



Telecom Decision CRTC 2006-8

Ottawa, 15 February 2006

Rogers Telecom Holdings Inc. - Application with respect to Competitor Digital Network Access service

Reference: 8622-C25-200512469

*The Commission **approves** an application by Rogers Telecom Holdings Inc. (Rogers Telecom) that the Commission find that carrier access circuits leased by Rogers Telecom or another competitor that connected either to a competitor's switch or to a competitor's point of presence (POP) that were located in a different Bell Canada wire centre area than the associated customer access were Competitor Digital Network Access (CDNA)-eligible circuits from 1 June 2002 to 2 February 2005 (the interim period). Given the specific circumstances of this case, the Commission reviews and varies its determination in Part VII application by Call-Net Enterprises Inc. with respect to the Interim Competitor Digital Network Access service, Telecom Decision CRTC 2003-60, 29 August 2003, that carrier accesses that connected to a competitor's POP in a different wire centre area of an incumbent local exchange carrier than the associated customer access were not eligible for CDNA rates during the interim period.*

Application

1. On 9 June 2005, Call-Net Enterprises Inc., now Rogers Telecom Holdings Inc. (Rogers Telecom), filed an application pursuant to Part VII of the *CRTC Telecommunications Rules of Procedure* (the Rules). Rogers Telecom requested that the Commission direct Bell Canada to treat certain access circuits leased by Rogers Telecom during the period between 1 June 2002 and 2 February 2005 (the interim period) as Competitor Digital Network Access (CDNA)-eligible. The date of 1 June 2002 reflected the effective date established for the CDNA service in *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002 (Decision 2002-34), and 3 February 2005 reflected the effective date established for the Competitor Digital Network (CDN) service in *Competitor Digital Network Services*, Telecom Decision CRTC 2005-6, 3 February 2005 (Decision 2005-6). The application filed by Rogers Telecom on 9 June 2005 was an abridged version of its application filed in confidence on 3 June 2005.
2. Rogers Telecom argued in its application that Bell Canada had treated as CDNA-eligible certain access circuits Rogers Telecom had leased from Bell Canada during the interim period but that after the release of Decision 2005-6, Bell Canada had advised Rogers Telecom that it no longer considered the circuits in question to be CDNA-eligible and was seeking payment based on the circuits being subject to the higher retail Digital Network Access (DNA) rates.
3. The accesses that are the subject of Rogers Telecom's application (disputed accesses) are Bell Canada accesses that connected a Bell Canada wire centre to a Rogers Telecom switch or to a Rogers Telecom point of presence (POP) (carrier accesses) and that were located in a different Bell Canada wire centre area than the associated access that connected the competitor's end-customer premise to a Bell Canada wire centre (customer access).

4. Rogers Telecom submitted that Bell Canada's CDNA service tariff supported Rogers Telecom's position. Rogers Telecom submitted further that Bell Canada's comments dated 12 December 2003 filed in the proceeding that led to Decision 2005-6 clearly demonstrated that Bell Canada's position was that the disputed accesses were CDNA-eligible. Rogers Telecom also submitted that it had made network provisioning decisions during the interim period based on Bell Canada's treatment of the disputed accesses as CDNA-eligible, and argued that these decisions would have been different if it had been aware that their CDNA-eligibility status was in issue.

Process

5. Bell Canada filed its comments on 15 June 2005. Rogers Telecom filed reply comments on 22 June 2005. MTS Allstream Inc. (MTS Allstream) filed comments on 15 July 2005. Further to a Commission letter dated 19 July 2005 inviting comments on Rogers Telecom's application from parties to the proceeding that led to Decision 2005-6, TELUS Communications Inc. (TCI) filed comments on 25 July 2005 and, consistent with the Commission's letter, Bell Canada filed reply comments on 29 July 2005.
6. In response to an 8 August 2005 letter from the Commission, Bell Canada provided further information on the network configuration of the disputed accesses. In response to a 25 August 2005 Commission letter, by separate letters dated 29 August 2005, Bell Canada and Rogers Telecom clarified the network configuration of the disputed accesses. Rogers Telecom submitted a further letter of clarification on 30 August 2005.

