



Telecom Decision CRTC 2010-898

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Ottawa, 2 December 2010

TELUS Communications Company – Application to direct TBayTel to correct overbilling for competitor digital network services

File number: 8661-T66-201010214

Introduction

1. The Commission received an application by TELUS Communications Company (TCC), dated 22 June 2010, in which the company requested that the Commission direct TBayTel to refund to TCC overbilled charges for competitor digital network (CDN) services.
2. The Commission received comments from MTS Allstream Inc. (MTS Allstream) and TBayTel. The public record of this proceeding, which closed on 3 August 2010, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Should the Commission direct TBayTel to refund TCC?

3. In Telecom Order 2007-398, the Commission approved on an interim basis the CDN Services section of TBayTel's Carrier Access Tariff (CDN services tariff). On 3 December 2009, at the request of TCC, TBayTel re-rated some of TCC's circuits from digital network access (DNA) rates to CDN rates. In Telecom Order 2010-294, the Commission approved TBayTel's CDN services tariff on a final basis.
4. TCC and MTS Allstream submitted that when TBayTel's CDN services tariff came into force on 18 October 2007, TBayTel was obliged by subsection 25(1) of the *Telecommunications Act* (the Act) to conduct an analysis of its customer base to determine which subscribers to DNA services were eligible to receive CDN rates. TCC stated that, on almost every form it had submitted to TBayTel to request service for CDN-eligible circuits, it had marked "Yes" in a box labelled "Bill CDNA." TCC submitted that, based on these requests for CDN rating, it had expected TBayTel to re-rate those circuits from DNA rates to CDN rates upon approval of TBayTel's CDN services tariff.
5. TCC also submitted that TBayTel's Terms of Service require TBayTel to refund a customer who should not have been billed or who was overbilled, subject to applicable limitation periods provided by law.¹ TCC argued that for the two-year

¹ The applicable limitation period provided by the Ontario *Limitations Act* is two years.

period before TBayTel began charging it CDN rates, it had been overbilled at DNA rates and that, accordingly, it is entitled to a refund.

6. TBayTel stated that subsection 25(1) of the Act requires Canadian carriers to provide telecommunications services in accordance with a tariff filed with and approved by the Commission, and does not oblige carriers to apply the tariff with the lowest rate. TBayTel submitted that customers must request the application of CDN rates. It argued that checking a box on a form when ordering a service does not constitute a sufficiently formal request for a change in a tariffed service. TBayTel stated that being expected to change its billing practices based on this checked box amounts to an unfair administrative burden.
7. TBayTel expressed the view that, although there is no dedicated service agreement governing its relationship with TCC, there are multiple combinations of TCC's requests and TBayTel's marketing memos and settlement pages, which together constitute contracts between the two companies. TBayTel submitted that these contracts establish the service rates, as described in the relevant settlement pages.
8. TBayTel also indicated that its Terms of Service are not an issue, since there was no error in billing and no recurring charge that should not have been billed.
9. Finally, TBayTel submitted that, based on the arguments put forward in its Part VII application leading to Telecom Decision 2010-897, CDN rates should no longer be available to TCC.

Commission's analysis and determinations

10. The Commission notes that in Telecom Decision 2005-6, which established the CDN services framework, it determined that the large incumbent local exchange carriers (ILECs)² should provide CDN services to competitors. The Commission notes, however, that the small ILECs were not parties to the proceeding that led to that decision and that the determinations set out in that decision do not apply to the small ILECs. The Commission also notes that the implementation of local competition in the territories of the small ILECs did not address the inclusion of CDN services.
11. The Commission further notes that in Telecom Decision 2005-6, the large ILECs subject to that decision, with the exception of Saskatchewan Telecommunications (SaskTel), were compensated through their deferral accounts for the loss of retail revenues due to the introduction of CDN services in their territories. Because SaskTel's deferral account did not contain sufficient funds to compensate the company, the Commission established alternative rules to minimize related revenue impacts. However, the Commission has not examined the issue of compensation to TBayTel for the loss of retail revenue due to the introduction of CDN services in its territory.

² Bell Aliant Regional Communications, Limited Partnership; Bell Canada; MTS Allstream; Saskatchewan Telecommunications; and TCC

12. Finally, the Commission notes that prior to 3 December 2009, TCC was not aware of the existence of TBayTel's CDN services tariff. As such, the Commission considers that TCC would have bid on and secured contracts with end-users based on DNA rates, not CDN rates.
13. In light of the unique circumstances of this case, the Commission considers that it would not be appropriate to require TBayTel to apply the CDN services tariff in its territory for the period in question. Accordingly, the Commission **denies** TCC's request that TBayTel be directed to refund TCC.

Secretary General

Related documents

- *TBayTel – Application for relief regarding provision of competitor digital network services*, Telecom Decision CRTC 2010-897, 2 December 2010
- Telecom Order CRTC 2010-294, 19 May 2010
- Telecom Order CRTC 2007-398, 29 October 2007
- *Competitor Digital Network Services*, Telecom Decision CRTC 2005-6, 3 February 2005, as amended by Telecom Decision CRTC 2005-6-1, 28 April 2006