



Telecom Decision CRTC 2005-11

Ottawa, 7 March 2005

Aliant Telecom Part VII application to review and vary Annual price cap filings deferral account – related issues, Telecom Decision CRTC 2004-42

Reference: 8662-A53-200408626

In this Decision, the Commission varies Annual price cap filings deferral account – related issues, Telecom Decision CRTC 2004-42, 22 June 2004, in order to provide equitable regulatory treatment to Aliant Telecom Inc., and directs the company to recalculate the amount of money that it must transfer into the deferral account for the reduction of the contribution revenue-percent charge. More specifically, the company may exclude from the 2001 capped service revenue base the capped service revenues of the former Maritime Tel & Tel Limited, since these revenues did not reflect the impact of the initial 4.5 percent contribution revenue-percent charge.

1. On 11 August 2004, Aliant Telecom Inc. (Aliant Telecom) filed an application pursuant to section 62 of the *Telecommunications Act* to review and vary a portion of *Annual price cap filings deferral account – related issues, Telecom Decision CRTC 2004-42, 22 June 2004* (Decision 2004-42). Aliant Telecom argued that there was substantial doubt as to the correctness of the Commission's decision to deny Aliant Telecom's proposal to draw down \$6.4 million in unused price cap "room" from its deferral account.

Background

2. In *Changes to the contribution regime*, Decision CRTC 2000-745, 30 November 2000 (Decision 2000-745), the Commission determined that the interim 2001 contribution revenue-percent charge would be 4.5 percent and that the incumbent local exchange carriers (ILECs) under price cap regulation would be allowed to reflect, in their 2001 price cap filings, an exogenous factor adjustment of 4.5 percent to the service basket limit (SBL) for each of the Residential Local Service and Other Capped Services sub-baskets and to the overall price cap index (PCI). In *Interim 2002 revenue-percent charge, national subsidy requirement and procedures for the revenue-based contribution regime*, Order CRTC 2001-876, 14 December 2001, the Commission approved an interim contribution revenue-percent charge of 1.4 percent, effective 1 January 2002.
3. In *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002 (Decision 2002-34), the Commission noted that it had allowed the ILECs certain exogenous factors in the initial price cap period. Most of these allowed the ILECs to recover costs by increasing rates to subscribers or by mitigating required rate decreases. While most of the adjustments were intended to be ongoing, portions of two of these adjustments were time-limited. These two adjustments related to the reduction in 2002 of the contribution revenue-percent charge, and the one-time start-up costs related local competition and local number portability (LNP). In *Final 2002 revenue-percent charge and related matters*, Telecom Decision CRTC 2002-71, 22 November 2002, the Commission approved a final contribution revenue-percent charge of 1.3 percent, effective 1 January 2002.

4. In Decision 2002-34, the Commission determined that adjustments were required to recognize the expiry of the two time-limited exogenous factors. The Commission noted that the time-limited exogenous events were applied to rates in both non-high-cost serving areas (non-HCSAs) and high-cost serving areas (HCSAs), and concluded that the time-limited exogenous adjustment for non-HCSAs should be accomplished through the deferral account. In addition, the Commission reset the SBL and service basket index (SBI) at 100, effective 31 May 2002.
5. In response to the Commission's direction in Decision 2002-34, Aliant Telecom submitted its proposed deferral account additions and draw-downs on 6 August 2002. In its submission, the company proposed that the Commission treat the exogenous adjustments related to the reduction of the contribution revenue-percent charge and the one-time related start-up costs associated with local competition and LNP as additions to the deferral account. It also proposed that the unused price cap room remaining at the end of the first price cap period should be treated as a draw-down from, or a reduction to, the deferral account. More specifically, Aliant Telecom proposed to draw down its deferral account by \$6.4 million to recover the unused price cap room from the first price cap period.
6. In Decision 2004-42, the Commission denied Aliant Telecom's proposal to draw down from the deferral account \$6.4 million of unused price cap room from the first price cap period.

Process

7. The Commission received comments from MTS Allstream Inc. (MTS Allstream), dated 10 September 2004, and reply comments from Aliant Telecom, dated 20 September 2004.

