



Telecom Decision CRTC 2010-637

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Ottawa, 31 August 2010

Follow-up to Telecom Decision 2008-1 – Proposal by Bell Aliant Regional Communications, Limited Partnership and Bell Canada to dispose of the funds remaining in their deferral account

File numbers: 8638-C12-200817505; 8638-C12-200817512; 8638-C12-200817520;
Bell Aliant Tariff Notice 305; and Bell Canada Tariff Notices 7240
and 7242

In this decision, the Commission approves the use of deferral account funds by Bell Aliant and Bell Canada to expand broadband services to 112 communities in Ontario and Quebec. The Commission also directs the companies to rebate funds remaining in their deferral account to residential subscribers in non-high-cost serving areas. The dissenting opinion of Commissioner Katz is attached.

Introduction

1. In Telecom Decision 2006-9, the Commission determined that incumbent local exchange carriers (ILECs) should, to the greatest extent possible, use the funds in their deferral accounts to improve access to telecommunications services for persons with disabilities and to expand broadband services to rural and remote communities. The Commission also concluded that any accumulated balance remaining in an ILEC's deferral account after these initiatives had been approved would be rebated to the ILEC's residential local subscribers in non-high-cost serving areas (non-HCSAs).
2. In Telecom Decisions 2007-50 and 2008-1 (these two decisions and Telecom Decision 2006-9 are hereafter referred to collectively as the deferral account decisions), the Commission approved, among other things, a proposal by Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) and Bell Canada (collectively, the Bell companies) to expand broadband services to certain rural and remote communities in Ontario and Quebec (the approved communities) using funds from their deferral account. In Telecom Decision 2008-1, the Commission also approved the use of certain other funds in the Bell companies' deferral account to complete initiatives to improve access to telecommunications services for persons with disabilities. Finally, in Telecom Decision 2008-1, the Commission determined that any funds remaining in the Bell companies' deferral account after funds were allocated to the broadband plans and accessibility initiatives should be rebated to residential subscribers of record in non-HCSAs as of the date of that decision, 17 January 2008.

3. The implementation of the deferral account decisions was put on hold pending disposition of appeals before the Federal Court of Appeal and the Supreme Court of Canada related to the broadband expansion proposals and to the consumer rebates.¹ Following the dismissal of the appeals to the Supreme Court of Canada, the Bell companies submitted revised plans to provide broadband service to the final 112 communities approved in the deferral account decisions and in related decisions.²
 4. The Commission received comments from Barrett Xplore Inc. and Barrett Broadband Networks Inc. (collectively, Barrett); Dryden Municipal Telephone System; Execulink Telecom; Globalive Wireless Management Corp. (WIND); MTS Allstream Inc. (MTS Allstream); the Public Interest Advocacy Centre and Canada Without Poverty (PIAC et al.); Rogers Communications Inc. (RCI); and Quebecor Media Inc. and Videotron Ltd. (collectively, Videotron). The Commission also received comments from representatives of certain approved communities and from one individual. The public record of this proceeding, which closed on 8 June 2010, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file numbers provided above.
 5. The Commission notes that other decisions are also being released today approving the use of deferral account funds for TELUS Communications Company (TCC) and MTS Allstream to expand broadband services to other approved communities in their operating territories and to provide rebates to their residential subscribers in non-HCSAs.
 6. The Commission has identified the following four issues to be addressed in this decision:
 - I. What is the remaining balance in the Bell companies' deferral account?
 - II. Is the Bell companies' proposed broadband rollout plan consistent with the Commission's determinations in the deferral account decisions?
 - III. Is the Bell companies' proposal not to provide a rebate to residential subscribers in non-HCSAs appropriate?
 - IV. Are the Bell companies' proposed competitor services tariffs appropriate?
- I. What is the remaining balance in the Bell companies' deferral account?**
7. As part of their revised plans, the Bell companies estimated their deferral account balance at \$487.9 million as of 31 May 2007, which includes \$25.4 million to fund initiatives to improve accessibility for persons with disabilities.

¹ Funding for initiatives to improve accessibility for persons with disabilities was not part of the appeals and was approved in Telecom Decision 2008-1.

² Other decisions relating to the approval of the 112 communities include Telecom Decisions 2008-13, 2008-21, 2008-88, 2009-763, and 2010-60.

8. The Commission notes that the Bell companies' estimate does not include interest accumulated beyond 31 May 2006 or certain recurring amounts which might have otherwise accrued in their deferral account until they were eliminated on 1 June 2009, pursuant to the Commission's determination in Telecom Decision 2009-213. The Commission notes further that the Bell companies opposed the inclusion of interest beyond 31 May 2006 and of recurring amounts beyond 31 May 2007.
9. The Commission has reviewed the submissions of MTS Allstream and TCC regarding interest and recurring amounts in relation to their deferral accounts. The Commission notes that MTS Allstream supported the Bell companies' position, while TCC opposed the continued accumulation of interest beyond 31 May 2007 but did not object to the accumulation of recurring amounts up to the present time.

