BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

IN THE MATTER OF A PART I APPLICATION BY TELUS COMMUNICATIONS COMPANY SEEKING A REVIEW AND VARY OF TELECOM DECISION CRTC 2014-487

TBAYTEL

FEBRUARY 9, 2015

INTRODUCTION

1. On January 8, 2015, TELUS Communications Company ("**TELUS**") submitted an application to the Commission (the "**Application**") in accordance with Part I of the *CRTC Telecommunications Rules of Procedure* (the "**Rules**"). In the Application, TELUS seeks a review and variance of Telecom Decision CRTC 2014-487 ("**Decision 2014-487**"). TELUS submits that the "*Commission made multiple errors of law and fact in TD 2014-487*" and provides a summary of the five errors it alleges were made by the Commission in its determination of Decision 2014-487:

    1. The Commission erred in law in its unduly narrow reading of Decision 2010-897;
    2. The Commission did not order the withdrawal of CDN services in Decision 2010-897;
    3. Tbaytel was required to apply a withdrawal mechanism to affect the withdrawal of its CDN services;
    4. Tbaytel's customers were unjustly discriminated against; and,
    5. The Commission failed to address TELUS' argument that the withdrawal of CDN by Tbaytel was optional.

2. Pursuant to section 62 of the *Telecommunications Act* (the "**Act**"), the Commission has the power to review or vary one of its own decisions. The criteria used by the Commission to determine when it is to review and vary a decision are set out in Telecom Information Bulletin CRTC 2011-214, *Revised Guidelines for Review and Vary Applications*.

3. An applicant seeking the review and vary of a decision under the Act must file an application demonstrating "that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision". These criteria are not exhaustive.

4. Therefore, the aforementioned test is two-fold: not only must the applicant demonstrate that the Commission, for instance, made an error in law or in fact in the original decision, but the applicant must also show that the error raises a substantial doubt as to the correctness of the decision under the review.

5. In the case at hand, TELUS provided no evidence that the Commission made an error in law or in fact and, consequently, also failed to demonstrate that there is a substantial doubt as to the correctness of the decision under review.

6. TELUS merely re-submitted all the arguments that it had raised in its original application of April 11, 2014. The Commission dismissed that application. Therefore, TELUS' request seeking a review and variance of Decision 2014-487 is merely a repetition of its initial application and not a genuine application to review and vary, and should be denied.

7. The following constitutes Tbaytel's full response to the Application. Failure to respond to any specific allegations made by TELUS should not be interpreted as a finding that Tbaytel agrees with these allegations where such an interpretation would be contrary to the interests of Tbaytel.

BACKGROUND

4. As in the previous proceeding that lead to Decision 2014-487, TELUS' account of the facts and circumstances that lead to the current dispute does not accurately reflect the facts on the record. Tbaytel will provide the Commission with a clear description of the events that lead to the current dispute, a description upon which the Commission has already adjudicated.

5. On November 27, 2009, Tbaytel received a request from TELUS to migrate its eligible current and future services to Competitor Digital Network ("**CDN**") rates from DNA rates, including DS1 and DS3 circuits. Thereafter, Tbaytel made the changes necessary to migrate TELUS' services as of the December 2009 billing cycle, as requested.

6. However, in its Application, TELUS alleges that Tbaytel denied multiple requests by TELUS for the provision of CDN services. Tbaytel reiterates that prior to November 27, 2009, Tbaytel was not aware of any formal requests from TELUS in connection with CDN services and the statement attributed to Tbaytel "that no such tariff services were in existence" is untrue and misleading. As indicated above, immediately upon receipt of

a formal request from TELUS, Tbaytel migrated the eligible services effective as of the December 2009 billing cycle as requested.

7. TELUS' original dispute stemmed from its request that Tbaytel retroactively apply its CDN rates to the date Tbaytel's CDN rates were approved. Tbaytel disagreed with TELUS' view that Tbaytel "incorrectly billed CDN-eligible services" going back to October 1, 2007. The aforementioned disagreement lead to TELUS filing a Part VII application with the Commission on June 22, 2010, seeking a retroactive refund of what it claimed were overbilled charges.