Positions of parties

7. Bell Canada submitted that the Commission's determinations in paragraphs 17, 18, 265, 269, 504, and 527 of Decision 2005-6 supported its position that the disputed accesses were not eligible for CDNA rates during the interim period and, therefore, supported its position that rates for these accesses now needed to be adjusted. With respect to Rogers Telecom's submission regarding its network provisioning decisions, Bell Canada submitted that all parties were aware that the final CDN service regime adopted in Decision 2005-6 could be applied on a retroactive basis.
8. MTS Allstream supported Rogers Telecom's application and submitted that the Commission did not make a new finding in Decision 2005-6 with respect to the eligibility of the disputed accesses such that they became ineligible for CDNA rates. MTS Allstream noted that paragraphs 17 and 18 were in the "Background" section of Decision 2005-6, and submitted that the remaining paragraphs of that Decision cited by Bell Canada were not relevant to the eligibility of the disputed accesses for CDNA rates. MTS Allstream submitted that, more specifically, in paragraph 265 the Commission determined that carrier accesses between a wireless carrier's cell site and an incumbent local exchange carrier (ILEC) wire centre were eligible for CDN rates; in paragraph 269, it clarified that an "end-customer" included a customer that was eligible in its own right for the customer access component of the CDN service; in paragraph 504, it established final rates for CDN DS-0 and DS-1 accesses; and, in paragraph 527, it established final rates for CDN DS-3, OC-3 and OC-12 accesses.

9. MTS Allstream submitted that the retroactive treatment of the final eligibility, rates, terms and conditions of the CDN services in Decision 2005-6 was applied only to those accesses that were eligible during the interim period. MTS Allstream submitted further that issuing an erratum to correct paragraphs 17 and 18 of Decision 2005-6 would remove any mischaracterization in this regard.
10. TCI submitted that its application of CDNA rates for carrier accesses during the interim period was consistent with the treatment described by Rogers Telecom, and that it had not contemplated making the accesses in the configurations in question ineligible for CDNA rates on a retroactive basis.
11. Bell Canada submitted in reply that TCI had decided for reasons unrelated to regulatory requirements to apply CDNA rates to the disputed accesses and that this had no bearing on what Bell Canada submitted was the Commission's ruling in Decision 2005-6 that the disputed accesses were not eligible for CDNA rates during the interim period. Bell Canada submitted further that paragraphs 17 and 18 of Decision 2005-6 reaffirmed in general terms that the disputed accesses were not eligible for CDNA rates during the interim period.

Commission's analysis and determinations

Carrier accesses that connected to a competitor's switch

12. In Decision 2002-34, the Commission required ILECs subject to that Decision to develop the CDNA service and, in order to implement the service as expeditiously as possible, directed each ILEC to issue interim tariffs pursuant to which certain of their DNA facilities were to be made available to competitors at Competitor Service rates. The Commission determined in paragraph 192 of that Decision that the CDNA service was "available only to competitors to provide access between an end customer premise to a competitor's switch within the same ILEC serving wire centre area or to the ILEC serving wire centre, in which case it must terminate on the competitor's co-located equipment". In *Interim Competitor Digital Network Access service*, Telecom Decision CRTC 2002-78, 23 December 2002 (Decision 2002-78), the Commission confirmed that competitors could use components of the CDNA service in conjunction with other ILEC services or service components at the then-current tariff rates, with any service that they self-supplied, or with any service acquired from a third party. In Decision 2005-6, the Commission subsequently approved on a final basis the ILEC facilities to be made available to competitors at Competitor Service rates, terms and conditions, which were referred to as the CDN service.
13. With respect to Bell Canada's reliance on paragraph 17 of Decision 2005-6, the Commission notes that the word "not" was mistakenly included before the text "available as part of the CDNA service to connect to its switch" and that paragraph 17 should have read: "If the competitor was not co-located at the second ILEC wire centre, the competitor would obtain another access facility, available as part of the CDNA service, to connect to its switch."
14. The Commission further notes that the description of the CDNA service in paragraph 17 of Decision 2005-6, as corrected above, accords with Bell Canada's CDNA service tariff as amended in response to Decision 2002-78, and accords with Bell Canada's interpretation of its

CDNA service tariff as set out in its comments in the proceeding that led to Decision 2005-6, as discussed more fully below.

