



Telecom Decision CRTC 2006-7

Ottawa, 7 February 2006

Quebecor Média inc. - Application to review and vary Telecom Decision CRTC 2005-6

Reference: 8662-Q15-200509193

*The Commission **denies** an application by Quebecor Média inc. that the Commission review and vary its determination in Competitor Digital Network Services, Telecom Decision CRTC 2005-6, 3 February 2005, so that facilities-based competitors would receive compensation for revenues lost as a result of the introduction of Competitor Digital Network and Competitor Digital Network Access services on the same basis and over the same period as the incumbent local exchange carriers.*

The application

1. On 29 July 2005, Quebecor Média inc. (QMI), on behalf of its subsidiary Vidéotron Télécom ltée (VTL), filed an application pursuant to section 62 of the *Telecommunications Act* (the Act) requesting that the Commission review and vary its determination in *Competitor Digital Network Services*, Telecom Decision CRTC 2005-6, 3 February 2005 (Decision 2005-6), to deny facilities-based competitors compensation for lost revenues attributable to the Commission's introduction of the Competitor Digital Network (CDN) and Competitor Digital Network Access (CDNA) services. QMI requested that facilities-based competitors be compensated on the same basis and over the same period as the incumbent local exchange carriers (ILECs), and that such compensation be paid from the ILECs' deferral accounts.
2. QMI submitted that the following four grounds raised substantial doubt as to the correctness of the Commission's determination in Decision 2005-6 to compensate the ILECs, and not facilities-based competitors that offered services in competition with the ILECs' CDN services:
 - (i) the Commission's determination undermined facilities-based competition;
 - (ii) the CDN rates were not just and reasonable, contrary to subsection 27(1) of the Act;
 - (iii) the CDN rates and the ILEC compensation regime established in Decision 2005-6 granted the ILECs an undue preference and subjected competitors to an undue disadvantage, contrary to subsection 27(2) of the Act; and
 - (iv) the Commission's finding that the competitors' fibre facilities used to provision Digital Network Access (DNA) services may also be used to generate revenue from other services was made without evidence and, hence, was a nullity.

Process

3. Bell Canada and MTS Allstream Inc. each filed comments on 29 August 2005. TELUS Communications Inc. (TCI) filed comments on 30 August 2005.
4. QMI filed reply comments on 9 September 2005.

Background

5. In *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002 (Decision 2002-34), the Commission determined that in order to foster facilities-based competition, the ILECs were to develop the CDNA service as a Competitor Service, and approved interim rates for that service based on the ILECs' retail DNA service rates. In *Interim Competitor Digital Network Access service*, Telecom Decision CRTC 2002-78, 23 December 2002, the Commission subsequently approved revised interim rates for the CDNA service components based on Phase II costs plus a 15 percent mark-up.
6. In Decision 2002-34, the Commission noted that the creation of the CDNA service would reduce the revenues the ILECs derived from their retail DNA service. Because these reduced rates resulted from policy considerations as opposed to cost reductions, the Commission considered it appropriate to compensate the ILECs for this reduction in revenues with funds drawn from their deferral accounts. The Commission considered that this approach balanced the interests of customers, competitors and the ILECs, the three main stakeholders in telecommunications markets.
7. In Decision 2005-6, the Commission determined that as part of the CDN service, the ILECs should provide competitors with DS-0 and DS-1 accesses, including associated links (Category I components), and DS-3, OC-3 and OC-12 accesses, including associated links; DNA intra-exchange facilities; central office channelization facilities; and non-forborne metropolitan IX facilities (Category II components).
8. In Decision 2005-6, the Commission approved rates for Category I CDN service components based on Phase II costs plus a 15 percent mark-up, and approved rates for Category II service components that incorporated mark-ups greater than 15 percent.
9. In Decision 2005-6, consistent with its determination in Decision 2002-34 to compensate the ILECs for the revenues lost due to the introduction of the CDNA service, the Commission approved for all ILECs except Saskatchewan Telecommunications compensation:
 - (i) for the CDNA-eligible migrated demand, as at 1 June 2002, based on the difference between the CDN access and link rates approved in Decision 2005-6 and the corresponding retail DNA access and link rates; and
 - (ii) for other CDN service migrated demand, as at 3 February 2005, based on the difference between CDN rates approved in Decision 2005-6 and the corresponding retail rates.

