



Telecom Decision CRTC 2008-39

Ottawa, 14 May 2008

Canadian Association of Internet Providers' request for interim relief regarding Bell Canada's practice of "throttling" its wholesale ADSL access services

Reference: 8622-C51-200805153

In this Decision, the Commission denies the interim relief requested by the Canadian Association of Internet Providers (CAIP). In regard to the process associated with the disposition of CAIP's application on a final basis, the Commission has set out the process in a letter to the parties to be issued on 15 May 2008.

Introduction

1. On 3 April 2008, the Canadian Association of Internet Providers (CAIP) filed an application requesting that the Commission issue an order directing Bell Canada to cease and desist from "throttling"¹ its wholesale Asymmetric Digital Subscriber Line (ADSL) services and in particular, the wholesale service known as Gateway Access Service (GAS).
2. As part of its application, CAIP requested interim relief on an expedited basis. Specifically, CAIP requested that the Commission issue an order directing Bell Canada to immediately cease and desist from throttling wholesale GAS.
3. In this Decision, the Commission disposes of CAIP's request for interim relief.
4. The Commission received comments from Primus Telecommunications Canada Inc. and Bell Canada's reply. The proceeding closed on 24 April 2008 with CAIP's final comments. The public record of this proceeding is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."
5. The Commission has identified that the issue to be considered is whether CAIP has satisfied the test for interim relief.

Has CAIP satisfied the test for interim relief?

6. Before granting an application for interim relief, the Commission requires the party requesting the interim relief to demonstrate that its 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

¹ "Throttling" has been used by CAIP in reference to traffic management activities implemented by Bell Canada to control traffic flow, delaying some packets in order to meet certain criteria. In its application CAIP also refers to activities to "shape," "throttle," and/or "choke" traffic. In this Decision the terms "throttling" and "traffic shaping" are used interchangeably and are assumed to include all such traffic management activities.

be determined; b) the party seeking the interim relief will incur irreparable harm if the relief is not granted; and c) the balance of convenience, taking into account the public interest, favours granting the interim relief.

Is there a serious issue to be determined?

7. CAIP submitted that its application raised the following issues that met the threshold for a serious issue to be determined:
 - a) Bell Canada was imposing unauthorized and unilateral modifications to its tariffed services on its wholesale customers, contrary to sections 24 and 25 of the *Telecommunications Act* (the Act);
 - b) Bell Canada had failed to provide notice of network changes;
 - c) Bell Canada was granting undue and unreasonable preference on itself and was applying a disadvantage to competitors, in violation of section 27(2) of the Act; and
 - d) Bell Canada was violating privacy and common carrier obligations, contrary to sections 7 and 36 of the Act.
8. Bell Canada submitted that CAIP's request for interim relief did not satisfy the evidentiary threshold for a serious issue to be determined. Bell Canada submitted that
 - a) it was not operating off tariff, contrary to sections 24 and 25 of the Act;
 - b) it was not granting undue and unreasonable preference on itself nor applying a disadvantage to competitors in violation of section 27(2) of the Act; and
 - c) it was not affecting end-users' privacy nor controlling the content nor influencing the meaning or purpose of telecommunications as set out at section 36 of the Act.
9. The Commission notes that the threshold for a finding that there is a serious question to be tried is a low one. The issue is whether or not the application for final relief is frivolous or vexatious. Based on the record, the Commission is satisfied that CAIP has demonstrated that there is a serious issue to be determined regarding whether Bell Canada's practice of throttling Internet traffic carried by CAIP's members subscribing to the GAS tariff is in accordance with the requirements of the Act.

Will the party seeking the interim relief incur irreparable harm if the relief is not granted?

10. CAIP submitted that Bell Canada's traffic shaping measures were causing irreparable harm to its members subscribing to the GAS tariff. CAIP submitted that its members had suffered the following harm that could not be cured or could not be quantified in monetary terms:

- a) difficulties in managing the services they provide to their end-customers;
 - b) reductions in traffic volumes delivered to Internet backbone providers resulting in the need to pay for capacity they could no longer use;
 - c) the requirement to pay for GAS components even though Bell Canada was not delivering traffic volumes to justify the need for these components;
 - d) threatened or actual cancellation of service contracts; and
 - e) a loss of goodwill and permanent loss of market share.
11. CAIP submitted that the harm to its members who are GAS customers would be irreparable for the following reasons:
- a) there was no prospect of compensation in damages;
 - b) there was no way to quantify or recover goodwill and market share loss, threatened and materializing;
 - c) even if losses of unusable GAS capacity and backbone/transit capacity were quantifiable, they were unlikely to be recoverable in a civil suit;
 - d) there was no way to mitigate losses; and
 - e) damage to the public interest in the orderly provision and development of telecommunications and the inviolability of telecommunications carried by Bell Canada could not be compensated in damages.
12. Bell Canada submitted that CAIP had not provided facts or supporting evidence to prove any harm. In Bell Canada's view, there was no evidence to support CAIP's arguments that there were difficulties in managing service to end-customers or that reductions of traffic volumes delivered to Internet backbone providers were causing CAIP's members to pay for capacity that they could not actually use. Bell Canada submitted that even if there was financial harm resulting from delivery of reduced traffic volumes, the harm would not be irreparable because CAIP's members were obligated to pay for contracted transit capacity and GAS whether interim relief was granted or not. Bell Canada also submitted that CAIP had not produced evidence of actual lost customers, loss of goodwill, permanent market share loss, or that CAIP's members would not be able to recover any lost revenues. According to Bell Canada, damage to the public interest should be addressed under the third of the *RJR-MacDonald* criteria (i.e. balance of convenience).
13. The Commission notes that the second criterion of the test for interim relief requires the party seeking the relief to demonstrate that it will suffer irreparable harm if its request for interim relief is not granted and its request for final relief is granted. The Commission notes that the test of irreparable harm relates only to the harm suffered by the applicant and does not relate to the public interest.

14. The Commission considers that CAIP did not provide sufficient evidence in support of its claim that its members no longer need the amount of transit capacity and GAS service components that they have contracted for, and that they will suffer irreparable harm if interim relief is not granted. Similarly, the Commission considers that CAIP did not provide sufficient evidence in support of its claim that Bell Canada's throttling practices will make it difficult or impossible for CAIP's members to properly manage the services that they provide to their end-customers and that these practices will result in permanent loss of market share or goodwill. Finally, with respect to CAIP's claim regarding loss of revenue due to customers terminating service, the Commission considers that CAIP failed to demonstrate that its members will suffer irreparable harm as a result of Bell Canada's throttling practices. In conclusion, the Commission finds that CAIP has not demonstrated that its members will suffer irreparable harm if the interim relief was not granted.
15. In light of the Commission's determination with respect to irreparable harm, it is not necessary for the Commission to consider whether CAIP has satisfied the balance of convenience criterion.
16. In light of the above, the Commission concludes that CAIP's application for interim relief does not meet the *RJR-MacDonald v. Canada* criteria. Accordingly, the Commission **denies** CAIP's application for interim relief.
17. In regard to the process associated with the disposition of CAIP's application on a final basis, the Commission has set out the process in a letter to the parties to be issued on 15 May 2008.

Secretary General

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