Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2007-102

Ottawa, 31 October 2007

Retail quality of service rate adjustment plan and competitor quality of service rate rebate plan – Adverse events

Reference: 8660-C12-200708159

In this Decision, the Commission adopts a force majeure *clause that will apply to quality of service exclusion applications under the retail quality of service rate adjustment plan and the competitor quality of service rate rebate plan.*

Introduction

1. In Telecom Decision 2005-17, the Commission determined that it was appropriate for the retail quality of service (Q of S) rate adjustment plan (RAP) to include an exclusion mechanism that was sufficiently flexible to accommodate the effects of natural disasters and other adverse events that, by their very nature, were unpredictable and beyond the reasonable control of an incumbent local exchange carrier (ILEC). The Commission considered that a labour disruption might qualify as an adverse event in certain circumstances. The Commission concluded that its determinations with respect to adverse events should be made on a case-by-case basis as to the modifications, if any, that should be made to the Q of S results for the purposes of the retail Q of S RAP.

2. In Telecom Decision 2005-20, the Commission determined that it was appropriate for the competitor Q of S rate rebate plan (RRP) to also include a mechanism for considering possible exclusions from competitor Q of S results where circumstances beyond the control of an ILEC may have caused the ILEC to fail to meet a performance standard. The Commission also determined that the types of circumstances at issue were, by their very nature, unpredictable and unique, and therefore best dealt with on a case-by-case basis.

3. In Telecom Public Notice 2007-9, the Commission invited parties to comment on the adoption of a *force majeure* clause that would apply to both the retail Q of S RAP and the competitor Q of S RRP, such as the following:

> No penalty shall apply in a month where failure to meet the retail or competitor Q of S standard is caused, in that month, by fire, acts of God, labour difficulties (such as work stoppages, strikes, lockouts, slow-downs and similar labour disrupting events), default or failure of other carrier, epidemics, war, civil commotions including acts of terrorism, acts of public authorities or other events beyond the reasonable control of the Company.

The proceeding

4. The Commission received comments from Bell Aliant Regional Communications, Limited Partnership (Bell Aliant), Bell Canada, and Saskatchewan Telecommunications (collectively, Bell Canada et al.); MTS Allstream Inc. (MTS Allstream); the Public Interest Advocacy Centre (PIAC); Rogers Communications Inc. (RCI); and TELUS Communications Company (TCC). The record of this proceeding closed with parties' reply comments dated 13 July 2007.

5. The Commission has identified the following three issues to be addressed in its determinations:

   I. Should a *force majeure* clause be adopted for both the retail Q of S RAP and competitor Q of S RRP and, if so, should labour disruptions be included in the *force majeure* clause?

   II. Should the ILEC have to maintain parity between the Q of S accorded to its retail operations and that provided to competitors?

   III. Should an incremental increase factor apply to competitor rebates where an ILEC has repeatedly missed the monthly competitor Q of S standard for an indicator?

I. Should a *force majeure* clause be adopted for both the retail Q of S RAP and competitor Q of S RRP and, if so, should labour disruptions be included in the *force majeure* clause?

Should a force majeure *clause be adopted?*

6. Bell Canada et al. and TCC supported the adoption of a *force majeure* clause and agreed with the Commission's proposed wording, while RCI, MTS Allstream, and PIAC opposed the adoption of the *force majeure* clause.

7. RCI argued that there was no pressing need to change the existing regime and that it was neither too time-consuming nor too complex to administer.

8. PIAC and MTS Allstream considered that even in circumstances where a natural disaster or criminal act impaired the ability of an ILEC to deliver service, there should not be blanket immunity. They were of the view that in each case, the reasonable foreseeability of the subject event as well as the emergency planning and response that the ILEC had undertaken was the key to determining whether poor performance should be excused.

9. PIAC and MTS Allstream were of the view that while automatically classifying adverse events might save time, it was of questionable value in ensuring that the ILECs will maintain Q of S standards. PIAC submitted that it would do little to promote market forces and would not advance competition for the Commission to allow exemptions that would absolve all of the ILECs' Q of S failures without inquiry. PIAC further submitted that, if implemented, the proposed *force majeure* would simply remove the consequences of poor performance by the ILECs in situations where poor performance might not have been inevitable.

10. RCI submitted that it would be inconsistent with *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (the Policy Direction) for the Commission to remove the requirement for an ILEC to prove that the alleged adverse event was beyond its reasonable control.

