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

Telecom Decision CRTC 2007-74

Ottawa, 17 August 2007

Bell Canada – Application to modify the rules for mixed Type 2 customer-specific arrangements

Reference: 8622-B2-200510463

In this Decision, the Commission determines that, effective the date of this Decision, the tariff approval requirement and other rules applicable to Type 2 customer-specific arrangements that consist of both tariffed and non-tariffed services (mixed Type 2 CSAs) do not apply to such CSAs where the price of a mixed Type 2 CSA at least equals the sum of the rates of all its tariffed components.

Introduction

1. In an application dated 2 September 2005, Bell Canada requested that the Commission modify the tariff approval requirement and other rules applicable to Type 2 customer-specific arrangements that consist of both tariffed and non-tariffed services (mixed Type 2 CSAs). Specifically, Bell Canada proposed that the Commission eliminate all the rules applicable to mixed Type 2 CSAs where a mixed Type 2 CSA's price at least equalled the sum of the rates of all its tariffed components and the CSA was not part of a practice designed to circumvent tariffs (qualifying mixed Type 2 CSA). Bell Canada further considered that under this approach, the Commission could deal on an *ex post* basis with any complaint that a particular mixed Type 2 CSA had been part of a practice designed to circumvent tariffs or was otherwise anti-competitive.

2. In light of Order in Council P.C. 2006-1534, *Order issuing a direction to the CRTC on implementing the Canadian telecommunications policy objectives* (the Policy Direction), which came into effect 14 December 2006 and which applies to the disposition of the application, the Commission requested further comments on the application.[1]

3. The Commission received comments, reply comments, and/or further comments from AT&T Global Services Canada Co. (AT&T Canada); Bell Canada; the Coalition for Competitive Telecommunications (the Coalition); the federal Minister of Justice (the Minister of Justice); MTS Allstream Inc. (MTS Allstream); Rogers Communications Inc. (RCI); Quebecor Media Inc. (QMI); and Xit telecom inc., on behalf of itself, Telecommunications Xittel inc., and 9141-9077 Quebec inc. (Xit telecom). The record of the proceeding closed 20 February 2007.

4. The Commission considers that Bell Canada's application and parties' submissions raise the following issues:

[1] The Commission received comments on the 2 September 2005 application from interested parties in October 2005. The record of the proceeding initially closed on 27 October 2005. The Commission reopened the proceeding on 30 January 2007 to request further comments on the application in light of the Policy Direction.

I. Whether the application constitutes a review and vary application

II. Whether elimination of the rules would require the exercise of the Commission's forbearance powers under section 34 of the *Telecommunications Act* (the Act)

III. Whether the rules applicable to qualifying mixed Type 2 CSAs should be eliminated

IV. Whether the Commission's assessment of mixed Type 2 CSAs on an *ex post* complaint basis should be limited to tariff circumvention

I. Whether the application constitutes a review and vary application

5. MTS Allstream and RCI submitted that Bell Canada's application constituted an application to review and vary Telecom Decision 2005-27 where the Commission had established the pricing rules that are currently applicable to mixed Type 2 CSAs. These parties further submitted that Bell Canada's application did not meet the criteria for a review and vary application as set out in Telecom Public Notice 98-6.

Commission's analysis and determinations

6. The Commission notes that, while the Policy Direction does not apply to Telecom Decision 2005-27, pursuant to section 11 of the Act, the Commission is required to assess Bell Canada's application in light of the Policy Direction, regardless of whether it constitutes a review and vary application or a new application. Given this, the Commission considers that in the circumstances of this case, it is not necessary to rule on whether the application is a review and vary application.

II. Whether elimination of the rules would require the exercise of the Commission's forbearance powers under section 34 of the Act

7. MTS Allstream submitted that Bell Canada had failed to satisfy the conditions for forbearance from the regulation of local exchange services set out in Telecom Decision 2006-15. In this regard, MTS Allstream submitted that Bell Canada had failed to provide any evidence that would support a finding of fact under subsection 34(1) of the Act that to refrain from regulating Type 2 CSAs would be consistent with the Canadian telecommunications policy objectives. In addition, MTS Allstream submitted that evidence demonstrated that forbearance from the current regulatory measures that apply to Type 2 CSAs would impair unduly the establishment of a competitive market for telecommunications services provided to large and very large business customers, which would be contrary to subsection 34(3) of the Act.

