



Telecom Decision CRTC 2012-520

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Ottawa, 27 September 2012

Bell Aliant Regional Communications, Limited Partnership / Bell Canada and MTS Allstream Inc. – Applications regarding Ethernet services

File numbers: 8663-B54-201109893 and 8661-M59-201115403

In this decision, the Commission denies a request from MTS Allstream to reclassify wholesale Ethernet access service and wholesale Ethernet transport service. The Commission also denies a request from Bell Aliant and Bell Canada to reclassify their Ethernet access service offered in Ontario and Quebec from retail to wholesale.

Background

1. Competitive telecommunications service providers rely to various degrees on a variety of incumbent carrier wholesale services to provide retail services to the service providers' end-users. The Commission requires incumbent carriers, which consist of incumbent local exchange carriers (ILECs) and cable companies, to provide certain wholesale services to competitors on a mandated basis to facilitate facilities-based competition in the telecommunications market.
2. In Telecom Decision 2008-17, the Commission, among other things, set out a revised regulatory framework for wholesale services. Specifically, the Commission assigned incumbent carrier wholesale services to six service categories¹ and determined the pricing principles for the services assigned to those categories. The Appendix to this decision provides an overview of the wholesale services regulatory framework.
3. The Commission assigned wholesale Ethernet access service (EAS) and wholesale Ethernet transport service (ETS)² to the “non-essential subject to phase-out” category.³ Wholesale EAS was assigned a five-year phase-out period with

¹ These service categories are the following: essential, conditional essential, conditional mandated non-essential, public good, interconnection, and non-essential subject to phase-out.

² Ethernet is a communications protocol used for networking and enables the transmission of broadband data between two or more locations.

³ The term “phase-out” means phasing out mandated access for services assigned to this category at the end of the transition period, at which time the services would be forborne from regulation. Once the services are forborne from regulation, the ILECs are no longer required to obtain Commission approval with respect to the rates, terms, and conditions for their provision. However, the Commission has retained jurisdiction to address instances of unjust discrimination pursuant to subsection 27(2) of the *Telecommunications Act* (the Act) and to impose conditions with respect to the provision of these services under section 24 of the Act, as warranted.

forbearance from regulation to be effective in March 2013. Wholesale ETS was assigned a three-year phase-out period and has been forborne from regulation since March 2011.

4. As per Telecom Decision 2008-17, for any service subject to phase-out, telecommunications service providers are to provide written notice of the phase-out to the Commission and to all customers of that service at least six months before the end of the phase-out period to enable customers to review their provisioning arrangements and find alternatives as appropriate.
5. Currently, wholesale EAS is only offered by Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) in the Atlantic region and is assigned to the “non-essential subject to phase-out” wholesale service category. All other EAS offerings provided by the other ILECs are classified as retail services. ETS was forborne from regulation in March 2011.

The applications

6. The Commission received two applications regarding Ethernet services: one made jointly by Bell Aliant and Bell Canada (collectively, the Bell companies), dated 23 June 2011, and one made by MTS Allstream Inc. (MTS Allstream),⁴ dated 25 November 2011. The Bell companies requested that the Commission reclassify their EAS offered in Ontario and Quebec from a retail service to a wholesale service. MTS Allstream requested that the Commission reclassify wholesale EAS as a “conditional essential” service and wholesale ETS as a “conditional mandated non-essential” service under the regulatory framework for wholesale services set out in Telecom Decision 2008-17, thereby re-establishing rate regulation for these services. The Commission combined the two above-noted proceedings into a single proceeding on 8 May 2012.
7. The Commission received comments regarding the applications from the Bell companies, the British Columbia Broadband Association (BCBA), the Canadian Federation of Independent Business (CFIB), the Canadian Network Operators Consortium Inc. (CNOC), Cogeco Cable Inc., Distributel Communications Limited (Distributel), MTS Allstream, Primus Telecommunications Canada Inc. (Primus), the Public Interest Advocacy Centre (PIAC), Quebecor Media Inc. on behalf of Videotron Ltd., Rogers Communications Partnership (RCP), Saskatchewan Telecommunications (SaskTel), Shaw Cablesystems G.P. (Shaw), TELUS Communications Company (TCC), and Vaxination Informatique (Vaxination).
8. The public record of this proceeding, which closed on 18 June 2012, is available on the Commission’s website at www.crtc.gc.ca under “Public Proceedings” or by using the file numbers provided above.