Commission's analysis and determination

11. The Commission notes that both the retail Q of S RAP and the competitor Q of S RRP were initially implemented on an interim basis. The Commission further notes that provisions for exclusion applications were not adopted until the plans were finalized in Telecom Decisions 2005-17 and 2005-20. The Commission also notes that this resulted in the filing of numerous exclusion applications in 2005 and 2006 for the period 1 July 2002 onward.

12. With respect to the exclusion applications processed to date where the adverse event was classified as an act of God, such as a forest fire, a severe storm, or a flood, the Commission notes that parties to those proceedings have been in agreement that these events were adverse and beyond the reasonable control of the ILECs. Similarly, in regard to exclusion applications regarding cable cuts by a third party contractor, parties to those proceedings agreed that they were adverse events beyond the reasonable control of the ILECs. The Commission also notes that its findings as to whether these types of events qualified as adverse events have been consistent and further, they have been uncontested.

13. The Commission notes PIAC's and MTS Allstream's arguments that even in circumstances where a natural disaster or criminal act impaired the ability of an ILEC to deliver service, there should not be blanket immunity. The Commission considers that it would be inappropriate for it to analyze whether an ILEC's emergency planning and response are reasonable, and considers that, similarly, it is outside of its mandate and purview to undertake that analysis of a natural disaster or a criminal act.

14. The Commission further notes PIAC's and MTS Allstream's arguments that a *force majeure* clause would do little to promote market forces, would not advance competition, and would remove the consequences of poor performance by the ILECs in situations where poor performance may not have been inevitable. The Commission notes, however, that notwithstanding the adoption of a *force majeure* clause, the ILECs will still be required to prove that an adverse event caused the below-standard performance for the time period for which the exclusion is being sought.

15. In light of the above, the Commission considers that it would be unnecessary to continue to assess, on a case-by-case basis, whether or not such events qualify as adverse events. The Commission therefore considers that adopting a *force majeure* clause for these types of events would be appropriate.

Should labour disruptions be included in the* force majeure *clause?

16. Parties opposed to the *force majeure* clause submitted that in the event that the Commission determined that it was appropriate to adopt such a clause, labour difficulties should not be included. These parties proposed that the Commission maintain its case-by-case approach to dealing with labour disruptions.

17. PIAC and MTS Allstream submitted that labour disruptions, especially work stoppages that resulted from normal collective bargaining developments, were foreseeable in their incidence, duration, and scope and, by their very nature, could be influenced by the actions of an ILEC. They argued that any consideration of work stoppages or labour disruptions as events capable of triggering exemptions from Q of S adjustments should be the exception, rather than the rule. MTS Allstream submitted that only labour difficulties that were unforeseen and did not arise from the legal strike position of an accredited bargaining agent should qualify for treatment as an adverse event.

18. MTS Allstream submitted that case law had specifically found that labour disruptions, in particular, were both foreseeable and, at least in part, within the control of the parties to the labour dispute and therefore, merited case-by-case assessment to determine qualification as an adverse event.

19. RCI was of the view that the proposed definition of labour difficulties was too broad and should only include strikes and work stoppages. It submitted that including labour difficulties in the *force majeure* clause would be inappropriate and competitively risky in that it would result in a finding that any and all labour difficulties were beyond the reasonable control of the ILEC. RCI submitted that any one of the labour-related events listed in the clause proposed in Telecom Public Notice 2007-9 could conceivably be within the reasonable control of the ILEC.

20. RCI submitted that neither judicial authorities nor the Commission's own prior decisions supported the proposition that labour disruptions should qualify as *force majeure* events so as to relieve the ILECs of the requirement to prove that such events were beyond their reasonable control.

Commission's analysis and determination

21. The Commission notes that MTS Allstream, PIAC and RCI argued that the Commission should maintain its case-by-case approach to determining whether a labour disruption would qualify as an adverse event. They argued that the inclusion of labour difficulties in a *force majeure* clause was inappropriate because such events might be predictable and might not be beyond the reasonable control of an ILEC. In several previous proceedings, the Commission has considered whether labour disruptions were predictable and within the ILEC's reasonable control and notes that these same arguments were raised in those proceedings. In each case, the Commission found that the labour disruption was an adverse event.

22. For example, with respect to the argument that labour disruptions might be predictable, the Commission found in Telecom Decision 2007-53 that until a labour disruption such as a strike occurs, there is no certainty that it will occur.