Interest

10. The Bell companies and MTS Allstream submitted that the Commission did not direct or give notice in Telecom Decision 2005-69 (which extended certain aspects of the price cap regime), in the deferral account decisions, or elsewhere that interest should be added to the accumulated balances beyond 31 May 2006.
11. More specifically, the Bell companies submitted that, while the ILECs were directed in Telecom Decision 2006-9 to file proposals to dispose of the funds that would have accumulated by the end of the fourth year of the price cap period, they were not directed to take into account interest that would accrue on those balances beyond 31 May 2006 in formulating those proposals. Furthermore, the Bell companies noted that the Commission has never taken issue with the fact that, in subsequent filings, they did not include interest in their deferral account balance beyond 31 May 2006. The Bell companies argued that the requirement to include interest would create uncertainty about the amount that should be allocated to accessibility initiatives.
12. TCC submitted that an extension of the interest accrual period from 31 May 2006 to 31 May 2007 would be consistent with Telecom Decision 2005-69 because that decision extended the deferral account mechanism in its entirety for one year. However, TCC submitted that an extension beyond that date would be inconsistent with Telecom Decision 2007-27, wherein the Commission determined that the deferral account mechanism would not form part of the next price cap regime, as the effect of such an extension would be to expand rather than phase out the accounts and the ILECs' obligations. TCC further submitted that the delay in implementing programs approved for drawdown from its deferral account was caused by the court appeals, and argued that the ILECs should not be penalized through the application of additional interest due to this delay.

Recurring amounts

13. The Bell companies submitted that the Commission had already made its final determination in Telecom Decision 2006-9 regarding the elimination of the recurring amounts. In particular, amounts recurring after 31 May 2006 were to be eliminated via prospective rate reductions, which the Bell companies submitted they had done.

14. On the other hand, TCC included all recurring amounts in its estimated deferral account balances.

Commission's analysis and determinations

15. With respect to interest, the Commission notes that Telecom Decision 2002-34 specifically provides that amounts in the deferral accounts will bear interest at the ILECs' short-term cost of debt, which is to be determined annually, and that no subsequent Commission decision has indicated that this practice should cease. Furthermore, the Commission notes that in Telecom Decision 2006-9, in directing the ILECs to file updates to their deferral account schedules, it specifically indicated that these updates were to reflect all decisions that impact the balance (this would include Telecom Decision 2002-34) and that the ILECs were to provide any assumptions or rationale, including the rate of interest, used to derive their figures.
16. With respect to recurring amounts, the Commission notes that its statement in Telecom Decision 2006-9 regarding further accumulation of funds in the deferral accounts was related to its desire for the ILECs to eliminate the recurring balance flowing into each of their deferral accounts. Specifically, the Commission directed the ILECs to file proposed rate reductions that were to be effective 1 June 2006 to eliminate their recurring balances. Had the Bell companies implemented rate reductions to that effect at that time, it would have been unnecessary to include the recurring amounts in subsequent years.
17. The Commission notes that Telecom Decision 2005-69 extended the deferral account regime as a whole until 31 May 2007. However, the Commission notes that the extension did not single out particular elements of the regime for different treatment, as suggested by the Bell companies. In addition, Telecom Decision 2007-27, which ended the application of the deferral account mechanism going forward, did not eliminate obligations under the existing deferral accounts, including the accumulation of interest and of any remaining recurring amounts.
18. The Commission also notes that it did not approve any specific deferral account balances in Telecom Decision 2008-1, nor did it confirm the estimates provided by the ILECs in the proceeding that led to that decision. Once the follow-up processes resumed, the Commission required the ILECs to update their deferral account balances, a step that would have been unnecessary if the amounts were frozen as of 31 May 2006 or 31 May 2007.
19. In light of the foregoing, the Commission considers that the ILECs' deferral accounts should continue to accrue interest and recurring amounts beyond the date proposed by the Bell companies. The Commission considers that this methodology recognizes the full value of the funds in the accounts, and that to permit otherwise would allow the ILECs to benefit from, in effect, interest-free loans.

20. Accordingly, the Commission finds that the Bell companies' deferral account balance should be adjusted to include interest beyond 31 May 2006 and that the recurring amounts recorded between 1 June 2006 and 1 June 2009 should be added to the accumulated balance at the end of each applicable year.
21. The Commission notes that amounts related to accessibility initiatives were apportioned in Telecom Decision 2008-1 and that their disposition was not delayed due to the legal actions. Accordingly, in its analysis the Commission did not include interest calculations related to those amounts after 17 January 2008, the date of Telecom Decision 2008-1.
22. In light of all the above, the Commission determines the accumulated balance in the Bell companies' deferral account to be \$583.3 million as of 31 May 2010. This amount includes the \$25.4 million already approved and apportioned to fund initiatives to improve accessibility for persons with disabilities.

