Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

# Telecom Decision CRTC 2013-39

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Ottawa, 1 February 2013

## Primus Telecommunications Canada Inc. – Request to delay date that rate approval would no longer be required for certain wholesale services

File number: 8661-P11-201214098

*In this decision, the Commission denies, by majority decision, Primus' application to delay by six months the 3 March 2013 date on which rate approval will no longer be required for certain wholesale services.*

### Introduction

1. Under the *Telecommunications Act* (the Act), the Commission has the power to oblige Canadian carriers to provide telecommunications services. Further, the Act requires that telecommunications services be provided at rates, terms, and conditions approved by the Commission. However, in appropriate circumstances, the Commission can relieve Canadian carriers of these requirements.

2. In Telecom Decision 2008-17, the Commission decided to no longer require the affected incumbent local exchange carriers (ILECs) to provide certain wholesale services to competitors and found that if these ILECs chose to continue to provide these services, they could so without having to obtain prior rate approval by the Commission. The Commission did, however, retain its powers to address issues of unjust discrimination or undue preference under subsections 27(2) and 27(4)[1] of the Act. For certain services, the effective date for the implementation of these findings was 3 March 2011, while for the other wholesale services, it was set to be 3 March 2013.

3. In Telecom Decision 2008-17, the Commission directed the ILECs to provide advance written notice, to the Commission and all customers, of the ILEC's intentions regarding the wholesale services that would no longer be subject to rate approval (the "relevant services") so as to allow customers to review and rearrange their provisioning arrangements for the wholesale services in question. The Commission stated that the written notice must

[1] Subsection 27(2): No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.
Subsection 27(4): The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

- be made at least six months before the date that rate approval was no longer required,

- identify the tariff pages that will be withdrawn, and

- describe the carrier's intentions with respect to the continued provision of the relevant services in each geographic market in which they are offered at that time.

## Background

4. In Telecom Decision 97-15, the Commission put in place the primary purpose rule, also referred to as the "co-location rule," to ensure that competitors who choose to locate their equipment in or near the ILEC central offices do so to interconnect with the ILEC. This primary purpose rule was put in place in order to ensure that competitors do not use the ILEC's facilities mainly as a hub in order to interconnect and exchange traffic with other co-located competitors. The Commission put in place a method that required the competitor to demonstrate that the capacity dedicated to interconnection with the ILEC's facilities was greater than that dedicated to other co-located competitors.

5. In Telecom Decision 2012-209, the Commission introduced a new methodology to calculate a competitor's adherence to the primary purpose rule which was less restrictive that the one put in place in Telecom Decision 97-15.

## The application

6. The Commission received an application from Primus Telecommunications Canada Inc. (Primus), on behalf of itself and Globility Communications Corporation (Globility), dated 6 November 2012, in which Primus requested that the Commission delay the date on which the relevant services provided by Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies), and TELUS Communications Company (TCC) would no longer be subject to rate approval.

7. Specifically, Primus requested that the Commission delay the date of 3 March 2013 pursuant to its powers under subsections 27(2) and 27(4) of the Act

   a) by six months following the latter of the date on which the Bell companies and TCC provide proposed rates for all the relevant services or the Commission releases its decision regarding the application[2] to review and vary the primary purpose rule, or

   b) to the time equivalent to the time between the filing of its application and the issuance of the final decision on its application, if the Commission decides not to grant the six-month delay referred to above.

[2] The Canadian Network Operators Consortium Inc. (CNOC) filed an application dated 4 July 2012 to review and vary Telecom Decision 2012-209.

8. Primus also requested that the Commission grant interim relief pursuant to section 61 of the Act by delaying the 3 March 2013 date until the Commission disposes of its application.

9. The Commission received comments on Primus' application from the Bell companies, the Canadian Network Operators Consortium Inc. (CNOC), MTS Inc. and Allstream Inc. (collectively, MTS Allstream), Rogers Communications Partnership (RCP), and TCC. The public record of this proceeding, which closed on 30 November 2012, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

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

    I. Should the Commission delay the date of 3 March 2013 on which rate approval would no longer be required?

    II. Should the Commission grant interim relief?

## I. Should the Commission delay the date of 3 March 2013 on which rate approval would no longer be required?

11. Primus stated that, in Telecom Decision 2008-17, the Commission directed the ILECs to provide notice a minimum of six months in advance of the date on which rate approval was no longer required in order to inform customers of their intentions for the service so as to permit customers to review and rearrange their provisioning arrangements as appropriate. In Primus' view, the Commission therefore expected that this time period would be the minimum amount of time sufficient to establish negotiated agreements or competitive supply arrangements.