15. The Commission notes that the CDNA tariff pages issued by Bell Canada in response to Decision 2002-34 were effective 1 June 2002 and stated that the CDNA service was "available to competitors, to provide access between an end-customer premise to a competitor's switch located in the same Bell Canada serving wire centre area, or to the Bell Canada serving wire centre, in which case it must terminate on the competitor's co-located equipment".
16. The Commission further notes that Bell Canada subsequently amended its CDNA service tariff, effective 1 June 2002, in response to Decision 2002-78. Bell Canada's amended CDNA tariff pages stated that the CDNA tariff pages provided access arrangements to competitors "between the competitor's end-customer premises served by a Bell Canada wire centre and either the competitor's switch located in a Bell Canada wire centre area, or a Bell Canada wire centre, in which case it must terminate on the competitor's co-located equipment". The other ILECs amended their CDNA tariffs with the same effect. Bell Canada also added the following "Note" to the Definition section of its CDNA service tariff: "Connection with a competitor switch through a Bell Canada wire centre requires two (2) CDNA accesses, one at each end of the Bell Canada serving wire centre. Connection with a competitor's co-located equipment requires one CDNA access, at the end-customer's premises, and a CO link to the competitor's co-located equipment".
17. Bell Canada's amended CDNA service tariff did not contain the restriction in its original tariff that the access arrangements must be in the "same" Bell Canada wire centre area. In this regard, the Commission also considers that the diagram titled Figure 2 contained in comments dated 12 December 2003 submitted by Bell Canada on behalf of itself, Aliant Telecom Inc. (Aliant Telecom), Saskatchewan Telecommunications (SaskTel) and the former MTS Communications Inc., now MTS Allstream (Bell Canada et al.) in the proceeding that led to Decision 2005-6 (Bell Canada et al.'s 12 December 2003 comments) demonstrates clearly that it was Bell Canada et al.'s interpretation of their CDNA service tariffs that a carrier access which connected to a competitor's switch in a different wire centre area than the associated customer access was eligible for CDNA rates.
18. The Commission further notes that paragraph 17 of Decision 2005-6 appeared in the "Background" section of that Decision and that, contrary to Bell Canada's submission, did not purport to change the network configurations with respect to CDNA-eligibility.
19. Bell Canada also referred to paragraphs 265, 269, 504, and 527 of Decision 2005-6 in support of its position that carrier accesses that connected to a competitor's switch in a different wire centre area than the associated customer access were not eligible for CDNA rates. The Commission notes, however, that Bell Canada did not elaborate on why these paragraphs supported its position.
20. Paragraph 265 of Decision 2005-6 states: "The Commission notes that the purpose of the CDNA proceeding included the possibility of making carrier access facilities available at competitor service rates. The Commission considers that the terms of the CDN services are consistent with the principle of technological neutrality." The Commission notes that this

paragraph was contained in the section of Decision 2005-6 in which it considered the submission made by wireless carriers that they should receive CDN rates for accesses they lease and in which it found the facilities used by wireless carriers to be carrier accesses. The Commission notes that certain carrier accesses were not eligible for CDNA rates during the interim period. Paragraph 265 of Decision 2005-6 therefore reflects the fact that in the proceeding that led to Decision 2005-6 the Commission was considering whether to make all carrier accesses, regardless of the network configuration in which they were used, available at Competitor Service rates.

21. It is therefore the Commission's view that paragraph 265 of Decision 2005-6 does not support Bell Canada's position that carrier accesses that connected to a competitor's switch in a different wire centre area than the associated customer access were not eligible for CDNA rates.
22. The Commission agrees with MTS Allstream that paragraphs 269, 504, and 527 are not relevant to the CDNA-eligibility of the disputed accesses, and notes that it did not make a new finding in these paragraphs of Decision 2005-6 with respect to the CDNA-eligibility of the disputed accesses.
23. The Commission therefore confirms that a carrier access leased by Rogers Telecom and other competitors that connected to a competitor's switch and that was located in a different Bell Canada wire centre area than the associated customer access were eligible for CDNA rates during the interim period.

Carrier accesses that connected to a competitor's POP

24. Bell Canada referred to paragraph 18 of Decision 2005-6 in support of its position that carrier accesses that connected to a competitor's POP in a different wire centre area than the associated customer access were not eligible for CDNA rates during the interim period. That paragraph was a summary description of certain Commission determinations in *Part VII application by Call-Net Enterprises Inc. with respect to the Interim Competitor Digital Network Access service*, Telecom Decision CRTC 2003-60, 29 August 2003 (Decision 2003-60).
25. Paragraph 18 of Decision 2005-6 reads: "In Decision 2003-60, the Commission determined that if the competitor's traffic passed through an intermediate point of presence (POP) before reaching its switch, the interim CDNA service would apply in respect of the customer access. However the CDNA service would not provide for the carrier access between the ILEC serving wire centre and the competitor's POP."
26. In the Commission's view, paragraph 18 of Decision 2005-6 accurately reflected its determination in the second sentence of paragraph 27 of Decision 2003-60. Paragraph 27 of Decision 2003-60 reads: "Accordingly, for the purpose of implementing the interim CDNA service tariff, the Commission finds that an end-customer access circuit remains eligible for the interim CDNA service tariff notwithstanding that the end-to-end connection of which it is a part passes through a competitor's POP to terminate on a competitor's switch and notwithstanding that the end-to-end connection may include ILEC intra-exchange or