II. Is the Bell companies' proposed broadband rollout plan consistent with the Commission's determinations in the deferral account decisions?

23. In the deferral account decisions, the Commission directed the Bell companies to deploy broadband services in the approved communities using least-cost technology and to make services available that would be comparable to the services they provide in urban areas in terms of rates, terms and conditions, upload and download speeds, and reliability. The Commission also considered that it would be in the public interest for ILECs to offer various speed levels.

Proposed broadband service

24. As part of their revised plans, the Bell companies proposed to offer residents in the approved communities a wireless broadband service that would provide up to 2 megabits per second (Mbps) of download speed and up to 800 kilobits per second of upload speed, with a 2 gigabyte (GB) monthly usage allowance, for a monthly rate of \$31.95. Usage above the 2 GB monthly allowance would cost \$2.50 per GB.
25. The Bell companies submitted that this service would be adequate for most customers' needs since the service speed meets the Commission's minimum requirements and the 2 GB monthly usage cap is representative of the anticipated average usage per subscriber per month in all the approved communities. The Bell companies expressed the view that the average usage of subscribers in the approved communities for the proposed wireless service will approximate the current average usage of their wireline Essential Plus (Ontario) subscribers because of the similarity of the two services.
26. The Bell companies proposed to offer this broadband service using high-speed packet access (HSPA) wireless technology, noting that this would also provide the approved communities with new or improved mobile voice services.

27. RCI, Videotron, and WIND argued that the Bell companies' proposed service is inferior to the broadband service currently available from the Bell companies in urban areas both because the 2 GB cap will not meet the needs of most users, and because there is a lack of other service options beyond the 2 Mbps/2 GB option. Videotron also argued that unless the Bell companies agree to provide the service with an available digital subscriber line (DSL) technology solution, the total amount of the deferral account funds should be rebated to subscribers.
28. The majority of the intervening municipalities and towns generally supported the Bell companies' proposal, provided that the proposed broadband wireless service is on par with the broadband service the Bell companies currently provide in urban areas. One individual submitted that the proposed service does not satisfy the Commission's criteria in terms of price and features being on par with wireline services in urban areas.

Commission's analysis and determinations

29. The Commission notes that, under their proposal, the Bell companies will provide a single service offering, unlike the variety of service options, including various speeds and usage caps, that they offer in urban areas. For example, the most popular broadband service in urban areas appears to be the Bell companies' Residential Performance Service option, which provides a downstream speed of up to 6 Mbps with a monthly usage cap of 25 GB in Ontario, and download speeds of up to 7 Mbps with a monthly usage cap of 60 GB in Quebec.
30. Further, the Commission notes that, based on evidence filed by the Bell companies, the average monthly usage of subscribers to all the Bell companies' existing wireless and wireline broadband services is well above the 2 GB usage allocation proposed by the Bell companies. In this respect, the Commission considers that the average usage requirements of subscribers in the approved communities will more closely approximate the average usage of all subscribers in other communities. Accordingly, in the Commission's view, the 2 GB usage allowance will not meet the needs of the average user of the service in the approved communities.
31. The Commission also notes that, for residential subscribers in urban areas with higher usage requirements, an insurance option is available that will provide an extra 40 GB of usage each month for \$5 per month. The Commission notes that the Bell companies' proposal does not offer a comparable insurance option.
32. Based on the above, the Commission considers that the single service offering proposed by the Bell companies under the HSPA proposal does not satisfy the Commission's requirements as set out in the deferral account decisions.
33. The Commission notes that mobile voice services are already available in 93 of the 112 approved communities, with 90 of the 93 already partially or fully served by wireless HSPA facilities. Although the Bell companies' proposal would result in the expansion of mobile voice services in all the approved communities, the Commission

notes that the primary objective of its deferral account determination is to ensure that these communities receive broadband services comparable to those available in urban areas.

34. In the proceeding that resulted in Telecom Decision 2008-1, the Bell companies originally proposed to offer broadband services using mainly DSL technology that is currently used to provide a variety of broadband services in urban areas. As part of the current proceeding, at the request of the Commission, the Bell companies submitted information on the costs associated with providing broadband services using DSL technology. The Commission considers that the service options available under the DSL alternative comply with the requirement in the deferral account decisions that the Bell companies provide broadband services in the approved communities that are comparable to those they offer in urban areas.
35. In light of the above, the Commission directs the Bell companies to provide broadband services using DSL technology to implement their broadband proposal. The variety of services provided must be comparable to those offered in urban areas, using the same DSL technology, in terms of their rates and terms and conditions.

