



Telecom Decision CRTC 2007-111

Ottawa, 22 November 2007

Barrett Xplore Inc. – Application to review and vary certain determinations in Telecom Decision 2007-50

Reference: 8662-B55-200711384

In this Decision, the Commission denies an application by Barrett Xplore Inc. to review and vary certain determinations in Telecom Decision 2007-50.

Introduction

1. Barrett Xplore Inc. (BXI) filed an application, dated 13 August 2007, to review and vary certain aspects of Telecom Decision 2007-50.
2. More specifically, BXI requested that the Commission review and vary its determinations in Telecom Decision 2007-50 approving the use of deferral account funds by Bell Aliant Regional Communications, Limited Partnership (Bell Aliant), Bell Canada, MTS Allstream Inc. (MTS Allstream), and TELUS Communications Company (TCC) to expand broadband services to certain rural and remote communities in British Columbia, Manitoba, Ontario, and Quebec.
3. BXI also requested a stay of implementation of those same aspects of Telecom Decision 2007-50, pending the Commission's review of its application and the determinations in the proceeding initiated by Telecom Public Notice 2006-15.
4. The Canadian Cable Systems Alliance, Coopérative de câblodistribution de l'Île-aux-Coudres, Xittel Telecommunications Inc. (Xittel), and Fédération des coopératives des câblodistributeurs du Québec filed comments in support of BXI's review and vary application. Open Source Solutions agreed with BXI that Telecom Decision 2007-50 was premature, but indicated that subject to certain enhancements its members would like to see broadband services deployed. Bell Aliant and Bell Canada (collectively, Bell Canada et al.) and TCC filed comments generally opposing the review and vary application although TCC submitted that it was reasonable for BXI to assume that it could add new planned communities as part of its final comments. The record of this proceeding closed 24 September 2007 with the receipt of BXI's reply comments. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
5. The Commission has identified the following issues to be addressed in its determinations:
 - I. Did the Commission err by issuing Telecom Decision 2007-50 prior to the close of the record?
 - II. Should the communities of Lafontaine and Newtonville be removed from the list of uncontested communities set out in Telecom Decision 2007-50?

- III. Should the Commission stay the implementation of Telecom Decision 2007-50 until the broader issues raised in the Telecom Public Notice 2006-15 proceeding are addressed?

Background

6. In Telecom Decision 2006-9, the Commission set out guidelines for the incumbent local exchange carriers (ILECs)¹ concerning the disposition of funds remaining in the deferral accounts.² The Commission determined, among other things, that initiatives to expand broadband services to rural and remote communities were an appropriate use of funds in the deferral accounts.³ Accordingly, the Commission directed each ILEC that wished to pursue broadband expansion to file, by 30 June 2006,⁴ proposals to expand broadband services to the customer premises in communities located primarily in Bands E and F in high-cost serving areas unlikely to receive such services from any other service provider in the near future. The ILECs were also to consult with provincial government agencies responsible for broadband initiatives to ensure that the proposals would take into account provincial priorities.
7. In Telecom Public Notice 2006-15, the Commission initiated a proceeding to consider the ILECs' proposals. As part of this process, alternative broadband service providers (ABSPs) were provided with the opportunity to file submissions with respect to the exclusion of any community identified in the ILECs' proposals, on the basis that it was already served or likely to be served in the near future. ABSPs were directed to file certain information regarding their current and proposed service areas by 19 January 2007. This date was subsequently extended to 19 February 2007. The Commission, the ILECs, and other interested parties were then able to test the information submitted by the ABSPs through the use of interrogatories and requests for further responses to interrogatories.
8. The Commission issued Telecom Decision 2007-50 approving the use of deferral account funds by Bell Aliant, Bell Canada, MTS Allstream, and TCC to expand broadband services to certain rural and remote communities in Rate Bands E, F, and G in British Columbia, Manitoba, Ontario, and Quebec where no ABSP had indicated, on the record of the Telecom Public Notice 2006-15 proceeding, that it currently provided or had firm plans to provide broadband services in the near future ("uncontested communities").

¹ The incumbent local exchange carriers referred to in Telecom Decision 2006-9 were Aliant Telecom Inc., now part of Bell Aliant Regional Communications, Limited Partnership; Bell Canada; MTS Allstream Inc.; Saskatchewan Telecommunications; TELUS Communications Inc., now TELUS Communications Company (TCC); Société en commandite Télébec, now known as Télébec, Limited Partnership (Télébec); and TELUS Communications (Québec) Inc. (TCQ), now part of TCC.

² In Telecom Decision 2002-34, the Commission imposed a pricing constraint equal to inflation less a productivity offset of 3.5 percent on residential local services in non-high-cost serving areas. However, in order to avoid an adverse impact on local competition, the Commission required that all incumbent telephone companies that were subject to the determinations in Telecom Decision 2002-34 create a deferral account where they placed amounts equal to the revenue reductions that would otherwise have resulted from an application of the price cap formula. Deferral accounts were subsequently established for Télébec and TCQ in Telecom Decision 2002-43.