12. Primus stated that, in August and September 2012, it had received from the Bell companies and TCC, respectively, written notices identifying services and associated tariffs to be withdrawn and which services would continue to be available following the 3 March 2013 date. However, despite repeated requests, Primus was advised that proposed rates for the period after 3 March 2013 would not be available until the end of 2012 for the Bell companies and mid-December 2012 for TCC. Primus argued that this position was contrary to the Commission's directives in Telecom Decision 2008-17.

13. Primus submitted that the six-month time frame is feasible only if a customer knows what arrangements the ILEC is willing to offer, including rates, at the outset of the six-month period. Primus submitted that by failing to provide proposed rates at the beginning of the six-month period, the Bell companies and TCC had conferred an undue preference on themselves and unjustly discriminated against Primus, contrary to subsection 27(2) of the Act, because such actions left insufficient time for fair negotiations and for Primus to complete alternate arrangements in the event that negotiated agreements cannot be achieved. Primus submitted that if no agreement

can be reached by 3 March 2013, it would be required to pay the rates proposed by the Bell companies and TCC because the migration process could not be completed by 3 March 2013.

14. Primus argued, relying on subsections 27(2) and 27(4) of the Act, that further frustrating the ability to establish alternative arrangements of competitive supply for wholesale services is the continuing uncertainty related to the appropriate application of the primary purpose rule which is currently under consideration in the proceeding initiated by the CNOC application to review and vary Telecom Decision 2012-209.

15. Primus noted that it currently leases ILEC services between its point of presence and the ILEC central offices. Primus stated that Globility represents an alternative source of supply for certain of these services. Primus argued, however, that Globility is impeded from being able to provide competitive supply to Primus as a result of the continued uncertainty related to the primary purpose rule. Primus added that, despite the fact that competitive supply should be available, it is not able to utilize it. Primus argued that these barriers and impediments further strengthen the position and power of the Bell companies and TCC in negotiations for those services that will no longer be subject to rate approval on 3 March 2013.

16. CNOC, MTS Allstream, and RCP supported Primus' application.

17. CNOC submitted that when an ILEC does not provide a meaningful opportunity for commercial negotiations with respect to the rates, terms, and conditions of the relevant services, the ILEC is conferring an undue preference on itself and unjustly discriminating against its competitors with respect to the ongoing provision of services, contrary to subsection 27(2) of the Act.

18. MTS Allstream submitted that competition is being unduly impeded by the failure of the Bell companies in particular to negotiate competitively reasonable wholesale arrangements for what are, in the majority of locations, monopoly services, and by the ongoing use of the primary purpose rule to prevent access to competitive services.

19. In RCP's view, the relief requested by Primus is necessary to ensure that the Bell companies and TCC conduct negotiations in a timely and fair manner.

20. The Bell companies submitted that there is no undue preference or unjust discrimination. They stated that they were in the process of setting market rates for the relevant services by negotiating agreements with customers with large volumes. They stated that these agreements set benchmark base rates, from which rates for customers with smaller volumes will be adjusted. The Bell companies asserted that they are committed to provide at least 60 days' notice to all customers of proposed rates and that 60 days' notice is commercially reasonable.

21. The Bell companies submitted that Primus' request to delay the date of 3 March 2013 because of uncertainty with respect to the primary purpose rule is an attempt to review and vary Telecom Decision 2008-17. The Bell companies argued that, given that the primary purpose rule in place at the time the Commission made its decision in

Telecom Decision 2008-17 was more restrictive than the one in place today and that which will be in place once the Commission rules on the CNOC application referenced above, the outstanding CNOC application should have no bearing on the 3 March 2013 date.

