parties submitted significantly revised proposals with increased convergence regarding the total price payable for the Transition Services. Each of PWGSC's and Bell Canada's final proposals included an overall contract term of two years with the option of a third year at PWGSC's discretion. However, while PWGSC proposed that Bell Canada have no obligation

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<sup>3</sup> For example, see Appendix 2, item 1.

<sup>4</sup> By contrast, the existing CSA provided for scalability of services.

to provide the Other Services after X months,<sup>5</sup> Bell Canada proposed that the Other Services be provided for up to X plus .5X months, with financial incentives to PWGSC for meeting specified disconnection targets.<sup>6</sup>

31. Regarding the provisioning of the Other Services, the Commission notes that there have been significant delays in the transition to TCC as the new service provider. The Commission notes that for the transitioning of each service, first TCC must migrate the service onto its own network and then DND must complete its internal processes to assure itself that it is possible to proceed with issuing an order for disconnection from the Bell Canada network.
32. PWGSC had provided for a 12-month transition period in its competitive bidding process and obtained from Bell Canada an additional 6 months as a contingency against transition delays. Even after the expiry of this 18-month transition period, DND had not – and still had not, as of 22 January 2009 – issued disconnect orders for the vast majority of the Other Services.<sup>7</sup> As a result, Bell Canada continued to operate the bulk of its network associated with PWGSC's requirements.
33. The Commission notes, however, that PWGSC's proposal assumes disconnection of all the Other Services within X months. Based on the past failures to accurately predict the time required for transition and the amount of work left to be done, the Commission considers that there is a significant risk that DND will not have issued disconnect orders to Bell Canada for all remaining Other Services within PWGSC's proposed transition schedule. Given that national security is involved, the Commission considers that a proposal that would limit Bell Canada's contractual obligation to provide the Other Services to X months is unacceptable.
34. The Commission considers that Bell Canada's proposal for an X-plus-.5X-month transition period for the Other Services provides for a more realistic and orderly transition time frame. As noted above, Bell Canada's pricing proposal includes significant financial incentives to PWGSC for timely disconnection. The Commission considers that Bell Canada's proposal better reflects the significant risk that PWGSC will continue to require some Other Services from Bell Canada for more than X months, while passing through Bell Canada's cost savings should PWGSC meet its X-month target.
35. Further, the Commission considers that Bell Canada's proposed pricing provides an appropriate basis for establishing just and reasonable rates in accordance with subsection 27(1) of the Act. The Commission notes, for example,
  - the unplanned capital investments in equipment and software necessary to maintain the network past the extended contract period;
  - the integrated nature of the network, which requires Bell Canada to maintain dedicated support resources and associated facilities until all Transition Services are disconnected; and

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<sup>5</sup> The exact figure is found in Appendix 2, item 2.

<sup>6</sup> See Appendix 2, item 3 for details regarding the incentives.

<sup>7</sup> See Appendix 2, item 4 for details regarding the number of disconnects and migration success rates.

- the additional risks associated with the tail-end loading of disconnect orders.
36. For these reasons, the Commission determined, on 30 January 2009, that Bell Canada's Telecommunications Services Renewal Project Extension Proposal #5 to provide DVACS services for two years, with an optional third year, and to provide Other Services for up to X plus .5X months with incentives for early disconnection, as clarified in the 30 January session of the oral hearing, is appropriate under the circumstances.
  37. The Commission directs Bell Canada to file, within 15 days of the date of this decision, a proposed tariff reflecting the appropriate rates, terms, and conditions to implement its Telecommunications Services Renewal Project Extension Proposal #5, with an effective date of 16 December 2008. The Commission will deal with this tariff application on an expedited basis.

Secretary General

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*

**Summary of PWGSC's Proposals**

<b>Proposal</b>	<b>Brief Description</b>	<b>Total Payments to Bell Canada (2 years)</b>	<b>Total Payments to Bell Canada (3 years)</b>
<b>1</b>	<p>Two separate elements:</p> <p>1) Other Services provided on a month-to-month basis for up to 12 months, subject to 30-day notification for termination</p> <p>2) DVACS services for two years, with an option for a one-year renewal</p>	##	##
<b>2</b>	<p>Years 1 and 2 – Other Services for X months and DVACS services for 24 months</p> <p>Year 3 (optional) – DVACS services only</p>	##	##
<b>3</b>	<p>Years 1 and 2 – Other Services for X months and DVACS services for 24 months</p> <p>Year 3 (optional) – DVACS services only</p>	##	##

**Summary of Bell Canada's Proposals**

<b>Proposal</b>	<b>Brief Description</b>	<b>Total Payments from PWGSC (2 years)</b>	<b>Total Payments from PWGSC (3 years)</b>
<b>1</b>	Services provided as per the existing tariff – minimum contract period (MCP) of 60 months, minimum revenue guarantee (MRG) of ## per month	##	##
<b>2</b>	Services provided as per the existing tariff but modified to offer MCP of 24 months, MRG of ## per month	##	##
<b>3</b>	Three separate contracts:  1) Proposed tariff for customized regulated services  2) Regulated services as per General Tariff  3) Other forborne services as negotiated between the parties	##	##
<b>4</b>	Years 1 and 2 – Other Services for X plus .5X months, with incentives for achieving disconnection targets, and DVACS services for 24 months  Year 3 (optional) – DVACS services only	<b>##, or ## with all disconnection incentive targets met</b>	<b>##, or ## with all disconnection incentive targets met</b>
<b>5</b>	Years 1 and 2 – Other Services for X plus .5X months, with incentives for achieving disconnection targets, and DVACS services for 24 months  Year 3 (optional) – DVACS services only	<b>##, or ## with all disconnection incentive targets met</b>	<b>##, or ## with all disconnection incentive targets met</b>

**Appendix 2 is provided in confidence to PWGSC and Bell Canada.**