



Telecom Decision CRTC 2013-99

PDF version

Ottawa, 28 February 2013

Allstream Inc. – Application regarding Bell Canada’s and Bell Aliant Regional Communications, Limited Partnership’s Competitor Digital Network services

File number: 8622-M59-201300095

In this decision, the Commission denies an application by Allstream and confirms that the Bell companies will be permitted to provide Competitor Digital Network (CDN) DS-3 Access service to Allstream without rate approval as of 3 March 2013, consistent with the regulatory framework for wholesale services set out in Telecom Decision 2008-17. However, the Bell companies are required to continue to provide certain CDN DS-1 Intra-exchange circuits to Allstream at Commission-approved rates until they have migrated the circuits in question. In addition, the Bell companies are not to impose new resale restrictions on the provision to Allstream of wholesale services not subject to rate approval. The Commission has also decided to schedule a review of the essential services framework, which will be known as the wholesale services framework review, for 2013.

Introduction

1. Under the *Telecommunications Act* (the Act), the Commission has the power to require Canadian carriers to provide telecommunications services. Further, the Act requires that Canadian carriers provide telecommunications services at rates, terms, and conditions approved by the Commission. However, in appropriate circumstances, the Commission can relieve Canadian carriers of these requirements.
2. In *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008 (Telecom Decision 2008-17), the Commission set out a regulatory framework for wholesale services provided by certain large incumbent local exchange carriers (ILECs) to competitors (the essential services framework). In that decision, the Commission decided to no longer require the affected ILECs to provide certain wholesale services to competitors and found that if those ILECs chose to continue to provide those services, they could do so without having to obtain prior approval from the Commission for the rates, terms, and conditions of the services. The Commission did, however, retain its powers to address issues of unjust discrimination or undue preference under subsections 27(2) and 27(4)¹

¹ Subsection 27(2): No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

Subsection 27(4): The burden of establishing before the Commission that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable is on the Canadian carrier that discriminates, gives the preference or subjects the person to the disadvantage.

of the Act. For certain services, the effective date for the implementation of these findings was 3 March 2011, while for other wholesale services, it was set to be 3 March 2013 (phase-out date). The Commission also determined that it would review the assignment of all remaining mandated wholesale services six years from the date of the decision.

The application

3. The Commission received an application from Allstream Inc. (Allstream), dated 8 January 2013, requesting that it direct Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies) to maintain the current rates, terms, and conditions for Competitor Digital Network (CDN) DS-3 Access² and CDN DS-1 Intra-exchange³ services beyond the phase-out date of 3 March 2013.
4. Specifically, Allstream requested that, pursuant to its powers under subsection 27(2) of the Act, the Commission
 - a. direct the Bell companies to maintain the current tariffed CDN rates, terms, and conditions for in-service DS-3 Access services, pending a final determination in the upcoming review of the essential services framework;
 - b. direct the Bell companies to maintain the current tariffed CDN rates, terms, and conditions for in-service DS-1 Intra-exchange circuits pending the fulfillment of Allstream's 2 March 2012 request to migrate these circuits; and
 - c. require that wholesale facilities and services leased from the Bell companies be available for resale other than simple resale⁴, irrespective of whether the service in question is forborne or continues to be regulated.
5. In addition, Allstream requested that the Commission launch the review of the essential services framework in 2013 instead of 2014 since, in its view, the above requests would lead to short-term remedies only.
6. The Commission received comments on the application from the Bell companies, Canadian Network Operators Consortium Inc. (CNOc), Iristel Inc. (Iristel), TELUS Communications Company (TCC), and Verizon Canada Ltd. (Verizon Canada).⁵

² CDN Access service provides a connection between a customer site and a wire centre, which allows a competitor to reach a customer. The connection is provided at various speeds, including DS-3 (45 megabits per second (Mbps)).

³ CDN Intra-exchange service provides a connection between two wire centres within an exchange. The connection is provided at various speeds, including DS-1 (1.544 Mbps).

⁴ Simple resale means that a service provider purchases a wholesale service and then simply resells it to another service provider without any adding any value.

⁵ As part of its comments, Verizon Canada requested an order directing the Bell companies to co-operate with its customers' efforts to mitigate the adverse effects of the price increases scheduled to go into effect on 3 March 2013. The Commission considers that this request is out of scope as it was improperly included in an intervention, rather than in an application.

The public record of this proceeding, which closed on 24 January 2013, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.