8. During this same period, Tbaytel reviewed the underlying reasons for submitting its CDN tariffs to the Commission for approval and concluded that they should not have been filed. Therefore, on July 22, 2010, Tbaytel filed its own Part VII application so as to remove the CDN tariffs that it had implemented along with the other local network interconnection tariffs that the Commission had approved to accommodate local competition in Tbaytel's territory.

9. Tbaytel's Part VII application dated July 22, 2010, resulted in Decision 2010-897, which was issued specifically to Tbaytel to deal with the unique set of circumstances that Tbaytel had brought before the Commission. Indeed, contrary to TELUS' contention, Decision 2010-897 was not rendered in response to TELUS' prior Part VII application.

10. In Decision 2010-897, the Commission determined that as of December 2, 2010, and onwards, "any new circuits ordered by new or existing customers should be provided at digital network access (DNA) rates".[1] This determination effectively withdrew Tbaytel's CDN tariff since no carrier as of December 2, 2010, could order a CDN service from Tbaytel. The only CDN rates in place at the time of Decision 2010-897 were those in place as of December 2, 2010, and these rates would remain in place until the phase-out periods provided in the Appendix to the decision.

11. In order to ensure a complete and accurate record of the historical events pertaining to Tbaytel's CDN tariff, Tbaytel must correct several of the factually inaccurate statements

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[1] Telecom Decision CRTC 2010-897, paragraph 22.

made in TELUS' Application. At paragraph 13 of its Application, TELUS writes that, "As directed in TD 2010-897, TBayTel modified its billing for DNA circuits to which TELUS was subscribing such that TELUS was charged the applicable CDN rates, based on TBayTel's tariff."[2] This statement is incorrect, as it again implies that Tbaytel only complied upon a direction from the Commission. Tbaytel reiterates that it migrated TELUS' in place circuits to CDN rates upon receipt of a formal written request and incorporated the changes effective for the period requested.

12. TELUS further states that "Following that decision, TELUS has been obtaining CDN services from Tbaytel in accordance with Tbaytel's CDN tariffs." This statement is misleading as it implies that TELUS continues to obtain CDN rates for all circuits purchased. In fact, the only circuits that TELUS receives at CDN rates were those in place prior to December 2, 2010. This will only be so until the end of the specified CDN phase-out period. Any new circuit requests that Tbaytel receives from TELUS or any other carrier are rated at Tbaytel's DNA tariff rates in accordance with Decision 2010-897. In light of the above, since December 2, 2010, no carrier can obtain CDN rates from Tbaytel, as Decision 2010-897 removed Tbaytel's CDN Tariff.

13. On January 15, 2014, Tbaytel sent letters to the two remaining customers (including TELUS) that were receiving CDN rates and informed them that Tbaytel, as directed by the Commission by virtue of Decision 2010-897, would be adjusting the charges for DS3 and OC3 access and associated channelization service as well as for DS0, DS1, DS3 and OC3 link and channel service from CDN rates to Tbaytel's retail DNA rates.

14. That same day, Tbaytel received an email requesting further clarification and copies of Tbaytel's DNA rates and Tbaytel responded by clarifying that it was implementing the rate change in accordance with the prescribed phase-out included in the appendix to Decision 2010-897 and included a copy of Tbaytel's DNA tariff.

15. Two phone calls were held between Tbaytel and TELUS staff to discuss the rate change. TELUS was not satisfied with the outcome of the discussions and, as a result, it filed a Part I application with the Commission on April 11, 2014, in which it sought a number

[2] TELUS Part I Review and Vary Application, paragraph 13

of changes. Tbaytel filed comments on May 12, 2014 to refute TELUS' claims. On May 22, 2014, TELUS filed its reply comments.

16. On September 22, 2014, the Commission rendered Decision 2014-487 denying TELUS' application. In the decision, the Commission determined that:

    a. Tbaytel is not subject to the end of transition requirements set out in paragraph 191 of Telecom Decision 2008-17 with respect to the withdrawal of its wholesale CDN services[3];

    b. All digital network services provided by Tbaytel to TELUS as of March 3, 2013 were and are to be provided at DNA rates[4]; and

    c. Tbaytel is entitled to apply the rate adjustment from CDN to DNA rates for the period of March 3, 2013 to December 31, 2013[5].

