



Telecom Public Notice CRTC 2008-13

Ottawa, 15 October 2008

Review of Telecom Decision 2006-71 regarding revisions to the *Telecommunications Fees Regulations, 1995*

Reference: 8657-A53-200606692

In this Public Notice, the Commission is reopening the proceeding initiated by the application filed on 26 May 2006 by Aliant Telecom Inc. (now Bell Aliant Regional Communications, Limited Partnership)¹ and Bell Canada seeking revisions to the Telecommunications Fees Regulations, 1995. In the proceeding, the Commission will consider whether to vary Telecom Decision 2006-71, which resulted from this application. The Commission considers that it appears that: (a) it failed to consider a basic principle which had been raised in the original proceeding, and (b) there has been a fundamental change in circumstances or facts since the decision.

The Commission is also initiating a reference to the Federal Court of Appeal. The reference question to the Federal Court of Appeal is set out in this Public Notice. Pending the outcome of the reference proceeding, the Commission is staying the proceeding to consider varying Telecom Decision 2006-71.

Introduction

1. On 26 May 2006, Aliant Telecom Inc. (now Bell Aliant Regional Communications, Limited Partnership) and Bell Canada (collectively, Bell Canada et al.) filed an application requesting that the Commission revise the *Telecommunications Fees Regulations, 1995* (the Fees Regulations) and, in particular, the basis on which telecommunications fees are determined and levied.
2. The following parties filed comments in reply to Bell Canada et al.'s application: AOL Canada Inc.; MTS Allstream Inc.; Primus Telecommunications Canada Inc.; Rogers Communications Inc. (RCI); TELUS Communications Company; Xit télécom inc., on behalf of itself, Télécommunications Xittel inc., and 9141-9077 Québec inc; and Yak Communications (Canada) Inc.
3. The public record of the proceeding that led to Telecom Decision 2006-71, which closed on 6 July 2006, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings."

¹ On 7 July 2006, Bell Canada's regional wireline telecommunications operations in Ontario and Quebec were combined with, among others, the wireline telecommunications operations of Aliant Telecom Inc., Société en commandite Télébec (now referred to as Télébec, Limited Partnership) and NorthernTel, Limited Partnership to form Bell Aliant Regional Communications, Limited Partnership.

The application and issue in dispute

4. Bell Canada et al. noted that the Commission levies telecommunications fees to recover costs that it determines to be attributable to its responsibilities under the *Telecommunications Act* (the Act).² Bell Canada et al. also noted that the current regulations governing fees, the Fees Regulations, stipulate that the costs of the Commission's telecommunications activities are borne by tariff-filing Canadian carriers.
5. Bell Canada et al. submitted that the current method for allocating telecommunications fees payable by each carrier is inequitable. They proposed the adoption of an approach similar to that implemented by the Commission in Decision 2000-745 in the context of the contribution regime. Bell Canada et al. also submitted that telecommunications fees are substantial and are expected to increase.
6. Bell Canada et al. noted that the Treasury Board had established principles for government departments and agencies to follow in the development of user fees and cost recovery procedures. Bell Canada et al. were of the view that the Commission's current fee-setting process is inconsistent with these principles.
7. Bell Canada et al. submitted that, consistent with the Treasury Board principles in its *Policy on Service Standards for External Fees* (the Policy) and adopting the *User Fees Act* as a guide, the Commission should consult with the industry to establish measurable service standards associated with its activities and publish the related performance results on a quarterly basis. Bell Canada et al. suggested that the Fees Regulations must be considered in the context of the *User Fees Act*, which, they suggested, applies to the Fees Regulations. Bell Canada et al. proposed a financial relief mechanism for fee payers to mitigate the harm that would result from Commission decision-making delays if it did not meet its performance standards.
8. On the issue of user fees, RCI submitted that it would be inappropriate to implement certain recommendations made by Bell Canada et al. that had been formulated under the guidance of the *User Fees Act*. Specifically, RCI argued against the implementation of mechanisms for remedial action in the event that established service standards were not met by the Commission, since the ability to meet such standards could be affected by a number of differing factors.
9. In reply, Bell Canada et al. emphasized that the remedial actions identified in its application had been legislated under the *User Fees Act*, and further suggested that this legislation is applicable to the Commission.

Telecom Decision 2006-71

10. The Commission issued its determination on Bell Canada et al.'s application in Telecom Decision 2006-71. In that Decision, among other things, the Commission noted that in 2004, the Treasury Board issued the Policy, which required government authorities that set fees to provide stakeholders with fundamental information on the services being provided and any associated service standards. The Commission noted that the Policy requires that service

² The statutory and regulatory context for consideration of the issues discussed in this Public Notice is set out in the Appendix.

standards be developed in consultation with paying and non-paying stakeholders and that they be reported annually to Parliament. The Commission enumerated a number of measures it had taken since 2002, such as implementing service standards for various applications, in order to comply with the Policy and the predecessor Treasury Board policy.