7. The Commission has identified the following issues to be addressed in this decision:
 - I. Should the Commission-approved rates, terms, and conditions be maintained for the Bell companies' in-service CDN DS-3 Access service circuits provided to Allstream until the upcoming essential services framework review is complete?
 - II. Should the Commission-approved rates, terms, and conditions be maintained for the Bell companies' in-service CDN DS-1 Intra-exchange service circuits provided to Allstream until the Bell companies migrate the circuits?
 - III. Should the Bell companies be allowed to impose new restrictions with respect to the resale of wholesale services not subject to rate approval that are made available to Allstream?

I. Should the Commission-approved rates, terms, and conditions be maintained for the Bell companies' in-service CDN DS-3 Access service circuits provided to Allstream until the upcoming essential services framework review is complete?

8. Allstream submitted that, on 3 January 2013, it received the Bell companies' latest proposal for the rates, terms, and conditions of services scheduled for phase-out on 3 March 2013. The proposal includes rates for CDN DS-3 Access service after the phase-out date that are approximately the same as the rates for the analogous retail services provided by the Bell companies. Allstream submitted that the proposed rates prevent it from competing with the Bell companies and demonstrate that the Bell companies possess, and are willing to exercise, market power. Allstream further submitted that no suitable substitutes for the service are available.
9. Allstream also argued that there is evidence of increasing ILEC market share in the data market since the Commission issued Telecom Decision 2008-17. The company submitted that the ILECs' in-territory share of the overall revenue for the retail data market increased from 58 percent in 2007 to 65 percent in 2011 and that if wholesale revenue is factored in, the ILECs' share would have increased from 78 percent to 82 percent.⁶
10. Allstream submitted that the Bell companies' costs to provide CDN DS-3 Access service are declining and that much of the existing investment has already been depreciated. Allstream further submitted that the rate increase proposed by the Bell companies is aimed at boosting the profit margin for the service rather than recovering costs.

⁶ Based on information in the *CRTC Communications Monitoring Report* for 2008 and 2011

11. CNOOC, Iristel, and Verizon Canada supported Allstream's application. CNOOC submitted that there will be an undue lessening of competition in the downstream markets for retail services unless the Commission grants the relief requested by Allstream.
12. The Bell companies submitted that their latest proposed rates are reasonable, as the wholesale CDN rates were set in 2005 and are artificially depressed. They argued that prospective phase-out of the CDN DS-3 Access service is the correct decision and that there is no reason to delay it. They further submitted that Allstream had almost five years to negotiate alternative arrangements or to self-supply.
13. The Bell companies submitted that Allstream has failed to provide any evidence to demonstrate that the circumstances justifying the Commission's decision to no longer require tariff approval with respect to CDN DS-3 Access service, effective 3 March 2013, have changed such that the service should continue to be subject to Commission tariff approval.
14. TCC submitted that Allstream's request to maintain the Commission-approved rates beyond the phase-out date should be dismissed because it amounts to a request to review and vary the essential services framework and its intended regulatory certainty, as set out in Telecom Decision 2008-17.

Commission's analysis and determinations

15. The Commission notes that pursuant to subsections 27(2) and 27(4) of the Act, it has the authority to address circumstances of unjust discrimination and undue or unreasonable preference or disadvantage in relation to the provision of telecommunications services by Canadian carriers. The burden of proof is on the respondent to an application to establish that any discrimination is not unjust or that any preference or disadvantage is not undue or unreasonable.
16. The Commission notes that the phase-out date for CDN DS-3 Access service was established in Telecom Decision 2008-17 so that competitors such as Allstream would have ample opportunity to make arrangements for the continued provision of services, whether through negotiated agreements or investment in self-supplied facilities. The Commission also notes that Telecom Decision 2008-17 contemplated that where negotiated agreements were not put in place, the functionality provided by such services would continue to be available to competitors through the ILECs' retail service offerings.
17. The Commission further notes that the Bell companies have indicated a willingness to explore a mutually beneficial arrangement with Allstream for the continued provision of CDN DS-3 Access service. Given that their latest proposal appears to reflect rates for a month-to-month commitment, the Commission expects that the Bell companies would offer Allstream a significant discount from these rates in

exchange for term and volume commitments. The Commission expects that such commitments would be reasonable and be based on realistic forecasts of Allstream's needs for the service.

