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

Telecom Decision CRTC 2007-36

Ottawa, 25 May 2007

Follow-up to Decision 2006-75 – Range-within-a-range proposal

Reference: 8661-C12-200606965

In this Decision, the Commission denies a proposal by Bell Canada, NorthernTel, Limited Partnership, and Télébec, Société en commandite to implement a public range of rates within a larger confidential rate range.

The Commission determines that where an incumbent local exchange carrier (ILEC) proposes to de-average the rate charged for a service for which rate de-averaging is allowed, the ILEC may request the Commission's approval for a rate range where either the maximum rate or the minimum rate, or both, are publicly specified in the tariff.

A dissenting opinion of Commissioner Langford is attached.

Introduction

1. In *Rate ranges for services other than voice over Internet protocol services*, Telecom Public Notice CRTC 2006-8, 9 June 2006 (Public Notice 2006-8), the Commission initiated a proceeding to consider the establishment of appropriate guidelines for filing applications involving rate ranges for services other than voice over Internet Protocol services.

2. During the Public Notice 2006-8 proceeding, Bell Canada, NorthernTel, Limited Partnership, and Télébec, Société en commandite (formerly Société en commandite Télébec) (collectively, the Companies) proposed, among other things, the concept of a "range within a range" as part of their rate range model. The range-within-a-range concept consisted of a public rate range within a larger confidential rate range.

3. In *Rate ranges for services other than voice over Internet Protocol services*, Telecom Decision CRTC 2006-75, 23 November 2006 (Decision 2006-75), the Commission approved the use of rate ranges with confidential range limits with a public price point and authorized the incumbent local exchange carriers (ILECs) to change the actual public rate charged within an approved confidential rate range at any time by issuing an amended tariff page without the necessity of Commission approval.

4. In Decision 2006-75, the Commission also noted the interrelationship between the Companies' range-within-a-range proposal and the matter of further rate de-averaging being considered in the proceeding initiated by *Review of price cap framework*, Telecom Public Notice CRTC 2006-5, 9 May 2006 (Public Notice 2006-5). As a result, the Commission deferred its determinations on the range-within-a-range proposal until it had made its determinations on rate de-averaging in the Public Notice 2006-5 proceeding.

5. In *Price cap framework for large incumbent local exchange carriers*, Telecom Decision CRTC 2007-27, 30 April 2007 (Decision 2007-27), the Commission removed the prohibition on further rate de-averaging for residential services, including residential optional local services. As a result, the ILECs are permitted to charge different rates for the same service to different subscribers within the same exchange. The Commission specified that these differing rates would be subject to a minimum rate that must comply with the imputation test and a maximum rate that must meet the applicable price cap constraint.

6. The following parties commented on the Companies' range-within-a-range proposal during the Public Notice 2006-8 proceeding: Bell Aliant Regional Communications, Limited Partnership (Bell Aliant); MTS Allstream Inc. (MTS Allstream); Saskatchewan Telecommunications (SaskTel); Cogeco Cable Inc., Quebecor Média Inc., Rogers Communications Inc., and Shaw Communications Inc. (collectively, the Competitors); and the Public Interest Advocacy Centre, on behalf of the Consumer Groups (the Consumer Groups). The record of the Public Notice 2006-8 proceeding closed on 28 July 2006.

The Companies' range-within-a-range proposal

7. In the Public Notice 2006-8 proceeding, the Companies proposed that for a given tariffed service, a rate range would have an approved confidential range setting out the absolute minimum and maximum rates for the tariff element. They also proposed that this confidential range would contain a smaller public rate range within which the company would offer the tariffed service to the public. The Companies submitted that the minimum rate of the absolute rate range would have to pass the imputation test and the maximum rate would be constrained by the upper limit of the rate element constraint under the price cap regime.

8. The Companies further proposed that they be permitted to price the service using any rate within the smaller public rate range and to modify the value of the maximum rate and/or the minimum rate of the smaller public rate range at any time without the necessity of further Commission approval merely by issuing an amended tariff page. They also proposed that the actual rate charged to any individual subscriber, at any point in time, would not be known to either the public or the competitors.

9. The Companies submitted that this range-within-a-range approach would increase the competitive and regulatory benefits of rate ranges, and provide maximum reliance on market forces and minimum intrusive regulatory measures. They also submitted that the range-within-a-range proposal would provide additional pricing flexibility within the context of existing regulatory safeguards and would further streamline the filing process by reducing the need for multiple filings to charge rates that fell within the absolute range.

10. Bell Aliant and SaskTel supported the Companies' range-within-a-range proposal.

11. MTS Allstream, the Competitors, and the Consumer Groups opposed the proposal. They expressed concerns that its purpose was to engage in rate de-averaging or other anti-competitive conduct, that it could lead to price discrimination among customers, and that it would be difficult for the Commission to ensure that regulated services continued to meet existing pricing rules and safeguards.

