



Telecom Decision CRTC 2012-205

PDF version

Ottawa, 4 April 2012

Bell Aliant Regional Communications, Limited Partnership – Application to review and vary Telecom Decision 2011-407 regarding TBayTel’s competitor digital network services

File number: 8662-B54-201113670

In this decision, the Commission denies Bell Aliant’s request to review and vary its finding in Telecom Decision 2011-407 that Bell Aliant suffered no unjust discrimination from the withdrawal of TBayTel’s competitor digital network services.

Background

1. From 1 January 2003 to 31 December 2010, Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) received services from TBayTel under the terms of a Dedicated Services Interconnection and Settlement Agreement (DSISA).¹
2. In Telecom Order 2007-398, the Commission approved, on an interim basis, TBayTel’s competitor digital network (CDN) services tariff.² Prior to that order, TBayTel had offered digital network access (DNA) services and rates, pursuant to its DNA services tariff.³ The Commission approved TBayTel’s CDN services tariff on a final basis in Telecom Order 2010-294.
3. Under the DSISA, network access services were made available to Bell Aliant at rates lower than under the DNA services tariff but higher than under the CDN services tariff. The terms of the DSISA provided for yearly renewals.
4. On 22 July 2010, TBayTel filed an application with the Commission requesting to either remove the CDN services tariff, or amend the CDN services tariff with respect to certain large carriers’ entitlement to CDN services and rates. In support of its application, TBayTel submitted that as it was not a party to the CDN service

¹ Bell Canada and TBayTel originally signed the DSISA. However, by letter dated 6 June 2006, Bell Canada advised the Commission that the DSISA was being assigned to Bell Aliant as part of an internal restructuring between Bell Aliant and Bell Canada.

² TBayTel’s proposed CDN services tariff was submitted in response to Telecom Decision 2007-78. In that decision, TBayTel was directed to file all necessary tariffs in order to permit local competition within its incumbent operating territory by ExaTEL Inc.

³ CDN service makes an incumbent local exchange carrier’s DNA services and associated link facilities available to competitors at rates less than retail DNA service rates.

proceeding,⁴ it should not have been made subject to the CDN service requirements established for the large incumbent local exchange carriers (ILECs) in that decision.

5. In Telecom Decision 2010-897, the Commission noted that, unlike the large ILECs, TBayTel's CDN services were not mandated by the Commission. In that decision, the Commission determined that TBayTel's CDN services tariff should continue to be available, but be limited to the CDN services that TBayTel was providing at the time. Consequently, the Commission directed TBayTel to continue to provide CDN services with associated rates to MTS Allstream Inc. (MTS Allstream)⁵ and TELUS Communications Company (TCC) for existing circuits, subject to certain phase-out periods. The Commission further directed that any new circuits ordered by any new or existing customers should be provided at DNA rates.
6. On 19 January 2011, Bell Aliant filed an application requesting that the Commission direct TBayTel to provide services to Bell Aliant at CDN rates for its existing circuits, similar to what was granted to MTS Allstream and TCC. Bell Aliant argued that the services it received from TBayTel were functionally equivalent to CDN services and that it had negotiated agreements with customers based on the expectation of the continued availability of CDN services in TBayTel's tariffs. Bell Aliant submitted that it was being placed at a competitive disadvantage relative to MTS Allstream and TCC, contrary to subsection 27(2) of the *Telecommunications Act* (the Act).
7. In Telecom Decision 2011-407, the Commission denied Bell Aliant's application. The Commission determined that, while the services Bell Aliant received from TBayTel were functionally equivalent to CDN services, they were in effect DNA services such that Bell Aliant had never provided services to end-customers on existing circuits at CDN rates, contrary to the situation prevailing with MTS Allstream and TCC. The Commission further determined that denial of Bell Aliant's application would not be contrary to subsection 27(2) of the Act as all carriers would be precluded from negotiating contracts for new circuits based on CDN rates such that all competing carriers had been placed on a level playing field.

Bell Aliant's review and vary application

8. On 7 October 2011, Bell Aliant filed an application requesting that the Commission review and vary its finding in Telecom Decision 2011-407 that Bell Aliant suffered no unjust discrimination from the withdrawal of TBayTel's CDN services. Bell Aliant submitted that TBayTel did not serve its application to withdraw CDN services on Bell Aliant, even after the Commission requested⁶ that TBayTel was to serve its application on all carriers that were receiving CDN access services from TBayTel.

⁴ This proceeding was initiated by Telecom Public Notice 2002-4, culminating in Telecom Decision 2005-6.

⁵ As of early 2012, MTS Allstream Inc. became known as two separate entities, namely, MTS Inc. and Allstream Inc.

⁶ The request was set out in a Commission staff letter to TBayTel dated 30 July 2010.

