Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2007-15

Ottawa, 14 March 2007

Barrett Xplore Inc. – Application to review and vary determinations in *Disposition of funds in the deferral accounts,* Telecom Decision CRTC 2006-9, related to the expansion of broadband services

Reference: 8662-B55-200607046

In this Decision, the Commission denies Barrett Xplore Inc.'s request to review and vary certain determinations in Disposition of funds in the deferral accounts*, Telecom Decision CRTC 2006-9, related to the expansion of broadband services.*

The dissenting opinion of Commissioner Cram is attached.

Introduction

1. Barrett Xplore Inc. (BXI) filed an application, dated 2 June 2006, in which it requested that the Commission review and vary certain aspects of *Disposition of funds in the deferral accounts*, Telecom Decision CRTC 2006-9, 16 February 2006 (Decision 2006-9).

2. Specifically, BXI requested that the Commission review and vary its determinations in Decision 2006-9 to allow the incumbent local exchange carriers[1] (ILECs) to use deferral account funds[2] to expand broadband services to rural and remote communities in their respective operating territories.

3. In addition, BXI requested a stay of those parts of Decision 2006-9 that address the broadband subsidy issue and of the Commission's consideration of the ILECs' plans for spending the deferral account funds, pending the Commission's disposition of BXI's review and vary application and a reconsideration of appropriate ways to implement a competitively and technologically neutral subsidy scheme.

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[1] The incumbent local exchange carriers referred to in Decision 2006-9 were Aliant Telecom Inc., now part of Bell Aliant Regional Communications, Limited Partnership; Bell Canada; MTS Allstream Inc.; Saskatchewan Telecommunications; TELUS Communications Inc., now TELUS Communications Company (TCC); Société en commandite Télébec (Télébec); and TELUS Communications (Québec) Inc. (TCQ), now part of TCC.

[2] In *Regulatory framework for second price cap period*, Telecom Decision CRTC 2002-34, 30 May 2002, as amended by Telecom Decision CRTC 2002-34-1, 15 July 2002 (Decision 2002-34), the Commission imposed a pricing constraint equal to inflation less a productivity offset of 3.5 percent on residential local services in non-high-cost serving areas. However, in order to avoid an adverse impact on local competition, the Commission required that all incumbent telephone companies that were subject to the determinations in Decision 2002-34 create a deferral account where they placed amounts equal to the revenue reductions that would otherwise have resulted from an application of the price cap formula. Deferral accounts were subsequently established for Télébec and TCQ in *Implementation of price regulation for Télébec and TELUS Québec*, Telecom Decision CRTC 2002-43, 31 July 2002.

Background

4. In Decision 2006-9, the Commission set out guidelines for the ILECs concerning the disposition of funds remaining in the deferral accounts. The Commission determined that initiatives to expand broadband services to rural and remote communities were an appropriate use of funds in the deferral accounts. The Commission directed each ILEC that had a positive accumulated balance in its deferral account and that wished to pursue broadband expansion to rural and remote communities to file proposals for such initiatives, in accordance with the guidelines set out in Decision 2006-9, by 30 June 2006.[3] The Commission also noted that it would issue a letter shortly outlining the requirements for filing broadband expansion proposals.

5. By Commission Letter dated 10 March 2006 (the 10 March 2006 Letter), the filing requirements for the ILECs' broadband expansion proposals were outlined. These requirements included, among other things, the broadband expansion roll-out schedule and a detailed cost study, which would include all assumptions (such as number of homes passed and expected take rate). For each initiative, the ILECs were required to consider the use of all suitable technologies, including Digital Subscriber Line, fibre, terrestrial radio and satellite radio. The ILECs were also required to provide detailed justification if they chose not to use the least-cost technology for any initiative.

6. In *Review of proposals to dispose of the funds accumulated in the deferral accounts*, Telecom Public Notice CRTC 2006-15, 30 November 2006 (Public Notice 2006-15), the Commission initiated a proceeding to consider the ILECs' proposals.

Process

7. Comments in response to BXI's application were filed by United Telecom Council of Canada (UTC), Canadian Cable Systems Alliance Inc. (CCSA), Shaw Communications Inc. (Shaw), Xit telecom inc. on its behalf and on behalf of Xittel telecommunications inc. (collectively, Xit telecom), Rogers Communications Inc. (RCI), Bell Canada, and TELUS Communications Company (TCC). BXI filed a reply to parties' comments.

