



Telecom Decision CRTC 2014-391

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MTS Inc. – Application to review and vary Telecom Decision 2013-630 regarding MTS’ subsidy rate component calculations

*The Commission **denies** MTS’ request to vary portions of Telecom Decision 2013-630, finding that it did not exceed its jurisdiction when it eliminated off-season service rates from the company’s subsidy rate component calculations as of the date of Telecom Regulatory Policy 2011-291.*

Background

1. The Commission’s subsidy regime, including the National Contribution Fund, collects money from telecommunications companies to subsidize the provision of regulated residential telephone service in high-cost serving areas (HCSAs) by the incumbent local exchange carriers (ILECs).¹ Each year, the Commission issues a decision identifying the amount of subsidy to be received by each ILEC for this purpose.
2. Most recently, in Telecom Decision 2013-630, the Commission finalized the subsidy amounts to be paid to the ILECs for the year 2013. In that same decision, the Commission determined that MTS Inc. (MTS) had made an error in its subsidy rate component calculations by including off-season service rates,² resulting in the company having received excess subsidy. In making its determination, the Commission noted that, in Telecom Regulatory Policy 2011-291 in which modifications were made to the subsidy regime, it did not identify that off-season rates were to be included in the subsidy rate component calculations.³
3. The Commission therefore adjusted MTS’ subsidy rate component calculations to correct for this error for the years 2011, 2012, and 2013 and adjusted the monthly subsidy paid to MTS for the remainder of the 2013 National Contribution Fund processing year to evenly recover the error made in previous years.

¹ First established in the 1990s, the subsidy regime was modified in Decision 2000-745.

² Off-season service allows customers to temporarily disconnect their primary exchange service (PES) and retain their phone number at reduced rates.

³ Prior to Telecom Regulatory Policy 2011-291, residential PES rates in regulated HCSAs varied considerably. In that decision, the Commission modified the subsidy rate component in order to ensure that it would be more uniform, which would produce a more equitable and more efficient result.

Application

4. The Commission received an application from MTS, dated 13 February 2014, in which the company requested that the Commission review and vary the determinations it made related to the calculation of MTS' subsidy rate component and MTS' final subsidy amounts for the years 2011, 2012, and 2013. MTS submitted that the Commission erred in fact and in law when it eliminated off-season service rates and revenues from the calculation of MTS' subsidy rate component.
5. Specifically, MTS submitted that the Commission
 - erred in fact and in law in considering that the question of eliminating MTS' off-season service rates and revenues from its subsidy calculations was determined in Telecom Regulatory Policy 2011-291;
 - exceeded its jurisdiction and erred when it eliminated off-season service rates and revenues from MTS' subsidy rate component calculations effective as of the date of Telecom Regulatory Policy 2011-291; and
 - should have provided MTS an orderly transition plan to phase out the company's off-season service rates and revenues.
6. MTS requested that the Commission vary Telecom Decision 2013-630 such that the calculation of MTS' subsidy rate component is adjusted on a going-forward basis, and that a transition plan is provided for the elimination of off-season service rates and revenues from MTS' subsidy rate component calculations for the years 2014, 2015, and 2016.
7. The Commission received interventions regarding MTS' application from Bell Canada and Bell Aliant Regional Communications, Limited Partnership (collectively, the Bell companies), Rogers Communications Partnership (RCP), and TELUS Communications Company (TCC). The public record of this proceeding, which closed on 27 March 2014, is available on the Commission's website at www.crtc.gc.ca or by using the file number provided above.
8. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications that are filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, due to, for example, one or more of the following: i) an error in law or in fact, ii) a fundamental change in circumstances or facts since the decision, iii) a failure to consider a basic principle which had been raised in the original proceeding, or iv) a new principle which has arisen as a result of the decision.
9. The Commission has identified the following issues to be addressed in this decision:
 - Did the Commission err when it denied the inclusion of MTS' off-season service rates and revenues in its subsidy calculations?

- Did the Commission exceed its jurisdiction when it eliminated off-season service rates from MTS' subsidy rate component calculations effective as of the date of Telecom Regulatory Policy 2011-291?
- Should the Commission have provided MTS with a transition plan regarding the company's off-season service?

