



Telecom Decision CRTC 2008-117

Ottawa, 11 December 2008

Cybersurf Corp.'s application related to matching service speed requirements for wholesale Internet services

Reference: 8622-C122-200808785

In this Decision, the Commission approves in part Cybersurf's application requesting that incumbent local exchange carriers be required to provide speeds for wholesale asymmetric digital subscriber line services that match the speeds made available to their retail Internet service customers. For existing retail service speeds, this requirement will apply only where there is a request from a competitor for such speeds.

Introduction

1. In an application dated 19 June 2008, Cybersurf Corp. (Cybersurf) sought to have reinstated the requirement that incumbent local exchange carriers (ILECs) provide wholesale aggregated asymmetric digital subscriber line (ADSL) service¹ speed to competitors that matched the ADSL throughput speeds provided to the ILECs' retail Internet service customers (the matching service speed requirement). This requirement was rescinded by the Commission in Telecom Decision 2007-77.
2. The Commission received comments from Bell Aliant Regional Communications, Limited Partnership (Bell Aliant), Bell Canada, and Saskatchewan Telecommunications (SaskTel) [collectively, Bell Canada et al.]; the Coalition of Internet Service Providers Inc.; Distributel Communications Limited; MTS Allstream Inc. (MTS Allstream); Primus Telecommunications Inc.; TELUS Communications Company (TCC); and Yak Communications (Canada) Corp. The record of this proceeding, which closed on 31 July 2008, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
3. The Commission notes that Bell Canada et al. and TCC opposed Cybersurf's application while the other parties generally supported it.
4. The Commission has identified the following issues to be addressed in its determinations:
 1. Is Cybersurf requesting that the Commission review and vary Telecom Decision 2008-17?
 2. Does Telecom Decision 2008-17 apply to new wholesale services?

¹ For the purposes of this Decision, the term "aggregated ADSL services" includes the aggregated ADSL access services of the ILECs (sometimes referred to as Gateway Access Service (GAS)) as well as the High Speed Access services of the ILECs (sometimes referred to as HSA service).

3. Would a matching service speed requirement be consistent with the Policy Direction?²

1. Is Cybersurf requesting that the Commission review and vary Telecom Decision 2008-17?

5. Bell Canada et al. and TCC submitted that Cybersurf had raised the issue of the matching speed requirement in the proceeding that led to Telecom Decision 2008-17. In their view, because the Commission had not imposed such a requirement on the ILECs in Telecom Decision 2008-17, the Commission had considered and rejected the relief sought by Cybersurf. They submitted that Cybersurf was attempting to re-litigate the matter in this proceeding and that Cybersurf's present application had failed to demonstrate that the Commission's determination in Telecom Decision 2008-17 on this matter was incorrect.
6. Cybersurf submitted that in Telecom Decision 2008-17, the Commission had not considered, nor ruled on, the matching service speed issue. Cybersurf further submitted that it was not seeking to change any of the Commission's determinations in Telecom Decision 2008-17, and, accordingly, that it should not be subject to the evidentiary burden related to a review and vary application.

Commission's analysis and determination

7. The Commission agrees that the issue of matching service speed was not considered, nor ruled on, in Telecom Decision 2008-17. Accordingly, the Commission does not consider Cybersurf's application to be a review and vary application with respect to Telecom Decision 2008-17.

2. Does Telecom Decision 2008-17 apply to new wholesale services?

8. TCC submitted that Cybersurf's reliance on Telecom Decision 2008-17 to support its application was misplaced because that Decision was not intended to provide a framework for the treatment of new wholesale services, but rather was limited to existing wholesale services.

Commission's analysis and determination

9. Contrary to TCC's submission, and consistent with the Commission's finding in Telecom Decision 2008-116 regarding an application by Bell Canada et al. for a forbearance framework for new non-essential services, the Commission considers that Telecom Decision 2008-17 does provide the framework for the treatment of new wholesale services.

² Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, P.C. 2006-1534, 14 December 2006

3. Would a matching service speed requirement be consistent with the Policy Direction?

10. Cybersurf submitted that the determination in Telecom Decision 2007-77 to rescind the matching service speed requirement that had been established in Telecom Orders 2007-21, 2007-22, 2007-24, and 2007-25 (collectively, the aggregated ADSL orders)³ stemmed from the significant regulatory uncertainty at the time given that the regulatory framework for wholesale services was under review as a result of the Policy Direction. Given that the review had been completed and that a revised regulatory framework for wholesale services had been established in Telecom Decision 2008-17, Cybersurf submitted that the circumstances that had led to the rescission of the matching service speed requirement no longer existed. Cybersurf further submitted that its claim for relief was consistent with the Policy Direction. In this respect, Cybersurf argued, among other things, that because the third-party Internet access (TPIA) services of the cable companies were subject to a matching service speed requirement, symmetry required that the ILECs be subject to the same requirement.
11. Cybersurf noted that in Telecom Decision 2008-17, the Commission classified the aggregated ADSL service in respect of which the matching service speed requirement was sought as a conditional mandated non-essential service. In that Decision, the Commission found such a finding to be consistent with the Policy Direction. Cybersurf submitted that throughput speed was a major competitive attribute in retail Internet service markets. In Cybersurf's view, it would be inconsistent to mandate the wholesale provision of aggregated ADSL services on competitive grounds, while at the same time not establishing conditions that enabled Internet service providers to compete on the same basis as ILECs. According to Cybersurf, the absence of a matching service speed requirement would effectively marginalize competitors as they would be limited to providing inferior retail Internet services.
12. Bell Canada et al. and TCC submitted that approval of the relief sought by Cybersurf would be contrary to the Policy Direction because it would evince a lack of reliance on market forces to the maximum extent feasible and would disincent investment in networks by incumbents and competitors. In support of its position with respect to investment, TCC relied on a separate paper prepared by a consultant which, among other things, argued that mandatory unbundling would dampen investment in broadband infrastructure, and in particular dampen investment in fibre to the node and fibre to the home.
13. Bell Canada et al. further submitted that granting the relief requested would be contrary to what they considered was a presumption, if not a requirement, in the Policy Direction that the Commission should not broaden mandated access to new non-essential services.
14. Bell Canada et al. further submitted that the Cybersurf application was based on the philosophy that competitors should be able to access ILEC facilities, rather than build their own facilities. Bell Canada et al. argued that this philosophy was contrary to the Policy Direction's emphasis on innovation, investment, and reliance on market forces. Bell Canada et al. argued that the introduction of new speeds involved significant investment and that the

³ It is noted that the new service requirements applicable to MTS Allstream's ADSL service in Telecom Order 2007-23 were not subject to Telecom Decision 2007-77. However, in light of Telecom Decision 2007-77, MTS Allstream proposed to withdraw the tariff proposals that would have implemented these requirements; this proposal was then approved in a letter dated 25 October 2007.

establishment of additional mandatory access requirements with respect to services found to be non-essential would fail to constitute minimalist regulatory intervention, contrary to the Policy Direction.

15. Bell Canada et al. submitted that to the extent that symmetry in the regulatory treatment of ILEC and cable company wholesale Internet services was required, the ILEC offering should provide the benchmark from which cable company obligations should be derived, rather than the converse.

Commission's analysis and determinations

16. As a preliminary matter, the Commission notes that its determination in Telecom Decision 2007-77 to rescind the matching service speed requirement in the aggregated ADSL orders, and its finding that such a determination was consistent with the Policy Direction, were due to the significant regulatory uncertainty created by the fact that the wholesale services framework was under review at the time. Accordingly, the Commission's determination that such rescission was consistent with the Policy Direction was based on very narrow grounds and the Commission did not purport to find that a matching service speed requirement was, in and of itself, contrary to the Policy Direction. Further, the Commission notes that the regulatory uncertainty referred to in Telecom Decision 2007-77 was removed with the issuance of Telecom Decision 2008-17.
17. The Commission notes that no party in this proceeding took issue with the Commission's determination in Telecom Decision 2008-17 to classify the ILECs' aggregated ADSL services as conditional mandated non-essential services. The Commission further notes that the relief sought by Cybersurf is to require ILECs to provide their aggregated ADSL services to competitors at the same speeds as they provide to their retail Internet customers.
18. With respect to subparagraph 1(a)(i) of the Policy Direction, based on the record of this proceeding, the Commission finds that market forces cannot be relied on to address the relief sought by Cybersurf. In the Commission's view, the ILECs have little incentive, if any, to negotiate matching aggregated ADSL service speeds with competitors. The Commission notes, for example, Cybersurf's unchallenged statement in its application that Bell Canada had rejected its request to upgrade the wholesale service to a higher throughput speed that would have matched a Bell Canada retail speed.
19. With respect to subparagraph 1(a)(ii) of the Policy Direction, the Commission considers that the purpose of a matching service speed requirement would be to ensure that competition in the retail high-speed Internet access services market is not substantially lessened or prevented. The Commission finds that such a requirement would be efficient and proportionate to its purpose. Cybersurf's application pertains to a wholesale service that the Commission found in Telecom Decision 2008-17 must be mandated because, among other things, it is the only cost-effective means to provide transport to, and access from, an ILEC's central office to a competitor's end-customer. Service speed is an important competitive attribute, with rates differing significantly by speed and speed often being a major differentiation point from a marketing standpoint. The Commission considers that absent a matching service speed requirement, the ability of competitors that rely on the mandated aggregated ADSL service to