The application

8. BXI argued that there was substantial doubt as to the correctness of Decision 2006-9 based on the following five grounds:

    i) the Commission failed to apply the principle of competitive neutrality by permitting deferral account funds to be used exclusively by ILECs for the expansion of their broadband services, and by ignoring the impact of this decision on competitors;

    ii) the Commission failed to address the principle of technological neutrality and ignored the advances in alternate broadband technologies, specifically the capabilities of Ka-band satellite services;

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[3] The deadline was later extended to 1 September 2006.

iii) the Commission erred by assuming that the use of deferral account funds to construct backbone facilities would be insufficient to assure the provision of broadband services to end-customers by alternative broadband service providers;

iv) Decision 2006-9 was in conflict with the recommendations of the Telecommunications Policy Review Panel Report (the TPR Report); and

v) there was a fundamental change in circumstances since the release of Decision 2006-9 related to advances in technology that changed the economics of expanding broadband services to rural and remote areas, and related to the experience that was gained in Alberta through the SuperNet model.

9. BXI requested that the Commission consider alternative means of implementing a competitively and technologically neutral subsidy scheme. BXI requested that the Commission consider and assess the following three alternative models:

i) the Alberta SuperNet model, which is based on government subsidies for backbone facilities only;

ii) the Ubiquitous Canadian Access Network (U-CAN) program outlined in the TPR Report, which uses a competitive bidding process; and

iii) a portable contribution regime, which allows consumers to select their service provider of choice and extends the subsidy to the service provider selected.

10. BXI submitted that it was also open to the Commission to decide that the subsidization of broadband facilities and services was properly a government responsibility and that the Commission ought not to be embarking on a subsidy scheme of its own. BXI favoured a solution that would i) avoid the adverse consequences of Decision 2006-9 on the development of a competitive market and ii) leave the decision to subsidize broadband services to the government, as recommended by the TPR Report.

11. BXI suggested that, at a minimum, the Commission should consider competitors' business plans for extension of broadband services over the same four-year period that they consider the ILECs' plans.

Positions of parties

12. UTC, CCSA, RCI, Shaw, and Xit telecom supported BXI's application, while Bell Canada and TCC opposed it.

13. Both UTC and CCSA submitted that Decision 2006-9 would have a negative impact on competitors. UTC requested that the Commission review Decision 2006-9 based on a change in circumstances and the principle of competitive neutrality. UTC also requested that the Commission vary the Decision to provide for a competitively neutral subsidy scheme, such as

a least-cost subsidy auction. CCSA submitted that, due to Decision 2006-9, ILECs would receive zero-cost and risk-free financing, enabling them to overbuild into CCSA members' territories at a substantially lower cost than would have been required. Accordingly, CCSA submitted that deferral account funds should be used only to build-out and deliver Internet backbone to unserved rural and remote communities. CCSA also submitted that a competitively neutral bidding process should be used to allocate funds to the least-cost builder of backbone facilities.

14. RCI argued that a review and variance of Decision 2006-9 was justified because the Decision conflicted with TPR Report recommendations, including instituting targeted government-sanctioned subsidy programs, establishing a competitively neutral bidding process, treating backbone and access issues separately, and holding least-cost subsidy auctions. RCI submitted that providing third-party access to the ILECs' subsidized network did not address competitive neutrality; RCI submitted that, instead, this placed competitors at the mercy of the ILECs' monopoly networks and inhibited price and service competition. RCI also submitted that in Decision 2006-9 the Commission assumed that other carriers were not already building their own backbone networks, such as RCI's new national broadband wireless network, Inukshuk.

15. In Shaw's view, given the ubiquity of satellite service, there was no community for which an ILEC could attest that competitive broadband access services would not be present within the timeframe for an ILEC build-out program. Shaw further submitted that, based on the 10 March 2006 Letter, subsidized services would be provided at comparable rates to ILEC urban services, removing the possibility of competitor entry at any higher price, irrespective of what the market would normally bear. Shaw submitted that the aspect of Decision 2006-9 involving broadband subsidization should be replaced with a declaration of intent to rebate consumer overpayments, thereby compensating consumers whose overpayments had resulted in the original accumulation of funds.

16. Xit telecom submitted that the Commission should grant the relief sought by BXI and should immediately consider an alternative process to implement Decision 2006-9 that would not have adverse consequences for competing broadband suppliers.

17. In opposing BXI's application, Bell Canada and TCC submitted that Decision 2006-9 contained sufficient safeguards to ensure that dispersal of the deferral account funds would be done in a competitively and technologically neutral manner. Bell Canada and TCC also submitted that the three alternative models suggested by BXI (the SuperNet model, the U-CAN model, and the portable contribution regime model) were not feasible.

Commission's analysis and determinations

18. In *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998, the Commission set out the criteria to consider review and vary applications. Specifically, the Commission stated the following:

> … applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to: (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.

