



## Telecom Decision CRTC 2015-142

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*File number: 8662-M59-201410422*

### **Allstream Inc. – Application to review and vary Telecom Order 2014-364 regarding the effective date of rates for toll transport service**

*The Commission **denies** a request from Allstream to review and vary Telecom Order 2014-364. In that order, the Commission, among other things, approved the Bell companies' proposed toll transport service rates for five small incumbent local exchange carriers (ILECs), and made their toll transport service rates interim, pending the outcome of the proceedings related to the other small ILECs' direct connection rates, both effective on 11 July 2014.*

#### **Introduction**

1. In Telecom Regulatory Policy 2013-160, the Commission revised the regulatory framework under which the small incumbent local exchange carriers (ILECs) operate. Among other things, the Commission considered it very likely that costs for the small ILECs' direct connection (DC) services had declined since they were first established. Accordingly, the Commission made the small ILECs' existing DC service rates interim, and directed each small ILEC to file with the Commission, within 90 days of the date of that decision, either
  - revised tariff pages for DC rates reflecting those of TELUS Communications Company (TCC) in the province of Quebec<sup>1</sup> (TCC in Quebec); or
  - notice that within 180 days from the date of that decision, the small ILEC would file for Commission approval tariff pages for DC service (the proposed rates would be supported by a cost study).
2. Of the 35 small ILECs, seven<sup>2</sup> chose to adopt TCC in Quebec's DC rates. The Commission approved these revised DC rates for each of them in Telecom Order 2013-594, effective 28 March 2013, the date the rates had been made interim in Telecom Regulatory Policy 2013-160.

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<sup>1</sup> The DC rate for TCC in Quebec had recently been updated based on a cost study. Because TCC in Quebec operates largely in high-cost serving areas similar to the small ILECs, the Commission was of the view that, in the absence of current cost information for the small ILECs, TCC in Quebec's DC rate would likely provide a suitable benchmark for the small ILECs' DC rates.

<sup>2</sup> Amtelecom Limited Partnership; DMTS; KMTS; NorthernTel, Limited Partnership; Ontera; People's Tel Limited Partnership; and TBayTel

3. On 21 November 2013, the Commission received applications from Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies), in which they proposed revisions to their respective Access Services Tariff (AST) related to rebilling of small ILEC carrier access tariff (CAT) charges, with an proposed approval date of 21 December 2013.
4. In their applications, the Bell companies had proposed to revise their toll transport service rates for traffic transferred to and from Amtelecom Limited Partnership, DMTS, KMTS, People's Tel Limited Partnership, and TBayTel (referred to hereafter as "the five small ILECs"),<sup>3</sup> because these small ILECs' DC rates had been changed in Telecom Order 2013-594.
5. The Bell companies had also proposed to update the rate model using a new methodology, by using forecasted costs and 2012 conversation minutes rather than forecasted revenues to determine the per-minute costs. They had submitted that the proposed method would better align the per-minute toll interconnection charges with their costs.
6. On 11 July 2014, the Commission issued Telecom Order 2014-364, and, among other things,
  - approved the Bell companies' proposed toll transport service rates for the five small ILECs, effective the date of that order; and
  - made the Bell companies' toll transport service rates for the other small ILECs interim, effective the date of the order, pending the outcome of the proceedings related to the other small ILECs' DC rates.

### **The application**

7. The Commission received an application from Allstream Inc. (Allstream), dated 9 October 2014, in which the company requested that the Commission review and vary Telecom Order 2014-364, as it believes there is substantial doubt as to the correctness of this order. Allstream submitted that the Commission
  - erred in law by making its determination on the effective date solely on the basis that the previous rates had not been granted interim approval;
  - erred in fact by failing to consider that the Bell companies (a) will be reimbursed for small ILEC DC rates that had been made interim and (b)

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<sup>3</sup> The Bell companies did not propose to revise rates for NorthernTel, Limited Partnership and Ontera; their tariffs indicate that rates for those companies are calculated differently, based on Telecom Decision 2005-3.

proposed an effective date nearly seven months earlier<sup>4</sup> than the one approved by the Commission; and

- failed to consider a basic principle by not addressing MTS Allstream's<sup>5</sup> request that the previous rate be given interim status.