Aliant Telecom's application

8. Aliant Telecom submitted that there was substantial doubt as to the correctness of the Commission's determination in Decision 2004-42 concerning the company's proposal to draw down \$6.4 million in unused price cap room from the deferral account. The company submitted that this was due to an error in fact and a failure to consider a basic principle that had been raised.
9. Aliant Telecom argued that the error in fact arose from the statement in paragraph 59 of Decision 2004-42, where the Commission noted that "...[it] did not intend to allow for carry-over of unused room from the first price cap period into the current price cap period, which is why it reset the SBIs and SBLs at 100 effective 31 May 2002." The company submitted that the Commission's determinations to reset the SBI and SBL could, in no reasonable way, indicate that the Commission did not intend to allow for the carry-over of unused room. The company argued that, in paragraph 22 of Decision 2004-42, the Commission had indeed allowed for the carry-over of unused room for MTS Communications Inc.¹

¹ MTS Communications Inc. has since changed its name to MTS Allstream Inc. For ease of reference, MTS Allstream is used throughout the remainder of this Decision.

10. Aliant Telecom argued that the Decision failed to consider the basic principle of fairness in two respects: (a) by ordering a reversal of an event that did not happen, and (b) by treating the same situation in a different manner for different companies.
11. Aliant Telecom stated that in its response to an interrogatory, it had identified that it had annualized price cap room increases of \$6.4 million remaining as of the end of the first price cap period.
12. Aliant Telecom submitted that the former Maritime Tel & Tel Limited's (MT&T) rates did not reflect the application of the exogenous factor related to the introduction of the contribution tax. The company argued that the reversal of an exogenous adjustment that had not resulted in rate increases in the first place was fundamentally unfair and unreasonable.
13. Aliant Telecom noted that because the former MT&T's rates had not been increased, and because the company had \$6.4 million in price cap room remaining at the end of the first price cap period, it was clear that the company's actual level of recovery of the exogenous adjustments was less than the full amount of the exogenous adjustments that it should have been able to recover. Aliant Telecom argued that this was the same determinative factor that the Commission used in reaching its conclusion to allow MTS Allstream an adjustment for its unused price cap room increase in Decision 2004-42.
14. Aliant Telecom submitted that the same standard should have applied to its situation as had applied to MTS Allstream's situation when the Commission determined that MTS Allstream's contribution revenue-percent charge adjustments should reflect the actual level of recovery.

MTS Allstream's comments

15. MTS Allstream submitted that Aliant Telecom had not put forward a credible case warranting the variance of Decision 2004-42, as it related to Aliant Telecom's previously unused price cap room.
16. MTS Allstream submitted that the essence of Aliant Telecom's application was based on the premise that the Commission intended to permit the carry-over of unused price cap room from the first price cap period into the regulatory framework for the second price cap period. MTS Allstream also submitted that this notion was incorrect. MTS Allstream submitted, further, that its analysis of Aliant Telecom's application identified no evidence that the Commission had made any error in fact, or had failed to consider the correct treatment of Aliant Telecom's previously unused price cap room in the proceeding leading to Decision 2004-42.
17. MTS Allstream stated that any unused head room that previously existed from the first price cap period ceased to exist when the new regulatory framework for the second price cap period came into effect. MTS Allstream argued that Aliant Telecom's suggestion that the Commission had intended to allow the carry-over of any unused price cap room, or that the Commission had failed to consider the proper treatment of Aliant Telecom's previously unused price cap room in the proceeding leading to Decision 2004-42 was not credible, and was not supported by the language or effect of the Commission's determinations. Further, MTS Allstream argued that such conclusions could not be implied as suggested by Aliant Telecom.

18. MTS Allstream argued that Aliant Telecom had provided no evidence demonstrating that the Commission had made any error in fact, or that the Commission had failed to consider the principle of fairness in its evaluation of the arguments previously put forward concerning Aliant Telecom's unused price cap room. MTS Allstream argued that Aliant Telecom had not demonstrated that there was substantial doubt as to the correctness of Decision 2004-42 and that, therefore, its application should be denied.

Aliant Telecom's reply comments

19. Aliant Telecom noted that in its intervention, MTS Allstream had stated that "[t]he fact is that any unused head room and associated pricing flexibility that existed in the first price cap period, ceased to exist for all companies." Aliant Telecom argued that this was not the case, since the Commission had recognized the carry-forward of unused price cap room for MTS Allstream, and that the Commission should do the same in the case of Aliant Telecom.
20. Aliant Telecom argued that MTS Allstream's situation with respect to the amounts remaining in its deferral account from the initial price cap period was, for all intents and purposes, identical to that of Aliant Telecom. The company submitted that appropriate regulatory treatment of any company should be based on that company's circumstances, and that similar circumstances should receive similar regulatory treatment.
21. Aliant Telecom noted that MTS Allstream had stated in its intervention that the Commission had determined that the actual amount of contribution-related recovery should be reflected in MTS Allstream's deferral account. Aliant Telecom submitted that, consistent with the Commission's determinations regarding MTS Allstream's deferral account, the Commission's findings for Aliant Telecom should be amended to reflect the actual amount of contribution revenue-percent charge related recovery in its deferral account.