19. The Commission does not agree with the arguments made by BXI, supported by UTC, Shaw, RCI, and Xit telecom, that in Decision 2006-9 the Commission did not apply the principle of competitive neutrality or that it ignored the impact of its determinations on competitors. In this regard, the Commission notes that in Decision 2006-9 it considered the impact of Decision 2006-9 on competitors when it established safeguards to ensure that the disposition of funds from the deferral accounts would be done in a competitively neutral manner. The Commission notes that in Decision 2006-9 it required the ILECs to select communities that were unlikely to receive broadband services from any service provider in the near future. In addition, the Commission notes that in Decision 2006-9 it stated that only the uneconomic portion of the initiative to expand broadband services would be recovered using funds from the deferral accounts. Furthermore, the Commission notes that alternative broadband service providers will be able to use any backbone facilities constructed with deferral account funds on the same terms as the ILECs. The Commission continues to consider that this will allow end-customers access to the widest possible choice of service providers.

20. In addition, the Commission notes that, in the proceeding initiated by Public Notice 2006-15, it is considering submissions and expansion plans by alternative broadband service providers, including BXI, to determine which communities are being served, or would likely be served in the near future, by such providers. The Commission further notes that, based on the assessment of the record of that proceeding, it may determine in the resulting decision that the provision of broadband services to certain communities will not be funded from the deferral accounts in order to be consistent with the principle of competitive neutrality.

21. The Commission disagrees with arguments made by BXI, UTC, and Xit telecom that in Decision 2006-9, the Commission failed to address the principle of technological neutrality, and with arguments made by BXI and UTC that it ignored advances in technology, specifically Ka-band satellite services. The Commission was fully aware of the advances in technology identified by BXI and UTC, including the capabilities of satellite service, when Decision 2006-9 was issued. With regard to technological neutrality, the Commission notes that Decision 2006-9 stated that a letter would be issued, outlining the requirements for filing broadband expansion proposals: the 10 March 2006 Letter required the ILECs to consider the use of all suitable technologies, including satellite, for each project and to justify their choice of technology where it was not least-cost. The Commission also notes that issues related to the technologies proposed by the ILECs to expand broadband service will be considered in the proceeding initiated by Public Notice 2006-15.

22. The Commission notes that BXI and UTC also argued that there had been a fundamental change in circumstances since Decision 2006-9 with respect to advances in technology that are changing the economics of expanding broadband services to rural and remote areas. In this respect, BXI and UTC highlighted Ka-band satellite service as well as lower cost fibre and wireless broadband solutions. The Commission notes that the evidence on the record relates to

technologies that existed at the time that Decision 2006-9 was issued. In addition, BXI and UTC have not provided sufficient evidence regarding advances in technology, which they claim are changing the economics of expanding broadband services, to convince the Commission that a fundamental change in circumstances has occurred.

23. With respect to arguments made by BXI and RCI, and generally supported by CCSA, Shaw, and UTC, that the Commission's determinations in Decision 2006-9 were in conflict with TPR Report recommendations, the Commission notes that the TPR Report recommendations in question were recommendations to the government pertaining to its national broadband initiatives, not to the broadband expansion initiatives set out by the Commission in Decision 2006-9.

24. The Commission disagrees with the argument made by BXI, supported by CCSA and UTC, that in Decision 2006-9 the Commission erred in allowing the use of deferral account funds to construct access as well as backbone facilities. In this regard, the Commission notes that, in Decision 2006-9, it recognized the importance of having at least one provider in a community where it was evident that neither market forces nor other funding would result in the provision of broadband facilities in the near future. Further, the Commission continues to consider that the construction of only backbone facilities in such a community would generally not provide sufficient economic incentive to broadband providers to offer broadband services. As noted earlier, interested parties, including alternative broadband service providers, may comment on the ILECs' roll-out plans in the proceeding initiated by Public Notice 2006-15.

25. With respect to BXI's argument that models similar to the Alberta SuperNet or U-CAN should be implemented, the Commission continues to consider that the safeguards outlined in Decision 2006-9 will ensure that access to facilities constructed using deferral account funds will be done in a competitively and technologically neutral manner. Further, with respect to BXI's request for a competitive bidding process (using the U-CAN model), the Commission considers that a bidding process would add a significant layer of complexity, delay the implementation of broadband expansion, and result in substantial administrative and regulatory burden.

26. With respect to BXI's third alternative remedy, a portable contribution scheme, the Commission considers that the deferral account monies are not, as suggested by BXI, funds that would fall within the scope of section 46.5 of the *Telecommunications Act*,[4] since the accounts were not created to support continued access to basic telecommunications services.

27. In light of all of the above, the Commission considers that BXI has failed to show substantial doubt as to the correctness of Decision 2006-9 and, accordingly, **denies** BXI's application.

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[4] Subsection 46.5(1) of the *Telecommunications Act* allows the Commission to establish a fund to support continuing access by Canadians to basic telecommunications services.

BXI's request for a stay

28. Given the Commission's determination regarding BXI's application to review and vary Decision 2006-9, the Commission concludes that BXI's request for a stay of that Decision is moot.