Commission's analysis and determinations

8. The Commission notes that the requirement that mixed Type 2 CSAs be subject to tariff approval stems from a determination that tariff approval was the most appropriate means by which to ensure that tariffed services within a mixed Type 2 CSA were provided: (1) at just and reasonable rates, and (2) not in an unduly preferential or unjustly discriminatory manner, consistent with subsections 27(1) and (2) of the Act. In this respect, the Commission considers that while it has the statutory authority to impose the prior tariff approval requirement, it is not

required to do so under the Act. Accordingly, the Commission considers that elimination of the requirement that mixed Type 2 CSAs be subject to tariff approval would not require the exercise of the forbearance powers under section 34 of the Act.

III. Whether the rules applicable to qualifying mixed Type 2 CSAs should be eliminated

Background

9. At present, the ILECs are subject to the following requirements with respect to mixed Type 2 CSAs:[2]

    a. Mixed Type 2 CSAs must be tariffed and filed for Commission approval;

    b. Mixed Type 2 CSAs must satisfy a pricing rule in the form of a price floor (imputation test);

    c. The ILEC must demonstrate that there is not sufficient demand to offer any customer-specific elements of the service through the general tariff;

    d. In order that there be no unjust discrimination or undue preference, the service package and the associated rates, terms, and conditions provided under the CSA must be generally available to other customers; and

    e. Resale must be permitted.

Bell Canada's application

10. Bell Canada submitted that the Commission should eliminate the rules for qualifying mixed Type 2 CSAs for the following reasons:

    a. The mixed Type 2 CSA rules did not meet the Policy Direction's directive to rely on market forces to the greatest extent possible. The rules ignored that customers that used such CSAs were already relying on market forces by routinely looking to a variety of service providers such as incumbent local exchange carriers (ILECs), competitive local exchange carriers, systems integrators, information technology companies, and utility companies.

    b. Where pre-approval and imputation tests were already applied to stand-alone tariffed services, redundant application of these same tests to the same tariffed services on the basis that these services are marketed in combination with non-tariffed services did not constitute minimally intrusive regulation.

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[2] The Commission set out these requirements in Telecom Decision 94-19, expanded the rules to allow for the inclusion of forborne and non-telecommunications services in Order 2000-425, and modified the imputation test in Telecom Decision 2005-27.

c. Where the Commission had forborne from the regulation of a service because competition was sufficient to protect the interests of users, it was unnecessary, inefficient, and a violation of the Policy Direction for the Commission to conduct an assessment of the service's price and margin.

d. The rules for mixed Type 2 CSAs introduced delays, increased the costs of doing business, complicated the bidding process, and needlessly constrained the company's ability to offer customers the operational flexibility that they demanded. Bell Canada submitted that due to the mixed Type 2 CSA rules, it would often resort to artificially separating tariffed and non-tariffed services into distinct agreements or would forgo designing certain bundled offerings altogether.

e. There was little risk of anti-competitive behaviour as mixed Type 2 CSAs were used by large, sophisticated customers with countervailing power in a highly competitive environment in which competitors had already made a significant investment.

11. Bell Canada noted that in the proceeding that led to Telecom Decision 2005-27, the Coalition had stated, "The bid tender process, in which customer requirements, the terms of the competitive bidding process and the criteria by which the winning provider is selected, is intensely competitive, with usually three to five providers vying for any given large contract". Bell Canada indicated that in the proceeding which led to that Decision, the Canadian Bankers' Association (CBA) had stated that, "it has been our members' experience that this market is very competitive, with multiple vendors competing for service contracts put to tender".

Parties' comments

12. The Coalition indicated that mixed Type 2 CSAs were offered almost exclusively to large, sophisticated business customers, many of which it represented. The Coalition supported Bell Canada's application and argued that customers using CSAs required greater certainty and flexibility with respect to supplier selection and the contract negotiation process. The Coalition further argued that, from a customer point of view, the process to obtain such CSA-related services was far less efficient and effective because of unnecessary regulatory requirements.

13. The Department of Justice expressed concerns with respect to *ex post* reviews of CSAs. In this regard, the Department of Justice submitted that such measures might create an incentive for ILECs to undercut their competitors' prices whenever CSAs were involved if the ILECs believed that the only consequence of the breach would be that, if an *ex post* review were conducted, they would be ordered to make more profit on a contract that could not, for practical reasons, be put out to tender again.

14. AT&T Canada, MTS Allstream, RCI, QMI, and Xit telecom submitted that the Commission should retain the mixed Type 2 CSA rules.

15. MTS Allstream and RCI submitted that there was not sufficient competition in the large and very large business market segments to protect the interests of users, and as such, the approval of Bell Canada's application would severely damage competition, undermine the policy objectives of the Act, and violate the Policy Direction.