Did the Commission err when it denied the inclusion of MTS' off-season service rates and revenues in its subsidy calculations?

10. In its application, MTS argued that the Commission erred in its determination in Telecom Decision 2013-630 that the company had made an error in its subsidy rate component calculations. MTS asserted that the Commission had concluded in that same decision that it had previously eliminated off-season service rates and revenues from the calculation of MTS' average monthly rate per HCSA band in Telecom Regulatory Policy 2011-291. MTS argued that Telecom Regulatory Policy 2011-291 did not have this effect, since there is no mention of off-season service rates in Telecom Regulatory Policy 2011-291, and questions relating to the inclusion of off-season service rates and revenues were not raised at any point in the proceeding.
11. MTS also submitted that the Commission had, since 2004, a policy of permitting MTS to include off-season service rates and revenues in its subsidy calculations. MTS noted that the company had identified that it was including off-season service rates in its subsidy calculations in the proceeding leading up to Telecom Decision 2004-81. MTS further noted that, in that decision, the Commission approved MTS' 2004 subsidy calculations, which included off-season service rates. MTS submitted that it has used the same methodology and included off-season service rates in every subsequent filing up to and including 2013.
12. The Bell companies, RCP, and TCC argued that the Commission had not made an error in Telecom Decision 2013-630. They generally submitted that Telecom Regulatory Policy 2011-291 made it clear that off-season service rates and revenues did not make up a part of the subsidy rate component.
13. The Bell companies submitted that residential primary exchange service (PES) does not include off-season service, and that this is demonstrated by the fact that MTS' off-season service is offered under a different tariff from residential PES. Further, by defining what is included in the subsidy rate component, namely residential PES rates, Telecom Regulatory Policy 2011-291 by default defines what is excluded from that rate component, namely the rates of all services other than residential PES.
14. The Bell companies stated that, to the best of their knowledge, all the other ILECs understood Telecom Regulatory Policy 2011-291 as stating that off-season service rates were not to be included in subsidy rate component calculations. In their view, there was no existing Commission policy permitting ILECs to include off-season service rates in their subsidy rate component calculations, and it was an unfortunate

mistake on the part of the Commission to have approved MTS' calculations that included such rates.

15. RCP argued there was no ambiguity surrounding the definition of the subsidy rate component, and that the definition has been consistent since Decision 2000-745. RCP submitted that the Commission consciously chose to use residential PES rates for the subsidy rate component, being aware of other services, such as off-season service, and that there was no pre-existing policy of allowing the inclusion of off-season service rates.
16. TCC submitted that off-season service rates were not mentioned in previous Commission decisions because off-season service is not equal to, or a subset of, residential service.

Commission's analysis and determinations

17. Residential PES is a specific service that all ILECs are required, subject to certain conditions, to offer to all customers in their operating territories, including HCSAs. In contrast, off-season service is an optional service, separate from residential PES. The Commission has been consistent in defining the subsidy component as being based solely on residential PES and, in various decisions related to the calculation of subsidy, has identified that the calculation of the rate component was to be based on residential PES rates.⁴
18. With respect to MTS' arguments that the inclusion of off-season service rates was not specifically addressed in Telecom Regulatory Policy 2011-291, the Commission considers that while the determinations in Telecom Regulatory Policy 2011-291 did not explicitly address the definition of the subsidy rate component, it did so implicitly by addressing the calculation of the subsidy rate component. The Commission considers that the stated goal of more uniform rates used to calculate subsidies and the changes to the calculation of the subsidy rate component⁵ clearly indicated that off-season service rates and revenues did not make up a portion of the subsidy rate component.
19. In light of the above, the Commission finds that it did not err in Telecom Decision 2013-630 when it denied the inclusion of MTS' off-season service rates and revenues in its subsidy calculation.

⁴ The Commission identified residential rates as the basis for the rate component calculation in Decision 2000-745, Telecom Decisions 2002-34 and 2007-27, and Telecom Regulatory Policies 2011-291 and 2013-160.