⁴ As of early 2012, MTS Allstream Inc. became known as two separate entities, namely, MTS Inc. and Allstream Inc.

Issues

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

- I. Should the Commission reclassify wholesale EAS and wholesale ETS, thereby re-establishing rate regulation?
- II. Should the Bell companies' EAS offered in Ontario and Quebec be reclassified from a retail service to a wholesale service?

I. Should the Commission reclassify wholesale EAS and wholesale ETS, thereby re-establishing rate regulation?

10. MTS Allstream submitted that the Commission should remove EAS from the “non-essential subject to phase-out” service category and assign it to the “conditional essential” service category.⁵ The company argued that EAS meets the essential service criteria set out in Telecom Decision 2008-17. MTS Allstream also submitted that the Commission should remove ETS from the “non-essential subject to phase-out” service category and assign it to the “conditional mandated non-essential” service category.⁶ The company also argued that failure to reclassify Ethernet services as such would result in a lessening of competition.

11. MTS Allstream submitted that competitors require Ethernet services since only the ILECs have a ubiquitous network infrastructure. Specifically, MTS Allstream indicated that the ILECs' Ethernet infrastructure cannot be duplicated and noted that despite significant investment, less than half of its customer base can be served using entirely its own facilities, even in major centres. The company argued that while it uses its own facilities and alternatives to ILEC facilities to provide Ethernet services wherever it is practical to do so, there is no other sufficient source of a third-party supply of Ethernet services.

12. MTS Allstream argued that without mandated competitor access to ETS, competitors would (i) be limited to providing services to their customers only where they are co-located, (ii) be forced to buy bundled, end-to-end Ethernet services, or (iii) use inefficient and expensive private line services.

13. The BCBA, the CFIB, CNOC, Distributel, PIAC, Primus, and Vaxination (collectively, the Interveners) supported reclassifying EAS and ETS, arguing that access by competitors to wholesale Ethernet services at affordable rates is crucial to developing a competitive market. The Interveners also submitted that the ILECs and the cable companies remain dominant in the supply of key network elements, and that

⁵ See the Appendix to this decision for a description of the service categories as per Telecom Decision 2008-17.

⁶ In Telecom Decision 2008-17, the Commission priced services in the “conditional essential” service category at company-specific Phase II costs plus a 15-percent markup (excluding Télébec, Limited Partnership and TCC in Quebec). Although the Commission did not specify a markup for services in the “conditional mandated non-essential” and “non-essential subject to phase-out” categories in Telecom Decision 2008-17, it did not adjust the existing markups for these services.

this is more apparent today than during the proceeding leading to Telecom Decision 2008-17. The Interveners argued that although the Commission determined in Telecom Decision 2008-17 that there was sufficient competition and potential for self-supply regarding the uses for Ethernet services at that time, the Commission may now need to reconsider its decision since the role of these services has expanded.

14. The Bell companies, SaskTel, and TCC opposed MTS Allstream's proposed reclassification. They submitted that MTS Allstream provided insufficient evidence to justify its proposal. As well, they noted that in Telecom Decision 2008-17, the Commission determined that Ethernet services do not meet the essential service criteria and that there is sufficient competition and self-supply in the market for Ethernet services to warrant the phasing-out of these services.
15. The Bell companies submitted that investment in Ethernet service facilities by non-ILEC service providers is increasing competitive supply options for Ethernet services. The Bell companies also submitted that competitors are maintaining market share in wholesale Ethernet services and that growing industry-wide wholesale Ethernet service revenues indicate an increase in the supply of wholesale Ethernet services.
16. RCP and Shaw stated that they have made significant investments in Ethernet infrastructure to compete with the ILECs on a wholesale basis and to use in the provision of their own retail Ethernet service offerings.
17. The Bell companies, SaskTel, and TCC argued that providing mandated access to Ethernet services would reduce the incentive for competitors to invest in their own networks and that reclassifying Ethernet services would violate the Policy Direction⁷ by not relying on market forces to the maximum extent feasible.
18. MTS Allstream and the Interveners submitted that it was not feasible to rely on negotiated agreements with ILECs regarding Ethernet services rather than on mandated access for competitors. MTS Allstream also submitted that, due to the ILECs' market power, they have little incentive to reach agreements with competitors.
19. The Bell companies and TCC indicated that negotiated agreements are a viable means for competitors to access Ethernet services and that the ILECs have successfully negotiated numerous agreements regarding wholesale services with competitors.