THE JANUARY 8, 2015, TELUS PART I REVIEW AND VARY APPLICATION

17. In TELUS' current review and vary Application, TELUS claims that the Commission made "multiple errors of law and fact" in Decision 2014-487. Tbaytel provides its responses below to TELUS' claims.

TELUS' first allegation: the Commission erred in law with its unduly narrow reading of Decision 2010-897

18. TELUS claims that the Commission erred in law with its unduly narrow reading of Decision 2010-897. TELUS asserts that the Commission, in making its determinations in Decision 2014-487, relied only on the wording of paragraph 22 of Decision 2010-897 rather than taking into account what was stated in paragraph 21. TELUS alleges that by not performing "a full, proper and contextual reading of TD 2010-897", the Commission did not properly interpret its own intent of Decision 2010-897.

[3] Decision 2014-487, Paragraph 16
[4] Decision 2014-487, Paragraph 19
[5] Decision 2014-487, Paragraph 20

19. This assertion is unsubstantiated both in law and in fact. TELUS incorrectly relies on a decision rendered by the Supreme Court of Canada, namely *Bell ExpressVu Limited Partnership v. Rex*, [2003] 2 S.C.R. 559, 2002 SCC 42 ("***Bell ExpressVu***"). *Bell ExpressVu* is one of Canada's leading cases on statutory interpretation. It stands for the proposition that the words of a "statute' should be interpreted in their entire context. However, TELUS' reliance on that decision is unfounded, as *Bell ExpressVu* sets out the basic rule of "statute" interpretation, but in no way does it establish any rules of case law or prior decision interpretation. As a result, the use of *Bell ExpressVu* raises significant doubt as to the seriousness of the review undertaken by TELUS and, at the very least, the Commission should set aside any arguments raised by TELUS in relation to *Bell ExpressVu*.

20. Notwithstanding TELUS' incorrect use of *Bell ExpressVu*, Tbaytel submits that the Commission's intention in Decision 2010-897 was clear, that context was taken into account, and that the Commission never intended to read a single paragraph in isolation. For instance, by reading paragraphs 21 and 22 along with the appendix to Decision 2010-897, the main theme at issue are the <u>phase-out periods</u> and not the phase-out plan as suggested by TELUS (emphasis added).

21. The plain reading of paragraphs 21 and 22 and the appendix clearly shows that the Commission intended to tie Tbaytel's phase-out period to that of the large ILEC's phase-out period which can be found in the large ILEC's phase-out plan. As such, the "consistency" mentioned in paragraph 21 refers to the consistency in the phase-out periods, and not in phase-out plans as TELUS has incorrectly stated.

22. There is no doubt that this was the Commission's true intention as the phase-out period included in the appendix to Decision 2010-897 is the same as the large ILEC phase-out period. The appendix contains no additional criteria.

23. Moreover, TELUS provides no evidence that the Commission did not take into account the wording of paragraph 21 in its analysis that lead to the Commission's determination in Decision 2014-487. TELUS speculates that since the Commission finding was different than TELUS' interpretation, the Commission did not take a contextual approach at paragraph 21.

24. Therefore, when reading the full context of paragraphs 21 and 22 combined with the appendix to Decision 2010-897 it is clear that the Commission's intention was to ensure consistency of Tbaytel's CDN phase-out <u>period</u> to the large ILEC's phase-out <u>period</u> (emphasis added). Consequently, the Commission correctly did not include a notification requirement as part of Decision 2010-897. In light of the above, it is clear that TELUS failed to raise a substantial doubt as to the correctness of the decision under review.

TELUS' second allegation: the Commission did not order the withdrawal of CDN services in Decision 2010-897

25. The second error that TELUS alleges the Commission made was "the mischaracterization of TD 2010-897 as a withdrawal order". TELUS argues that the Commission did not withdraw Tbaytel's CDN service but rather destandardized it because the "the service is no longer available to new customers, but continues to be available to existing customers".

