



## Telecom Decision CRTC 2006-73

Ottawa, 16 November 2006

### **Rogers Telecommunications Inc. – request that Bell Canada be ordered to provide credits with respect to certain access circuits for the period between 1 June 2002 and 2 February 2005**

Reference: 8661-R29-200604456

*The Commission denies an application by Rogers Telecommunications Inc. (RTI) requesting that the Commission order Bell Canada to provide credits to RTI with respect to certain access circuits that RTI submitted were eligible for competitor services rates during the period 1 June 2002 to 2 February 2005 (the interim period). The Commission finds that in Competitor Digital Network Services, Telecom Decision CRTC 2005-6, 3 February 2005, as amended by Telecom Decision CRTC 2005-6-1 dated 28 April 2006, it ruled that while such circuits provided to competitors were eligible for competitor service rates on a prospective basis, they were not eligible for such rates during the interim period if the competitor's customer was a telecommunications service provider.*

#### **Introduction**

1. In *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, as amended by Telecom Decision CRTC 2002-34-1 dated 15 July 2002 (Decision 2002-34), the Commission concluded that there was a need for the major incumbent local exchange carriers (ILECs) to develop a Competitor Digital Network Access (CDNA) service. In order to implement the service as expeditiously as possible, the ILECs were directed to issue an interim CDNA service (interim CDNA service) tariff no later than 14 June 2002 pursuant to which the interim CDNA service was to consist of access and link components only. The Commission also directed that the interim CDNA service tariff provide, among other things, that the interim CDNA service be available only to competitors to provide access between an end-customer's premise and a competitor's switch within the same ILEC serving wire centre area, or to the ILEC serving wire centre, in which case it would need to terminate on the competitor's co-located equipment. In addition, the Commission directed that the interim CDNA service tariff provide that a competitor may not engage in simple resale of the interim CDNA service. The interim CDNA service was in effect from 1 June 2002 to 2 February 2005 (the interim period).
2. In *Competitor Digital Network Access service proceeding*, Telecom Public Notice CRTC 2002-4, 9 August 2002 (Public Notice 2002-4), the Commission initiated the proceeding (the CDNA proceeding) that led to *Competitor Digital Network Services*, Telecom Decision CRTC 2005-6, 3 February 2005, as amended by Telecom Decision CRTC 2005-6-1 dated 28 April 2006 (Decision 2005-6). The Commission subsequently made determinations during the interim period relevant to the interim CDNA service in

*Interim Competitor Digital Network Access service*, Telecom Decision CRTC 2002-78, 23 December 2002 (Decision 2002-78), and *Part VII application by Call-Net Enterprises Inc. with respect to the Interim Competitor Digital Network Access service*, Telecom Decision CRTC 2003-60, 29 August 2003 (Decision 2003-60).

3. In the proceeding that led to Decision 2003-60, MTS Communications Inc., now MTS Allstream Inc. (MTS Allstream) submitted that certain ILECs, including Bell Canada, had indicated that the access and link facilities were not eligible for the interim CDNA service rates when the competitor was serving an end-customer premise as an agent for a service provider that the ILEC had deemed eligible for the interim CDNA service. In Decision 2003-60, the Commission determined that MTS Allstream's submission should be addressed in the context of other conditions associated with what was referred to in that Decision as the final CDNA service.
4. In Decision 2005-6, the Commission established the scope, rates, terms, and conditions of the ILECs' Competitor Digital Network (CDN) service on a final basis. The CDN service represented an expanded service as compared to the interim CDNA service. The CDN service included certain access facilities that had not been available as part of the interim CDNA service as well as the following additional facilities: intra-exchange facilities, channelization facilities for a competitor that was not co-located in a given ILEC wire centre, and certain metropolitan interexchange facilities. The rates approved on a final basis were effective 3 February 2005, except for the rates applicable to the facilities subject to the interim CDNA service which were effective 1 June 2002.
5. In paragraph 269 of Decision 2005-6, the Commission stated that it "determines that the description of "end-customer" includes a customer that is eligible in its own right for the customer access service included as part of CDN services."