22. TCC submitted that there is no tactic of delay. TCC stated that it is working to compile pricing proposals for all of its customers that lease services subject to the 3 March 2013 date. TCC stated that these pricing proposals will be provided well in advance of the 3 March 2013 date, thus providing customers with sufficient time to negotiate arrangements with the company or to seek alternate means of supply.

23. TCC submitted that Primus erroneously believes that ILECs were told by the Commission in Telecom Decision 2008-17 to supply proposed rates at least six months in advance of the 3 March 2013 date. TCC submitted that it is merely following the practice it adopted with respect to the services that were no longer subject to rate approval effective 3 March 2011 for which it proposed rates after the six-month advance notification to customers had been issued.

## Commission's analysis and decisions

24. The Commission considers that Telecom Decision 2008-17 is limited to requiring that the ILECs provide at least six months' notice of their intentions with respect to the wholesale services that will no longer be subject to rate approval. The Commission did not require that the ILECs provide notification of their proposed rates at the same time.

25. The Commission notes that the Bell companies and TCC have stated that they will continue to provide the relevant services following 3 March 2013 and that they will provide proposed rates in December 2012. In the Commission's view, this time frame should allow sufficient time for competitors such as Primus to decide whether to continue to use the ILEC's services based on negotiated rates or to migrate to an alternative carrier. The Commission notes that if Primus chooses to migrate its services and the migration is not completed by 3 March 2013, it will continue to have access to the services at issue in this proceeding but at retail rates. In this respect, the Commission notes that it expects that the Bell companies and TCC will negotiate with Primus in good faith. Accordingly, the Commission finds that the Bell companies and TCC have not conferred an undue preference on themselves or unjustly discriminated against Primus, contrary to subsection 27(2) of the Act by not providing the rates at the time of the required six-month written notice.

26. Further, the Commission is unconvinced that the uncertainty surrounding the primary purpose rule strengthens the bargaining power of the Bell companies and TCC thus impeding Primus' ability to establish alternative competitive arrangements, as argued by Primus. The Commission notes that the uncertainty of the primary purpose rule resulting from CNOC's application to review and vary Telecom Decision 2012-209 is a matter outside the control of either the Bell companies or TCC. Accordingly, the Commission finds that the Bell companies and TCC have not conferred an undue

preference on themselves or unjustly discriminated against Primus, contrary to subsection 27(2) of the Act. However, as noted above, the Commission has retained its powers under subsections 27(2) and 27(4) of the Act to address issues of unjust discrimination and undue preference in the post-3 March 2013 period. Should a particular fact situation be found to constitute unjust discrimination or undue preference, the Commission may order the appropriate relief.

27. The Commission is also not persuaded that a delay equivalent to the time between the filing of Primus' application and the issuance of the final decision on the application is justified. In the Commission's view, it would not be appropriate to delay the date that rate approval would no longer be required based on the fact that a party has chosen to file an application for relief.

28. Therefore, based on the above, the Commission, by majority decision, **denies** Primus' application to extend the date of 3 March 2013 by six months or by the time required by the Commission to consider the company's application.

## II. Should the Commission grant interim relief?

29. In light of the Commission's decisions set out above, it is not necessary to address Primus' request for interim relief as it is moot.

## Policy Direction

30. The Commission considers that the findings in this decision are consistent with the Policy Direction[3] and advance the policy objectives set out in paragraphs 7(*a*), (*b*), (*c*), (*f*), and (*h*) of the Act.[4] Further, consistent with subparagraph 1(*a*)(i) of the Policy Direction, the Commission has, by confirming the 3 March 2013 date on which rate approval will no longer be required for certain wholesale service, relied to the maximum extent feasible on market forces as the means of ensuring the achievement of these objectives by ensuring that these services will be provided, effective that date, based on negotiated market rates.

Secretary General

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

[4] The cited policy objectives of the Act are

7(*a*) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;
7(*b*) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;
7(*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
7(*f*) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and
7(*h*) to respond to the economic and social requirements of users of telecommunications services.

## Related documents

- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application to review and vary Telecom Decision 2011-355 pertaining to the co-location rule*, Telecom Decision CRTC 2012-209, 5 April 2012

- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008

- *Co-location*, Telecom Decision CRTC 97-15, 16 June 1997