



Telecom Decision CRTC 2013-603

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Ottawa, 12 November 2013

TELUS Communications Company – Application to review and vary Telecom Decision 2013-73

File number: 8662-T66-201307703

In this decision, the Commission denies an application from TCC to review and vary Telecom Decision 2013-73. However, based upon further review of the costs associated with TCC's 6 megabit-per-second wholesale high-speed access (HSA) service, the Commission varies, on its own motion, the rate for this service, effective 15 November 2011.

Background

1. Wholesale high-speed access (HSA) services offered by large incumbent local exchange carriers (ILECs) and cable carriers (collectively, the incumbent carriers) enable independent service providers to offer retail Internet and other services to their own end-users. As a result of the availability of wholesale HSA services, residential and business end-users have a greater choice of services. Wholesale HSA services are offered under terms and conditions that must be approved by the Commission, whereas the Commission has refrained from regulating the rates and most terms and conditions applicable to retail Internet services.
2. In Telecom Regulatory Policies 2011-703 and 2011-704, the Commission approved the rates, terms, and conditions applicable to wholesale HSA services. The Commission subsequently received a number of applications from incumbent carriers and independent service providers to review and vary certain determinations made in those decisions.
3. In Telecom Decision 2013-73, the Commission amended the rates, terms, and conditions applicable to residential and business wholesale HSA services in response to various issues raised by the Canadian Network Operators Consortium Inc. (CNOC) in its application to review and vary Telecom Regulatory Policies 2011-703 and 2011-704. Specifically, the Commission (i) made certain revisions to TELUS Communications Company (TCC)'s rates to correct costing errors, and (ii) modified its policy regarding markups for business wholesale HSA services to require the rates for those services to be the same as rates for comparable residential wholesale HSA services. The Commission also decided that changes to rates made as a result of corrections to costing errors would be applied retroactively to the date the original decisions were issued.

The application

4. The Commission received an application from TCC, dated 22 May 2013, in which the company requested that the Commission review and vary Telecom Decision 2013-73. TCC alleged that the Commission made errors in law or in fact in the following three aspects of the decision: (i) the rate approved for TCC's 6 megabit-per-second (Mbps) wholesale HSA service, (ii) the determination that requires equivalent rates for business and residential wholesale HSA services, and (iii) the retroactive application of the wholesale HSA service rates approved in the decision.
5. The Commission received comments regarding TCC's application from the British Columbia Broadband Association (BCBA), CNOC, MTS Inc. and Allstream Inc. (collectively, MTS Allstream), Primus Telecommunications Canada Inc. (Primus), and Vaxination Informatique (Vaxination). The public record of this proceeding, which closed on 12 July 2013, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.
6. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications that are filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, due to, for example, one or more of the following: (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

Issues

7. The Commission has identified the following issues to be addressed in this decision:
 - I. Did the Commission err in fact and in law in its assessment of the costs incurred by TCC to provide its 6 Mbps wholesale HSA service?
 - II. Did the Commission err in fact by setting the same rates for TCC's business wholesale HSA services as for comparable residential wholesale HSA services?
 - III. Did the Commission err in law in making the rates for TCC's wholesale HSA services effective on a retroactive basis?

I. Did the Commission err in fact and in law in its assessment of the costs incurred by TCC to provide its 6 Mbps wholesale HSA service?

8. TCC noted that the rates approved for its wholesale HSA services in Telecom Decision 2013-73 were based on cost studies submitted by TCC and adjusted by the Commission. TCC further noted that in that decision, the Commission indicated that Broadband Remote Access Server (BRAS) costs associated with TCC's 6 Mbps

service were reduced by 76 percent. TCC submitted that based on its efforts to replicate the Commission's cost adjustments, it determined that BRAS costs had been reduced by more than 95 percent. TCC further submitted that the adjustment of 95 percent was not realistic because it was based on usage assumptions that were not supportable. Furthermore, TCC argued that approved rate was not in line with the rate approved by the Commission for comparable services provided by Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) and Bell Canada (collectively, the Bell companies).

9. CNOC, Primus, and Vaxination submitted that TCC's rate comparisons are flawed as they are based on a comparison of the rate approved for TCC's legacy 6 Mbps wholesale HSA service to the rate for the Bell companies' fibre-to-the-node (FTTN) 6 Mbps wholesale HSA service. They further submitted that TCC's analysis of the Commission's alleged errors should not be relied on because it was not placed on the public record. CNOC indicated that an analysis of the relationships between the rates approved by the Commission for TCC's various wholesale HSA services demonstrated that, if anything, the rate for TCC's 6 Mbps wholesale HSA service is too high.
10. TCC submitted that the use of the word "legacy" to describe its 6 Mbps wholesale HSA service is not a reflection of the network technology it uses to provide the service. TCC further submitted that the cost study for the service takes into account the fact that the service is provided over FTTN technology. Therefore, TCC submitted that its comparison of its service to the Bell companies' 6 Mbps wholesale HSA service is valid.