16. RCI submitted that if the market was as competitive as Bell Canada claimed, the competitors' share of the market should have improved materially since Bell Canada filed its original application (i.e. between September 2005 and February 2007). RCI submitted that, instead, in its *2006 Telecommunications Monitoring Report: Status of Competition in Canadian Telecommunications Markets* (the Monitoring Report), the Commission concluded that the ILECs continued to dominate the large and very large business market segments, with up to 98 percent market share in key segments. RCI submitted that, accordingly, neither Bell Canada's application nor the Policy Direction supported the relief requested by Bell Canada.

17. MTS Allstream submitted that the ILECs had 96 percent to 98 percent of the market share of the large and very large business local exchange services market despite the fact that these segments of the market included some of the most vigorously contested and sought-after customers and the fact that these customers are some of the most knowledgeable and sophisticated users of telecommunications services in Canada. MTS Allstream submitted that these figures confirmed that robust and sustained competition was not available under the current regime.

18. MTS Allstream submitted that without the mixed Type 2 CSA rules, the ILECs would use CSAs as a means of circumventing their tariffs.

19. MTS Allstream argued that approval of Bell Canada's amended application would allow Bell Canada to charge rates other than the just and reasonable rates approved by the Commission in Bell Canada's tariffs, which would be a violation of subsection 27(1) of the Act. MTS Allstream submitted that this would also allow Bell Canada to give an undue or unreasonable preference toward some customers while subjecting others to an undue or unreasonable disadvantage, which would be a violation of subsection 27(2) of the Act.

Bell Canada's reply comments

20. Bell Canada submitted that it was well-established that market shares alone did not indicate the state of competition. Bell Canada submitted that where customers recognized that they have alternatives and enjoy cost-efficient supply and choice, a market is competitive, irrespective of the market shares of its participants. Bell Canada further submitted that encouraging competition does not mean dispersing market shares between players.

21. Bell Canada submitted that MTS Allstream had misleadingly characterized market share statistics from the Monitoring Report. Bell Canada submitted that MTS Allstream had extrapolated the 96 percent and 98 percent market share figures to mean that markets were almost 100 percent controlled by a single provider. Bell Canada further submitted that these figures reflected the revenues derived from all ILECs, both in and out of territory. Bell Canada submitted that, accordingly, the 96 percent and 98 percent figures quoted by MTS Allstream as

indications of single firm dominance included revenues from the Bell Canada group, TELUS Communications Company, and MTS Allstream, rather than any single incumbent's share as MTS Allstream had suggested.

Commission's analysis and determinations

22. Section 1 of the Policy Direction sets out, among others, the following directives, which are relevant to Bell Canada's application:

> (a) …the Commission should (i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives; and (ii) when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;
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> (b) the Commission, when relying on regulation, should use measures that satisfy the following criteria, namely, those that (i) specify the telecommunications policy objective that is advanced by those measures and demonstrate their compliance with this Order; (ii) if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote inefficient entry; and
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> (c) the Commission, to enable it to act in a more efficient, informed and timely manner, should … (i) use only tariff approval mechanisms that are as minimally intrusive and as minimally onerous as possible.

23. The Commission notes that in previous decisions it determined that the mixed Type 2 CSA rules were necessary to address the following: weak competition in the market for local exchange services; the potential for unjust discrimination in the provision of tariffed service elements in a CSA; and the potential for anti-competitive behaviour.

24. The Commission considers that the mixed Type 2 CSA rules address the policy objectives set out in paragraphs 7 (*c*) and 7 (*h*) of the Act, which are as follows:

> (*c*) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;
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> and
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> (*h*) to respond to the economic and social requirements of users of telecommunications services.

25. With respect to the objective set out in paragraph 7 (*c*) of the Act, the Commission notes that MTS Allstream and RCI cited low competitor market shares in local exchange services in the large and very large business markets to demonstrate that the ILECs are dominant in these markets and that the mixed Type 2 CSA rules are necessary to foster competition in these markets.

26. The Commission notes Bell Canada's submission that customers that use mixed Type 2 CSAs routinely look to a variety of service providers. The Commission also notes Bell Canada's references to the submissions by the Coalition and the CBA in the proceeding that led to Decision 2005-27 with respect to multiple vendors bidding on contracts. The Commission further notes that MTS Allstream described customers that use CSAs as some of the most vigorously contested and sought-after customers. The Commission notes that no party disputed the characterizations of the customers to which mixed Type 2 CSAs are offered or the types of competitors offering services to them.