26. The difference between what normally occurs with the destandardization of a service and what occurred in Decision 2010-897 is that a destandardized service is generally maintained as is until such time that the customer cancels the service or requests a change to the service at which time the customer would no longer be able to purchase the destandardized service. With regard to Tbaytel's CDN service, this was not the case, as there was a defined end date incorporated into Decision 2010-897. The two affected parties, one of whom was TELUS, knew this end date. As such, the Commission correctly determined that Tbaytel's CDN service was effectively withdrawn as of the date of Decision 2010-897.

27. In paragraph 22 of its Application, TELUS refers to Telecom Decision CRTC 2008-22 and the process described therein to claim that Tbaytel did not follow the steps required to withdraw its CDN service.

28. Tbaytel did not need to follow the process referred to in Decision 2008-22 given the fact that Decision 2010-897 accomplished the processes TELUS references. In the proceedings that lead to Decision 2010-897, Tbaytel's original application was a request

to remove its CDN service rates given the unique circumstances in which the rates were implemented. In this proceeding, Tbaytel provided its *rationale* for the removal and indicated that only two parties would be affected thereby and that Digital Network service would continue to be available. Tbaytel provided a copy of its application to the affected parties, both of whom fully participated in the proceeding and were completely aware of the consequences of Decision 2010-897.

29. The same steps were followed in the proceeding that lead to Decision 2010-897 as those that were outlined in Decision 2008-22. Furthermore, the Commission acknowledged the appropriateness of Tbaytel's application when it denied TELUS' request to return Tbaytel's application to remove its CDN service rates.

30. In paragraph 23 of its Application, TELUS asserts that Tbaytel "recognized that TD 2010-897 did not withdraw its services because it continued to provide the service after that date and still continues to have the service noted in its tariffs."

31. This statement is incorrect. Tbaytel has submitted, and continues to submit, that its CDN service was effectively withdrawn by Decision 2010-897 and, as previously stated in its response to TELUS' April 11, 2014, Part I application, Tbaytel's CDN tariff rates were noted in Tbaytel's tariffs as a courtesy and only as a matter of reference.

32. Additionally, in paragraph 23 of its Application, TELUS implies that Tbaytel understood that notification was required based on the fact that Tbaytel did not bill TELUS until several months after the March 3, 2013, phase-out date.

33. This statement is also incorrect. Tbaytel did not extend CDN service past the March 3, 2013, phase-out date because it felt it was required to provide notification, but rather simply due to an oversight and Tbaytel rectified the billing in accordance with its terms of service.

34. TELUS then contends that since the Commission makes references to the "grandfathering" of Tbaytel's CDN service rates, this confirms that Tbaytel's CDN service rates were not withdrawn. Tbaytel once again disagrees with this interpretation as the one oversight is the fact that an end date is provided for when the service rate will

no longer be available. In a grandfathering situation, the customers maintain their service until such time as they choose to cancel the service or request a change, at which time the grandfathered service is no longer available. As of December 2, 2010, Tbaytel's CDN service rates were not available for circuit orders for new or existing customer orders and the existing circuits as of December 2, 2010, were to remain in place at the existing CDN rates until the phase-out date of March 3, 2013. The customer, in this case TELUS, did not have the choice to continue to purchase the circuits at CDN rates after March 3, 2013, the date that was established by the Commission in Decision 2010-897 for removal.

35. As Tbaytel has previously stated herein as well as in the prior proceedings, the situation surrounding Tbaytel's CDN service rates was unique and arose from a regulatory anomaly in the introduction of Tbaytel's CDN tariff rates. The Commission considered the unique nature of Tbaytel's CDN service rates and made its determinations accordingly.

36. Therefore, TELUS may not agree with the Commission's decision, but cannot claim that Decision 2010-897 did not withdraw Tbaytel's CDN service rates and that therefore Tbaytel is not able to phase-out its rates without a notification in accordance with a decision that was not applicable to Tbaytel.

37. The Commission made a reasoned decision in making its determinations in Decision 2010-897 to remove Tbaytel's CDN service rates and reaffirmed its findings in Decision 2014-487 when it denied TELUS' attempt to force the large ILEC phase-out plan notification process on Tbaytel.