18. In light of the amount of time that Allstream was afforded in Telecom Decision 2008-17 to make arrangements for the service and the Bell companies' stated willingness to continue to explore a solution, the Commission considers that it would not be appropriate to maintain the rates, terms, and conditions for the CDN DS-3 Access service in the circumstances. Accordingly, the Commission finds that the Bell companies have demonstrated that any preference or disadvantage is not undue or unreasonable.
19. Based on the above, the Commission **denies** Allstream's request to require the Bell companies to maintain the Commission-approved rates, terms, and conditions for Allstream's in-service CDN DS-3 Access service circuits until the upcoming essential services framework review is complete.

II. Should the Commission-approved rates, terms, and conditions be maintained for the Bell companies' in-service CDN DS-1 Intra-exchange service circuits provided to Allstream until the Bell companies migrate the circuits?

20. Allstream submitted that, to mitigate the impact of anticipated price increases for the CDN DS-1 Intra-exchange service and to avoid the imposition of unreasonable terms and conditions after the service is no longer subject to Commission tariff approval, it opted to migrate certain circuits to various alternatives, including the Bell companies' retail DS-3 Intra-exchange service.
21. Allstream submitted that although it requested migration of the majority of the circuits in March 2012, the Bell companies have unilaterally restricted the rate of migrations such that not all the circuits will be migrated before the phase-out date. Allstream requested that the Commission direct the Bell companies to maintain the Commission-approved rates for the circuits on the migration list until they are migrated so that it will not have to pay the higher rates that the Bell companies have proposed to charge for the CDN DS-1 Intra-exchange circuits.
22. Allstream submitted that it had signed an agreement⁷ with the Bell companies in 2007 that allowed for a certain rate of migration. Allstream argued that the Bell companies are migrating at a rate that is 75 percent below this rate, based on a 2009 agreement that Allstream did not sign. Allstream submitted that this was the most significant factor leading to the large number of migrations still outstanding.

⁷ The 2007 Inter Carrier Operation Practice is an agreement between Allstream and the Bell companies in which the rate of migration agreed to by both parties is set out.

23. The Bell companies submitted that Allstream delayed in requesting migration of some of its circuits. They also submitted that Allstream wrongly claimed that they have delayed migration by unilaterally restricting the rate. The Bell companies argued that the migrations were largely hampered by Allstream's own actions and that Allstream has been hedging that it would strike a deal with the Bell companies to avoid migration costs.
24. Verizon Canada submitted that the Bell companies have every incentive to delay migration. CNOC submitted that, given that the Bell companies enjoy significant market power, negotiation is unlikely to resolve problems.

Commission's analysis and determinations

25. The Commission notes that, while Allstream may not have initially submitted to the Bell companies a complete list of all its CDN DS-1 Intra-exchange circuits to be migrated, it gave the Bell companies a full year to migrate the majority of its circuits. The Commission considers that when Allstream planned its migration of the circuits, it reasonably expected that the Bell companies would follow the terms established in the June 2007 agreement.
26. In the Commission's view, the Bell companies should have co-operated to the fullest extent possible to facilitate the migration of Allstream's circuits, given Allstream's unique predicament. The Commission notes that the Bell companies had an incentive to delay, given their proposed higher rates for those circuits not yet migrated by the phase-out date. The Commission considers that the Bell companies have not demonstrated that they acted reasonably by insisting on a rate of migration that was established unilaterally in 2009, rather than the much faster rate to which the parties had mutually agreed.
27. Accordingly, the Commission finds that the Bell companies have conferred an undue preference on themselves and an unreasonable disadvantage on Allstream, contrary to subsection 27(2) of the Act, by not migrating Allstream's CDN DS-1 Intra-exchange circuits in a timely manner so that the migration would have been completed prior to the phase-out date.
28. Based on the above, the Commission **approves** Allstream's request and directs the Bell companies to maintain the Commission-approved rates, terms, and conditions for those in-service CDN DS-1 Intra-exchange service circuits provided to Allstream for which migration has been requested, until the Bell companies have migrated those circuits.

III. Should the Bell companies be allowed to impose new restrictions with respect to the resale of wholesale services not subject to rate approval that are made available to Allstream?

29. Allstream submitted that the Bell companies had proposed to prohibit the resale of wholesale services not subject to rate approval to other telecommunications service providers, which would have a negative consequence on the relationship that

Allstream has with its existing wholesale customers. Allstream submitted that the prohibition would cover not only simple resale, which is already proscribed under the existing CDN tariff, but also resale where a carrier uses its own circuits and circuits leased from the Bell companies to provide its wholesale customers with services. Allstream submitted that this prohibition would give the Bell companies a significant undue advantage, as it would ultimately force all wholesale customers to lease all transport from the Bell companies.