9. The Commission received comments from TBayTel. The public record of this proceeding, which closed on 21 November 2011, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

Did the Commission err by failing to consider that Bell Aliant's rights were prejudiced by TBayTel's failure to serve Bell Aliant with its application to withdraw CDN services?

10. Bell Aliant submitted that TBayTel's failure to serve its application to withdraw CDN services on Bell Aliant prejudiced its rights. In this regard, Bell Aliant submitted that the services it subscribed to under the DSISA were functionally equivalent to CDN services and that TBayTel knew that Bell Aliant would be affected by the outcome of its withdrawal application given that the availability of CDN services was a known and relevant factor in the negotiations between TBayTel and Bell Aliant regarding the extension of the DSISA. Bell Aliant submitted that this failure to serve resulted in Bell Aliant being unaware of TBayTel's withdrawal application such that it had no opportunity to intervene in the proceeding that led to Telecom Decision 2010-897. Bell Aliant argued that, if it had been served with TBayTel's application, it would not have sent TBayTel a notice of intent to terminate the DSISA, with the result being that the DSISA would have been renewed for the year 2011 with network access service rates lower than the prevailing DNA rates.
11. Bell Aliant submitted that termination of the DSISA under such circumstances subjects it to unjust discrimination and grants TBayTel an undue preference as Bell Aliant must now pay DNA rates for network access services, having lost both the benefits provided by the DSISA and access to the CDN rates, while TBayTel can earn higher revenues for the existing circuits subscribed to by Bell Aliant.
12. Bell Aliant requested that the Commission re-instate the DSISA for another renewal year, running from 1 January to 31 December 2011.
13. TBayTel submitted that it was not required to serve its application to withdraw its CDN services tariff on Bell Aliant as Bell Aliant was not an existing CDN customer at the time it filed its withdrawal application. TBayTel also submitted that, in light of the notice requirements set out in the DSISA with respect to early termination of this agreement, Bell Aliant would not have been in a position to migrate its DNA services to CDN services so as to qualify as a potential CDN customer before TBayTel's CDN tariff was withdrawn on 22 December 2010. In light of the above, TBayTel submitted that failure to serve Bell Aliant with its CDN services tariff withdrawal application did not cause unjust discrimination.
14. TBayTel further submitted that given that its CDN services tariff had been in place since 2007, Bell Aliant had the option of terminating the DSISA as early as 2008, but made a business decision to retain the DSISA. TBayTel argued that it was not the Commission's responsibility to intervene in contractual relations of industry participants in order to save one party from the consequences of its business decisions.

Commission's analysis and determinations

15. The Commission considers that Bell Aliant made a business decision to enter into an agreement with TBayTel to receive certain services on the basis of a negotiated agreement and that Bell Aliant chose to renew this agreement, in a modified form, in 2008 even though CDN services were by then available in TBayTel's tariff.
16. In the proceeding that led to Telecom Decision 2010-897, TBayTel was requested to notify all its existing CDN customers that it had applied to withdraw its CDN services tariff. The Commission notes that, in response to this request, TBayTel served its application on TCC and MTS Allstream, both of whom were existing TBayTel CDN customers.
17. In Telecom Decision 2011-407, the Commission considered that the services received by Bell Aliant from TBayTel were not CDN services but were DNA services, notwithstanding the functional equivalency of these types of services, and the Commission notes that this determination is not challenged by Bell Aliant in this proceeding.
18. The Commission considers that the posting of TBayTel's application on the Commission's website, and the opportunities afforded all persons to intervene with respect to such an application pursuant to the *CRTC Telecommunications Rules of Procedure* in effect at the time,⁷ provided Bell Aliant with sufficient notice and opportunity to intervene in the proceeding that led to Telecom Decision 2010-897.
19. In light of the above, the Commission considers that the fact that TBayTel did not serve Bell Aliant with its application to withdraw its CDN services tariff did not amount to the conferral of a preference or disadvantage on the part of TBayTel for the purposes of section 27 of the Act.
20. Accordingly, the Commission **denies** Bell Aliant's request to review and vary Telecom Decision 2011-407.

Secretary General

Related documents

- *Bell Aliant Regional Communications, Limited Partnership – Application to access TBayTel's competitor digital network service rates*, Telecom Decision CRTC 2011-407, 4 July 2011
- *TBayTel – Application for relief regarding provision of competitor digital network services*, Telecom Decision CRTC 2010-897, 2 December 2010

⁷ The *CRTC Telecommunications Rules of Procedure* have since been repealed, replaced by the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, effective 1 April 2011.

- Telecom Order CRTC 2010-294, 19 May 2010
- Telecom Order CRTC 2007-398, 29 October 2007
- *Implementation of local competition in TBayTel's serving territory – ExaTEL Inc. and Shaw Communications Inc.*, Telecom Decision CRTC 2007-78, 31 August 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
- *Competitor Digital Network Access service proceeding*, Telecom Public Notice CRTC 2002-4, 9 August 2002