Commission's analysis and determinations

22. In *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998, the Commission set out its current criteria for the exercise of its review and variance powers. The Commission stated that "...applicants must demonstrate that there is substantial doubt as to the correctness of the original decision..." The Commission also provided the following non-exhaustive list of what it described as concerns which may give rise to substantial doubt :
- (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.

23. In Decision 2002-34, the Commission directed the ILECs to place in the deferral account the revenues resulting from the exogenous factor adjustments related to the reduction of the contribution revenue-percent charge and the one-time start-up costs related to local competition and LNP with respect to non-HCSAs.
24. In *MTS Communications Inc. – Final rate increase to recover income tax expense*, Decision CRTC 2001-202, 30 March 2001, the Commission approved an exogenous adjustment and residential local rate increases to allow MTS Allstream to recover \$38.9 million in income tax expense. In addition, in *2001 Price cap filing – Service rate increases for Manitoba*, Order CRTC 2001-379, 14 May 2001, the Commission approved another residential local services rate increase.
25. In Decision 2004-42, the Commission noted that in the initial price cap regime, MTS Allstream was only able to recover 2.6 percent of the 4.5 percent contribution revenue-percent charge applicable to capped service revenues. As a result, the Commission accepted MTS Allstream's proposal to calculate the surplus revenues using the 2.6 percent actual level of recovery by MTS Allstream rather than the 4.5 percent allowed in Decision 2000-745.
26. In denying Aliant Telecom's proposal, in Decision 2004-42, the Commission stated that it did not intend to allow for carry-over of unused room from the first price cap period into the current price cap period, which is why it reset the SBI and SBL at 100 effective 31 May 2002.
27. The Commission notes Aliant Telecom's submission that, in Decision 2004-42, the Commission had erred in fact in stating that it did not intend to allow for the carry-over of unused price cap room from the first to the second price cap period. In this regard, Aliant Telecom submitted that, in that Decision, the Commission had indeed allowed for the carry-over of unused price cap room for MTS Allstream. The Commission notes that, in the case of MTS Allstream, the Commission accepted that the expired portion of the exogenous factor for the contribution revenue-percent charge should be calculated on the basis of the actual rate increases that MTS Allstream implemented to recover that charge. Contrary to Aliant Telecom's submission, this does not correspond to the carry-over of MTS Allstream's unused price cap room.
28. With respect to the reversal of expired exogenous factors, the Commission notes that all of the former companies that constitute Aliant Telecom were permitted to recover, through the price cap rules, the exogenous factors for the contribution revenue-percent charge and the one-time start-up costs related to local competition and LNP. The Commission, however, also notes that Aliant Telecom, in the territory of the former MT&T, did not fully recover the exogenous factor for the contribution revenue-percent charge.
29. The Commission notes that in the capped services revenues base used to calculate the surplus revenues resulting from the reduction in the contribution revenue-percent charge, Aliant Telecom included the capped service revenues of the former MT&T – which did not reflect any additional revenues for the recovery of the 4.5 percent contribution revenue-percent charge. Therefore, the Commission finds the revenue base used by Aliant Telecom to calculate the surplus revenues that would have to be transferred into the deferral account for the reduction of the contribution revenue-percent charge was overstated.

30. Consequently, the Commission considers that its determination in Decision 2004-42 regarding Aliant Telecom's surplus revenues to be transferred into its deferral account has resulted in the company having been treated inequitably. This resulted from the fact that MTS Allstream was allowed to calculate its surplus revenues based on the 2.6 percent portion of the 4.5 percent contribution revenue-percent charge which it recovered in the first price cap period, while Aliant Telecom calculated its surplus revenues on a base that included the former MT&T's revenues, which did not reflect the recovery of the initial 4.5 percent contribution revenue-percent charge.
31. Accordingly, the Commission finds that there is substantial doubt as to the correctness of Decision 2004-42, with respect to the calculation of surplus revenues to be placed in the deferral account by Aliant Telecom. In order to provide regulatory equity and fairness to Aliant Telecom, the Commission considers that the company should be permitted to calculate its surplus revenues resulting from the reduction in the contribution revenue-percent charge by excluding from the 2001 capped service revenues base the capped service revenues of the former MT&T.
32. In light of the above, the Commission varies Decision 2004-42 and directs Aliant Telecom to recalculate the amount of money that it must transfer into the deferral account for the reduction of the contribution revenue-percent charge, in accordance with the Commission's determinations in this Decision, and to file the revised amount, with supporting calculations, by **7 April 2005**.

Secretary General

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