



## Telecom Decision CRTC 2010-802

PDF version

Ottawa, 28 October 2010

### **Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application to review and vary Telecom Decision 2010-255 concerning usage-based billing for Gateway Access Services**

File number: 8662-B54-201009051

*In this decision, the Commission approves the Bell companies' request to review and vary Telecom Decision 2010-255 with respect to the implementation of usage-based billing for their Gateway Access Services (GAS) customers and with respect to equivalent treatment as it relates to promotions. The Commission also approves the Bell companies' request regarding the level of rates for the GAS UBB component and excessive usage charge, and initiates a proceeding to examine whether the rates for the UBB components of GAS and of third-party Internet access service should be lower than the comparable retail UBB rates. Finally, the Commission denies the Bell companies' request to readjust the costs used to determine the flat-fee component of GAS.*

#### **Introduction**

1. The Commission received an application by Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies), dated 28 May 2010, requesting that the Commission review and vary certain determinations in Telecom Decision 2010-255.
2. In Telecom Decision 2010-255, the Commission, among other things, concluded that the Bell companies' proposal to introduce usage-based billing (UBB)<sup>1</sup> for their wholesale Residence Gateway Access Services (GAS)<sup>2</sup> is an economic Internet traffic management practice (ITMP) and that each Bell company may implement this ITMP only once it charges UBB rates to all its retail Internet service customers (the Bell companies' retail customers).<sup>3</sup> The Commission also found that after each

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<sup>1</sup> With UBB, a monthly flat fee is charged for both Internet access and an Internet usage allowance up to a predetermined threshold. Monthly usage above that threshold is subject to further charges.

<sup>2</sup> GAS is a wholesale service that the Bell companies are required to provide to Internet service providers (ISPs) so that those ISPs can provide retail Internet services to their own customers.

<sup>3</sup> As of 1 February 2007, the Bell companies no longer offer flat-rate unlimited Internet usage plans to their retail customers. The Bell companies intend to implement similar measures for Internet service providers that subscribe to GAS as an economic ITMP.

Bell company implements the economic ITMP, to the extent that it chooses not to charge UBB rates to any existing or new retail customer, it is required to treat Internet service providers (ISPs) that subscribe to GAS (GAS ISPs) on an equivalent basis.

3. With respect to rates, the Commission approved rates for the monthly flat-fee component of the proposed economic ITMP for Residence GAS that are based on adjusted costs and reflect markups which are comparable to those for the large cable carriers' wholesale third-party Internet access (TPIA) services.<sup>4</sup> Further, the Commission concluded that UBB rates and an excessive usage charge<sup>5</sup> that are 25 percent lower than the Bell companies' comparable retail rates and charge would be appropriate for the proposed economic ITMP for Residence GAS.
4. In their application, the Bell companies submitted that there is substantial doubt as to the correctness of Telecom Decision 2010-255 and that the Commission erred in law and/or in fact in making the determinations referenced above.
5. The Commission received comments regarding the Bell companies' application from various ISP associations, cable carriers, and other telecommunications service providers (TSPs). The public record of this proceeding, which closed on 8 July 2010, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file number provided above.
6. In this decision, the Commission will decide whether to vary its determinations regarding the following issues:
  - I. Should the Bell companies be required to charge UBB rates to all their retail customers before implementing UBB for GAS ISPs?
  - II. Should the Bell companies be required to extend their retail UBB promotions to GAS ISPs?
  - III. Should the Bell companies' rates for the UBB component and the excessive usage charge be the same as their comparable retail rates?
  - IV. Should the Commission readjust the costs used to determine the rates for the flat-fee components?
7. The Commission will then consider what would be the appropriate implementation date for its determinations in this decision.

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<sup>4</sup> TPIA is a wholesale service that the major incumbent cable carriers are required to provide to ISPs so that these ISPs can provide retail Internet services to their own customers.

<sup>5</sup> An excessive usage charge is not, at this time, in place for the Bell companies' retail customers. Such a charge would only be implemented for Residence GAS coincident with the introduction of a comparable retail charge.