8. As such, Allstream requested that the Commission vary Telecom Order 2014-364

- by making the effective date for the Bell companies' revised rates for toll transport service 28 March 2013 or, alternatively, 21 December 2013; and
- by making the effective date of the interim status of the Bell companies' rates for toll transport service in respect of the remaining small ILECs 28 March 2013 or, alternatively, 21 December 2013.

9. The Commission received interventions from the Bell companies, the Canadian Network Operators Consortium Inc. (CNOc), the Independent Telecommunications Providers Association (ITPA), and Rogers Communications Partnership (RCP). The public record of this proceeding, which closed on 24 November 2014, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) or by using the file number provided above.

10. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications that are filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, due to, for example, one or more of the following: (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.

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

- Did the Commission fail to consider a basic principle by failing to address MTS Allstream's request in the proceeding that led to Telecom Order 2014-364 that the Bell companies' rates be made interim immediately?
- Did the Commission err in fact or in law by approving the Bell companies' toll transport service rates on a different effective date than the small ILECs' final or interim rates?

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<sup>4</sup> In the proceeding leading to Telecom Order 2014-364, the Bell companies requested approval of their proposed rates by 21 December 2013, 30 days after the filing of their proposed tariff revisions. The rates were approved and made effective on 11 July 2014, the date of Telecom Order 2014-364's publication.

<sup>5</sup> While the current review and vary application was filed by Allstream, interventions were filed by MTS Inc. and Allstream (collectively referred to as MTS Allstream) in the proceeding leading to Telecom Order 2014-364.

**Did the Commission fail to consider a basic principle by failing to address MTS Allstream's request in the proceeding that led to Telecom Order 2014-364 that the Bell companies' rates be made interim immediately?**

12. In their intervention in the proceeding leading to Telecom Order 2014-364, MTS Allstream had requested that the Bell companies' rates be made interim immediately. In its current application, Allstream submitted that the Commission did not address this request in Telecom Order 2014-364 or any other decision, and that the failure to consider this basic principle raised in the proceeding constitutes a serious error justifying a review and variance of the Commission's decision. CNOG, the ITPA and RCP supported Allstream's submission.
13. Allstream stated that the very title of the Bell companies' tariff items suggest that the nature of the service is the rebilling of charges to other carriers and that when those underlying rates subject to rebilling change, there is an obvious question raised as to the justness and reasonableness of the flowed-through rates. It submitted that the Commission accepted this in its decision by making these rates interim for the other small ILECs, and by also indicating that, in the future, the Bell companies' rebilling rates will be made interim immediately on the changing of the underlying rates.
14. Allstream added that the Bell companies had proposed that the new rates be effective as of 21 December 2013 and cannot be surprised by rates becoming effective as of then. It submitted that it is unclear why the rates were not made interim effective the day on which the Bell companies were prepared to do so, 21 December 2013. It concluded that the failure to consider that the Bell companies were prepared to charge the new rate as of that date is an error in fact and raises substantial doubt as to the correctness of Telecom Order 2014-364.
15. Allstream added that whether or not to give the existing rates interim status is a basic principle that was raised on the record of the proceeding. As the Commission failed to consider this matter, there is substantial doubt as to the correctness of its final decision, particularly given the weight placed on interim status when devising the effective date of the new rates.
16. The Bell companies submitted that the Commission responded to MTS Allstream's request that it make the Bell companies' toll transport service rates for all small ILECs interim effective "immediately" in Telecom Order 2014-364, when it set the Bell companies' toll transport service rates for the remaining small ILECs effective the date of that order.
17. The Bell companies added that the Commission has previously stated that it considers all arguments and positions, but that it cannot reasonably be expected to address specifically in its decisions every piece of evidence and argument put forward in the proceeding.

## Commission's analysis and determinations

18. In the proceeding leading to Telecom Order 2014-364, MTS Allstream had requested that the Commission approve the Bell companies' proposed toll transport rates retroactive to the same date that the Commission had approved the reduced DC rates for the five small ILECs, i.e., 28 March 2013. In this regard, the Commission notes that it dealt with the issue as to the effective date for the proposed rate revisions in Telecom Order 2014-364 (paragraphs 12, 13, and 15 of Telecom Order 2014-364 are set out below):

12. MTS Allstream noted that the five small ILECs' DC rates were reduced effective 28 March 2013. They submitted that the Bell companies were proposing to retain the benefit of the lower DC rates for the five small ILECs as of this date.