compete in the retail market would be significantly restricted, which would likely result in a substantial lessening or prevention of competition in the retail high-speed Internet services market. Accordingly, the Commission considers that the ability of competitors to compete in the retail market by receiving aggregated ADSL services at speeds that match the ILEC retail speeds would be consistent with subparagraph 1(a)(ii) of the Policy Direction. Consistent with this approach for existing retail service speeds, the Commission considers that a requirement to provide a matching wholesale speed should not apply where there is no request from a competitor with regard to that speed.

20. With respect to subparagraph 1(b)(i) of the Policy Direction, the Commission finds that a matching service speed requirement would advance the telecommunications objectives set out at paragraphs 7(b), (c), (f), and (h) of the *Telecommunications Act*.⁴
21. With respect to subparagraph 1(b)(ii) of the Policy Direction, the Commission finds that the relief sought by Cybersurf would neither deter economically efficient entry into the retail high-speed Internet access services market nor promote economically inefficient entry. The Commission notes that the rates to be charged by the ILECs for access to such services by competitors will be set on the basis of causal costs plus a reasonable mark-up, which will ensure that such access is provided on an economically efficient basis.
22. With respect to the submissions of Bell Canada et al. and TCC that the relief sought by Cybersurf would dampen investment in alternative facilities (Bell Canada et al.) and broadband in general (TCC), the Commission notes that this proceeding is limited to addressing the issue of matching service speeds of the ILECs' aggregated ADSL access services, which are provided over copper facilities. The Commission considers that the incentive to invest in alternative facilities and broadband services would not be materially impacted by a requirement applicable to the copper-based aggregated ADSL services. Further, the Commission considers that the ILECs' investment incentives will be principally impacted by their need to compete with facilities-based competitors in retail broadband markets. In addition, as noted above, ILECs will be able to recover their causal costs associated with the provision of these wholesale copper-based services, including their investments in the associated facilities.
23. Accordingly, the Commission is not persuaded that the specific relief sought by Cybersurf would materially dampen investment.
24. In light of the above, the Commission finds that a requirement to provide matching wholesale speeds where there is demand by a competitor would be consistent with the Policy Direction.

Conclusion

⁴ These objectives are, respectively, to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; 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 to respond to the economic and social requirements of users of telecommunications services.

25. The Commission **approves** Cybersurf's application in part. The Commission directs that the ILECs subject to this Decision, namely Bell Aliant, Bell Canada, MTS Allstream, SaskTel, and TCC, consult with their aggregated ADSL customers and file, within 45 days of the date of this Decision, proposed revised tariff pages to include any matching-speed with respect to existing retail service speeds offering where there is demand by any such customer. The Commission also directs that upon the introduction of a new retail Internet service speed by any such ILEC, the ILEC in question is to file at the same date proposed revised tariff pages for wholesale aggregated ADSL services at the same speed.

Secretary General

Related documents

- *Regulatory policy – Forbearance framework for new non-essential wholesale services*, Telecom Decision CRTC 2008-116, 11 December 2008
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- *Applications to review and vary Ethernet and ADSL Orders*, Telecom Decision CRTC 2007-77, 31 August 2007
- *TELUS Communications Company – Network-to-Network Interface Service, Wide Area Network ADSL Service, and Wholesale Internet ADSL Service*, Telecom Order CRTC 2007-25, 25 January 2007
- *Saskatchewan Telecommunications – Aggregated Asymmetric Digital Subscriber Line (ADSL) Service*, Telecom Order CRTC 2007-24, 25 January 2007
- *MTS Allstream Inc. – Asymmetric Digital Subscriber Line (ADSL) Data Access Service*, Telecom Order CRTC 2007-23, 25 January 2007
- *Bell Canada and Bell Aliant Regional Communications, Limited Partnership for services provided in Ontario and Quebec – Gateway Access Service and High Speed Access Service*, Telecom Order CRTC 2007-22, 25 January 2007
- *Bell Aliant Regional Communications, Limited Partnership for services provided in the Atlantic Provinces – ADSL Access Service and ADSL WAN Service*, Telecom Order CRTC 2007-21, 25 January 2007

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