inter-exchange circuits. The Commission notes, however, that in this circumstance other access circuits and associated links that may form part of the end-to-end connection are not eligible for the interim CDNA service tariff. In the Commission's view, the CDNA proceeding remains the appropriate forum in which to address whether access, intra-exchange or inter-exchange circuits that connect with a competitor's POP may be eligible for inclusion in the CDNA service."

27. The Commission therefore considers that Bell Canada underbilled the rates for these carrier accesses when it charged CDNA rather than retail DNA rates. In this connection, the Commission notes that Article 18.1(a) of Bell Canada's Terms of Service would permit Bell Canada to back-bill Rogers Telecom and other competitors the retail DNA rate for the carrier accesses in question for a period of one year from the date it first correctly billed the retail DNA rate.¹
28. The Commission further notes, however, that the diagram titled Figure 4 in Bell Canada et al.'s 12 December 2003 comments demonstrates clearly that Bell Canada's interpretation of its CDNA service tariffs was that a carrier access that connected with a competitor's POP in a different wire centre area than the associated customer access was eligible for CDNA rates.
29. Given that Bell Canada consistently treated the carrier access circuits in question as CDNA-eligible following the issuance of Decision 2002-78 and the company's position on the record of the proceeding leading to Decision 2005-6 that these accesses were CDNA-eligible, the Commission considers that it would not be appropriate for Bell Canada to subsequently reverse itself and now charge Rogers Telecom and other competitors the retail DNA rate for the accesses in question during the latter portion of the interim period.
30. With respect to Bell Canada's reliance on paragraphs 265, 269, 505, and 527 of Decision 2005-6, the Commission notes that paragraph 265 does not support Bell Canada's position and that paragraphs 269, 505, and 527 are not relevant to the accesses in question.
31. The Commission notes TCI's submission that its application of CDNA rates for carrier accesses during the interim period was consistent with the treatment as CDNA-eligible described by Rogers Telecom, and that it had not contemplated making the accesses in question ineligible for CDNA rates on a retroactive basis. The Commission further notes that Figure 4 in Bell Canada et al.'s 12 December 2003 comments, demonstrated that, like Bell Canada and TCI, Aliant Telecom, SaskTel and MTS Allstream considered that during the interim period a carrier access that connected to a competitor's POP in a different ILEC wire center area than the associated customer access was CDNA-eligible pursuant to their CDNA tariffs.

¹ Article 18.1(a) of Bell Canada's Terms of Service, "Liability for Unbilled and Underbilled Charges" states: "Unless there has been customer deception with regard to a charge, customers are not responsible for paying a previously unbilled or underbilled charge except where: (a) in the case of a recurring charge or a charge for an international long distance message it is correctly billed within a period of one year from date it was incurred." (Bell Canada General Tariff 6716, item 10).

32. In these particular circumstances, the Commission considers that a finding that a carrier access that connected to a competitor's POP in a different ILEC wire center area than the associated customer access was CDNA-eligible would most appropriately achieve the objectives of the *Telecommunications Act* (the Act). In these particular circumstances, the Commission also considers that there is substantial doubt as to the correctness of the Commission's finding in paragraph 27 of Decision 2003-60 that a carrier access that connected to a competitor's POP in a different ILEC wire centre area than the associated customer access was not CDNA-eligible during the interim period. Accordingly, pursuant to section 62 of the Act, the Commission hereby reviews and varies this finding and finds that such circuits were CDNA-eligible during the interim period. The Commission notes that this finding applies to all ILECs.
33. The Commission notes that Bell Canada and other ILECs subject to Decision 2005-6² are entitled to compensation from their deferral accounts for the associated forgone revenues based on the Commission's determination in Decision 2002-34 that the ILECs should be compensated for, among other things, the reduction in revenues stemming from the creation of the CDNA service.

Secretary General

² The Commission's determinations in this Decision do not apply to SaskTel in light of the Commission's determination in Decision 2005-6 that, having regard to the level of funds in its deferral account, SaskTel was to apply rates equal to the company's retail DNA rates for the interim period.

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