Proposed broadband costs

36. The Bell companies submitted their cost estimates for providing broadband service to the approved communities using HSPA technology (\$463.6 million), DSL technology (\$406.5 million), and a hybrid of the two technologies (\$419.4 million). The Bell companies requested that a contingency fund equal to 10 percent of the funds approved for broadband expansion be established to allow for any unexpected cost overruns.
37. Barrett, PIAC et al., RCI, and Videotron argued that the Bell companies' costs are overstated. Videotron noted that the Bell companies' 2010 HSPA cost estimates are not credible when compared to Videotron's costs to build its HSPA network of 800 sites throughout Quebec and eastern Ontario. Barrett suggested that the Bell companies' 2010 costs would be enough for Barrett to extend a more robust service to all areas of Canada that remain unserved.
38. RCI and Videotron submitted that the Bell companies should be directed to implement their original 2006 DSL proposal, since the Bell companies' own cost estimates using DSL technology are lower than their estimates using HSPA technology. PIAC et al. argued that the deferral account subsidy should be limited to the original 2006 cost proposals.

Commission's analysis and determinations

39. The Commission has reviewed the Bell companies' current proposed cost estimates and notes that the DSL technology solution complies with the deferral account decisions in that it is the least-cost technology of the three options identified. However, the Commission also notes that the costs in the current estimates are significantly higher than those proposed in the 2006 cost studies for the approved

communities provided by the Bell companies in the proceeding that led to Telecom Decision 2008-1. The Commission further notes that the Bell companies have provided some explanations where cost increases since 2006 have exceeded what might be expected due to inflation and other developments since 2006.

40. The Commission acknowledges that there have been some cost increases since 2006; for example, it agrees with the Bell companies that the use in some communities of DSL technology instead of a fixed wireless technology has increased certain costs. However, the Commission is not convinced that the increases are as significant as the Bell companies have indicated and considers that some of the current cost estimates submitted by the Bell companies are overstated. To allow for this, the Commission has made adjustments to the proposed costs as follows:

- adjusted the proposed backbone costs to reflect alternative uses for network equipment and to bring unit costs more in line with those proposed in the 2006 study;
- with respect to the proposed access costs, made adjustments to the construction mix of fibre facilities consistent with the costs for comparable services provided by the Bell companies;
- reduced proposed Internet Protocol core costs to recognize the built-in extra capacity expected to be used by other services and communities;
- reduced the proposed maintenance costs to reflect the above-noted capital cost adjustments; and
- reduced billing costs to bring the associated unit costs more in line with those proposed in the 2006 study.

41. Based on its review of the Bell companies' current cost estimates, the Commission finds that it would be reasonable to approve an amount of \$306.3 million for broadband expansion. The Commission considers that this amount of funding should be more than adequate to satisfy the requirement to provision broadband services to all of the approved communities.

42. The Commission considers it appropriate to fix the amount available for broadband expansion; therefore, no further adjustments to the total approved broadband expansion costs shall be permitted. This will provide a level of certainty with respect to the funds available and will simplify the follow-up process by avoiding any requirement to review the costs as the broadband services are rolled out.

43. With this decision, the Commission determines on a final basis the apportionment of the remaining balance in the Bell companies' deferral account. As indicated above, in determining the amounts to be apportioned, the Commission has calculated the interest that accumulated in the funds until 31 May 2010. The Commission notes that the interest that accumulates between 1 June 2010 and the disposition of the funds

will be available to the Bell companies. In light of this, the Commission considers that there is no requirement for a contingency fund to cover unforeseen broadband expansion expenses, as proposed by the Bell companies. The Commission also considers that no further adjustments to the remaining balance need to be made after 31 May 2010.

44. Accordingly, the Commission **approves** the drawdown of \$306.3 million from the Bell companies' deferral account for the expansion of broadband services and directs the Bell companies to use these funds to serve the approved communities. The Commission notes that, as directed in the deferral account decisions, this service expansion should take place over no more than four years and should be completed by the end of August 2014.

III. Is the Bell companies' proposal not to provide a rebate to residential subscribers in non-HCSAs appropriate?

45. The Commission notes that, although the Bell companies initially submitted a proposal to provide rebates to current subscribers in non-HCSAs, they withdrew this proposal because their proposed broadband expansion plans indicated that there would be insufficient funds remaining in their deferral account to provide such rebates.
46. However, the Commission considers that, once the above-noted adjustments have been made to the Bell companies' deferral account balance and to their broadband expansion costs, sufficient funds will remain to permit a rebate to subscribers in non-HCSAs. Specifically, the Commission notes that the amount available for rebate is \$251.6 million and concludes that this amount is sufficient to provide rebates to the Bell companies' subscribers in non-HCSAs.
47. Accordingly, the Commission considers that the following issues must be addressed:
- Who should receive the rebate?
 - How should the funds be rebated?
 - Should the Bell companies be permitted to recover the cost of providing rebates from their deferral account?

Who should receive the rebate?

48. As stated above, the Commission determined in Telecom Decision 2008-1 that any funds available for rebate in the Bell companies' deferral account should be rebated to residential subscribers in non-HCSAs as of the date of that decision, 17 January 2008.
49. As part of the current process, the Bell companies' proposal was to provide the rebate to active customers who were subscribed to their services on 17 January 2008 and whose subscriptions are still in effect at the beginning of the rebate program. The Bell companies indicated that they are also prepared to include former customers who

discontinued their services after 17 January 2008, if the Commission deems it necessary, but noted that this would greatly increase the costs and time required for implementation.