23. With respect to the argument that labour disruptions are within the reasonable control of the ILEC, the Commission determined in Telecom Decision 2007-26 that a work stoppage involving Bell Aliant was the result of a complex negotiation between two sophisticated entities acting in accordance with, and exercising, their legal rights within the framework of applicable Canadian labour legislation. Accordingly, the Commission determined that, for the purposes of determining whether the work stoppage qualified as an adverse event,

Bell Aliant did not exercise reasonable control over either the occurrence or the length of the work stoppage. In Telecom Decision 2007-26, the Commission held that an event that is partially controlled by one party and partially controlled by another is essentially beyond the reasonable control of either party.

24. The Commission notes that since the close of the record of the proceeding that led to this Decision, it has released Telecom Decisions 2007-52, 2007-53, 2007-55, and 2007-73, each of which addressed Q of S exclusion applications associated with labour disruptions. In those Decisions, the Commission made the same finding as in Telecom Decision 2007-26, namely that because the occurrence of the labour disruption was only partially controlled by the ILEC, the ILEC did not exercise reasonable control over either the occurrence or the length of the labour disruption.

25. The Commission remains of the view that labour disruptions are not predictable and are beyond the reasonable control of the ILEC.

26. As noted above, RCI also argued that, in the event that the Commission determined that a *force majeure* clause was appropriate, the wording of the *force majeure* should be narrowed because "labour difficulties" was too broad. For example, RCI argued that if labour difficulties were to be included, they should be narrowly defined to include only strikes and work stoppages.

27. The Commission notes that in Telecom Decisions 2007-52 and 2007-53, it determined that in order to evaluate the reasonableness of the measures put in place by TCC and Bell Canada to mitigate the effects of a strike on customers, it would need to delve into issues outside its purview and expertise. The Commission continues to consider that it is inappropriate for it to analyze whether an ILEC's measures to maintain service during a strike or work stoppage are reasonable, and considers that, similarly, it is outside of its mandate and purview to undertake that analysis for any type of labour disruption.

28. The Commission further notes that in the past it has approved a number of agreements that included a *force majeure* clause that contained, in addition to strikes, events such as lockouts and similar labour disruptions.[1]

29. The Commission also notes Bell Canada et al.'s submission that such clauses appeared in standard commercial agreements of other carriers. The Commission considers that these clauses reflect common commercial practice.

30. The Commission notes RCI's submission that the current case-by-case approach to determining whether an event is adverse was neither too time consuming nor too complex to administer. In this regard, the Commission notes that the case-by-case approach for determining whether

[1] For example, see the Master Agreement for Interconnection between Local Exchange Carriers, version 28, 11 August 2005; the Basic Service Construction Agreement for the Service Improvement Plan (see Telecom Order 2005-84); the 9-1-1 PERS (Public Emergency Reporting Service) agreement, with respect to which the Commission explicitly excluded lockouts as within the control of an ILEC, but endorsed the inclusion of strikes (see Telecom Decision 93-12); and the High Speed Internet Service Reseller Agreement, which the Commission directed Shaw Cablesystems G.P. and Cybersurf Corp. to enter into (see Telecom Order 2004-331).

labour disruptions qualify as adverse events has been a significant burden on both the parties and the Commission and has significantly increased the time required to process these applications. The Commission therefore considers that the inclusion of labour disruptions in a *force majeure* clause would speed up the decision-making process.

31. In light of the above, the Commission considers that labour disruptions should be included in the *force majeure* clause.

Conclusion

32. Accordingly, the Commission determines that it is appropriate to adopt a *force majeure* clause that applies to both the retail Q of S RAP and the competitor Q of S RRP. The Commission further determines that it is appropriate to include labour disruptions (such as work stoppages, strikes, lockouts, and similar labour disruption events) in the *force majeure* clause. The language of the *force majeure* clause will be as follows:

> No penalty shall apply in a month where failure to meet the retail or competitor quality of service standard is caused, in that month, by fire, acts of God, labour disruptions (such as work stoppages, strikes, lockouts and similar labour disruption events), default or failure of another carrier, epidemics, war, civil commotions including acts of terrorism, acts of public authorities or other events beyond the reasonable control of the Company.

33. The Commission also considers that by adopting a *force majeure* clause that includes labour disruptions, it is streamlining the procedures to be followed when an exclusion application is filed and that this is consistent with the requirement of section 1(*c*)(iv) of the Policy Direction that the Commission continue to implement new approaches for streamlining its processes.[2]

II. Should the ILEC have to maintain parity between the Q of S accorded to its retail operations and that provided to competitors?