Commission's analysis and determinations

11. The Commission notes that TCC agreed that the BRAS costs it submitted in support of its original proposal for the 6 Mbps wholesale HSA service were overstated and required modification. The Commission further notes that TCC did not provide evidence to support its claim that the Commission reduced the BRAS costs by more than 95 percent. However, upon review of the record of the proceeding leading to Telecom Decision 2013-73, the Commission has identified that the reduction in TCC's BRAS costs was incorrectly stated in paragraph 88 of that decision as being 76 percent, when it should have read 85 percent. The Commission confirms that in setting TCC's rate, it applied an 85 percent reduction to the BRAS costs.
12. With regard to TCC's comparison of its legacy 6 Mbps wholesale HSA service rate with that of the Bell companies' FTTN 6 Mbps wholesale HSA service, the Commission notes that it compared these services' cost studies and confirms that the differences in rates are valid and justified.
13. In addition, a review of cost adjustments made to establish rates for TCC's 6 Mbps wholesale HSA service uncovered errors made by the Commission related to three cost elements: service provisioning, product management, and capital costs.

14. With regard to service provisioning costs, the cost associated with loop qualification had been applied in error to the number of users at year's end for every other year of the study period, when it should have been applied to the incremental number of users added in each year of the study period. The correction of this error reduces the cost for TCC's 6 Mbps wholesale HSA service.
15. With regard to product management costs, the one-time cost associated with product management had also been applied in error to the number of users at year's end for every other year of the study period, when it should have been applied to the incremental number of users added in each year of the study period. The correction of this error further reduces the cost for TCC's 6 Mbps wholesale HSA service.
16. With regard to capital costs, in the course of the proceeding leading to Telecom Regulatory Policy 2011-703 and in response to Commission interrogatories, TCC submitted detailed and supplementary cost information, which the Commission relied upon in setting the rate for the company's 6 Mbps wholesale HSA service. The Commission, in reviewing its cost adjustments, discovered calculation and assumption errors that underestimated the capital costs associated with the access components of this service. The correction of these errors increases the cost for TCC's 6 Mbps wholesale HSA service.
17. The Commission notes that correcting the costs for TCC's 6 Mbps wholesale HSA service to account for these three errors results in an increase in the overall rate of the service of \$1.21 per month per end-user. With this increase in costs, the rate for the service would increase to \$19.18 per month per end-user.
18. In light of the above, the Commission finds that TCC has not demonstrated that the Commission had erred in law or in fact in its assessment of the costs incurred by TCC to provide its 6 Mbps wholesale HSA service. The Commission therefore **denies** TCC's request to vary the rate approved for the service.
19. However, the Commission, on its own motion, varies the rate for the service to \$19.18 per month per end-user to correct the errors that it found in its treatment of the costs for the service. Given that the rate was based on incorrect costs, and replaces the one set out in Telecom Regulatory Policy 2011-703, the Commission makes the rate effective 15 November 2011, the date that decision was issued.
20. The Commission notes that it issued a letter, dated 12 July 2013, wherein it established a new procedure for the filing of wholesale service tariff applications. The Commission expects that the new filing requirements will provide it with greater assistance in conducting its analysis and minimize potential errors in the cost methodology, assumptions, and calculations used to develop wholesale service costs and rates.

II. Did the Commission err in fact by setting the same rates for TCC's business wholesale HSA services as for comparable residential wholesale HSA services?

