



## Telecom Decision CRTC 2008-38

Ottawa, 5 May 2008

### **Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application to review and vary part of Telecom Decision 2007-35**

Reference: 8662-B2-200716707

*In this Decision, the Commission denies an application by Bell Aliant Regional Communications, Limited Partnership and Bell Canada to review and vary the portion of Telecom Decision 2007-35 related to the methodology for assessing applications for forbearance from regulation of high-speed digital network access services in wire centres with 25 or more connected buildings.*

### **Introduction**

1. The Commission received an application from Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, Bell Canada et al.), dated 23 November 2007, requesting that the Commission review and vary the portion of Telecom Decision 2007-35 related to the methodology for assessing applications for forbearance from regulation of high-speed digital network access (DNA) services in wire centres with 25 or more buildings connected to high-speed DNA-capable networks.
2. Bell Canada et al. submitted that this methodology does not permit a proper implementation of Telecom Decision 2007-35's substantive forbearance framework, which depends on whether the 30 percent competitor network presence threshold has been met in any given wire centre. They also submitted that forbearance assessments of high-speed DNA services based on this methodology would, in certain cases, violate the Policy Direction.<sup>1</sup>
3. The Commission received comments from MTS Allstream Inc. (MTS Allstream) and TELUS Communications Company (TCC). The record of the proceeding closed on 17 January 2008. The public record of this proceeding is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings."
4. The Commission considers that Bell Canada et al.'s application raises the following two issues to be addressed in the Commission's determinations:
  - I. Does the methodology improperly implement the framework adopted in Telecom Decision 2007-35 such that it raises substantial doubt as to the Decision's correctness?
  - II. Are forbearance assessments based on the methodology consistent with the Policy Direction?

<sup>1</sup> Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, P.C. 2006-1534, 14 December 2006 (the Policy Direction)

## **I. Does the methodology improperly implement the framework adopted in Telecom Decision 2007-35 such that it raises substantial doubt as to the Decision's correctness?**

### **Bell Canada et al.'s application**

5. Bell Canada et al. noted that in Telecom Decision 2007-35, the Commission determined that the appropriate geographic market for forbearance from the regulation of high-speed DNA services is the wire centre, and that a competitor network presence of 30 percent would demonstrate that competitors have been able to overcome barriers to entry and have sufficient presence within a wire centre to provide a viable competitive alternative to the incumbent local exchange carrier (ILEC). Bell Canada et al. also noted that the Commission set out the methodology to assess forbearance applications in wire centres with 25 or more buildings connected to high-speed DNA-capable networks in footnote 7 of Telecom Decision 2007-35, which states the following:

In this context, competitor network presence is the ratio of buildings connected to the competitors' high-speed DNA capable network, divided by the total number of buildings connected to all service providers' high speed DNA capable networks. Multiple competitor connections to a building are counted as one connection, while ILEC and competitor connections to a building are counted as two connections.

6. Bell Canada et al. stated that they interpreted the methodology as follows: a building connected to the high-speed DNA-capable network of competitive local exchange carriers (CLECs) only (single or multiple) is counted as one building, while a building connected to the high-speed DNA-capable networks of both CLECs (single or multiple) and the ILEC is counted as two buildings.
7. Bell Canada et al. submitted that the methodology describes a flawed hybrid of customer-based and capacity-based elements that fails to correctly measure the competitors' network presence. Bell Canada et al. contended that the Commission's use of the methodology results in consistent undervaluation of competitors' network presence in any given wire centre such that forbearance would be denied or otherwise delayed in wire centres where competitors have a network presence of 30 percent or more.
8. Bell Canada et al. submitted that in determining whether to exercise its power to review and vary its telecommunications decisions, the Commission need only be satisfied that there is substantial doubt about the correctness of the original decision. In Bell Canada et. al.'s view, the inconsistency between the conceptual framework adopted by the Commission for forbearing from regulating high-speed DNA services – which Bell Canada et al. were not challenging in their application – and the methodology set out to ascertain competitor network presence in a given wire centre raises such a doubt.
9. Bell Canada et al. submitted that it would be more appropriate to use the buildings-based approach laid out in the first sentence of the methodology such that the total count of buildings where at least one CLEC is present should simply be divided by the total number of connected buildings in the wire centre.