13. MTS Allstream further submitted that the Commission should direct the Bell companies to flow through to long distance service providers all revenues associated with the reductions in the small ILECs' DC rates, retroactive to the effective date of those reductions. ...

15. The Commission notes that it did not make the Bell companies' toll transport service rates interim. Accordingly, the Commission considers that it would be appropriate to approve the Bell companies' proposed toll transport service rates for the five small ILECs, effective the date of this order.

19. The Commission notes that it specifically referred to MTS Allstream's position that rates should be retroactive to the effective date of the small ILECs' DC rate reductions. Further, the Commission specifically noted that it had not made rates interim, and that it would be appropriate to approve the rates effective the date of the order. The Commission therefore concludes that it adequately addressed MTS Allstream's request to make rates interim immediately and disposed of the essential issue as to the appropriate effective date for the revised rates.

20. Accordingly, the Commission considers that it did not fail to address MTS Allstream's request that the Bell companies' rates be made interim immediately, and, hence, did not fail to consider a basis principle that arose in the proceeding.

### **Did the Commission err in fact or in law by approving the Bell companies' toll transport service rates on a different effective date than the small ILECs' final or interim rates?**

21. Allstream, supported by CNOC, the ITPA and RCP, argued that the Commission has the jurisdiction, pursuant to the Act, to ensure that rates are at all times just and reasonable. It added that this jurisdiction provides the Commission with the authority to retroactively change rates that have been approved on a final basis, and that the Commission has exercised this power in the past.

- In Telecom Decision 2013-603, the Commission stated that when rates are based on incorrect costs, the rates are not just and reasonable, and that adjustments are required to bring them into compliance with the Act.
  - In Telecom Decision 2014-391, the Commission stated that its decisions are explicitly subject to change, for instance through its powers to vary interim rates and to review and vary past decisions, including final approvals. It also noted that the Act provides the Commission with the jurisdiction to correct errors upon their discovery and ensure that rates are at all times just and reasonable.
22. Allstream claimed that the Commission erred in law by basing its decision in Telecom Order 2014-364 strictly on the fact that the previous rate had not been granted interim status. Allstream argued that given that the Commission is statutorily obliged to ensure that each approved rate is just and reasonable at all times, it is not sufficient that the analysis consider only whether rates had been made interim. In its view, the appropriate effective date for the new rates is well before the date on which Telecom Order 2014-364 was issued; it was on 28 March 2013 or, alternatively, 21 December 2013.
23. Allstream added that, for the period following Telecom Order 2013-594, the Bell companies will have been paying the lower DC rate to the small ILECs. By failing to make Telecom Order 2014-364 effective the same date as the small ILECs' DC rate reductions, alternative providers of long distance services will be prejudiced by paying rates that are not just and reasonable and providing the Bell companies with a wholly unjustified windfall, as it will not reflect actual costs. Adjusting the Bell companies' rates retroactively simply means that the Bell companies must share an appropriate portion of the rebate with the company to which it had flowed through the charges. RCP added that any benefits from rate reductions in the small ILECs' rate should be passed on to the toll service providers and not retained by the Bell companies.
24. CNOC, the ITPA, and RCP added that the Bell companies' rates for their toll transport service have not been just and reasonable, in their view, since 28 March 2013.
25. The Bell companies submitted that the Commission does not have the statutory power to retroactively change rates that it has approved on a final basis, adding that the Supreme Court of Canada has repeatedly held that the Commission has no authority to change rates that are final and confirmed that final orders, unlike interim orders, are not subject to retroactive review and remedial orders.
26. The Bell companies submitted that the Commission's statutory power to retroactively change rates is limited to changing rates that have been granted interim approval, or where there has been an error in the determination of the final rate. The Commission has itself recognized this limitation on its power, such as in Order 2001-137 (paragraphs 18 to 20 of Order 2001-137 are set out below).