### **Application**

6. On 13 April 2006, Rogers Telecommunications Inc. (RTI) filed an application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure*. RTI requested that the Commission direct Bell Canada to provide credits with respect to certain access circuits (the disputed circuits), leased to RTI during the interim period, that RTI submitted were eligible for competitor service rates. RTI submitted that it had used the disputed circuits to connect to other telecommunications service providers (TSPs) that were eligible to use the interim CDNA service in their own right.
7. RTI submitted that its application raised the issue of whether the Commission's determination with respect to end-customer in Decision 2005-6 applied to the interim CDNA service during the interim period, or only on a going-forward basis in respect of the CDN service. RTI argued that, in Decision 2005-6, the Commission merely clarified and confirmed that the term "end-customer," used in Decision 2002-34 with respect to the interim CDNA service, included both retail customers and TSPs. RTI further argued that in Decision 2005-6 the Commission merely clarified that the restriction against resale of the interim CDNA service applied to simple resale of that service without adding value.

8. RTI submitted that, since 2002, Bell Canada had consistently declined to apply interim CDNA service rates to the disputed circuits. RTI submitted that Bell Canada's position was not tenable given that the disputed access circuits were physically identical to other access circuits that were eligible for interim CDNA service rates.
9. RTI noted that, in paragraph 268 of Decision 2005-6, the Commission referred to its finding in Decision 2002-34 that the development of a wholesale market was important to the overall development of facilities-based competition. RTI also noted that, in paragraph 269 of Decision 2005-6, the Commission determined that an end-customer included a customer that would be eligible in its own right for the CDN service. RTI submitted that the reference to Decision 2002-34 in paragraph 268 of Decision 2005-6 supported its position that, in paragraph 269, the Commission was clarifying that the disputed circuits were also eligible for competitor service rates. RTI further submitted that these paragraphs did not state or create the inference that this determination was prospective only.
10. RTI submitted that, if the Commission accepted Bell Canada's position and concluded that the disputed circuits were not included in the interim CDNA service, it would nonetheless be appropriate to treat them as eligible for the interim CDNA service. RTI submitted that doing so would be consistent with the Commission's reasoning in *Rogers Telecom Holdings Inc. – Application with respect to Competitor Digital Network Access service*, Telecom Decision CRTC 2006-8, 15 February 2006 (Decision 2006-8). RTI argued that to do otherwise would be inconsistent with the Commission's objectives when establishing the CDN service regime and would also be unduly punitive to competitors.

### **Process**

11. Bell Canada filed its answer on 15 May 2006. MTS Allstream and TELUS Communications Company (TCC) filed comments on 10 and 15 May 2006, respectively. RTI filed reply comments on 29 May 2006.

### **Positions of parties**

12. MTS Allstream supported RTI's application. MTS Allstream submitted that Bell Canada and TCC had also refused its request for competitor service rate treatment for its disputed circuits. MTS Allstream also submitted that the ILECs should provide rebates with respect to the disputed circuits because they were terminated at the premises of end-customers, not carriers, and because competitors added value to them by using their own facilities and services in conjunction with the disputed circuits.
13. MTS Allstream agreed with RTI's submission that the reference to Decision 2002-34 in paragraph 268 of Decision 2005-6 supported the position that, in paragraph 269 of Decision 2005-6, the Commission merely clarified that the disputed circuits were eligible for competitor service rates. MTS Allstream submitted that these paragraphs made it clear that Decision 2002-34 did not preclude competitor service rate treatment for the disputed circuits provided the arrangement did not constitute simple resale.