50. PIAC et al. argued that the rebate should be provided to customers of record as close as possible to 17 January 2008, since this would be the best proxy of those customers who paid the rates for services that were not reduced by the price cap formula as a result of Telecom Decision 2002-34.
51. In the Commission's view, the effort associated with tracking down subscribers of record as of 17 January 2008 would introduce undue complexity, delays, and costs that could be avoided by applying the rebate to current subscribers. Accordingly, in the interest of benefiting subscribers to the greatest extent possible, the Commission directs the Bell companies to rebate their residential subscribers of record in non-HCSAs as of the date of this decision.

How should the funds be rebated?

52. The Bell companies initially proposed to provide the following rebate options:
 - a monthly billing credit over 12 months per qualifying network access service (NAS), which would be the default option where a subscriber chooses not to accept another rebate option;
 - a one-time rebate cheque in the amount of the rebate obligation per qualifying NAS, less the associated processing charge;
 - a monthly billing credit over six months, if the subscriber purchases a new service or upgrades an existing service with the Bell companies for a value greater than the rebate obligation; and
 - a gift certificate redeemable at a Bell Canada-owned retail location for a greater value than the rebate.
53. Videotron and RCI submitted that only a one-time rebate is appropriate because the proposal to offer promotions would be too complex and costly to implement, and promotions and credits for long periods are an anti-competitive marketing ploy. Videotron also submitted that the rebate should be issued in the form of a cheque instead of a billing credit, so that the subscriber would not be tied to the Bell companies in any manner.
54. PIAC et al. argued that consumers should be credited or sent the full rebate with no promotions employed.
55. The Commission considers that the Bell companies should have some flexibility in the options they provide to their customers regarding the rebate. However, the Commission notes the parties' concerns about the length of the rebate period and the potential for existing subscribers to be tied to the Bell companies.

56. Accordingly, the Commission directs the Bell companies to fully rebate or credit the funds within **six months** of the date of this decision. The rebate plan may include options for customers, such as an option to accept a promotion of greater value than the value of the rebate obligation, as long as the full value of the promotion is provided within six months of the date of this decision. Further, in communicating with their subscribers, the Bell companies are to note that the rebate has been ordered by the Commission.
57. Regarding subscribers who disconnect their services before the six-month period elapses and the full rebate is given, the Commission directs the Bell companies to apply any remaining rebate credit to their final bill with respect to the disconnected services.

Should the Bell companies be permitted to recover the cost of providing rebates from their deferral account?

58. The Bell companies proposed to recover all costs associated with implementing their proposed rebate program, including promotions, from their deferral account.
59. The Commission considers that the simplest and most cost-effective method to provide the rebate would be via a one-time billing credit on a subscriber's monthly bill with an explanation on the bill as to why the rebate is being given. The offer of other rebate options, such as promotions, a rebate cheque, or rebates over a period longer than one month, would increase the cost of the rebate plan. The Commission considers it appropriate that the deferral account be used to cover the cost of rebating customers. However, in order to maximize the benefit to subscribers, only the costs associated with the least-cost alternative, a one-time billing credit, should be recovered from the deferral account.
60. Accordingly, the Commission **approves** the drawdown from the Bell companies' deferral account of the cost to process a one-time billing adjustment on each subscriber's monthly bill. The Commission has determined this amount to be \$1.02 million, which includes costs for billing system adjustments, billing notices, and increased call centre activity.

IV. Are the Bell companies' proposed competitor services tariffs appropriate?

61. In Telecom Decision 2006-9, the ILECs were required to make the backbone facilities funded through the deferral accounts available to alternative broadband service providers at a minimal rate.
62. In Bell Aliant Tariff Notice 305 and Bell Canada Tariff Notice 7240 (Tariff Notices 305 and 7240), the Bell companies filed proposed tariffs and supporting cost studies for their Broadband Expansion Service using HSPA technology. In Bell Canada Tariff Notice 7242 (Tariff Notice 7242), Bell Canada proposed to introduce General Tariff item 5430 – Wholesale Wireless Broadband Service.

63. The Commission notes that Tariff Notices 305, 7240, and 7242 do not comply with its determination that the Bell companies should provide the variety of services that are available using DSL technology. Accordingly, the Commission **denies** Tariff Notices 305, 7240, and 7242, and directs the Bell companies to file, within **60 days** of the date of this decision, proposed tariffs to provide the competitor services using DSL technology, consistent with the Commission's determinations in this decision. The Commission considers that the services referenced in those tariff notices are to be classified as conditional mandated non-essential services, consistent with the Bell companies' submission.