³ Initiatives to improve access to telecommunications services for persons with disabilities were also deemed to be an appropriate use of the funds.

⁴ The deadline was later extended to 1 September 2006.

Commission's analysis and determinations

9. In Telecom Public Notice 98-6, the Commission set out the criteria to consider review and vary applications. Specifically, the Commission stated the following:

...applicants must demonstrate 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.

I. Did the Commission err by issuing Telecom Decision 2007-50 prior to the close of record?

10. BXI submitted that, for a variety of reasons, the Commission had erred by issuing Telecom Decision 2007-50 without final comments or reply comments in the Telecom Public Notice 2006-15 proceeding. In particular, BXI submitted that a number of issues at the heart of Telecom Decision 2006-9 were raised by parties during the Telecom Public Notice 2006-15 proceeding, including what constituted an uncontested community, least-cost technology, the provisioning of service to business customers, and the need to have appropriate backbone services in place. BXI submitted that these issues should have been addressed before any community was approved. BXI also submitted that the Commission had breached the rules of natural justice by issuing a decision prior to the close of the record without notice that such a decision would be issued.
11. With respect to "uncontested communities," the Commission notes that Telecom Public Notice 2006-15 set out a clear process for ABSPs to identify themselves and to provide the Commission with information regarding their present and planned service areas by 19 February 2007. Telecom Decision 2007-50 approved only a limited number of communities based on the Commission's review of the ILECs' proposals and the evidence received from ABSPs. Given that no ABSP had requested the exclusion of the communities approved in Telecom Decision 2007-50 on the record of the proceeding within the time frame established as part of the Telecom Public Notice 2006-15 proceeding, the Commission considers that it did not have to wait for final or reply comments before rendering its decision on these communities and that no principle of natural justice was breached in doing so.
12. With respect to least-cost technology, pursuant to the Commission's 10 March 2006 letter setting out the requirements for the filing of broadband expansion proposals (10 March 2006 letter), the ILECs were required to use least-cost technology allowing them to deploy broadband services comparable to those provided in urban areas in terms of rates, terms and conditions, upload and download speeds, and reliability. In their submissions, BXI and Xittel noted the difference in language between Telecom Decision 2006-9 (use least-cost technology for each project) and Telecom Decision 2007-50 (least-cost technology currently employed by each ILEC); however, the Commission does not consider that this represents a change in approach. In its analysis of least-cost technology, the Commission was cognizant of the fact that the ILECs are able to leverage synergies with their existing technologies and infrastructure in order to provide service which meets the standards set out in the 10 March 2006 letter at a cost which is lower than it would be if they were to introduce

new technologies. Accordingly, the Commission continues to be satisfied, based on the evidence in the ILECs' proposals and interrogatory responses, that the ILECs' proposals satisfy the requirement to use least-cost technology.

13. In addition, the Commission notes that, consistent with its 10 March 2006 letter, the ILECs may re-engineer appropriate broadband expansion projects and report the details to the Commission if new technologies that meet the service and least-cost technology requirements are introduced during the rollout of the program. The Commission considers that this is consistent with a dynamic view of the broadband service marketplace.
14. Concerning whether business customers should be able to access the deferral account-funded broadband services, the Commission agrees with TCC's submission that the determination in Telecom Decision 2006-9 that residential customers should primarily benefit from the funds remaining in the accounts was not intended to limit the use of the funds to residential customers. The Commission continues to consider, as stated in Telecom Decision 2006-9, that the social and economic development of rural and remote communities would be enhanced through the establishment of broadband services. The Commission expects that the number of business subscribers in the funded communities will be small compared to residential subscribers, and is of the view that once the initial investment is made to provide broadband service in a community, it would be appropriate to allow small business and other business customers to access the services.
15. With regard to BXI's submission that communities should not be approved before appropriate backbone services are in place, the Commission notes that the broader issue of competitor services will be addressed in upcoming Commission determinations as part of the Telecom Public Notice 2006-15 proceeding and any related follow-up processes. The Commission considers that the logistics of provisioning competitor services and associated rates did not require finalization before approving the use of deferral account funds for certain communities in Telecom Decision 2007-50.
16. For all the reasons stated above, the Commission disagrees that the issuance of Telecom Decision 2007-50 without final comments or reply comments gave rise to an error in fact or law.

II. Should the communities of Lafontaine and Newtonville be removed from the list of uncontested communities set out in Telecom Decision 2007-50?