27. The Commission notes that firms competing for large business customers include, among others, at least four national telecommunications carriers that have their roots in incumbency. The Commission notes that these competitors are well-financed, established, facilities-based carriers that have significant investment in network infrastructure. The Commission considers that below-cost pricing by the ILECs when operating in-territory would be unlikely to drive such competitors from the market on a permanent basis. In the Commission's view, the ILECs would not be able to recoup the associated losses by increasing prices in a less competitive market in the future. Accordingly, the Commission is of the view that there is robust competition for customers that use mixed Type 2 CSAs.

28. The Commission notes the concern that without the mixed Type 2 CSA rules, the ILECs could leverage their market power in non-forborne markets to compete unfairly in competitive markets. The Commission considers that this situation could arise if customers were unable to obtain the tariffed services unless they were also required to take the forborne and/or non-telecommunications services. However, the Commission considers that this is not a concern with respect to the provision of services by the ILECs because tariffed services must be made available on a stand-alone basis.

29. The Commission notes that most retail services used by mixed Type 2 CSA customers are entirely forborne (e.g. long distance services and Internet access), largely forborne (e.g. most data services and most interexchange private line routes), or have forbearance frameworks in place (e.g. local exchange services and high-speed intra-exchange digital services). In the Commission's view, tariffed services are increasingly less present in mixed Type 2 CSAs due to increased forbearance. Accordingly, the Commission considers that the incentive for the ILECs to use CSAs to circumvent tariffs and to engage in unjust discrimination with respect to tariffed services is significantly less of a concern now than previously.

30. In light of the level of competition in telecommunications services that are provided through mixed Type 2 CSAs, the Commission is of the view that regulation of qualifying mixed Type 2 CSAs is no longer required to ensure that tariffed services are provided at just and reasonable rates and not in an unjustly discriminatory or unduly preferential manner.

31. With respect to the telecommunications policy objective set out in paragraph 7 (*h*) of the Act, the Commission considers that market forces, rather than regulation, can be relied upon to advance the economic and social requirements of customers.

32. In light of the above, the Commission finds it appropriate to eliminate the mixed Type 2 CSA rules for qualifying mixed Type 2 CSAs.

33. The Commission notes that the elimination of the mixed Type 2 CSA rules for qualifying mixed Type 2 CSAs does not alter the ILECs' obligation to provide tariffed services in accordance with the approved tariffs, regardless of whether such services are provided within a CSA.

IV. Whether the Commission's assessment of mixed Type 2 CSAs on an ex post complaint basis should be limited to tariff circumvention

34. Bell Canada proposed that if the mixed Type 2 CSA rules were eliminated, the Commission could deal on an *ex post* basis with any complaint that a particular mixed Type 2 CSA had been part of a practice designed to circumvent tariffs. Bell Canada also proposed that in light of the Policy Direction, the Commission should not retain the ability to assess, even on an *ex post* complaint basis, whether a particular mixed Type 2 CSA had an anti-competitive purpose or effect. In this regard, Bell Canada submitted that such concerns should be left to the *Competition Act.*

Commission's analysis and determinations

35. With respect to Bell Canada's proposal in regard to tariff circumvention, the Commission notes that it addresses tariff compliance in general, including issues of tariff circumvention, on an *ex post* complaint basis.

36. With respect to Bell Canada's proposal in regard to anti-competitive behaviour, the Commission notes that Bell Canada did not point to specific wording in the Policy Direction to justify its position. The Commission considers that the Policy Direction does not alter the Commission's jurisdiction to examine anti-competitive behaviour with respect to mixed Type 2 CSAs. Given this, the Commission's assessment of mixed Type 2 CSAs will not be limited, on an *ex post* complaint basis, to tariff circumvention.

Conclusions

37. The Commission determines that, effective the date of this Decision, the following requirements with respect to qualifying mixed Type 2 CSAs do not apply:

i) filing of a tariff and associated agreement for Commission approval;

ii) filing of an imputation test;

iii) demonstrating that there is not sufficient demand to offer any customer-specific elements of the service through the general tariff;

iv) making mixed Type 2 CSAs generally available to other customers; and

v) permitting the resale of mixed Type 2 CSAs.

Secretary General

Related documents

- *Forbearance from the regulation of retail local exchange services, Telecom Decision CRTC 2006-15, 6 April 2006*
- *Review of price floor safeguards for retail tariffed services and related issues,* Telecom Decision CRTC 2005-27, 29 April 2005
- *Bundling framework developed for customer-specific arrangements,* Order CRTC 2000-425, 19 May 2000
- *Guidelines for review and vary applications,* Telecom Public Notice CRTC 98-6, 20 March 1998
- *Review of regulatory framework,* Telecom Decision CRTC 94-19, 16 September 1994