



## Telecom Decision CRTC 2007-46

Ottawa, 27 June 2007

### **Incumbent local exchange carriers' applications with respect to the implementation of Ethernet and ADSL Orders**

Reference: 8680-T66-200707325, 8680-T66-200702945, 8680-S22-200703026,  
8680-B2-200702805

*In this Decision the Commission addresses applications made by Bell Canada, Bell Aliant Regional Communications, Limited Partnership, TELUS Communications Company and Saskatchewan Telecommunications with respect to the implementation of several Orders dated 25 January 2007 related to the provision of Ethernet and Asymmetric Digital Subscriber Line services. With limited exceptions, pursuant to section 50 of the Telecommunications Act, the Commission extends the period for implementing the determinations in the Orders with respect to competitor services.*

#### **Introduction**

1. The Commission received applications (collectively, the Stay Applications) from Bell Canada, on behalf of itself and Bell Aliant Regional Communications, Limited Partnership (Bell Aliant) (collectively, Bell Canada et al.), TELUS Communications Company (TCC), and Saskatchewan Telecommunications (SaskTel) (collectively, the incumbent local exchange carriers) (ILECs), requesting that the Commission stay several orders dated 25 January 2007 related to Ethernet and Asymmetric Digital Subscriber Line (ADSL) services.
2. Bell Canada et al. requested, on 16 February 2007, that the Commission stay *Ethernet services*, Telecom Order CRTC 2007-20 (the Ethernet Order) as well as *Bell Aliant Regional Communications, Limited Partnership for services provided in the Atlantic provinces – ADSL Access Service and ADSL WAN Service*, Telecom Order CRTC 2007-21 (Order 2007-21) and *Bell Canada and Bell Aliant Regional Communications, Limited Partnership for services provided in Ontario and Quebec – Gateway Access Service and High Speed Access Service*, Telecom Order CRTC 2007-22 (Order 2007-22) pending the Commission's determination with respect to its application dated 16 February 2007 to review and vary the Ethernet Order, Order 2007-21 and Order 2007-22.
3. Both TCC and SaskTel requested, on 19 February 2007 and 21 February 2007, respectively, that the Commission stay the Ethernet Order pending the Commission's determinations regarding their applications dated 28 February 2007 and 21 March 2007, respectively, to review and vary the Ethernet Order and pending the conclusion of the proceeding initiated in *Review of regulatory framework for wholesale services and definition of essential service*, Telecom Public Notice CRTC 2006-14, 9 November 2006 (the Essential Services proceeding).<sup>1</sup>

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<sup>1</sup> In this Decision wholesale services are referred to as competitor services.

4. SaskTel requested, on 21 February 2007, that the Commission stay *Saskatchewan Telecommunications – Aggregated Asymmetric Digital Subscriber Line (ADSL) Service*, Telecom Order CRTC 2007-24 (Order 2007-24) pending the Commission's determinations with respect to its associated application dated 14 March 2007 to review and vary Order 2007-24 and pending the conclusion of the Essential Services proceeding. TCC requested, on 10 May 2007, that the Commission stay *TELUS Communications Company – Network-to-Network Interface Service, Wide Area Network ADSL Service, and Wholesale Internet ADSL Service*, Telecom Order CRTC 2007-25 (Order 2007-25). TCC submitted that the Commission should stay Order 2007-25 on the same terms as the stays proposed by Bell Canada et al. and SaskTel in regard to their respective ADSL Orders.
5. The ILECs' applications dated 16 and 28 February 2007, 14, 19 and 21 March 2007 to review and vary Orders 2007-21, 2007-22, 2007-24, 2007-25 (ADSL Orders) and the Ethernet Order (collectively, the Orders) relate to the Commission's determinations regarding competitor services in those Orders. The ILECs' applications are referred to below as the Review and Vary Applications.
6. The Commission notes that, as directed in paragraph 66 of Order 2007-24, SaskTel issued revised tariff pages with respect to Letters of Authorization (LOAs), termination charges, and the proposed conditions of service, effective 25 January 2007. The Commission further notes that: (a) as directed in paragraph 57 of Order 2007-25, TCC issued revised tariff pages, for the 3 Mbps speed only, to modify its rates, and to remove volume discounts, for its Wholesale Internet ADSL Service, effective 25 January 2007 and (b) as directed in paragraph 63 of Order 2007-25, TCC issued revised tariff pages to reduce the Central Office (CO) activation fee for its Wholesale Internet ADSL Service, effective 25 January 2007.
7. The Commission received comments on the Stay Applications from the Canadian Association of Internet Providers (CAIP), Cybersurf Corp. (Cybersurf), MTS Allstream Inc. (MTS Allstream), Primus Telecommunications Canada Inc. (Primus), Rogers Communications Inc. (Rogers), Vonage Canada Corp. (Vonage), and Xittel Telecommunications Inc. (Xittel) (referred to collectively as the Competitors) and TCC. The record of this proceeding closed with the ILECs' reply comments dated 25 May 2007.
8. In this Decision, the Commission considers the following issues:
  - I) Have the ILECs satisfied the test for a stay of the Orders?
  - II) Should the Commission exercise its powers under section 50 of the *Telecommunications Act* (the Act) to extend the dates for implementing the Orders with respect to competitor services?