TELUS' third allegation: Tbaytel was required to apply a withdrawal mechanism to affect the withdrawal of its CDN services

38. The third error that TELUS claims the Commission made was that the Commission did not follow the framework and processes that apply when a tariffed service is withdrawn. TELUS again refers to the withdrawal process set out in Decision 2008-22 and Decision

2008-17 and insists that the Commission erred in not forcing Tbaytel to provide "some sort of withdrawal process".[6]

39. As was argued by Tbaytel in response to TELUS' April 11, 2014 Part I application and confirmed by the Commission in Decision 2014-487, Decision 2008-17 does not pertain to Tbaytel.

40. The proceeding that resulted in Decision 2010-897 encompassed all aspects of the withdrawal process included in Decision 2008-22, allowed for a more fulsome participation from the impacted parties and provided a service end date. Given the foregoing, the impacted parties had more than sufficient notification of the impending removal of Tbaytel's CDN service rates.

41. In paragraph 27 of its Application, TELUS indicates that in order to remove a tariffed service, Tbaytel would need to "utilize some sort of withdrawal process", even "a new withdrawal process unique to Tbaytel's CDN service". Tbaytel, as it has done before, submits that the circumstances surrounding Tbaytel's CDN service tariffs were unique and would agree with TELUS that a unique process to deal with the removal of Tbaytel's CDN service rates was applicable. To that end, Tbaytel asserts that the proceedings that resulted in Decision 2010-897 constituted a unique process that ultimately ended in the effective withdrawal of Tbaytel's CDN service. The Commission reaffirmed this intention in Decision 2014-487.

42. TELUS cannot claim to have, and does not have, a greater understanding than the Commission has of the issues at hand. Furthermore, Tbaytel notes that the mere absence of the words "withdraw" or "withdrawal" in Decision 2010-897 does not hide or annihilate the intent of the Commission. The Commission unequivocally confirmed its intent in Decision 2014-487.

43. Decision 2010-897 withdrew Tbaytel's CDN service rates for any new circuits for new and existing customers, as well as provided the notification of the phase-out date, for those circuits that were in place prior to Decision 2010-897, as intended by the Commission.

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[6] TELUS Part I Review and Vary Application, paragraph 27

TELUS' fourth allegation: Tbaytel's customers were unjustly discriminated against

44. TELUS claims the fourth error made by the Commission was its determination, in Decision 2014-487, that Decision 2010-897 relieved Tbaytel of what TELUS contends is a universal obligation that all suppliers of CDN services must provide a minimum of six months notice to its customers prior to the withdrawal of the service. TELUS indicates that it had "a contingency plan in place to migrate its circuits off of the Tbaytel network upon receiving six months written notice from Tbaytel"[7]. TELUS also asserts that the lack of notice amounted to unjust discrimination against TELUS.

45. As has been previously stated by Tbaytel, the parties involved in the proceedings leading to Decision 2010-897, inclusive of TELUS, were aware of who would receive CDN services at existing CDN rates and for how long, and were also notified when the CDN rates would expire and when digital network access rates would commence. Decision 2010-897 provided TELUS with more than three years notification of when it would no longer be available to receive CDN service rates. In Decision 2014-487, the Commission reaffirmed its previous decision as well as Tbaytel's position that a six-month notification was not required.

46. In TELUS' April 11, 2014, Part I application, TELUS stated that "Tbaytel is denying TELUS the ability to plan its service provisioning arrangements". In its current Application, it has stated that "TELUS had a contingency plan in place to migrate its circuits off of the Tbaytel network…".

47. There is a conspicuous inconsistency between the above-mentioned two statements, as either TELUS had a plan or it did not have a plan. Furthermore, drafting a contingency plan shows that TELUS had previous knowledge of an upcoming phase-out of Tbaytel's CDN service rates for the circuits billed at CDN service rates that TELUS was purchasing from Tbaytel.

48. A sophisticated company such as TELUS should not require a six-month notification to implement a contingency plan and fail to implement its plan without such a notification.

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[7] TELUS Part I Review and Vary Application, paragraph 34

49. TELUS claims that it has been unjustly discriminated against because it did not receive a six-month notification in addition to the over-three-year notification that was provided through the findings of Decision 2010-897.