Commission's analysis and determinations

12. After the close of record of the Public Notice 2006-8 proceeding, the Governor in Council issued *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534 (the Policy Direction), in which it directed the Commission to, among other things:

    - when relying on regulation, use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;
    - when relying on regulation, use measures that, if they are of an economic nature, neither deter economically efficient competitive entry into the market nor promote economically inefficient entry; and
    - use only tariff approval mechanisms that are as minimally intrusive and as minimally onerous as possible.

13. The Policy Direction came into effect on 14 December 2006. Although the Policy Direction does not apply to this particular proceeding,[1] the Commission has taken the spirit of the Policy Direction into account in making its determinations in this Decision.

14. Section 25 of the *Telecommunications Act* (the Act) states the following:

> 25(1) No Canadian carrier shall provide a telecommunications service except in accordance with a tariff filed with and approved by the Commission that specifies the rate or the maximum or minimum rate, or both, to be charged for the service.
> …
>
> 25(3) A tariff shall be filed and published or otherwise made available for public inspection by a Canadian carrier in the form and manner specified by the Commission and shall include any information required by the Commission to be included.
> …

15. As indicated in Decision 2006-75, the Commission considers that rate ranges would provide ILECs with increased pricing flexibility and that they would lessen the regulatory burden for both the ILECs and the Commission by reducing the number and complexity of tariff applications.

16. The Commission considers that the Decision 2006-75 requirement that the ILEC issue an amended tariff page containing the actual public rate being charged would be an onerous and ineffective way to implement rate de-averaging as permitted in Decision 2007-27 because each individual price point would require a different tariff page.

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[1] In accordance with subsection 11(2) of the Telecommunications Act (the Act), Policy Directions may apply in respect of matters pending before the Commission. However, in accordance with subsection 11(3) of the Act, a policy direction does not apply in respect of a matter pending before the Commission if final submissions were filed during the year prior to the direction coming into effect.

17. The Commission notes that the Companies' range-within-a-range proposal would allow an ILEC to de-average the rate for a particular service because the ILEC could charge individual subscribers any price for that service within the public range at any time, without Commission approval.

18. The Commission also notes that under the Companies' range-within-a-range proposal, the ILECs could charge any price within the larger approved confidential rate range to any customer at any time without the necessity for any further Commission approval merely by issuing revised tariff pages to change the smaller public range. Thus, the smaller public range limits would not represent the true absolute maximum rate or the true absolute minimum rate that could be charged to a customer.

19. The Commission considers that one of the fundamental elements of a rate to be charged to a customer is that the information regarding the rate for the telecommunications service be publicly specified in the tariff. The Commission also considers that at least one of the following related to the rate set out in subsection 25(1) of the Act must be so specified: the rate, the maximum rate of the range, the minimum rate of the range, or both the maximum and the minimum rates of the range.

20. Accordingly, the Commission concludes that the Companies' proposed range-within-a-range approach would not comply with the requirements of subsection 25(1) of the Act since the approved maximum rate or minimum rate, or the actual rate, would not be made public.

21. However, the Commission considers that there is another approach that would be consistent with the objectives, noted above, of Decision 2006-75, and with section 25 of the Act and would provide a degree of pricing flexibility, similar to that associated with the Companies' proposal, in order to implement rate de-averaging for a service pursuant to Decision 2007-27. The Commission considers that it would be appropriate for the ILECs to propose rate ranges for services for which rate de-averaging is allowed, as long as one of the following is publicly specified in the tariff:

    - the maximum rate to be charged;
    - the minimum rate to be charged; or
    - both the maximum and minimum rates to be charged.

22. The Commission notes that the maximum rate would have to comply with the applicable rate element constraint and the service basket index constraint of the price cap regime established in Decision 2007-27, and the minimum rate would have to pass the imputation test.[2] In cases where the ILEC only makes publicly available either the maximum or the minimum rate, the other limit of the range could remain confidential. Where rate de-averaging is allowed and following Commission approval of a rate range, the ILEC would be authorized to charge each customer any rate within the approved range.

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[2] For residential primary exchange service, the minimum rate in high-cost serving areas would generally not be less than the actual rate charged because the rate for this service is generally below cost. The maximum rate for residential primary exchange service in non-high-cost serving areas would be no greater than the actual rate charged because the rate for this service is capped at the existing rate level.

23. The Commission considers that this approach is also aligned with the Policy Direction since it employs a tariff approval mechanism that is as minimally intrusive and as minimally onerous as possible.