⁵ The Commission determined that in regulated HCSAs where subsidies had not yet been eliminated and monthly rates for residential services were below \$30, these rates would be increased, over a three-year period, to the lesser of \$30 or the amount required to eliminate subsidy.

Did the Commission exceed its jurisdiction when it eliminated off-season service rates from MTS' subsidy rate component calculations effective as of the date of Telecom Regulatory Policy 2011-291?

20. MTS submitted that the Commission is estopped from varying MTS' subsidy amounts for the years 2011, 2012, and 2013. MTS argued that public law estoppel⁶ applies to these circumstances because the Commission had approved MTS' inclusion of off-season service rates in Telecom Decision 2004-81, and had given final approval to MTS' subsidy calculations for 2011 and 2012 in Telecom Decisions 2011-743 and 2012-619, respectively. MTS submitted that it would be unfair for the Commission to claw back subsidy calculations and amounts filed by MTS in good faith reliance on the Commission's historical treatment of its off-season service rates since 2004 and the Commission's 2011 and 2012 decisions giving them final approval.
21. MTS also submitted that the Commission impermissibly engaged in retrospective rule-making when it decided to adjust MTS' subsidy amounts for 2011, 2012, and 2013. MTS argued that the Commission's determinations in Telecom Decision 2013-630 revised subsidy amounts for 2011 and 2012 that had previously been given final approval. MTS also argued that it was not known by MTS that subsidy amounts approved on a final basis could be subject to a revision. Furthermore, MTS submitted that the subsidy funds did not remain subject to the Commission's subsequent direction.
22. The Bell companies submitted that, in Telecom Decision 2013-630, the Commission simply corrected an error made by MTS in calculating its subsidy rate component for the years 2011, 2012, and 2013. They further submitted that the Commission has, in the past, approved prior-year adjustments for subsidy rate component calculation errors, and that correcting errors does not constitute retrospective rule-making.
23. RCP submitted that the Commission's failure to address MTS' error is not analogous to the type of case where public law estoppel applies, noting that on many occasions in the past the Commission has adjusted subsidy payments despite issuing a final order. This indicates that final subsidy orders remain subject to subsequent or further direction from the Commission. RCP submitted that since the definition of the subsidy rate component was clear to all ILECs except MTS, MTS clearly made an error by including off-season service rates.
24. TCC submitted that previous Commission decisions make it clear that subsidy is only intended for residential PES in HCSAs, and as a result MTS has no lawful claim to the funds it was never entitled to collect and keep.

⁶ Estoppel is a legal principle that precludes (estops) a person from asserting something contrary to a previous action or statement of that person.

Commission's analysis and determinations

25. On the issue of public law estoppel, MTS relies solely on the Commission's annual subsidy decisions in order to support its position that an expectation had been created such that off-season service rates could be used in calculating the total subsidy amount. The Commission notes that its decisions are explicitly subject to change, for instance through its powers to vary interim rates and to review and vary past decisions, including final approvals. The Commission further notes that it has exercised its powers to make adjustments with respect to subsidy rates previously approved on a final basis, in several decisions, including two times at the request of MTS.⁷ Accordingly, the Commission considers that the subsidy decisions relied on by MTS do not create the expectation posited by MTS that it could rely on such decisions for the proposition that off-season rates could be used in calculating the total subsidy amount. Consequently, the Commission considers that MTS has failed to discharge the burden required to establish that the doctrine of public law estoppel is applicable in this case.
26. On the issue of whether the Commission engaged in retrospective rule-making, the Act provides the Commission with the jurisdiction to correct errors upon their discovery, as was the case for the subsidy calculations in Telecom Decision 2013-630. The correction of such errors is necessary in order to ensure the fair and appropriate allocation of amounts collected through the National Contribution Fund. The Commission considers that no evidence submitted by MTS in this proceeding has provided a basis on which to vary the finding made in Telecom Decision 2013-630 that MTS made an error in its subsidy rate component calculations by including off-season service rates.
27. As noted above, the Commission has made retrospective adjustments to subsidy amounts by exercising its review and vary power in the past. Furthermore, the Commission notes that it has the jurisdiction to ensure rates are at all times just and reasonable.
28. In light of the above, the Commission finds that it did not err in law either by reason of making a determination from which it was estopped or by impermissibly engaging in retrospective rule-making.