34. RCI submitted that during any alleged labour-related adverse event, the ILEC must maintain parity between the Q of S accorded to its retail operations and that provided to competitors. RCI argued that if a *force majeure* clause were adopted that included strikes and/or other labour difficulties, failure to achieve parity should lead to automatic denial of an exclusion request.

35. Bell Canada et al. submitted that since retail and competitor Q of S indicators were materially different and their relative service levels could not generally be compared, it was extremely difficult to assess whether comparable levels of service had been achieved. Bell Canada et al. submitted that, as such, the Commission should reject RCI's proposal.

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[2] Policy Direction section 1(*c*) states that "the Commission, to enable it to act in a more efficient, informed and timely manner, should adopt the following practices, namely,…(iv) to continue to explore and implement new approaches for streamlining its processes."

Commission's analysis and determination

36. The Commission determined, in Telecom Decision 2007-53, that comparing the retail and competitor indicator functions was not appropriate at the indicator level because the activities being measured and the personnel required to perform those activities were different in certain circumstances. The Commission finds that a re-examination of the issue of service parity is outside the scope of this proceeding.

III. Should an incremental increase factor apply to competitor rebates where an ILEC has repeatedly missed the monthly competitor Q of S standard for an indicator?

37. RCI argued that if a *force majeure* clause were adopted that included strikes and/or other labour difficulties, the adoption of a repeat factor in the competitor Q of S RRP of the kind proposed by competitors in the proceeding leading to Telecom Decision 2005-20 had to be taken into consideration.

38. Bell Canada et al. and TCC noted that the Commission had decided not to incorporate a repeat factor in the competitor Q of S RRP in Telecom Decision 2005-20. Bell Canada et al. submitted that RCI was inappropriately attempting to review and vary Telecom Decision 2005-20 and to substantially change the character of the competitor Q of S RRP. According to Bell Canada et al. and TCC, RCI's proposal was beyond the scope of the proceeding and should be disregarded.

Commission's analysis and determination

39. The Commission notes that a repeat factor pertains to a proposal to apply an incremental increase factor to competitor rebates where an ILEC has repeatedly missed the monthly competitor Q of S standard for an indicator. The Commission determined in Telecom Decision 2005-20 that it would not be appropriate to incorporate a repeat factor in the competitor Q of S RRP. The Commission finds that a re-examination of this issue is outside the scope of this proceeding.

Secretary General

Related documents

- *Bell Canada – Application to exclude certain retail quality of service results from the calculation of the retail quality of service rate adjustment plan for 2005*, Telecom Decision CRTC 2007-73, 17 August 2007

- *TELUS Communications Company – Application to exclude certain retail quality of service results from the retail quality of service rate adjustment plan for the months of July 2005 to February 2006*, Telecom Decision CRTC 2007-55, 20 July 2007

- *Bell Canada – Application to exclude certain competition-related quality of service results from the rate rebate plan for competitors due to a strike*, Telecom Decision CRTC 2007-53, 13 July 2007

- *TELUS Communications Company – Application to exclude certain competition-related quality of service results from the rate rebate plan for competitors due to a labour disruption*, Telecom Decision CRTC 2007-52, 13 July 2007

- *Retail and competitor quality of service rate adjustment plans – Adverse events*, Telecom Public Notice CRTC 2007-9, 30 May 2007

- *Bell Aliant Regional Communications, Limited Partnership's request to review and vary Telecom Decision CRTC 2005-17, as interpreted and applied in Telecom Decision CRTC 2006-27 related to the retail quality of service rate adjustment plan*, Telecom Decision CRTC 2007-26, 27 April 2007

- *Instalment payment plans for service improvement plans*, Telecom Order CRTC 2005-84, 2 March 2005

- *Finalization of quality of service rate rebate plan for competitors*, Telecom Decision CRTC 2005-20, 31 March 2005

- *Retail quality of service rate adjustment plan and related issues*, Telecom Decision CRTC 2005-17, 24 March 2005

- *Cybersurf Corp. v. Shaw Cablesystems G.P. – Reseller agreement*, Telecom Order CRTC 2004-331, 1 October 2004

- *Bell Canada – Revenue requirements for 1993 and 1994*, Telecom Decision CRTC 93-12, 30 August 1993