Conclusion

24. In light of the above, the Commission **denies** the Companies' range-within-a-range proposal. The Commission determines that where an ILEC proposes to de-average the rate charged for a service for which rate de-averaging is allowed, the ILEC may request the Commission's approval for a rate range where either the maximum rate or minimum rate, or both, are publicly specified in the tariff, subject to the considerations noted above regarding maximum and minimum rate constraints. The Commission notes that for services for which rate de-averaging is not permitted, the rate range regime set out in Decision 2006-75 continues to apply.

25. The dissenting opinion of Commissioner Langford is attached.

Secretary General

Dissenting opinion of Commissioner Stuart Langford

I disagree with the majority decision in this matter. It provides powerful, well-established telephone companies with even more power to manipulate consumer prices and to prevent competitors from obtaining a toehold in their markets. In the cause of regulatory efficiency, this majority decision may do far more harm than good.

A new world

The process leading to today's majority decision began almost exactly one year ago. The world of telecom regulation was a far different place then than it is now. Two government initiatives and one Commission decision have so altered the regulatory landscape as to render it unrecognizable.

On December 14th, 2006 the Government Policy Direction came into force (see the majority decision, paragraph 12), instructing the Commission to rely on market forces rather than regulation wherever possible. While not applicable to certain proceedings initiated before December 14th, 2006, this Direction has had a significant impact on Commission thinking. See paragraph 13 of the majority decision.

On April 4th, 2007, by Order-in-Council, the Government established a simple, competitor presence-based test to be applied by the Commission when deciding whether certain markets should be deregulated. By this time next year, informed commentators expect that, when buying telephone services, 60 to 65% of consumers in Canada will be relying on competition rather than regulatory oversight for price protection.

On April 30th, 2007, the Commission established a new pricing regime, Telecom Decision CRTC 2007-27, (Price Cap 3) for those parts of the country where competitive forces are too weak to protect consumers. As I said in my dissent to that decision, Price Cap 3 is unlikely either to protect vulnerable consumers or to stimulate the rollout of competition. Today's majority decision promises to exacerbate rather than mitigate Price Cap 3's inherent weaknesses.

Power to the powerful

What today's majority decision does is give already powerful incumbent phone companies even more power to maximize profits in areas where competition is not strong enough to discipline prices. The Price Cap 3 decision gave incumbent telephone companies the powers to raise the prices of optional services and bundles of these services with basic local service as high as they wished, and to rate de-average – that is, to offer different prices to different customers living in the same service area. Today's majority decision gives those same companies another tool, the power to negotiate with consumers without having to fully reveal regulated price limits.

Combined, these powers will result in some customers in a given rural area subsidizing other customers in the same service area as the phone companies shore up their defences against competitive entry. Incumbent phone companies will be able to make unique, special, low-priced and/or features-rich offers to customers who they fear may switch to a competitor like Vonage or Primus. Simultaneously, the incumbent phone companies will be able to maintain their revenue flows by extracting higher prices, without the need to obtain specific Commission approval, from customers who have not contemplated switching their business.

Nationally, the rate range powers bestowed on incumbent phone companies today, combined with the pricing powers those same companies received in Price Cap 3, will enable them to extract maximum revenues from captive customers, thereby partially offsetting the economic impact of the price wars necessary to retain customers in deregulated areas where facilities-based competition exists.

Pricing as paradox

In the past, the Commission has required urban customers to subsidize consumers in remote rural areas where the costs of providing service are high. Price Cap 3 and this decision will almost certainly reverse that situation. From now on, I anticipate that rural customers, with only one facilities-based service provider to buy from, will find themselves partially underwriting the low rates enjoyed by subscribers in larger metropolitan areas where competition is strong.

The notion of captive rural customers paying more to offset lower urban prices is not only unjust and unreasonable at the individual customer level, it also seems to fly in the face of the Government's 2006 Policy Direction. According to the majority, that Direction instructs the Commission "when relying on regulation, [to] use measures" that do not "deter economically efficient competitive entry into the market…" (See today's majority decision, paragraph 12, point 2.)

Rate ranges and rate de-averaging, when used in areas where incumbent phone companies enjoy monopoly or near-monopoly market power, are only good for two things: to maximize profits and to "deter [otherwise] economically efficient competitive entry." No entrepreneur in his or her right mind would invest the millions of dollars needed to launch a facilities-based competitive phone company in rural Canada when the incumbent company, armed with pricing powers like rate ranges and rate de-averaging, is standing by ready and able to crush competition before it can gain sufficient strength to survive and prosper.

Paradoxically, in its rush to embrace its simplistic interpretation of "the spirit of the Policy Direction," (majority decision, paragraph 13) the majority, in my opinion, has succeeded in doing just the opposite. Rate ranges are bad for consumers in non-competitive areas and they represent one more nail in the coffin constructed by the majority decision in Price Cap 3 to house the stillborn corpse of competitive entry in rural Canada. For this reason, I cannot support this decision.