18. The Commission considers that modifying rates retroactively, which have previously granted final approval, would create uncertainty as to the finality of Commission decisions.
19. In the Commission's view, this would potentially give rise to frequent changes in rates, after the fact, giving rise to further uncertainty.
20. Accordingly, the Commission considers that, as a matter of regulatory policy, rates approved on a final basis should not generally be subject to adjustment.
27. The Bell companies noted that subsections 25(1) and 27(1) of the Act do not support the existence of a specific jurisdiction to retroactively alter rates once they have received final approval. Had Parliament intended to grant retroactive powers to the Commission in the exercise of its section 25 and 27 powers, it would have used express language similar to that used in section 61 of the Act.
28. The Bell companies added that the Commission's powers to retroactively change rates that it has approved on a final basis are limited to correcting errors. They submitted that Allstream cites Telecom Decisions 2013-603 and 2014-391, but fails to identify that both decisions corrected errors. According to the Bell companies, Allstream does not argue that there were errors in the Bell companies' proposed toll transport service rates.
29. The Bell companies submitted that Allstream did not present any evidence to support its view that the Commission was not aware that the Bell companies would be reimbursed for the reduction in small ILECs' DC rates retroactive to 28 March 2013.
30. The Bell companies further submitted that their toll transport service rates were just and reasonable between 28 March 2013 and 11 July 2014 (the effective date of Telecom Order 2014-364). They were approved by the Commission on a final basis in Telecom Order 2006-224 and no Commission order changing these rates was issued, hence these rates continued to be just and reasonable. Also, the Bell companies' tariffs do not require that their toll transport service rates change on the same day as the small ILEC's CAT rates become effective.

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

31. As discussed above, the Commission dealt with the issue as to the effective date for the Bell companies' proposed rate revisions beginning at paragraph 12 of Telecom Order 2014-364.
32. The Commission notes that the Bell companies' toll transport service rates approved in 2006 were just and reasonable and were not approved in error. Those rates continued to be just and reasonable until the Commission determined otherwise in Telecom Order 2014-364. Accordingly, when it changed the rates in Telecom Order 2014-364, the Commission properly exercised its discretion to approve those rates as of the date of the order. Further, the Commission notes that the approved rates did not only reflect the change in the small ILECs' DC rates, as they also reflected the new

method for calculating the equivalent per-minute rate as discussed above. There has been no evidence presented to demonstrate that there was an error in relation to the previous method of calculation.

33. In light of all of the foregoing, the Commission concludes that it did not err in fact or in law by approving the Bell companies' toll transport service rates for the five small ILECs effective on the date of the order.
34. The Commission notes that its decision to make rates effective as of the date of Telecom Order 2014-364 is consistent with past decisions.<sup>6</sup> In previous cases where the Bell companies' toll transport service rates were modified to reflect reductions in small ILEC DC rates, the final rates were not modified retroactively to reflect previous DC rate changes.
35. In light of the above, the Commission finds that there is no substantial doubt as to the correctness of the Commission's determinations in Telecom Order 2014-364, and **denies** Allstream's application.

Secretary General

#### **Related documents**

- *MTS Inc. – Application to review and vary Telecom Decision 2013-630 regarding MTS' subsidy rate component calculations*, Telecom Decision CRTC 2014-391, 28 July 2014
- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Rebilling of carrier access tariff charges for incumbent local exchange carriers*, Telecom Order CRTC 2014-364, 11 July 2014
- *TELUS Communications Company – Application to review and vary Telecom Decision 2013-73*, Telecom Decision CRTC 2013-603, 12 November 2013
- *Direct connection service rates for certain small incumbent local exchange carriers*, Telecom Order CRTC 2013-594, 7 November 2013
- *Regulatory framework, for the small incumbent local exchange carriers and related matters*, Telecom Regulatory Policy CRTC 2013-160, 28 March 2013
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- Telecom Order CRTC 2006-224, 28 August 2006

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<sup>6</sup> In Bell Canada Tariff Notice 6857, dated 11 March 2005, the company proposed revision to its toll transport service to, among other things, reflect changes in the DC and trunking rates for the small ILECs that were approved in Telecom Decision 2005-3, effective 1 January 2005. The rates were approved in Telecom Order 2005-118 with an effective date of 24 March 2005.

- Telecom Order CRTC 2005-118, 24 March 2005
- *Direct toll and network access costing methodology for small incumbent local exchange carriers – Follow-up to Decision 2001-756*, Telecom Decision CRTC 2005-3, 31 January 2005
- *CRTC denies application by Call-Net and AT&T Canada for a refund of amounts paid for direct connection service*, Order CRTC 2001-137, 14 February 2001