Ongoing reporting requirements

64. In Telecom Decision 2008-1, the Commission directed the ILECs to file annual reports, by 31 March of each year, beginning in 2009 and ending in 2012. These reports were to include, among other things, annual updates to cost studies and revenue assumptions for the broadband expansion program, and annual adjustments to the deferral account balances for activities carried out in the previous year. In light of the Commission's determinations herein that the amount of funding available for broadband expansion shall be fixed at the amount approved in this decision and that no further adjustments will be permitted, the Commission no longer requires the level of detail in these reports set out in Telecom Decision 2008-1.

65. Accordingly, the Commission directs the Bell companies to file an annual report containing a description of their previous year's broadband rollout, the service introduction date for the communities in which broadband service was made available, and their proposed rollout plan for the remaining years of their broadband expansion program. This report must be filed on 31 March of each year, beginning in 2011 and ending in 2015.

66. The Bell companies are also directed to provide, in their 31 March 2011 annual report, a confirmation that they have completed their rebate plan and a calculation of the total amount of funds that were rebated.

67. The dissenting opinion of Commissioner Katz is attached.

Secretary General

Related documents

- *Follow-up to Telecom Decision 2008-1 – Requests by Bell Aliant Regional Communications, Limited Partnership and Bell Canada to expand broadband services to certain supplemental communities in Ontario and Quebec using deferral account funds*, Telecom Decision CRTC 2010-60, 5 February 2010

- *Follow-up to Telecom Decision 2008-1 – Late filed requests to exclude certain Ontario communities from the list of approved communities for broadband service expansion by Bell Aliant Regional Communications, Limited Partnership and Bell Canada, Telecom Decision CRTC 2009-763, 9 December 2009, as amended by Telecom Decision CRTC 2009-763-1, 17 December 2009*
- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application to review and vary portions of Telecom Order 2008-305 regarding the elimination of the recurring balance in Bell Canada’s deferral account, Telecom Decision CRTC 2009-213, 23 April 2009*
- *Quebecor Media Inc. – Application to review and vary certain aspects of Telecom Decision 2008-1 related to the use of deferral account funds for broadband expansion, Telecom Decision CRTC 2008-88, 9 September 2008*
- *Follow-up to Mitchell Seaforth Cable T.V. Ltd. – Application to review and vary the determinations in Telecom Decision 2007-50 with respect to the community of Dublin, Ontario, Telecom Decision 2007-110, Telecom Decision CRTC 2008-21, 6 March 2008*
- *DERY Telecom – Application to review and vary certain determinations in Telecom Decision 2007-50, Telecom Decision CRTC 2008-13, 21 February 2008*
- *Use of deferral account funds to improve access to telecommunications services for persons with disabilities and to expand broadband services to rural and remote communities, Telecom Decision CRTC 2008-1, 17 January 2008*
- *Telecom Public Notice CRTC 2006-15 – Use of deferral account funds to expand broadband services to certain rural and remote communities, Telecom Decision CRTC 2007-50, 6 July 2007, as amended by Telecom Decision CRTC 2007-50-1, 27 July 2007*
- *Price cap framework for large incumbent local exchange carriers, Telecom Decision CRTC 2007-27, 30 April 2007*
- *Disposition of funds in the deferral accounts, Telecom Decision CRTC 2006-9, 16 February 2006*
- *Extension of the price regulation regime for Aliant Telecom Inc., Bell Canada, MTS Allstream Inc., Saskatchewan Telecommunications and TELUS Communications Inc., Telecom Decision CRTC 2005-69, 16 December 2005*
- *Regulatory framework for second price cap period, Telecom Decision CRTC 2002-34, 30 May 2002, as amended by Telecom Decision CRTC 2002-34-1, 15 July 2002*

Dissenting opinion of Commissioner Len Katz

My dissent of this decision is focused uniquely on the position taken by my fellow Commissioners regarding the requirement that Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies) rely on digital subscriber line (DSL) technology in the deployment of broadband services to the 112 communities approved for the Bell companies in Telecom Decisions 2007-50³ and 2008-1⁴ (these two decisions, along with Telecom Decision 2006-9,⁵ are hereinafter referred to collectively as the deferral account decisions) as well as in related decisions.⁶ More specifically, I believe that the Bell companies' proposal to roll out broadband using alternative technologies is consistent with the Commission's determinations in the deferral account decisions, while my colleagues have modified the Bell companies' proposal based on technological criteria. Having set a "hard cap" on the funds to be drawn from the Bell companies' deferral account for the purposes of deploying broadband services to the approved communities, the decision should then have limited itself to requiring the Bell companies to provide broadband services comparable to those offered in urban areas, as per the deferral account decisions.

It is my view that the majority's decision to require the Bell companies to roll out broadband to the concerned communities by means of DSL technology only is:

- i) contrary to the policy objectives set out in the *Telecommunications Act* (the Act),
- ii) inconsistent with previous Commission decisions and proclamations related to reliance on specific technology,
- iii) inconsistent with previous Commission decisions and directions relating to the disposition of deferral account funds, and
- iv) inconsistent with the Policy Direction's⁷ requirement that the Commission use measures that are efficient and proportionate to their purpose.