29. The dissenting opinion of Commissioner Cram is attached.

Secretary General

Dissenting opinion of Commissioner Barbara Cram

DEFERRAL AGAIN

Once again I disagree with my colleagues in the majority on this issue and I reiterate my dissent from Telecom Decision CRTC 2006-9 in its entirety. I continue to believe that my concerns stated therein remain valid and unanswered. And upon having the ability to once again reflect on the majority decision, I have further concerns.

EVERYTHING IS ON HOLD UNTIL THE COMMISSION DECIDES…AGAIN

First, it is over one year since the original decision was issued. The Commission started its process in *Review of proposals to dispose of the funds accumulated in the deferral accounts,* Telecom Public Notice CRTC 2006-15, 30 November 2006. The CRTC is now in the position of being a project manager for one of the largest, if not the largest, build-outs in Canada. Notwithstanding our excellent and hard-working staff, I question the ability of the Commission to do this in a nimble fashion. We are after all a quasi-judicial tribunal and natural justice and process are required, but it is these very requirements that mean the Commission is not nimble. Further, notwithstanding the prodigious abilities and aptitudes of staff, there is a limit to the number of staff and the amount of time they can devote to this particular file. It is no secret that this next year for the Commission will be very demanding – the essential services proceeding, many applications for forbearance (regardless of the criteria), completing the telemarketing process (a vast undertaking in and of itself); these all in addition to the normal load of tariffs, Part VIIs, competitive disputes, completing the Monitoring Report, etc.

Now, the Commission has received the responses by the parties to the proposals of the ILECs in response to Telecom Notice CRTC 2006-15. The file shows there are many and substantial objections to the ILEC proposals. It is now that substantial staff time is required on the file. I envisage many issues will have to be canvassed: relative capacities of proponents and respondents, relative coverage areas, quality of service issues, and what circumstances would be sufficient to approve or not approve proposals. Further, if the respondent claims it intends to build out in the near future, in addition to the issues above, there is the task of assessing the credibility of this intention and whether it is fair to the citizens of a particular town to have to wait and see if they will get high-speed service while their neighbours 50 miles away will be receiving it next year. Judgment calls will be required of the Commission, which means the accumulation of huge briefing books after a fulsome round of interrogatories, responses, and arguments, and finally, a decision will have to be drafted. Based on my 8 years of experience at the Commission, industry will receive a decision approximately 18 to 24 months after the initiation of the proceeding.

And what will happen in the interim until our decision on Telecom Notice CRTC 2006-15 is issued? Will banks be willing to lend money to competitors for builds? Not likely. And if the bank does lend the money, will a competitor actually expand now in order to own the customer in a certain area knowing of the distinct likelihood of an ILEC expansion into that area in the near future on a subsidized basis? Not likely.

THERE WILL BE NO COMPETITION IN THE TARGETED REMOTE AREAS

I assert that this is not the end of the problem. The majority has not answered and, in fact, cannot address the concern of the CCSA that the ILECs' exclusive subsidy will inhibit cable's growth in the long term. In the target areas of the ILEC build, what bank would finance infrastructure capital for any competitor knowing that its competitor, the incumbent telephone company with deep pockets, will enter its market with zero risk, subsidized capital and the ability to undercut prices for two out of the three services it will be offering? Internet and video services are unregulated by the Commission, meaning the Commission would have little if any ability to ensure a level playing field. It is likely that the small cable company or other new competitor would not obtain financing for its infrastructure.

The majority would then say that this competitor company would have access to the ILEC's infrastructure at a subsidized cost. This, it should be noted, only applies to competitors in the remote area being the target of the ILEC build. Thus the competitor may have stranded capital, and we would have competition based on reselling – a business that has limited margins and no hope of growth. Again, there is little to no protection against the ILEC simply undercutting its prices on its unregulated services.

AND COMPETITORS ARE WORSE OFF WHERE COMPETITION MAY HAVE OTHERWISE BEEN VIABLE

It is worse still for the competitor in the middle bands, those with a denser population that may have a better ability to support a business case for entering the market. The ILEC subsidized infrastructure will go through these bands to reach the remote area. The ILEC's business case for providing enhanced services to these bands is subsidized. Competitors have no status to object to an ILEC proposal on that basis and neither do they have the same right to access the ILEC infrastructure on a subsidized basis as would their counterparts in the target areas of the ILEC build. Consider the banker looking at the competitor's proposal for infrastructure upgrades in the middle bands knowing full well that its competitor, the ILEC, is subsidized, and there is little protection against price cutting.

RURAL CANADA WILL HAVE BROADBAND BUT NO COMPETITION

As a result of the majority's decision, I confess I cannot see sustainable competition developing anywhere in Canada save for the larger cities.

In an effort to provide high-speed access to remote areas, a matter not within our mandate, I believe the majority has gone against our statutory mandate – that of promoting and developing sustainable competition in Telecommunications.