10. In Decision 2005-6, the Commission also denied LondonConnect Inc.'s request that facilities-based entrants should receive compensation for revenue losses due to the introduction of the CDNA and CDN services.

Issues

11. In this Decision, the Commission addresses the issues raised by QMI in the following order:

A - Unjust discrimination

B - Just and reasonable rates

C - Facilities-based competition

D - Absence of evidence

A - Unjust discrimination

Positions of parties

12. QMI characterised the compensation afforded to the ILECs in Decision 2005-6 as a subsidy, and submitted that because the Commission denied facilities-based competitors compensation of the type available to the ILECs, the compensation regime provided the ILECs with an undue preference, contrary to subsection 27(2) of the Act. QMI further submitted that once discrimination, preference or advantage had been demonstrated, it would be considered unjust, unless a justification was provided. In QMI's view, the Commission had not identified any policy or other justification in Decision 2005-6 for making compensation available to the ILECs, and not to facilities-based competitors. QMI argued that because the ILECs were in a stronger financial position than competitors, they were equally or better able to replace lost revenues resulting from the CDN rates through revenues from other services.
13. Bell Canada submitted that the arrangement to offset the financial impact of the introduction of CDN services provided no competitive advantage or preferential treatment to Bell Canada.
14. Bell Canada also submitted that its retail DNA rates would potentially be reduced to remain competitive with the retail service offerings of competitors that had access to CDN services at the CDN discounted rates. Bell Canada further submitted that as demand for CDN services increased, it would also lose revenues that it would have obtained for these additional services had the retail DNA rates remained the same. In Bell Canada's view, neither Decision 2002-34 nor Decision 2005-6 permitted the company to recover these additional revenue losses by means of a draw down from its deferral account. Bell Canada argued that, in this respect, the Commission treated VTL and Bell Canada in the same way.
15. TCI submitted that QMI had misapplied subsection 27(2) of the Act. TCI relied on legal submissions filed with the Commission in previous proceedings to argue that there was no discrimination within the meaning of section 27 of the Act because all customers who were eligible for CDN service received the same service, and all these customers were being treated in the same manner.

16. TCI further submitted that QMI's argument was not that it was unjustly discriminated against as a customer of an ILEC's CDN service but rather that, as a competitor of the ILECs, it was being unjustly discriminated against by the Commission. TCI argued that subsection 27(2) of the Act did not apply to discrimination by the Commission in the treatment of competitors.
17. In reply, QMI submitted that Bell Canada had not directly addressed QMI's argument. QMI also submitted that TCI's argument was based on an unduly narrow and outdated interpretation of subsection 27(2) of the Act and that it was not only appropriate, but also necessary, to take into account competitive issues when determining whether the charging of a rate would constitute unjust discrimination or confer an undue preference.