(i) Finding is contrary to the policy objectives set out in the Act

Section 7 of the Act sets out the Canadian telecommunications policy objectives. These objectives, whether they relate to urban or rural areas of Canada, speak to the principle that all Canadians should have access to reliable and affordable telecommunications services of high quality (paragraph 7(b)). Nowhere does it reference specific technology

³ *Telecom Public Notice CRTC 2006-15 – Use of deferral account funds to expand broadband services to certain rural and remote communities*, Telecom Decision CRTC 2007-50, 6 July 2007, as amended by Telecom Decision CRTC 2007-50-1, 27 July 2007

⁴ *Use of deferral account funds to improve access to telecommunications services for persons with disabilities and to expand broadband services to rural and remote communities*, Telecom Decision CRTC 2008-1, 17 January 2008

⁵ *Disposition of funds in the deferral accounts*, Telecom Decision CRTC 2006-9, 16 February 2006

⁶ For a list of related decisions, see footnote 2 to the majority decision.

⁷ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (the Policy Direction)

or require the same technology in all markets. Moreover, by including the reference to “high quality” and coupled with the policy objective of encouraging innovation in the provision of telecommunications services (paragraph 7(g)), the Act recognizes the need to adapt to new and innovative technologies in meeting the needs of all Canadians. By limiting the rollout of broadband services in these communities to DSL technology, the Commission has taken a static view of technology and failed to recognize the dynamic changes taking place in functionality and cost from newer technologies.

(ii) Finding is inconsistent with previous Commission decisions and proclamations related to reliance on specific technology

At paragraph 19 of Telecom Public Notice 2004-2,⁸ reiterating a pronouncement made in Telecom Decision 98-9,⁹ the Commission stated that “consistent with its overall approach to telecommunications regulation, it was not appropriate to define the market for telecommunications services with reference to technology. Instead, service attributes should be the focus of analysis.” Moreover, in a 17 August 2005 discussion paper prepared for the Telecommunications Policy Review Panel established by the Minister of Industry,¹⁰ the Commission stated:

130. In this new environment, the Commission has pursued a policy of technological neutrality that is designed to ensure that regulatory interventions in the market do not inadvertently incent or disincent the choice of a particular technology. The local competition regime is a prime example of the application of this principle of technology neutrality. It permits both the ILECs [incumbent local exchange carriers] and new entrants to utilize whatever technologies they wish to compete with each other in the provision of local telephone services. The result of this policy is that we now see competitors using various types of wireless access, fibre, coaxial cable, digital subscriber line (DSL) over copper pair, as well as traditional copper pairs to provide analog, digital and IP-based telephone services. [...] The theory behind this approach is found in the objectives of the telecommunications policy in section 7 of the *Act*, as well as in the economic literature, that competition is the best mechanism to allocate economic resources, and that market forces will spur innovation and the use of new technologies, more efficiently than regulation.

⁸ *Regulatory framework for voice communication services using Internet Protocol*, Telecom Public Notice CRTC 2004-2, 7 April 2004

⁹ *Regulation under the Telecommunications Act of certain telecommunications services offered by “broadcast carriers”*, Telecom Decision CRTC 98-9, 9 July 1998

¹⁰ “Canadian Telecommunications Policy Review: Discussion paper”, submitted by the Canadian Radio-television and Telecommunications Commission on 17 August 2005

The Commission went on to state:

132. The Commission has also recognized the importance of regulation that incents new investment in Canadian telecommunications infrastructure in order to improve the quality of service and service innovation. [...] In the new competitive environment, a policy of technological neutrality doesn't mean that the Commission is necessarily technology blind. Rather, the Commission's role is a more subtle one of encouraging facilities-based competition and trying to ensure that its policies do not act as a damper on new investment. [Footnote omitted]

Yet, in the present decision, the Commission has deviated from this proposition and required the Bell companies to deploy a specific technology in all 112 communities. By limiting the deployment to DSL-based technology, I question whether Canada will really be keeping pace with technological developments and whether, during the 4-year implementation horizon for the rollout of the approved broadband expansion projects, DSL will provide the “best” solution, the “least-cost” solution or even the equivalent solution to that which will be available in urban markets across Canada. I believe in many markets today, DSL is not the optimal solution.

(iii) Finding is inconsistent with previous Commission decisions and directions relating to the disposition of deferral account funds

In the proceeding that resulted in Telecom Decision 2006-9, Bell Canada indicated that broadband deployed would:

be based on the least-cost technology that would provide the same quality of service that it currently provides via its commercial broadband expansion program based on DSL technology.