21. TCC submitted that the Commission erred in fact when it decided in Telecom Decision 2013-73 to set the rates for the company's business wholesale HSA services to be the same as the rates for comparable residential wholesale HSA services. TCC argued that the Commission erred because that decision limited network providers to an equivalent markup for residential and business wholesale services, even though business wholesale services enable wholesale customers to provide services that have a higher value in the retail market than do the same residential services in the retail market.
22. TCC submitted that the higher value of business services in the retail market is generally manifested in higher retail business service rates relative to comparable retail residential services for both incumbent carriers and independent service providers.
23. TCC further submitted that business end-users demand a higher level of technical and customer support from their service providers. This in turn imposes higher costs on incumbent carriers, as the independent service providers contact the incumbent carriers more often in regard to wholesale HSA service issues involving business end-users than they would for service issues involving residential end-users.
24. Based on these considerations, TCC proposed that the markups for business wholesale HSA services be increased from 40 percent to 60 percent, while markups on residential wholesale HSA services remain the same. TCC further proposed that if the Commission determines that equivalent rates for residential and business wholesale HSA services are appropriate, then the common markup for the services should be set at 50 percent.
25. TCC also argued that the common markups on wholesale HSA services approved in Telecom Decision 2013-73 (40 percent for wholesale HSA services provided on an FTTN network and 30 percent for those provided on a legacy network) do not reflect an appropriate rate of return for the incumbent carriers. TCC argued that a markup represents a proportionate recovery of fixed and common costs, compensation for the risks of investments made in network facilities, and an adequate return to shareholders. TCC argued that all three elements of markup are critical to maintain current and future network investments.
26. BCBA, CNOC, MTS Allstream, Primus, and Vaxination opposed TCC's proposals and did not agree that there was an error in Telecom Decision 2013-73. They submitted that any additional value that may be attributed to retail business services is based on additional features and service differentiation provided by independent service providers. They argued that TCC did not submit any evidence of material cost differences between residential and business wholesale HSA services and that, in any event, the approved business wholesale HSA service rates are compensatory.

27. MTS Allstream submitted that even if TCC incurred higher costs to deliver business wholesale HSA services, those costs would not justify a higher markup, as they would be reflected in the incremental costs for the service. MTS Allstream further submitted that end-user value is appropriately determined in a competitive retail market, not at the wholesale level. According to MTS Allstream, a higher markup on business wholesale HSA services allows the network provider control over the retail market, and forces end-users to pay artificially high rates for retail services.
28. MTS Allstream further submitted that TCC's allegations regarding the inadequacy of the compensation provided by the markups approved for business wholesale HSA services and their potential impact on TCC's incentives to invest are belied by TCC's financial results, which indicate that it is covering its costs and any investment risk posed by its current investments.
29. TCC submitted that MTS Allstream's comparison of its overall financial results to the markup on one service is invalid as the measures compared by MTS Allstream are based on completely different financial concepts, and that these differences make the comparisons irrelevant.

Commission's analysis and determinations

30. The Commission notes that TCC has acknowledged that residential and business wholesale HSA services are provided on essentially the same network, and that network providers incur essentially the same capital costs to provide the services. The Commission considers that TCC has failed to demonstrate that (i) there are any material differences in operating expenses incurred to provide residential and business wholesale HSA services, and (ii) if there were any such differences, why they would not already be reflected in the incremental costs.
31. The Commission notes that it does not regulate the rates for retail Internet services provided over these networks. If the Commission were to set wholesale rates on the basis of the retail rate levels, it would effectively be requiring the users of wholesale HSA services to pass these additional costs on to their retail customers. The Commission considers that this approach to setting wholesale service rates would be interfering with competitive market forces in retail markets, contrary to the Policy Direction¹ requirement to interfere with market forces to the minimum extent necessary to achieve the policy objectives set out in the Act.
32. With regard to TCC's contention that the markups approved in Telecom Decision 2013-73 provide inadequate compensation to network providers, and hence harm its incentives to invest in network infrastructure, the Commission notes that TCC has not provided any current evidence to support its contention, relying instead on submissions made in past proceedings with regard to different services. Similarly, the

¹ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

Commission notes that the markups proposed by TCC were not supported by any current evidence that would indicate why these markups are appropriate.

33. The Commission also notes that the decision to require incumbent carriers to provide business wholesale HSA services to independent service providers at the same rates as those approved for the equivalent residential wholesale HSA services was made under the policy considerations set out in Telecom Regulatory Policy 2013-70. One of the policy considerations expressly set out in that decision was the appropriate level of compensation to be provided to incumbent carriers for the provision of wholesale HSA services. The Commission considers that the impact of that decision on incentives to invest in new infrastructure was taken into account in determining the appropriate level of compensation for wholesale HSA services.
34. The Commission notes that the purpose of markup in Phase II costing is to provide for the recovery of fixed and common costs that are not causal to any service. In Telecom Regulatory Policy 2010-632, the Commission approved, for ILEC-provided wholesale HSA services, an additional 10 percent markup on the costs of providing these services over new network facilities, (i) in recognition of the fact that the cost of capital associated with these new facilities might be greater than the cost of capital approved for use in regulatory studies, and (ii) in lieu of evaluating what that higher cost of capital might be. This approach resolved the specific issue before the Commission, but it was not intended to change the fundamental purpose of markups in Phase II costing, contrary to TCC's argument.
35. Based on the above, the Commission finds that TCC's submissions that markups should be set with a view to compensate for risk, or to provide a return to shareholders, is not consistent with the principles of Phase II costing. Furthermore, the Commission finds that TCC's proposed increase to the markup on wholesale HSA services is not supported by any evidence that the markups approved in Telecom Decision 2013-73 are inadequate.
36. In light of the above, the Commission finds that it did not err in fact when it required, in Telecom Decision 2013-73, that rates for incumbent carriers' business wholesale HSA services be set equal to the rates for the equivalent residential wholesale HSA services. The Commission therefore **denies** TCC's request to rescind this requirement and to increase the markup on wholesale HSA services.