Commission's analysis and determinations

20. The Commission notes that ETS has been forborne from regulation since March 2011, and that EAS was prospectively forborne from regulation in Telecom Decision 2008-17, effective in March 2013. The Commission considers that in order to re-establish rate regulation in a forborne market, evidence needs to be filed that is sufficiently persuasive to demonstrate that the circumstances that justified the original forbearance determinations are no longer present.

⁷ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

21. The Commission notes that in Telecom Decision 2008-17, it required ILECs to offer ETS and EAS to competitors for three and five years, respectively, following that decision. The framework set out in that decision provided competitors with a reasonable period to review and restructure their provisioning arrangements as required, whether through self-supply or negotiated agreements with other suppliers.
22. The Commission notes that since the issuance of Telecom Decision 2008-17, cable companies have expanded their networks through investment and acquisition in order to compete with the ILECs in the wholesale Ethernet service market. The Commission also notes that such investments increase the availability of these services to other competitors. The Commission further notes that the information on market conditions for Ethernet and related services provided by parties in confidence to the Commission indicates that competitors' share of the market has not changed significantly since Telecom Decision 2008-17 was issued. The Commission therefore considers that MTS Allstream has not provided sufficiently persuasive evidence to demonstrate that the circumstances that justified the forbearance determinations in Telecom Decision 2008-17 have changed to the extent that forbearance with respect to EAS and ETS is no longer consistent with the criteria set out in section 34 of the *Telecommunications Act* (the Act).
23. The Commission notes that Telecom Decision 2008-17 allows for negotiated agreements between ILECs and competitors regarding wholesale Ethernet services, in keeping with reliance on market forces to the maximum extent feasible as the means of achieving the policy objectives set out in the Act. The Commission also notes that competitors may file applications to the Commission based on subsection 27(2) of the Act if they consider that they are being unjustly discriminated against.
24. In light of the above, the Commission considers that there is insufficient evidence to warrant changing the wholesale services regulatory regime by reclassifying wholesale EAS and wholesale ETS. Accordingly, the Commission **denies** MTS Allstream's proposal.

II. Should the Bell companies' EAS offered in Ontario and Quebec be reclassified from a retail service to a wholesale service?

25. The Bell companies submitted that reclassifying their EAS in Ontario and Quebec from a retail service to a wholesale service would reflect the reality of the service's actual customer base. The Bell companies stated that their EAS customers in the Ontario and Quebec region and that Bell Aliant's EAS customers in the Atlantic region are all wholesale customers. The Bell companies noted that the only difference in the two services is that EAS in the Ontario and Quebec region is classified as a retail service while EAS in the Atlantic region is classified as a wholesale service.
26. The Bell companies submitted that since their EAS in Ontario and Quebec is technologically identical to, and serves the same customer base as, Bell Aliant's EAS in the Atlantic region, the Bell companies' EAS in Ontario and Quebec

should be classified as “non-essential subject to phase-out” and forborne from regulation in 2013, as set out in Telecom Decision 2008-17. The Bell companies proposed to continue providing EAS in Ontario and Quebec to new and existing wholesale customers under the same terms and conditions that are currently in place, and to maintain the current EAS rates.

27. SaskTel supported the Bell companies’ proposal. The company submitted that the classification of its EAS as a retail service rather than a wholesale service is also inappropriate and that it should be similarly reclassified.
28. MTS Allstream opposed the Bell companies’ proposal. It submitted that instead of reclassifying EAS from a retail service to a wholesale service, the Bell companies should introduce wholesale EAS in the Ontario and Quebec region.
29. MTS Allstream indicated that, pursuant to the Act, forbearance from the regulation of retail services cannot be achieved merely through the reclassification of a service and that the Commission has not established a test for forbearance from the regulation of retail EAS.