11. In Telecom Decision 2006-71, the Commission considered that there was merit to initiating changes to the Fees Regulations. The Commission was of the view that a revised Fees Regulations structure using the same approach that applies under the contribution regime would address current inconsistencies due to different telecommunications service providers' (TSPs) corporate structures.
12. The Commission considered that a telecommunications fees regime that would increase the number of fee-paying companies and use the same approach that applies under the existing contribution regime,³ including a \$10 million revenue threshold and the same revenue deductions as apply under that regime, would be appropriate. Accordingly, the Commission stated that the share of fees paid by each TSP would, under the new fees formula, be calculated using the approach that is used under the contribution regime for subsidizing local residential service in high-cost serving areas. Under this approach, TSPs, or groups of related TSPs, with annual Canadian telecommunications service revenues equal to or greater than \$10 million would be required to pay annual telecommunications fees.
13. The Commission also noted in Telecom Decision 2006-71 that changes to the Fees Regulations require Treasury Board approval (under section 68 of the Act) and, as such, would require the initiation of government inter-departmental deliberations. The Commission stated that it intended to commence the necessary process to draft wording changes to the Fees Regulations. The Commission noted that, once drafted, the proposed regulations must be published in the *Canada Gazette* at least 60 days before their proposed effective date, and interested parties would be given an opportunity to comment on the proposed regulations.
14. Following the release of Telecom Decision 2006-71, the Commission prepared draft wording changes to the Fees Regulations and initiated the inter-departmental deliberations contemplated in Telecom Decision 2006-71. During the deliberations, the Commission received conflicting legal opinions with respect to the application of the *User Fees Act* to the proposed changes to the Fees Regulations. One opinion concluded that the *User Fees Act* applies to the proposed changes to the Fees Regulations and the other opinion concluded that it does not.⁴ As a consequence, the changes to the Fees Regulations which have been drafted have not been approved for pre-publication in accordance with section 69 of the Act.

³ The contribution regime, which among other things includes a definition of Canadian telecommunications services revenues, has since been consolidated and summarized in Telecom Circular 2007-15.

⁴ In its *2006-2007 Departmental Performance Report*, tabled in Parliament on 1 November 2007, the Commission noted that it had received a legal opinion indicating that the telecommunications fees charged under the Fees Regulations are considered to be external "regulatory fees" and not "user fees" as defined in the *User Fees Act*.

Review of Commission determinations

15. Section 62 of the Act empowers the Commission, on application or on its own motion, to review and rescind or vary any decision made by it. As outlined in Telecom Public Notice 98-6, in order for the Commission to exercise its discretion pursuant to section 62 of the Act, it must be demonstrated 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.
16. In Telecom Decision 2006-71, the Commission indicated measures it had taken to comply with the Policy. The Commission notes, however, that it failed to dispose of Bell Canada et al.'s assertions that the *User Fees Act* applies to the Fees Regulations.
17. The Commission considers that its failure to address Bell Canada et al.'s assertions, advanced in the original application and in reply comments to counter assertions from RCI, regarding the applicability of the *User Fees Act* appears to constitute "a failure to consider a basic principle which had been raised in the original proceeding."
18. Further, the Commission considers that the conflict between the legal opinions it received with respect to the applicability of the *User Fees Act* appears to be "a fundamental change in circumstances or facts since the decision."
19. In light of the above, the Commission hereby reopens the proceeding initiated by Bell Canada et al.'s application of 26 May 2006 in order to consider whether to vary Telecom Decision 2006-71.

Issues to be resolved

20. The issue to be resolved is whether amending or replacing the Fees Regulations in the manner contemplated by Bell Canada et al.'s application and Telecom Decision 2006-71, as more fully described in the Appendix to this Public Notice, would amount to fixing, increasing, expanding the application or increasing the duration, pursuant to subsection 4(1) of the *User Fees Act*, of a "user fee," as defined in section 2 of the same Act.
21. As such, it must be determined whether all essential constituent elements of a "user fee" – including that it be for the "direct benefit or advantage" of those paying the fee – would be present.

22. The answer to this question would affect the process that would have to be followed in order to amend or replace the Fees Regulations in the manner contemplated by Bell Canada et al.'s application and Telecom Decision 2006-71. As explained in more detail in the Appendix to this Public Notice, there are two possible alternative approaches:
- (a) if the telecommunications fees are not "user fees," the Commission would have to comply with the requirements set out in sections 68 and 69 of the Act (which set out an obligation to pre-publish proposed fees regulations for public comment and a requirement to secure Treasury Board approval before making regulations following pre-publication); or
 - (b) if the telecommunications fees are "user fees," in addition to complying with the requirements set out in (a) above, the Commission would have to comply with the requirements for implementing "user fees" set out in sections 4 and following of the *User Fees Act*.
23. The answer to this question would also affect whether the other requirements with respect to user fees in the *User Fees Act*, such as the requirement to reduce the fees that fund the Commission when performance standards are not met, would apply.
24. As noted above, the Commission has reopened the proceeding initiated by Bell Canada et al.'s application of 26 May 2006 as a result of its apparent failure to consider a basic principle which had been raised in the original proceeding and of an apparent fundamental change in circumstances or facts since the decision. Given that these reasons for reopening the proceeding raise a question of law, on today's date, the Commission is initiating a reference to the Federal Court of Appeal in order to seek an answer to the question noted below.