**I. Should the Bell companies be required to charge UBB rates to all their retail customers before implementing UBB for GAS ISPs?**

8. The Bell companies submitted that requiring them to apply UBB charges to all their retail customers before allowing them to implement UBB for GAS ISPs is contrary to the Policy Direction,<sup>6</sup> in that it unduly interferes with the operation of competitive market forces, and is contrary to the principle of regulatory symmetry, since such a requirement was never imposed on the cable carriers. The Bell companies therefore requested that the Commission vary this restriction in Telecom Decision 2010-255.
9. The Bell companies proposed a new grandfathering arrangement whereby they be allowed to implement economic ITMPs for GAS ISPs' non-grandfathered retail customers, provided that the grandfathering practices are applied on an equivalent basis to the Bell companies' retail customers. Under the Bell companies' proposed arrangement, flat monthly rates for unlimited usage would continue to apply for GAS ISPs' grandfathered retail customers, while the UBB regime would apply for GAS ISPs' non-grandfathered retail customers.
10. With respect to how to apply this proposal, the Bell companies stated that they have implemented a grandfathering arrangement for their retail customers and no longer offer flat-rate unlimited usage retail plans as of 1 February 2007. In their application, the Bell companies submitted that, consistent with their retail practices, a GAS ISP's grandfathered retail customer would be a retail customer who was with that ISP before 1 February 2007 and whose service has continued without any changes.
11. The Bell companies further stated that, rather than actively migrating retail customers to usage-based plans, their retail divisions have implemented an approach of increasing rates periodically for customers on unlimited plans to incent customer migration. They requested that the Commission approve a similar principle of applying an unlimited usage plan premium charge for GAS ISPs' grandfathered retail customers.
12. TELUS Communications Company (TCC) and the cable carriers supported the Bell companies' proposals.
13. Although other parties were generally opposed to the Bell companies' grandfathering and premium pricing proposals, Vaxination Informatique (Vaxination) was the only party that provided a specific comment with regard to the proposed grandfathering date, arguing that any grandfathering cut-off date must not be prior to the date on which GAS ISPs' retail customers are informed of a final, formal, and irrevocable implementation date for the Bell companies' proposal. Vaxination stated that, since 2007, GAS ISPs' retail customers have made choices such as switching service providers without any knowledge that grandfathering clauses could be retroactively applied in the future. Vaxination also submitted that cessation of any grandfathered, unmetered service should result only where a service change is initiated by the retail customer.

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<sup>6</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534

14. No parties raised any concerns regarding potential contractual arrangements which the GAS ISPs may have established with their retail customers since 1 February 2007.

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

#### *Bell companies' grandfathering proposal*

15. In Telecom Decision 2006-77, the Commission required equivalent treatment by cable carriers of their retail and wholesale TPIA customers. In Telecom Decision 2010-255, the Commission considered it appropriate to use the same equivalent treatment requirement to assess the Bell companies' economic ITMP proposal.
16. The Commission considers that, if an appropriate grandfathering arrangement is established for Residence GAS, the requirement of equivalent treatment for wholesale GAS and retail Internet services would be met in a minimally intrusive manner and, consequently, it would not be necessary for the Bell companies to charge UBB rates to all their retail customers prior to implementing UBB for GAS.

#### *Grandfathering criteria for Residence GAS*

17. In Telecom Decision 2010-255, the Commission concluded that the Bell companies' proposal to introduce UBB for GAS was an economic ITMP that was intended to incent heavy users to reduce their usage. The Commission notes that if the Bell companies use the date of this decision or a later date as the grandfathering date, as suggested by Vaxination, the entire base of existing GAS ISPs' retail customers would be grandfathered and the GAS ISPs would therefore not be required to pay higher rates for their retail customers' heavy Internet usage. The Commission considers that such a situation would significantly reduce the effectiveness of the economic ITMP.
18. The Commission considers that, by using 1 February 2007, only a portion of existing GAS ISPs' retail customers would be grandfathered, just as only a portion of the Bell companies' base of retail customers is currently grandfathered.
19. In light of the above, the Commission is of the view that 1 February 2007 is an appropriate date to use in establishing the initial base of GAS ISPs' grandfathered retail customers. The Commission considers that the GAS flat monthly rates for unlimited usage that were in place just prior to the publication of Telecom Decision 2010-255 would be the appropriate rates to apply for GAS ISPs' grandfathered retail customers. The Commission also considers it reasonable for the Bell companies to apply UBB charges for any GAS ISP's retail customers that have initiated a service change after 1 February 2007.

#### *Premium usage charge and related matters*

20. The Commission considers that, to the extent that the Bell companies periodically increase rates for their retail customers on unlimited plans to encourage these customers to migrate to usage-based plans, they should, in principle, have the same

flexibility to increase the applicable rates for GAS ISPs' grandfathered retail customers. The Commission notes that, since it continues to regulate GAS service rates, it would require the Bell companies to file tariff proposals and to obtain prior Commission approval for any such price increase.

21. The Commission notes that the Bell companies proposed that service charges be waived for the voluntary migration of GAS ISPs' retail customers to the GAS UBB regime within 60 days of the first implementation of an unlimited usage premium charge. The Commission considers that any proposed waiver of service charges should be addressed at the same time as any proposed rate increases for GAS ISPs' grandfathered retail customers.