14. Bell Canada and TCC opposed RTI's application. Bell Canada submitted that Decision 2002-34 did not define end-customer, that its interim CDNA service tariff, as approved in Decision 2002-78, defined an end-customer as "a party other than a customer of CDNA service," and that this definition excluded the disputed circuits. TCC submitted that a plain reading of Decision 2002-34 did not indicate that the disputed circuits were eligible for interim CDNA service rates and that, therefore, TCC had not made them available at those rates.
15. Bell Canada and TCC also referred to Decision 2003-60 in which the Commission addressed a request made by the former Allstream Inc. (now MTS Allstream) that the Commission find that an end-customer included a TSP. Bell Canada and TCC noted that, in Decision 2003-60, the Commission stated that MTS Allstream's request would be addressed in the context of other conditions associated with the final CDN service. Bell Canada submitted that during the period before Decision 2005-6 was rendered, its approved interim CDNA service tariff remained in effect and that, therefore, the disputed circuits were not eligible for interim CDNA service rates.
16. Bell Canada submitted that, like all other elements of the expanded scope of the CDN service, the competitor service eligibility of the disputed circuits applied on a going-forward basis only. Bell Canada also submitted that the only determination in Decision 2005-6 with retroactive effect was the determination that the final CDN access and link rates were also to be applied effective 1 June 2002 to circuits that were eligible for the interim CDNA service. Bell Canada further submitted that RTI was requesting that the Commission change the eligibility rules for the interim CDNA service with retroactive effect, and to do so in a matter which the Commission conclusively addressed in Decision 2005-6. Bell Canada submitted it was doubtful that the Commission would have the legal authority to do so.
17. TCC supported Bell Canada's position that the disputed circuits were not eligible for competitor service rates during the interim period. TCC argued that the Commission had indicated its intent with respect to retroactivity in Part V of Decision 2005-6 in connection with deferral account compensation for ILECs. TCC further argued that the Commission did so in a manner that clearly distinguished the retroactive rate changes that applied to the interim CDNA service rates from the expanded eligibility of accesses as part of the new CDN service. TCC submitted that there was no justification for the provision of rebates for the disputed circuits in view of the Commission's statements in Decision 2005-6 that ILEC compensation applied only to the existing access and link arrangements that were the subject of the interim CDNA service, and that it would not be appropriate to compensate ILECs for lost retail revenue due to retroactive rate adjustments for additional service components.
18. RTI argued in reply that Bell Canada and TCC had failed to show that the Commission's determination in Decision 2005-6 that end-customer included TSPs was not a clarification of the scope of the interim CDNA service. RTI submitted that it was inconsistent for Bell Canada to argue that this determination was a new ruling, and not a clarification, given its statement that end-customer was not further defined in that Decision.
19. RTI disagreed with Bell Canada that the treatment of the disputed circuits as eligible for competitor service rates would constitute unlawful retroactive rate-making, because the Commission has clear authority to make retroactive changes to interim rates, terms, and conditions.

20. RTI submitted that its TSP customers used the disputed circuits in one of two basic configurations. In Configuration A, the disputed circuits were resold by RTI to another TSP that, in turn, resold these circuits to a retail end-customer. In Configuration B, the disputed circuit was resold by RTI to another TSP, which RTI identified as a wireless service provider (WSP), directly for its own use.
21. RTI argued that, even accepting Bell Canada's position that an end-customer during the interim period was a party other than a customer of the interim CDNA service, the disputed circuits in Configuration A, which represented more than 70 percent of the disputed circuits, were eligible because they connected the premises of a retail end-customer, such as a bank, with a Bell Canada central office. RTI further argued that, therefore, these retail customers were end-customers within the meaning of Bell Canada's interim CDNA service tariff, notwithstanding that the retail end-customer's service contract was not with RTI, but with another TSP.