The CRTC, in paragraph 197 of Telecom Decision 2006-9, accepted the Bell Canada proposal subject to using least-cost technology and making access available to third parties, among other orders, but stopped short of ordering DSL as the technology solution. In paragraph 199 of that same decision, the CRTC indicated that it would issue a letter outlining the requirements for filing broadband expansion proposals, including requirements pertaining to the rollout schedule and technology description. On 10 March 2006, a letter was issued to all parties as a follow-up to the above-referenced decision, and in the latter part of Section 1, Broadband Roll-out Plan, it stated:

The ILEC is required to provide a network schematic to describe each technology used in its plan. The ILEC is also required to provide serving area maps as available.

The proposed broadband services should be comparable to those provided in urban areas, i.e., comparable monthly subscriber rates, terms and conditions, upload and download speeds, and reliability. The ILEC is required to provide these details in its proposal.

The ILEC is required to use least cost technology that meets the service requirements stated above for each project. The ILEC is required to consider the use of all suitable technologies for each project, specifically, Digital Subscriber Line (DSL), fibre, terrestrial radio, satellite radio, etc. The ILEC is required to provide detailed justification if it chooses not to use least-cost technology for any project in order to fulfill the service requirements described above.

If new technologies that meet the service and least-cost technology requirements are introduced in the market place during the roll-out of the program, the ILEC may re-engineer appropriate projects and report the details as part of its Reporting Requirements.

The present decision is inconsistent with the Letter direction outlined above flowing out of Telecom Decision 2006-9. While Telecom Decision 2006-9 and the accompanying Letter are forward-looking and flexible in recognizing the likelihood of technology evolution, the decision of the majority did not follow this approach.

I fail to see the logic in limiting the Bell companies' ability to use alternative technologies that meet or exceed the requirements imposed in the deferral account decisions.

Moreover, with this decision placing a cap on the quantum of investment available from the deferral account to use for broadband deployment to the 112 communities, the issue of least-cost should no longer be a consideration. If the Bell companies choose to use technology that may not be least-cost but provides other benefits and synergies, it is the Bell companies that would bear any additional costs without any reliance on "public" funds for those self-serving benefits.

In Telecom Decision 2007-111,¹¹ which decision disposed of an application by Barrett Xplore Inc. to review and vary Telecom Decision 2007-50, the Commission expanded on its pronouncements made in Telecom Decision 2006-9 and in its 10 March 2006 Letter relating to the ILECs' ability to re-engineer appropriate broadband expansion projects by stating in paragraph 13: "The Commission considers that this is consistent with a dynamic view of the broadband service marketplace." This decision does not recognize this dynamic view.

¹¹ *Barrett Xplore Inc. – Application to review and vary certain determinations in Telecom Decision 2007-50*, Telecom Decision CRTC 2007-111, 22 November 2007

Finally, at paragraph 41 of Telecom Decision 2008-1, the Commission recognized the Bell companies' proposal to rely on a combination of technologies, including DSL and fixed wireless. In its findings at paragraph 43, the Commission stated the following:

The Commission considers that the ILECs are able to leverage synergies with their existing technologies and infrastructure [...and] the ILECs may re-engineer appropriate broadband expansion projects and report the details to the Commission if new technologies meeting the service and least-cost technology requirements are introduced during the rollout of their programs.

Again, the issue of least-cost technology has been made moot given the hard cap that has been ordered on the investment in the 112 communities from the deferral account.

Finally, in paragraph 44 of Telecom Decision 2008-1, the Commission recognized the ability of alternate technologies to provide an equal, if not more efficient and effective, broadband service when it stated:

some of the communities in the ILECs' proposals may have customers who will remain unserved after the ILECs' proposed rollouts, due for example to distance limitations associated with DSL technology. The Commission considers that satellite and other technologies will help fill these gaps.

(iv) Finding is inconsistent with the Policy Direction of 2006

The Commission on several occasions, as referenced above, clearly articulated the conditions under which the ILECs would be permitted to access the deferral account funds to serve the unserved broadband markets. Without limiting these conditions, I would support the views of those intervening municipalities and towns represented in this proceeding (see paragraph 28 of this decision) who said they supported the Bell companies' proposal, provided the proposed broadband wireless service is on par with the broadband service offered by the Bell companies in urban areas.

I believe that during the 4-year period provided for in this decision for rollout of broadband to the concerned 112 communities, alternate technologies to DSL are available and will continue to evolve. The imposition of an obligation on the ILEC to deploy only DSL technology, I submit, goes beyond that which is necessary and is not only "not proportionate" to its purpose but, in fact, may result in a less efficient and effective service to the 112 communities than would otherwise be the case if the Bell companies were permitted technological flexibility.

I submit that once the Commission has established the appropriate allocation of funding from the deferral accounts, the ILECs should be free to deploy new and innovative technologies as long as they meet the price, quality, reliability, service and access conditions imposed by the Commission.

For all the above reasons, I find that the decision of the majority as it relates to the requirement to utilize DSL technology does not fully advance the policy objectives set out in the Act, is inconsistent with previous Commission decisions and statements, and is inconsistent with the Policy Direction in that such a requirement is not a regulatory measure that is efficient and proportionate to its purpose.