17. BXI noted the dynamic nature of the broadband marketplace and submitted that the Telecom Public Notice 2006-15 proceeding did not include a logical milestone to update its current and planned coverage information. As a result, BXI noted that it had intended to mention in its final comments that certain communities had been approved for broadband expansion by its Board of Directors, including the Ontario communities of Lafontaine and Newtonville. However, BXI submitted that the approval of these communities in Telecom Decision 2007-50 had negated its opportunity to update its information. BXI submitted that this was a fundamental error in the process, representing a fundamental change in the facts which led to the decision.

18. The Commission recognized the dynamic nature of the broadband service marketplace within the confines of a regulatory process when, as part of the Telecom Public Notice 2006-15 proceeding, ABSPs were given an opportunity to request the exclusion of communities from the ILECs' proposals on the basis of both their current and planned service areas. The Commission appreciates that plans can change over time, but agrees with Bell Canada et al. that in any regulatory proceeding certain dates must be established that apply to all parties. In order to ensure that the process is fair, predictable, and transparent, all parties are expected to adhere to these timelines subject to any requests for extension that the Commission may grant. If BXI had concerns with the absence of a milestone in the established process for updating its served and planned communities, this specific issue should have been raised at an early stage so that all parties and communities could be treated equally.
19. The Commission considers that with respect to broadband initiatives, the primary objective of the Telecom Public Notice 2006-15 proceeding remains to bring the benefit of broadband services to unserved communities. The Commission welcomes information clarifying the areas and services for both the served and planned communities identified in the ABSPs' February 2007 submissions where such information will allow it to better assess whether a community is served or likely to be served. The Commission also considers that the removal of communities from either the ILECs' or ABSPs' lists allows a more focused targeting of funds to those communities that meet the criteria for funding. However, allowing ABSPs to add communities to their plans at the late stages of the proceeding, after the plans of others have been made available on the public record, would be unfair to those ABSPs who adhered to the procedure as set out in Telecom Public Notice 2006-15. Interested parties, including the ILECs, have not had an opportunity to question BXI on its plans for these communities and there has been no opportunity to build a full record on which the Commission could base its decision. As a result, where a community has been approved by the Commission for broadband expansion in Telecom Decision 2007-50, the Commission considers that it would not be appropriate to vary such approval on the basis that an ABSP now has plans to serve that community.
20. For these reasons, the Commission **denies** BXI's request to remove Lafontaine and Newtonville from the list of uncontested communities appended to Telecom Decision 2007-50. The Commission considers that BXI has failed to show substantial doubt as to the correctness of Telecom Decision 2007-50 and, accordingly, **denies** BXI's application to review and vary Telecom Decision 2007-50.
21. The Commission notes that concurrent with the release of this Decision it is issuing Telecom Decision 2007-110. In that Decision, the Commission is approving an application by Mitchell Seaforth Cable T.V. Ltd. (Mitchell Seaforth) to review and vary Telecom Decision 2007-50 with respect to the community of Dublin, Ontario. Due to the fact that Mitchell Seaforth was already providing broadband service to Dublin on 19 February 2007 and, thus, within the time frame established for the identification of served and planned communities in the Telecom Public Notice 2006-15 proceeding, the Commission considered it appropriate to remove Dublin from the list of uncontested communities and to assess it on the same basis as other contested communities. BXI, on the other hand, requested the removal of Lafontaine and Newtonville on the basis that they had only recently become part of its expansion plans, beyond the time frame established for the identification of such communities. Accordingly, the Commission considers that the different circumstances warrant different conclusions in the case of the BXI and Mitchell Seaforth applications

III. Should the Commission stay the implementation of Telecom Decision 2007-50 until the broader issues raised in the Telecom Public Notice 2006-15 proceeding are addressed?

22. Given the Commission's determinations regarding BXI's application to review and vary Telecom Decision 2007-50, the Commission concludes that BXI's request for a stay of that Decision is moot.

Secretary General

Related documents

- *Mitchell Seaforth Cable T.V. Ltd. – Application to review and vary the determinations in Telecom Decision 2007-50 with respect to the community of Dublin, Ontario*, Telecom Decision CRTC 2007-110, 22 November 2007
- *Telecom Public Notice CRTC 2006-15 – Use of deferral account funds to expand broadband services to certain rural and remote communities*, Telecom Decision CRTC 2007-50, 6 July 2007, as amended by Telecom Decision CRTC 2007-50-1, 27 July 2007
- *Review of proposals to dispose of the funds accumulated in the deferral accounts*, Telecom Public Notice CRTC 2006-15, 30 November 2006
- *Disposition of funds in the deferral accounts*, Telecom Decision CRTC 2006-9, 16 February 2006
- *Implementation of price regulation for Télébec and TELUS Québec*, Telecom Decision CRTC 2002-43, 31 July 2002
- *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, as amended by Telecom Decision CRTC 2002-34-1, 15 July 2002
- *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998

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>