30. The Bell companies clarified in their answer that the wholesale resale restriction clause was not meant to apply to circuits already in service, but in any event, they would voluntarily remove the clause from their wholesale terms of service so that the prohibition would not apply to all services not subject to rate approval that are provided on month-to-month subscriptions. However, the Bell companies submitted that wholesale resale restrictions should continue to be permitted in any long-term contract in order to prevent arbitrage opportunities.
31. The Bell companies submitted that in all cases, wholesale resale restrictions apply only to Allstream's resale of services to wholesale customers and do not in any way restrict how Allstream or any other wholesale customer can use the Bell companies' services to sell or market any of its own services to retail customers.
32. Allstream submitted that the Bell companies' assurance that they will not prohibit wholesale resale of forborne services purchased on a month-to-month basis does not attenuate the anti-competitive nature of the restriction. Allstream argued that it may need to commit to a five-year rate with its wholesale customers despite only having month-to-month rates from the Bell companies.
33. Allstream also submitted that the Bell companies would have both the motive and the opportunity to increase the rates at any time and by any amount. Allstream submitted that the mere risk of such increases provides an undue preference to the Bell companies in competing with Allstream to serve wholesale customers, thus impeding competition in the wholesale market.
34. Verizon Canada and Iristel submitted that the Bell companies should be mandated to permit the resale of services not subject to rate approval.

Commission's analysis and determinations

35. The Commission notes that the Bell companies' decision to remove the wholesale resale restriction with respect to monthly rates would enable Allstream to provide services to its wholesale customers. However, the Commission considers that limiting Allstream's ability to purchase those services at monthly rates would not give the company the certainty necessary to properly structure bids for longer-term contracts.
36. The Commission considers that restrictions on resale for wholesale services provided under longer-term contracts (where lower rates would be available) would give a preference to the Bell companies, and disadvantage Allstream, in serving the wholesale market. The Commission considers that the Bell companies have failed to

demonstrate that this preference and disadvantage are not undue or unreasonable. In addition, the Commission considers that the Bell companies' proposal to prohibit resale for wholesale services offered under longer-term contracts would significantly harm Allstream's competitive position in the wholesale market. The Commission further considers that the Bell companies have failed to demonstrate that resale restrictions would not have significant negative effects on pricing and choice in the downstream retail business service markets.

37. Accordingly, the Commission finds that a prohibition on resale in negotiated arrangements of wholesale services provided to Allstream would constitute the conferring of an undue preference on the Bell companies and would subject Allstream to an unreasonable disadvantage, contrary to subsection 27(2) of the Act.
38. Based on the above, the Commission **approves** Allstream's request and directs the Bell companies not to impose resale restrictions, except with respect to simple resale, on the provision of wholesale services not subject to rate approval that are made available to Allstream.

Timing of wholesale services framework review

39. With respect to Allstream's request regarding the timing of the essential services framework review, the Commission considers that it would be appropriate to advance the launch of the review, which will be known as the wholesale services framework review, to 2013. Details of the review, including its scope and process, will be set out in an upcoming notice of consultation.

Policy Direction

40. The Commission considers that the findings in this decision are consistent with the Policy Direction⁸ and advance the policy objectives set out in paragraphs 7(a), (b), (c), (f), and (h) of the Act.⁹ Further, by denying Allstream's request to maintain the rates for CDN DS-3 Access service and thus ensuring that the service will be provided, effective 3 March 2013, based on negotiated market rates, the Commission has relied to the maximum extent feasible on market forces as the means of achieving the telecommunications policy objectives, consistent with subparagraph 1(a)(i) of the Policy Direction.

⁸ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

⁹ The cited policy objectives of the Act are

7(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

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.

41. In addition, by temporarily maintaining the rates, terms, and conditions for certain CDN DS-1 Intra-exchange circuits and directing the Bell companies to permit wholesale resale in negotiated arrangements for wholesale services not subject to rate approval provided to Allstream, the Commission has relied on measures that are targeted and fact-specific. Therefore, consistent with subparagraph 1(a)(ii) of the Policy Direction, the measures relied on are efficient and proportionate to their purpose, and interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives.

Secretary General