10. In Bell Canada et al.'s view, using the buildings-based approach would provide a fair and appropriate estimation of competitor network presence in each relevant wire centre and would properly identify those wire centres where competitor network presence demonstrates sustained competition sufficient to forbear.

**Positions of other parties**

11. MTS Allstream submitted that given that buildings provisioned by competitors and ILECs are not necessarily mutually exclusive, the denominator of the methodology equation must adjust for those buildings where both a competitor and an ILEC are present in the same building; otherwise, the competitor network presence test would set a low threshold for forbearance, resulting in forbearance being granted where competitors do not have sufficient presence to challenge the market power of the ILEC. It also submitted that the Commission had correctly adjusted for this possibility in the second sentence of the methodology. MTS Allstream submitted, therefore, that Bell Canada et al.'s application should be denied.
12. TCC, while not explicitly supporting Bell Canada et. al.'s review and vary application, suggested modifications to the wording of Telecom Decision 2007-35 that would substantially reproduce Bell Canada et. al.'s suggested reformulation of the methodology at issue.

**Commission's analysis and determinations**

13. Telecom Public Notice 98-6 states that in order for the Commission to exercise its discretion under section 62 of the *Telecommunications Act* (the Act) to review and vary any decision, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example, due to:
  - a) an error in law or in fact;
  - b) a fundamental change in circumstances or facts since the decision;
  - c) a failure to consider a basic principle which had been raised in the original proceeding; or
  - d) a new principle which has arisen as a result of the decision.
14. In determining whether there is substantial doubt as to the correctness of Telecom Decision 2007-35, the Commission will examine whether the methodology in question properly implements the framework adopted in Telecom Decision 2007-35.
15. The Commission notes that Telecom Decision 2007-35 set out a framework for, among other things, forbearing from the regulation of high-speed DNA services. As part of that framework, the Commission found that the wire centre constitutes the appropriate geographic market for high-speed DNA services.
16. In Telecom Decision 2007-35, the Commission determined that in order for forbearance to be appropriate, competitors should have the ability to independently and reasonably offer customers an alternative to ILEC high-speed DNA services over their own facilities. The

Commission considered that the competitors collectively should have the ability to constrain an ILEC's market power, both at the time of forbearance and on a going-forward basis. In this regard, the Commission considered that a test that relies on competitor network presence is the appropriate indicator of the extent to which competitors have overcome access barriers and are in a position to actually or potentially constrain ILEC market power.

17. In Telecom Decision 2007-35, the Commission established a methodology to measure competitor network presence that calculates in a wire centre the competitors' aggregated high-speed DNA network capability in relation to the ILEC's aggregated high-speed network capability. The Commission considered that an effective and efficient way to measure the network capability of the ILEC and the competitors is to use high-speed DNA network connectivity to buildings as the source data.
18. In order that the ILEC's or the competitors' aggregated network capability is not overstated, the Commission's methodology requires that multiple ILEC connections to a building be counted as a single ILEC-connected building and, similarly, that multiple competitor connections to a building be counted as a single competitor-connected building. However, in order to compare competitor capability to ILEC capability in a wire centre, the Commission considered that ILEC and competitor high-speed DNA connections to a building belong to two distinct networks and, therefore, counts them as two connections.
19. In Telecom Decision 2007-35, the Commission established a competitor network presence criterion. In arriving at the appropriate competitor network presence criterion, the Commission determined that it is not necessary to ensure competitive supply parity with the ILEC; instead, it should be sufficient to ensure that competition is established and would be sustainable in a forborne environment. The Commission considered that a competitor network presence criterion of 30 percent would represent a proper balance between competitive supply parity with the ILEC and the absence of competitors' facilities in a market to ensure that competition is established and sustainable.
20. The Commission notes that Bell Canada et al. proposed that the disputed methodology be changed to divide the total count of buildings where at least one competitor is present by the total number of connected buildings in the wire centre, regardless of the competitor or ILEC presence in the total number of all connected buildings.
21. The Commission notes that contrary to the methodology adopted in Telecom Decision 2007-35, Bell Canada et al.'s proposed methodology would result in an assessment of market power that would differ from one situation to another, depending on the particular configuration of the networks of the competitors and the ILEC, where there are an identical number of network connections. For example, in a wire centre in which the competitors' high-speed DNA-capable network is connected to 10 buildings and the ILEC is connected to 30 buildings, adopting Bell Canada et al.'s approach would lead to an assessment of competitor network presence ranging from 25 percent to 33 percent – 25 percent under a scenario in which the buildings reached by the ILEC and the competitors are entirely exclusive of each other and 33 percent under a scenario in which the ILEC's high-speed DNA network is connected in all buildings reached by the competitors.