Commission's analysis

18. The Commission agrees with QMI's submission that TCI's interpretation of subsection 27(2) of the Act is unduly narrow and that this provision is not limited to instances involving differential treatment of customers of the same, or substantially the same, service.
19. The Commission notes that the regulatory frameworks for non-dominant carriers and for competitive local exchange carriers (CLECs) are set out in *Forbearance - Services provided by non-dominant Canadian carriers*, Telecom Decision CRTC 95-19, 8 September 1995, and *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997 (Decision 97-8), respectively. Under these regulatory frameworks, non-dominant Canadian carriers, including CLECs such as VTL, are generally permitted to provide services on a non-regulated basis. Accordingly, these carriers can enter markets of their choosing and set the price they think the market will bear, without having to obtain prior Commission approval for the rates they charge. The Commission further notes that these competitors are free to target markets or geographical areas where the ILECs' profit margins are more appealing. The Commission also notes that these frameworks do not provide guarantees for non-dominant competitors with respect to their business plans or profit margins, or protection from ILEC rate reductions.
20. The Commission notes that the regulatory framework applicable to the ILECs is very different from those applicable to non-dominant carriers, including CLECs. For ILEC services that are not forborne, such as retail DNA and CDN services, the ILECs must obtain prior Commission approval of the rates, terms and conditions before they can provide them.
21. The Commission notes that unlike non-dominant facilities-based competitors, the ILECs are subject to a price cap regime. The Commission further notes that the price cap regime allows ILECs to be compensated for lost revenue arising from an exogenous event, namely, an event that is administrative in nature, specific to the telecommunications industry, has a material financial impact on the ILEC, and is beyond the ILEC's control. In the Commission's view, its direction to the ILECs to make their DNA facilities available to competitors at reduced rates is in the nature of an exogenous event in respect of which the price cap regime contemplates that the ILECs should be compensated. The Commission notes that if the deferral accounts had not been available for such compensation, the ILECs would have been entitled under the price cap regime to raise rates of other tariffed services to compensate for their loss of DNA revenues.

22. Given the significant differences between the regulatory framework applicable to the ILECs and that applicable to non-dominant competitors, the Commission finds that the ILEC compensation regime is not inconsistent with subsection 27(2) of the Act.

B - Just and reasonable rates

Positions of parties

23. QMI submitted that because the ILECs, and not facilities-based competitors, were able to draw down from their deferral accounts to compensate for the financial impact of the introduction of CDN services, the CDN service rates could not be just and reasonable, contrary to subsection 27(1) of the Act. In QMI's view, it could not be just and reasonable to subsidize the rate for a service offered on a competitive basis, such as the CDN service, unless the subsidy was made available to all competing service providers. In support of its position, QMI referred to the policy adopted in Decision 97-8, pursuant to which rate subsidies for local exchange service were made available to both ILECs and CLECs.
24. TCI relied on *Northwestern Utilities v. City of Edmonton*, [1929] S.C.R. 186 (*Northwestern Utilities*) and argued that the considerations that QMI relied on were not relevant to the issue of whether a rate was just and reasonable. TCI submitted that, based on this jurisprudence, subsection 27(1) of the Act requires that the Commission limit itself to determining whether rates were just and reasonable as between the customer and the ILEC providing the service only, and that the impact of the rates in question on competitors was irrelevant.
25. In reply, QMI submitted that *Northwestern Utilities* was not relevant because it was decided in different circumstances, and in the context of legislation that was different from the Act.

Commission's analysis

26. The Commission considers that TCI's interpretation of subsection 27(1) of the Act is unduly narrow. In the Commission's view, the determination of just and reasonable rates pursuant to the Act requires a balancing of the interests of all stakeholders, which include competitors as well as the ILECs and customers.
27. With respect to QMI's reliance on the Commission's approach in Decision 97-8, the Commission considers that the circumstances in that Decision were very different from those in Decision 2005-6. The Commission determined in Decision 97-8 that in order to maintain residential rates in high-cost serving areas at affordable levels, rates should be kept below cost and an explicit subsidy would be afforded to all local exchange carriers (LECs) that provided residential service in these areas.
28. The Commission notes that by contrast, the rates for components of the CDN service approved by the Commission in Decision 2005-6 are based on Phase II costs plus mark-ups of 15 percent or more. The Commission therefore notes that, unlike the residential rates in high-cost serving areas, the CDN rates recover the associated costs. Moreover, in the Commission's view, the CDN rates have sufficient mark-ups to allow competitors to compete against the ILECs in the wholesale market. The Commission notes that in Decision 2005-6, in establishing the mark-ups for DS-3, OC-3 and OC-12 access and intra-exchange services,

it weighed the competitors' need to build a customer base to cost-justify construction of facilities, against the need to have mark-ups that would be sufficiently high to provide competitors with appropriate incentives to build DNA facilities. The Commission also notes that in that Decision, it noted that approved rates for the interexchange components contained a mark-up sufficient to provide incentives for carriers to build interexchange facilities on non-forborne routes.