### **Conclusion**

22. In light of all the above, the Commission varies Telecom Decision 2010-255 such that:

- GAS ISPs' retail customers who have been with the same ISP since a date prior to 1 February 2007 without initiating any service changes are to be grandfathered; and
- the Commission-approved Residence GAS flat monthly rates for unlimited usage that were in place just prior to the date of Telecom Decision 2010-255 are to continue to apply for GAS ISPs' grandfathered retail customers.

23. To the extent that the Bell companies periodically increase rates for their retail customers on unlimited plans to encourage those customers to migrate to usage-based plans, the Commission determines that the Bell companies may propose equivalent increases to the applicable rates for GAS ISPs' grandfathered retail customers.

## **II. Should the Bell companies be required to extend their retail UBB promotions to GAS ISPs?**

24. In Telecom Decision 2010-255, the Commission found that, to the extent that the Bell companies chose not to charge UBB rates to any existing or new retail customer, they would be required to treat GAS ISPs on an equivalent basis. The Bell companies requested that the Commission rescind this requirement.

25. The Bell companies argued that requiring them to offer the same UBB promotions to both GAS ISPs and retail customers is tantamount to regulating rates in the forborne retail market because it means that the Bell companies cannot introduce a retail promotion without first seeking tariff approval for a corresponding wholesale service offering.

26. The Bell companies further submitted that, consistent with its past application of subsection 27(2) of the *Telecommunications Act* (the Act), the Commission should continue to examine complaints on an *ex post* basis.

27. TCC and the cable carriers supported the Bell companies' request.

28. In general, the other parties were opposed to the request, primarily arguing for the need to ensure equivalent treatment of the Bell companies' retail services and GAS. Parties argued that, if the Bell companies were allowed to waive UBB charges for their retail customers while continuing to charge UBB rates to GAS ISPs, they would be unjustly discriminating against the GAS ISPs and giving themselves an undue and unreasonable advantage.

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

29. The Commission has reviewed the Bell companies' arguments and considers that they raise substantial doubt with regard to this aspect of its determinations in Telecom Decision 2010-255.

30. The Commission considers that requiring the Bell companies to extend the same UBB promotions to GAS ISPs that they offer to their retail customers would unduly interfere with their operations in the retail Internet services market.

31. In the Commission's view, should any concern arise related to any of the Bell companies' promotional activities, it can be addressed on an *ex post* basis. The Commission notes that the GAS ISPs could use the criteria set out in Telecom Decision 2008-41<sup>7</sup> when evaluating an action undertaken by one of the Bell companies in relation to retail Internet service promotions, prior to filing a complaint. While not determinative, such criteria could be of assistance in evaluating whether retail promotions are compliant with subsection 27(2) of the Act.

32. Accordingly, the Commission determines that the restriction in paragraph 30 of Telecom Decision 2010-255 regarding equivalent treatment in the implementation of the Bell companies' economic ITMP is rescinded as it relates to promotions.

### **III. Should the Bell companies' rates for the UBB component and the excessive usage charge be the same as their comparable retail rates?**

33. In Telecom Decision 2010-255, the Commission approved the UBB component and the excessive usage charge proposed by the Bell companies, which included a 25 percent discount as compared to retail rates. The Commission also reduced the Bell companies' flat-fee component of the proposed economic ITMP to reflect a markup comparable to that applied to the cable carriers' TPIA flat-rate fees.

34. The Bell companies argued that a 25 percent discount in their wholesale rates as compared to their retail rates does not constitute equivalent treatment and that the Commission did not require a corresponding reduction in the rates of the cable carriers' UBB components. The Bell companies submitted that, given the

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<sup>7</sup> In that decision, the Commission determined the appropriate criteria for establishing which promotions should be considered for forbearance in relation to retail residential and business local wireline services.

Commission's reduction of the flat-fee component of their UBB proposal, it would be appropriate to provide equivalent treatment of their retail and wholesale UBB charges for excessive usage by applying the same UBB component caps and rates for both retail and residential GAS.

35. The Bell companies requested that the Commission vary Telecom Decision 2010-255 to approve the principle, consistent with what is currently being applied by cable carriers, of a UBB component and an excessive usage charge with a cap at equivalent rates to those imposed on the Bell companies' retail services, instead of a 25 percent discount.
36. TCC and the cable carriers supported the Bell companies' request.
37. Other parties were opposed to the request. The Commission notes a comment by Primus Telecommunications Canada Inc. that implementing a wholesale UBB framework where the rates are set 25 percent lower than the corresponding retail UBB rates would serve the intended purpose of UBB, namely to encourage alignment between usage and pricing. The Commission also notes a comment by Accelerated Connections Inc., EGATE Networks Inc., and TekSavvy Solutions Inc. that this discount is the only element in the GAS tariff that provides GAS ISPs with a modest ability to differentiate their retail services from those of the Bell companies.