Should the Commission have provided MTS with a transition plan regarding the company's off-season service?

29. MTS submitted that since off-season service is a tariffed service, the company has an obligation to provide this service to any customer in its operating territory until such time as the Commission authorizes MTS to withdraw the service or approves changes to the rates, terms, and conditions for the provision of the service. MTS further submitted that the decision to eliminate off-season service rates from its subsidy

⁷ See, for instance, Telecom Decisions 2005-52, 2006-20, 2008-43, and 2008-66.

calculations failed to provide any practical means of implementing the changes and it sought directions from the Commission for a reasonable transition plan.

30. The Bell companies submitted that since MTS' repayment of the excess subsidy it received is due to MTS' error in including its off-season service rates in its subsidy rate component calculations, and since MTS has had use of the excess subsidy for the last few years, there is no need for the Commission to provide MTS a transitional plan.
31. RCP submitted that MTS' request is not appropriate, since MTS has been overdrawn from the subsidy pool, undermining the subsidy regime and enjoying a windfall at the expense of other Canadian carriers and their customers.

Commission's analysis and determinations

32. The Commission notes that the rates for MTS' off-season service and its continued offering were not issues addressed in Telecom Decision 2013-630. The Commission considers that MTS' request for approval of a transition plan related to off-season service is outside the scope of the current proceeding.
33. In light of the above, the Commission finds that it did not err in not providing MTS a transition plan regarding its off-season service.

Policy Direction

34. The Policy Direction⁸ states that the Commission, in exercising its powers and performing its duties under the Act, shall implement the policy objectives set out in section 7 of the Act, in accordance with paragraphs 1(a), (b), and (c) of the Policy Direction.
35. The Commission considers that its decision to uphold the determinations in Telecom Decision 2013-630 is consistent with the Policy Direction and advances the policy objectives set out in paragraphs 7(a) and (b) of the Act.⁹ Further, consistent with subparagraph 1(a)(ii) of the Policy Direction, the Commission considers that it has, by revising MTS' subsidy calculations for 2011, 2012, and 2013, relied on regulatory measures that are efficient and proportionate to their purpose.
36. In light of the above, the Commission **denies** MTS' application.

Secretary General

⁸ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

⁹ The cited policy objectives of the Act are

7(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions; and

7(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada.

Related documents

- *Final 2013 revenue-percent charge and related matters*, Telecom Decision CRTC 2013-630, 27 November 2013
- *Regulatory framework for the small local incumbent exchange carriers and related matters*, Telecom Regulatory Policy CRTC 2013-160, 28 March 2013
- *Final 2012 revenue-percent charge and related matters*, Telecom Decision CRTC 2012-619, 8 November 2012
- *Final 2011 revenue-percent charge and related matters*, Telecom Decision CRTC 2011-743, 1 December 2011
- *Obligation to serve and other matters*, Telecom Regulatory Policy CRTC 2011-291, 3 May 2011, as amended by Telecom Regulatory Policy CRTC 2011-291-1, 12 May 2011
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Bell Aliant Regional Communications, Limited Partnership – Application for a subsidy adjustment for the period 1 January 2002 to 31 December 2007*, Telecom Decision CRTC 2008-66, 23 July 2008
- *TELUS Communications Company – Application for a subsidy adjustment, for its operating territory in Quebec, for the period 1 January 2003 to 31 December 2007*, Telecom Decision CRTC 2008-43, 29 May 2008
- *Price cap framework for large incumbent local exchange carriers*, Telecom Decision CRTC 2007-27, 30 April 2007
- *MTS Allstream – Application to review and vary part of Telecom Decision CRTC 2005-52*, Telecom Decision CRTC 2006-20, 24 April 2006
- *MTS Allstream’s application to review and vary certain decisions relating to its Band F subsidy*, Telecom Decision CRTC 2005-52, 9 September 2005
- *Final 2004 revenue-percent charge and related matters*, Telecom Decision CRTC 2004-81, 9 December 2004
- *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
- *Changes to the contribution regime*, Decision CRTC 2000-745, 30 November 2000