29. In light of the above, the Commission is not persuaded by QMI's submission that the absence of a compensation regime similar to the portable subsidy regime established in Decision 97-8 supports the conclusion that the CDN rates are not just and reasonable. Further, in light of the Commission's conclusion in the previous section that the ILEC compensation regime established in Decisions 2002-34 and 2005-6 does not confer an undue preference on the ILECs, the Commission disagrees with QMI's assertion that CDN rates cannot be just and reasonable.

C - Facilities-based competition

Positions of parties

30. QMI submitted that the Commission's decision to allow the ILECs, and not facilities-based competitors, to be compensated undermined the development of facilities-based competition as it favoured the ILECs and put competitors at a disadvantage, despite the fact that competitors faced greater challenges in the market and, hence, in QMI's view, were in greater need of compensation than the ILECs.
31. Bell Canada submitted that while it did not disagree with QMI that Decision 2005-6 would adversely affect the development of facilities-based competition, the remedy proposed by QMI was based upon a misperception of the public policy issues raised by that Decision.
32. TCI argued that the Commission's determinations in Decisions 2002-34 and 2005-6 to compensate the ILECs for reductions in their DNA service revenues attributable to the introduction of the CDNA and CDN services were due to policy considerations and that, as such, no subsidy was involved. TCI further submitted that from a regulated revenue perspective, the ILECs were in the same position as they were prior to Decision 2005-6.
33. QMI submitted in reply that neither Bell Canada nor TCI had demonstrated that the compensation mechanism established in Decision 2005-6 did not undermine facilities-based competition.

Commission's analysis

34. The Commission considers that the receipt of compensation would be one of many factors that non-dominant carriers would take into account when making business decisions with respect to provision of service in the wholesale DNA service market. The Commission further considers that equally or more significant factors include the price and margin for services in that market, the potential service alternatives, the level of competitiveness, the costs of providing services including the cost of deploying facilities, the expectation of acquiring a customer base sufficient to cost-justify the required facilities construction, and the overall revenue expected from providing such services.

35. Moreover, as discussed above, the Commission notes that different regulatory frameworks apply to non-dominant carriers and to the ILECs, with the result that ILECs are entitled to compensation in certain circumstances. The Commission is of the view that, given the ILECs' position in the market for DNA services, the ILECs are unlikely to exit this market. The Commission notes that, by contrast, under the regulatory framework applicable to non-dominant carriers, there are no restraints on these carriers' ability to exit markets, including the wholesale DNA service market.
36. The Commission therefore considers that the receipt of compensation by non-dominant carriers would not necessarily lead to their continued and sustained presence in the wholesale DNA service market.
37. The Commission notes that, in Decision 2005-6 it found, based on a number of considerations including supply considerations, that the DS-0 and DS-1 access and intra-exchange components of the CDN service are in very limited competitive supply. The Commission therefore classified these CDN service components as Category I components and, reflecting this classification, established their rates based on Phase II costs plus a 15 percent mark-up. Amongst other things, the Commission considered that the availability of these ILEC facilities at Category I Competitor Service rates would assist all competitors in building a customer base to support the construction of their own facilities and, in this way, promote facilities-based competition. The Commission further notes that, as set out above, the rates established for CDN services, particularly the rates for DS-3, OC-3 and OC-12 access and intra-exchange and interexchange service components, reflect mark-ups that are sufficiently high to provide competitors with appropriate incentives to build their own DNA facilities and, therefore, also promote facilities-based competition.
38. In light of the above, the Commission is not persuaded by QMI's submission that the ILEC compensation regime undermines facilities-based competition.