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

22. The Commission notes the submissions of RTI and MTS Allstream that paragraph 269 of Decision 2005-6 clarified or confirmed that the disputed circuits were eligible for CDNA treatment during the interim period. The Commission considers, however, that in Decision 2005-6, it did not do this.
23. As previously noted, the issue of whether ILEC circuits provided to a competitor by another competitor were eligible for competitor service rates was explicitly found by the Commission in Decision 2003-60 to be a matter for determination in the context of other conditions associated with the final CDN service. Based on the record of the proceeding that led to Decision 2005-6, the Commission found, in paragraph 269 of that Decision, that the description of "end-customer" included a customer that was eligible in its own right for the customer access service included as part of CDN services. The Commission considers that the reference to CDN services in the particular context of this paragraph is in contradistinction to the interim CDNA service and reflects the Commission's intention that this description of "end-customer" apply on a prospective basis only.
24. This finding is reinforced by the fact that when the Commission intended to apply its determinations in Decision 2005-6 with respect to the final CDN service during the interim period, it expressly stated so. In this connection the Commission notes that, in Section V of Decision 2005-6, it expressly found that the rates approved on a final basis with respect to the access and link components made available under the interim CDNA service should be applied retroactively to the beginning of the interim period. By contrast, the Commission made no such finding with respect to the expanded description of "end-customer." The Commission therefore disagrees with RTI's submission that the Commission merely clarified or confirmed in Decision 2005-6 that the disputed circuits were CDNA-eligible during the interim period.
25. The Commission also notes RTI's submission in reply that, even if the Commission disagreed that paragraph 269 of Decision 2005-6 applied on a retroactive basis, certain of the disputed circuits were CDNA-eligible notwithstanding that Bell Canada's interim CDNA tariff defined an end-customer to be a party other than a customer of CDNA service. In this regard,

RTI submitted that, notwithstanding that a retail person's service contract was with another TSP, and not with RTI, these persons were "end-customers" within the meaning of Bell Canada's CDNA service tariff.

26. With respect to the disputed circuit used in Configuration A, the Commission considers that Bell Canada's customer in respect of the circuit was RTI, and that RTI's customer was the competitor with whom RTI had a contractual agreement in respect of this circuit. The Commission considers that its directive with respect to the description of the interim CDNA services set out in Decision 2002-34 contemplated that the "end-customer" would be a person with whom the competitor had a contractual agreement. The Commission considers that Bell Canada's interpretation of its interim CDNA tariff, approved in Decision 2002-78, accurately reflected the Commission's directive in this regard. In addition, the Commission notes its determination in Decision 2003-60 that it would address the issue of whether "end-customer" included a TSP in the context of the final CDN service.
27. The Commission notes that RTI indicated that its customer for the disputed circuit used in Configuration B was a WSP. In Public Notice 2002-4, the Commission noted the submissions of various WSPs that WSPs used wireless facilities, and not the ILECs' retail Digital Network Access (DNA) service, to provide access between the WSP's end-customer and its switch (customer accesses). These parties also submitted that WSPs used the ILECs' DNA facilities to interconnect their networks with those of the ILECs. In Decision 2005-6, the Commission described this access as a "carrier access" facility, and not as a customer access facility.
28. The Commission notes that the purpose of the interim CDNA service was to make the ILECs' customer access facilities available to eligible competitors at competitor service rates and carrier access facilities available as part of the interim CDNA service only in association with the use of customer access facilities. As described above, WSPs used wireless technology, not customer access circuits, to connect to their end-customers. The Commission therefore considers that the disputed carrier access circuit in Configuration B was not available to RTI as part of the interim CDNA service for resale to a WSP.
29. The Commission notes RTI's request in the alternative that if the Commission finds that the disputed circuits were not eligible for interim CDNA service rates, it would nonetheless be appropriate to treat them as eligible for the interim CDNA service and that doing so would be consistent with the Commission's reasoning in Decision 2006-8. The Commission considers that the circumstances under consideration in this Decision are clearly different than, and distinguishable from, those considered in the proceeding that led to Decision 2006-8.<sup>1</sup> Significantly, in contrast to the circumstances under consideration in that Decision, Bell Canada and TCC consistently treated the disputed circuits as not included within the interim CDNA service. Further, the Commission finds that RTI and MTS Allstream have provided no compelling arguments for the Commission to review its determination in Decision 2005-6 that the expanded description of "end-customer" be applied on a prospective basis only.

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<sup>1</sup> In Decision 2006-8, among other things, the Commission reviewed and varied its finding in Decision 2003-60 that certain access circuits were not CDNA-eligible, on the basis, among other things, that Bell Canada consistently charged CDNA rates for the circuits in question during the interim period.

30. Accordingly, the Commission **denies** RTI's request to find that the disputed circuits were eligible for interim CDNA service rates on the basis of the Commission's reasoning in Decision 2006-8.
31. In light of the above, the Commission **denies** RTI's application.

Secretary General

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