50. As Tbaytel noted in its May 12, 2014, response to TELUS' previous Part I application, TELUS was fully aware of when the phase-out period was ending. Also, unlike the large ILECs' phase-out of CDN services that required a number of transitional steps because the CDN services remained an available service for ordering during the period between the date of Decision 2008-17 and the end of the phase-out period, Tbaytel's CDN service became no longer available for customers to order immediately upon the Commission's issuing of Decision 2010-897. All circuits ordered by TELUS from Tbaytel since the issuance of Decision 2010-897 have been rated at Tbaytel's DNA tariff rates. TELUS knew or ought to have known what rates were available to them for any circuit orders they required from Tbaytel as they were the same rates that they had been receiving since December 2, 2010 and which were <u>the only rates available to TELUS, or any other carrier</u> (emphasis added).

51. Therefore, TELUS errs in stating that it was unjustly discriminated against, because TELUS and the only other customer receiving CDN service rates from Tbaytel received significantly more than a six-month notification and were aware of when the phase-out of Tbaytel's CDN service rates would occur.

TELUS' fifth allegation: the Commission failed to address TELUS' argument that the withdrawal of CDN by Tbaytel was optional

52. The final error that TELUS claims the Commission made is that the Commission failed to address TELUS' argument that the withdrawal of CDN by Tbaytel was optional and, thus, required Tbaytel to provide "some notice needed to be provided to signal to TELUS that a withdrawal was to occur".[8]

53. Once again, Tbaytel states that as of December 2, 2010, no carrier (including TELUS) was able to receive CDN service rates from Tbaytel for new circuits ordered after December 2, 2010. The only circuits that would receive CDN rates were those in place

[8] TELUS Part I Review and Vary Application, paragraph 40

prior to December 2, 2010, only for the two customers that had previously acquired CDN service rates and only until the phase-out end date of March 3, 2013. There are no economic or financial reasons for Tbaytel to continue to provide CDN service rates past the phase-out period end date of March 3, 2014. As Tbaytel previously mentioned, the fact that Tbaytel continued to charge CDN rates past the phase-out end date was simply the result of an oversight and, upon recognizing this oversight, Tbaytel rectified the billing in accordance with its terms of service.

54. TELUS also contends that the Commission erred in law in failing to consider, in Decision 2014-487, TELUS' argument that withdrawal of CDN by Tbaytel was optional and the Commission "failed to consider this issue raised by TELUS".[9]

55. This contention is unfounded, as not every argument commands a specific written response in the decision, especially one that, after consideration by the Commission, is not considered persuasive. In the proceedings brought before the Commission, numerous issues and arguments have been raised by parties, and it is common that the Commission does not adopt a position on all of issues and arguments in its written decisions. However, this does not mean that the Commission does not take into consideration all of the information and arguments brought forward in the proceedings. Rather, the Commission weighs the evidence, makes reasoned determinations and renders its decision.

56. Finally, in their conclusion TELUS raises the issue that should the Commission have "any concerns about the revenue consequence to TBayTel, of this policy decision, TELUS submits that the Commission should find that TBayTel is eligible to apply for exogenous adjustment that would offset the impact of this decision."[10]. This is a new item that TELUS has not previously raised before and therefore, outside of the scope of this proceeding.

[9] TELUS Part I Review and Vary Application, paragraph 43
[10] TELUS Part I Review and Vary Application, paragraph 46

CONCLUSION

57. As indicated above the test for a review and variance is two-fold: not only must the applicant demonstrate that the Commission, for instance, made an error in law or in fact in the original decision, but the applicant must also show that the error raises a substantial doubt as to the correctness of the decision under the review

58. In the case at hand TELUS claimed that the Commission made multiple errors in law and fact in Decision 2014-487, however, as Tbaytel has documented in its response TELUS has failed to provide evidence that the Commission made an error in law or in fact and, consequently, also failed to demonstrate that there is a substantial doubt as to the correctness of the decision under review.

59. It is Tbaytel's position that TELUS' Part I review and vary application is no more than a re-submitting of the same arguments that it used in its previous Part I application of April 11, 2014 that was denied by the Commission.

60. Accordingly, Tbaytel requests that the Commission deny, in full, TELUS' Part I application to review and vary Decision 2014-487.

61. Respectfully submitted this 9th day of February 2015.

Respectfully,

Stephen Scofich
Regulatory Analyst
Tbaytel

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cc: TELUS