22. The Commission notes that from the perspective of market power analysis, an approach that provides a consistent assessment for an identical number of competitor network connections, regardless of the particular configuration of the networks of the ILEC and the competitors, is to be favoured over an approach that does not. In this regard, the Commission notes that the methodology set out in Telecom Decision 2007-35 provides for a consistent assessment of market power, regardless of the particular configuration of networks.
23. Furthermore, the Commission emphasizes that the competitor network presence criterion of 30 percent was established on the basis of a methodology that uses network connectivity rather than buildings as source data. The Commission adopted the 30 percent criterion on the basis that, given the methodology adopted, wire centres meeting the 30 percent threshold would be sufficiently competitive to warrant forbearance pursuant to section 34 of the Act and that to provide forbearance prior to that would be premature.
24. The Commission considers that, given the above, to accept a different methodology would result in a fundamental modification to the Commission's carefully designed substantive forbearance framework and, accordingly, would require a thorough reconsideration of the competitor network presence criterion to ensure statutory compliance.
25. In light of the above, the Commission concludes that Bell Canada et al. have not demonstrated that there is substantial doubt as to the correctness of the methodology set out in Telecom Decision 2007-35.

## **II. Are forbearance assessments based on the methodology consistent with the Policy Direction?**

### **Bell Canada et al.'s application**

26. Bell Canada et al. submitted that forbearance assessments of high-speed DNA services based on the methodology would, in certain cases, result in substantial unjustified financial harm and unduly postpone reliance on market forces, in violation of the Policy Direction.
27. Bell Canada et al. noted that paragraph 1(a) of the Policy Direction requires the Commission to rely on market forces to the maximum extent feasible.
28. Bell Canada et al. submitted that when a wire centre satisfies the Commission's carefully designed conditions for high-speed DNA forbearance under section 34 of the Act, market forces can be relied upon to protect the interest of users, in furtherance of the telecommunications policy objectives set out in the Act. They argued that it flows logically that the methodology necessarily postpones reliance on market forces every time it incorrectly indicates that an otherwise qualifying wire centre fails to meet the forbearance threshold and that this violates subparagraph 1(a)(i) of the Policy Direction. They submitted that continued economic regulation of a wire centre that but for the application of the flawed methodology would be forborne from regulation also violates subparagraph 1(a)(ii) of the Policy Direction since it constitutes needless regulation that, by definition, interferes with market forces beyond the minimum extent possible.

29. Bell Canada et al. submitted that erroneous regulation based on a flawed equation is neither efficient nor minimally intrusive and proportionate to a telecommunications policy objective. They submitted that correcting what they saw as a methodological error would improve the efficiency of the regulatory regime and better align it with the telecommunications policy objectives.

#### **Commission's analysis and determinations**

30. The Commission notes that Bell Canada et. al.'s position regarding compliance with the Policy Direction is based on the assumption that the methodology adopted by the Commission to assess applications for forbearance from the regulation of high-speed DNA services in wire centres containing 25 or more connected buildings improperly implements Telecom Decision 2007-35's substantive forbearance framework. In light of the above determinations, the Commission considers that Bell Canada et. al.'s position with respect to the Policy Direction is unfounded.
31. Notwithstanding the above, in relying on a network presence test based on present and future competitive potential, the Commission has taken a forward-looking approach to forbearance. In the Commission's view, this approach, contrary to Bell Canada et al.'s allegation, was specifically adopted in order to grant forbearance without delay.
32. Accordingly, the Commission considers that the methodology does not cause unjustified financial harm nor does it unduly postpone reliance on market forces, in violation of subsections 1(a)(i) and (ii) of the Policy Direction. Therefore, the Commission considers that forbearance assessments based on the methodology are consistent with the Policy Direction.

#### **Conclusion**

33. In light of the above, the Commission **denies** Bell Canada et al.'s application.

Secretary General

#### **Related documents**

- *Framework for forbearance from regulation of high-speed intra-exchange digital network access services*, Telecom Decision CRTC 2007-35, 25 May 2007
- *Guidelines for review and vary applications*, Telecom Public Notice CRTC 98-6, 20 March 1998

*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>*