D - Absence of evidence

Positions of parties

39. QMI submitted that the Commission determined in Decision 2005-6 that competitors would be able to use their facilities to generate revenues from services other than CDN services to replace the revenues lost as a result of the introduction of the CDN service. In QMI's view, there was no evidence before the Commission with respect to the types of revenues competitors could generate from other services using their fibre facilities, nor was there any evidence as to whether such revenues would be sufficient to replace the revenues lost as a result of the Commission's determination that ILECs are to make their DNA facilities available to competitors at reduced rates.
40. QMI relied on the Federal Court of Appeal's judgment in *TELUS Communications Inc. v. Canada (Canadian Radio-television and Telecommunications Commission)*, 2004 FCA 365 (*TELUS Communications*) to argue that the Commission's determination in Decision 2005-6 that competitors could replace revenues lost as a result of the introduction of CDN services was a nullity because it was made in the absence of any evidence.

41. Bell Canada submitted that QMI's contention that Decision 2005-6 was rendered without evidence was not accurate. Bell Canada argued that Decision 2005-6 followed an extensive and detailed public proceeding in which VTL had actively participated by addressing, among other things, the impact of a potential Commission ruling that the CDN service would be priced at Category I service rates.
42. Bell Canada further submitted that in the proceeding leading to Decision 2005-6, VTL had acknowledged in its submissions that the Commission was faced with the competing positions of various parties. In Bell Canada's view, QMI could not now argue that Decision 2005-6 was rendered without any evidence because the Commission chose one set of objectives in that Decision other than those put forward by VTL.
43. TCI submitted that the evidence on the record of the proceeding that led to Decision 2005-6, including evidence provided by VTL itself, contradicted QMI's claim that there was no evidence to support the Commission's conclusion that competitors' fibre facilities could also be used to generate revenues from other services. TCI submitted that based on VTL's final comments in that proceeding, it was appropriate for the Commission to conclude that VTL would be capable of generating revenues from other services given that VTL had stated that it was a facilities-based carrier with a fibre-optic network and offered a wide range of services.
44. In reply, QMI submitted that Bell Canada and TCI failed to identify any evidence that contradicted the specific submissions made by QMI. More specifically, QMI submitted that the evidence identified in TCI's submission did not address the ability of VTL to convert CDN-type facilities to non-CDN services, the cost of doing so, the opportunity to generate replacement revenues or whether any possible replacement revenues would be adequate.

Commission's analysis

45. As a preliminary matter, the Commission notes that, contrary to QMI's assertion, the Commission did not, in Decision 2005-6, express a view regarding the sufficiency of the revenues facilities-based competitors could generate from services other than DNA services.
46. The Commission notes that in *TELUS Communications*, the Federal Court of Appeal found that the Commission's decision to restore previously-approved support structure rates was not unlawful because the Commission's previous decision, which had the effect of approving their withdrawal, was made in the absence of any evidence, and, hence, was a nullity. In those circumstances, the Court found that the Commission's decision to restore the previous rates was legal and reasonable, and necessary to ensure the rates in question were just and reasonable.
47. In the Commission's view, unlike the situation at issue in *TELUS Communications* where there was no evidence to support the withdrawal of the support structure rates in question, there was evidence in the proceeding that led to Decision 2005-6 to support the Commission's determination that facilities-based competitors could use their fibre facilities to generate revenues from services other than DNA services. The Commission notes that considerable evidence, including that of VTL, with respect to competitor supply of DNA facilities was placed on the record of the proceeding leading to Decision 2005-6. The Commission further notes that VTL asserted in the proceeding leading to Decision 2005-6 that it operated

a fibre-optic network and provided a wide range of services. In light of this evidence, the Commission considers that, as an expert body, it was reasonable and appropriate to express the view that facilities-based competitors could use their facilities to generate revenue from other than DNA services.

48. Accordingly, the Commission disagrees with QMI's view that the Commission's determination that competitors could use their fibre facilities to generate revenue from other than DNA services was reached without evidence and was a nullity.

Commission's determination

49. In light of all of the above, the Commission **denies** QMI's application.

Secretary General

This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>