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

38. The Commission notes that it set the rates for the UBB component and the excessive usage charge of the Bell companies' proposed ITMP at 25 percent below their comparable retail rates, yet it has not required the same of the cable carriers for their TPIA services.
39. The Commission considers that, by establishing rates for the UBB component and the excessive usage charge of GAS, it did not meet the requirement for regulatory symmetry between the Bell companies' GAS and the cable carriers' TPIA services. Therefore, coincident with the release of this decision, the Commission is initiating a proceeding to consider whether rates for UBB components and any excessive usage charges of both Residence GAS and TPIA service should be set at levels below the comparable retail rates.
40. In light of the above, the Commission concludes that it would be appropriate to vary Telecom Decision 2010-255 in this respect and, accordingly, **approves** the Bell companies' request that the rates for the UBB component and excessive usage charge of their proposed economic ITMP be set at a level equivalent to the rates imposed on their retail services.

#### **IV. Should the Commission readjust the costs used to determine the rates for the flat-fee component?**

41. In Telecom Decision 2010-255, the Commission reduced the flat-fee component of the Bell companies' proposed economic ITMP in part by discarding, from their cost study, the use of asynchronous transfer mode (ATM) switching as a growth technology.

42. The Bell companies argued that the Commission's assumption that ATM switching costs can simply be replaced with Ethernet switching costs reflects a network configuration that is technically impossible. The Bell companies submitted that under the Commission's assumption, additional cost elements would be required for the conversion from ATM to Ethernet switching and for the migration of traffic from the ATM digital subscriber line access multiplexer (DSLAM) equipment, which is currently connected to ATM switches, to the new Ethernet platform.
43. The Bell companies submitted that, given the level of markup used by the Commission in Telecom Decision 2010-255 in setting rates for the flat-fee component, the addition of the missing cost elements would increase the monthly rate for each GAS flat-fee component by \$0.62, regardless of speed, volume, or contract duration. The Bell companies requested that the Commission vary paragraphs 61 to 63 of Telecom Decision 2010-255 to reflect this increase.

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

44. The Commission has reviewed the Bell companies' arguments and considers that they do not raise substantial doubt with regard to this aspect of its determinations in Telecom Decision 2010-255.
45. The Commission notes that, in response to a Commission interrogatory, the Bell companies submitted revised cost information based on an Ethernet growth solution that included the missing cost elements described above. After evaluating the revised cost information, the Commission considers that the Ethernet growth solution would include significant reductions to switching and transmission costs that would offset the additional conversion and traffic migration costs suggested by the Bell companies.
46. Accordingly, the Commission **denies** the Bell companies' request to vary paragraphs 61 to 63 of Telecom Decision 2010-255.

#### **Implementation period**

47. The Bell companies submitted that any further delays to the six-month implementation period that the Commission set out in Telecom Decision 2010-255 would be inappropriate.
48. Some TSPs submitted that, since the ultimate details of the Bell companies' economic ITMP would not be known until the Commission renders a determination in this decision, the implementation date suggested by the Bell companies would result in a shorter implementation timeline than that set out in Telecom Decision 2010-255.
49. The Commission received no submissions regarding how the Bell companies would identify first the base of GAS ISPs' retail customers as of 1 February 2007 and then those customers that had made a subsequent service change since that date.

50. The Commission considers that the GAS ISPs have been aware of the intended implementation of the Bell companies' economic ITMP since the publication of Telecom Decision 2010-255 and should not require any additional time for the possible revision of their retail service offerings. The Commission also considers, however, that a period of time will be required for the Bell companies to determine the base of GAS ISPs' grandfathered retail customers and for the GAS ISPs to review this base, make any associated system changes, and notify their retail customers as appropriate. The Commission considers that 90 days would allow for a reasonable implementation period.
51. In light of the above, the Commission concludes that implementation of the Bell companies' grandfathering arrangement and of the economic ITMP for GAS ISPs' non-grandfathered retail customers is to be completed within **90 days** of the date of this decision.

Secretary General

### **Related documents**

- *Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Applications to introduce usage-based billing and other changes to Gateway Access Services*, Telecom Decision CRTC 2010-255, 6 May 2010
- *Forbearance from the regulation of promotions for retail residential and business local wireline services*, Telecom Decision CRTC 2008-41, 22 May 2008
- *Cogeco, Rogers, Shaw, and Videotron – Third-party Internet access service rates*, Telecom Decision CRTC 2006-77, 21 December 2006