Commission’s analysis and determinations

30. The Commission notes that if the Bell companies’ application were approved, EAS would likely be assigned to the “non-essential subject to phase-out” wholesale service category with forbearance effective in March 2013, as per Telecom Decision 2008-17, resulting in the Bell companies withdrawing their retail EAS tariffs. The Commission also notes that this process would be appropriate if the service in question were subject to the wholesale services regulatory regime set out in Telecom Decision 2008-17, but that the Bell companies’ EAS in this case is a retail tariffed service and is therefore not subject to this regime.
31. The Commission notes that a process for withdrawing tariffed services was established in Telecom Circular 2005-7 and amended in Telecom Decision 2008-22. The Commission also notes that the Bell companies currently have customers using the retail EAS service and have failed to file an application seeking approval to withdraw their retail EAS tariff, consistent with the tariff withdrawal process.
32. The Commission considers that because the Bell companies have failed to apply to withdraw their retail EAS tariff, consistent with the tariff withdrawal process, it would not be appropriate to reclassify the Bell companies’ EAS in Ontario and Quebec from a retail service to a wholesale service. Accordingly, the Commission **denies** the Bell companies’ request.
33. The Commission notes that while the Bell companies do not currently offer wholesale EAS in Ontario and Quebec, they may apply to offer such a service at any time.

Compliance with the Policy Direction

34. The Commission considers that its determinations in this decision will advance the telecommunications policy objectives set out in paragraphs 7(b), 7(c), 7(f), and 7(h) of the Act.⁸
35. The Commission notes that its determinations in this decision maintain the classification of EAS and ETS as wholesale services subject to phase-out, do not require mandated access to these services after the phase-out period, and maintain the forbearance findings with respect to these services. The Commission also notes that its determinations in this decision do not preclude the Bell companies from applying to the Commission for approval to provide wholesale EAS in Ontario and Quebec consistent with the regime applicable to EAS set out in Telecom Decision 2008-17, including the phase-out of mandated access and prospective forbearance.
36. The Commission therefore considers that these determinations are consistent with the Policy Direction requirement that the Commission should rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives.

Secretary General

Related documents

- *Mandatory customer contract renewal notification and requirements for service destandardization/withdrawal*, Telecom Decision CRTC 2008-22, 6 March 2008
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- *New procedures for disposition of applications dealing with the destandardization and/or withdrawal of tariffed services*, Telecom Circular CRTC 2005-7, 30 May 2005

⁸ These objectives are the following: 7(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada; 7(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications; 7(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and 7(h) to respond to the economic and social requirements of users of telecommunications services.

Wholesale services regulatory framework set out in Telecom Decision 2008-17

Telecom Decision 2008-17 set out a regulatory framework for wholesale services and assigned these services to six categories. The service categories relevant to the issues considered in this decision are described below.⁹

- **Essential** services require mandated access, which means that they must be provided by the ILEC upon request, and meet all of the following criteria:
 - 1) The service is required as an input by competitors to provide telecommunications services in a relevant downstream market;
 - 2) The service is controlled by a firm that possesses upstream market power such that denying access to the service would likely result in a substantial lessening or prevention of competition in the relevant downstream market; and
 - 3) It is not practical or feasible for competitors to duplicate the functionality of the service.

Rates for services in this category were set at company-specific Phase II costs plus a 15-percent markup (25 percent for Télébec, Limited Partnership and for TCC in Quebec).

- **Conditional essential** services meet the “essential” service criteria and require mandated access, but future changes in market conditions could result in these services no longer being considered essential. Rates for services in this category were set at company-specific Phase II costs plus a 15-percent markup (25 percent for Télébec, Limited Partnership and for TCC in Quebec).
- **Conditional mandated non-essential** services do not meet the “essential” service criteria, but require mandated access for other reasons. The Commission did not adjust rates for services in this category in Telecom Decision 2008-17.
- **Non-essential subject to phase-out** services do not meet the “essential” service criteria and do not require mandated access after the phase-out period. The term “phase-out” means phasing out mandated access at the end of the transition period, at which time the services would be forborne from regulation. The Commission did not adjust rates for services in this category in Telecom Decision 2008-17.

Note: This summary has been provided for ease of reference. For details, see Telecom Decision 2008-17, accessible from the Commission’s website.

⁹ The other two wholesale service categories, public good and interconnection, were not at issue in the proceeding leading to this decision.