## **I. Have the ILECs satisfied the test for a stay of the Orders?**

9. Before granting a stay application, the Commission requires the party requesting the stay to demonstrate that the stay application meets the criteria set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, and modified in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311. These criteria (the *RJR-MacDonald* criteria) are that: a) there is a serious issue to be determined; b) the party seeking the stay will incur irreparable harm if the stay is not granted; and c) the balance of convenience, taking into account the public interest, favours granting the stay.
10. In the Ethernet Order, the Commission approved, on a final basis, rates and terms for two types of Ethernet services: (i) the retail Ethernet access services provided by Bell Canada, SaskTel, and TCC and (ii) a number of competitor Ethernet services provided by these ILECs as well as Bell Aliant. In the ADSL Orders, the Commission made final determinations regarding the ILECs' competitor ADSL services. The Commission also made interim determinations regarding the ILECs' competitor Ethernet and ADSL services in the Orders. In their Stay Applications, Bell Canada et al., SaskTel, and TCC requested that the Orders be stayed in their entirety.
11. In considering whether the ILECs have satisfied the test for a stay, the Commission will examine the ILECs' submissions regarding retail Ethernet access services separately from those associated with competitor Ethernet and ADSL services.

### ***Retail Ethernet access services***

12. The Commission notes that in the Stay Applications the ILECs did not apply the *RJR-MacDonald* criteria to those aspects of the Ethernet Order associated with retail Ethernet access services, nor did they submit any arguments or evidence in respect of those aspects. The Commission also notes that no party submitted comments on those aspects associated with retail Ethernet access services.
13. In light of the above, the Commission considers that the ILECs did not satisfy any of the three *RJR-MacDonald* criteria for a stay of the determinations in the Ethernet Order with respect to retail Ethernet access services.
14. Accordingly, within five days of the date of this Decision, the Commission requires that Bell Canada, SaskTel and TCC implement the direction in paragraph 53 of the Ethernet Order that required final tariff pages to be issued in respect of retail Ethernet access services.

### ***Competitor Ethernet and ADSL services***


15. The Commission notes that, given its determination below to exercise its powers under section 50 of the Act to extend, with limited exceptions, the dates for implementing the Orders with respect to competitor services, it is not necessary to further consider the ILECs' Stay Applications as they relate to the Orders' competitor services determinations.

## **II. Should the Commission exercise its powers under section 50 of the Act to extend the dates for implementing the Orders with respect to competitor services?**

16. The Commission notes that certain determinations in Orders 2007-24 and 2007-25 with respect to competitor services have already been implemented by TCC and SaskTel, as detailed in paragraph 6 above. Accordingly, the Commission will not consider whether to extend the date for implementing these determinations, but will consider whether to extend the date for implementing the remaining determinations related to competitor services.
17. The Review and Vary Applications call into question the relevance of the current regulatory regime for competitor services in light of the current Essential Services proceeding. The Commission also notes that these Applications challenge the Commission's interpretation of the Policy Direction issued by the Governor in Council on 14 December 2006<sup>2</sup> and the Commission's jurisdiction to issue the Orders. The Commission intends to dispose of the Review and Vary Applications by the end of August 2007.
18. The Commission considers that the Review and Vary Applications raise serious and substantive issues that are of a unique and fundamental nature. The Commission also notes that the period of time that will elapse prior to the Commission making its determinations with respect to these applications will be relatively short. The Commission therefore questions whether the ILECs should be required to implement the Orders' competitor services determinations at this time, and considers the impact on retail markets if those determinations were implemented at this time.
19. The Commission notes that, if the ILECs were required to implement the Orders' competitor services determinations at this time, competitors may be expected to use, and to rely on, the competitor services and rates approved in those Orders to offer services to customers in various retail markets pending the Commission's disposition of the Review and Vary Applications. If the Commission subsequently were to find in favour of the ILECs with respect to those applications, these services would not continue to be available to competitors on the terms approved in the Orders. The Commission therefore notes that, during this period, there would be uncertainty for retail service market customers.
20. Having regard to the unique and fundamental nature of the issues to be tried in this case and the timeframe in which the Commission will be dealing with the Review and Vary Applications, the Commission considers that such uncertainty in retail markets attributable to requiring implementation of the Orders' competitor services determinations at this time would be unacceptable. In the Commission's view, market uncertainty associated with its disposition of the Review and Vary Applications would be minimized if the ILECs were not required to implement the Orders' competitor services determinations at this time. The Commission notes that, pending its disposition of these applications, the competitor Ethernet and ADSL services provided by the ILECs prior to the Orders continue to be available.

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<sup>2</sup> The Governor in Council issued the Policy Direction to the Commission, effective 14 December 2006, pursuant to section 8 of the Act with respect to the implementation of the Canadian telecommunications policy objectives set out in section 7 of the Act.

21. In the specific circumstances of this case, the Commission therefore concludes that, subject to the exceptions set out below, the ILECs should not be required to implement the Orders' competitor services determinations pending the Commission's disposition of the Review and Vary Applications.
22. Accordingly, and subject to the exceptions set out below, the Commission hereby exercises its powers under section 50 of the Act to extend the dates  which the ILECs are to implement the directions with respect to competitor services in the Orders such that the dates specified in the Orders for complying with the directions with respect to competitor services in the Orders will run from the date of the Commission's disposition of the Review and Vary Applications rather than from the date of the Orders.<sup>3</sup>
23. The revised dates established above do not apply to the following directions, which have already been complied with:
  - the direction to SaskTel in the first bullet point in paragraph 66 of Order 2007-24 to issue revised tariff pages with respect to the Aggregated ADSL service reflecting the Commission's determinations in Order 2007-24 with respect to LOAs, termination charges, and the proposed conditions of service;
  - the direction to TCC in paragraph 57 of Order 2007-25 to modify its rates, and to remove volume discounts, for the Wholesale Internet ADSL Service for the 3 Mbps speed only; and
  - the direction to TCC in paragraph 63 of Order 2007-25 to reduce its CO activation fee for the Wholesale Internet ADSL Service.

Secretary General

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<sup>3</sup> For example, where the Orders specify that an action is to be done within 30 days of the date of the Order, the revised date is 30 days from the date of the Commission's disposition of the Review and Vary Applications.

*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>*