III. Did the Commission err in law in making the rates for TCC's wholesale HSA services effective on a retroactive basis?

37. TCC submitted that the Commission erred in law in determining, in Telecom Decision 2013-73, that the approved rates for wholesale HSA services would apply retroactively to 15 November 2011. TCC noted that the rates were final and that the Commission operates under a positive approval scheme for rate regulation. According to TCC, under this scheme, only interim rates can be applied retroactively.

38. TCC noted that while several review and vary applications were filed with the Commission following Telecom Regulatory Policy 2011-703, none of those applications challenged the validity of the rates approved on a final basis for TCC's wholesale HSA service rates.
39. TCC further submitted that the Federal Court of Appeal has held that a decision by the Commission with regard to a rate may be set aside and revised effective from the date of the original decision, if the original decision can be demonstrated to have been made in the absence of any evidence to support it. TCC argued that this circumstance does not apply in this case, since the Commission's original rate decisions in Telecom Regulatory Policy 2011-703 were based on a full record provided in the proceeding that led to that decision.
40. CNOC submitted that the Commission is entitled to review the rates approved in Telecom Regulatory Policy 2011-703 on its own motion and has the authority to correct those rates retroactively to 15 November 2011 under section 62 of the Act.
41. CNOC further submitted that while no court decisions have specifically ruled on the Commission's jurisdiction to vary a final rate retroactively, in the course of exercising its authority to review and vary a decision, the Supreme Court of Canada has, in some instances, ruled that review and vary powers similar to those of the Commission could be applied retroactively.
42. TCC replied that the rulings cited by CNOC are not relevant to the Commission's authority under the Act and are based on interpretations that ignore the overall statutory context of the Act.

Commission's analysis and determinations

43. The Commission notes that TCC has correctly argued that no party to the proceeding that led to Telecom Decision 2013-73 challenged the costs that formed the basis for TCC's wholesale HSA rates approved in Telecom Regulatory Policies 2011-703 and 2011-704. However, the Commission also notes that it can, on its own motion, review and vary a decision that it has made.
44. The Commission remains of the view, as set out in Telecom Decision 2013-73, that when rates are based on incorrect costs, the rates are not just and reasonable, and that adjustments are required to bring them into compliance with the Act. In such cases, it is necessary and appropriate to apply these adjustments retroactively to the date of service implementation to ensure that the rates are at all times just and reasonable, and further the policy objectives set out in the Act. The Commission considers that TCC has not provided sufficient evidence to demonstrate an error in law in relation to this issue.
45. In light of the above, the Commission finds that its determination in Telecom Decision 2013-73 to vary TCC's wholesale HSA service rates retroactively to 15 November 2011 was not an error in law that raised substantial doubt about the

correctness of the decision. Accordingly, the Commission **denies** TCC's request to rescind the determination to make the rates effective on a retroactive basis.

Secretary General

Related documents

- *Canadian Network Operators Consortium Inc. – Application to review and vary Telecom Regulatory Policies 2011-703 and 2011-704*, Telecom Decision CRTC 2013-73, 21 February 2013
- *Disposition of review and vary applications with respect to wholesale high-speed access services: Introductory statement*, Telecom Regulatory Policy CRTC 2013-70, 21 February 2013
- *Billing practices for wholesale business high-speed access services*, Telecom Regulatory Policy CRTC 2011-704, 15 November 2011
- *Billing practices for wholesale residential high-speed access services*, Telecom Regulatory Policy CRTC 2011-703, 15 November 2011, as amended by Telecom Regulatory Policy CRTC 2011-703-1, 22 December 2011
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Wholesale high-speed access services proceeding*, Telecom Regulatory Policy CRTC 2010-632, 30 August 2010