Order of reference

25. By order, pursuant to section 18.3 and subsection 28(2) of the *Federal Courts Act* and section 14 of the *CRTC Telecommunications Rules of Procedure*, the Commission hereby refers the question of law which follows to the Federal Court of Appeal for hearing and determination (the reference proceeding). Pending the outcome of the reference proceeding, the Commission hereby stays the review and vary proceeding that it reopened in paragraph 19 above.
26. The reference question is as follows:
- Would amending or replacing the *Telecommunications Fees Regulations, 1995*, SOR/95-157 (the "Fees Regulations"), in the manner contemplated in the application dated 26 May 2006 by Aliant Telecom Inc. (now Bell Aliant Regional Communications, Limited Partnership) and Bell Canada (which requested that the Canadian Radio-television and Telecommunications Commission revise the Fees

Regulations) and Telecom Decision CRTC 2006-71, and as more fully described in the Appendix to Telecom Public Notice CRTC 2008-13, dated 15 October 2008, amount to fixing, increasing, expanding the application or increasing the duration, pursuant to subsection 4(1) of the *User Fees Act*, of a "user fee," as defined in section 2 of the same Act?

Procedure

27. The Commission expects to receive directions on procedure from the Federal Court of Appeal. The Court's directions on procedure will be available at the Court, and copies can be obtained from the Commission on request.
28. The Commission expects to issue directions for further procedure, if necessary, or a decision with respect to Telecom Decision 2006-71, within 120 days after a final decision has been rendered in the reference proceeding.

Location of CRTC offices

29. The record of the proceeding that led to Telecom Decision 2006-71 may be examined electronically on the Commission's website or at the Commission offices during normal business hours.

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Secretary General

Related documents

- *The Canadian revenue-based contribution regime*, Telecom Circular CRTC 2007-15, 8 June 2007
- *Part VII application to revise the Telecommunications Fees Regulations, 1995*, Telecom Decision CRTC 2006-71, 6 November 2006
- *Changes to the contribution regime*, Decision CRTC 2000-745, 30 November 2000
- *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>

Statutory and regulatory context

1. The Commission was established pursuant to section 3 of the *Canadian Radio-television and Telecommunications Commission Act*. The Commission regulates the telecommunications industry pursuant to the *Telecommunications Act* (the Act).
2. Under section 47 of the Act, the Commission is required, among other things, to exercise its powers and duties with a view to implementing the Canadian telecommunications policy objectives set out in section 7 of the Act, and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27 of the Act. Section 27 requires the Commission to ensure that every rate charged by a Canadian carrier for a telecommunications service be just and reasonable. It also requires the Commission to ensure that no Canadian carrier, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminates or gives an undue or unreasonable preference toward any person, including itself, or subjects any person to an undue or unreasonable disadvantage.
3. Subsection 68(1) and section 69 of the Act empower the Commission to impose telecommunications fees to recover costs attributable to its responsibilities under the Act, and set out the process to be followed in setting such fees. These provisions read as follows:
 68. (1) The Commission may, with the approval of the Treasury Board, make regulations prescribing fees, and respecting their calculation and payment, for the purpose of recovering all or a portion of the costs that the Commission determines to be attributable to its responsibilities under this Act or any special Act.
 69. (1) Any regulations proposed to be made under section 67 or 68 shall be published in the *Canada Gazette* at least sixty days before their proposed effective date, and a reasonable opportunity shall be given to interested persons to make representations to the Commission with respect to the proposed regulations.
 69. (2) Proposed regulations that are modified after publication need not be published again under subsection (1).
4. Pursuant to its power to make fees regulations, the Commission, with Treasury Board¹ approval, made the *Telecommunications Fees Regulations, 1995* (the Fees Regulations), which came into force on 1 April 1995.

¹ The Treasury Board was established pursuant to section 5 of the *Financial Administration Act*.

5. The Fees Regulations set out a simple formula for calculating telecommunications fees. Expressed as a mathematical formula, the annual telecommunications fees payable by a Canadian carrier for which tariffs are filed with the Commission are calculated as follows: $A/B \times C$, where:
 - A represents the fee-paying Canadian carrier's operating revenues, derived from the provision of telecommunications services and reported in that Canadian carrier's most recent annual financial statements;
 - B represents the aggregate of such operating revenues of all the fee-paying Canadian carriers; and
 - C represents the total amount to be recovered by the Commission in respect of its current fiscal year through telecommunications fees.
6. Similarly, subsections 3(2) and 4(5) of the Fees Regulations provide for an annual adjustment amount to be recovered by the Commission each year. For any fiscal year, the annual adjustment amount consists of the amount by which the telecommunications fees recovered through initial and supplementary payments for the fiscal year are greater or less, as the case may be, than the actual expenditures of the Commission for its Telecommunications Activity and its other expenditures attributable to its Telecommunications Activity in respect of that year.
7. As noted at paragraph 12 of this Public Notice, changing the telecommunications fees regime in the manner set out in the application filed by Aliant Telecom Inc. (now Bell Aliant Regional Communications, Limited Partnership) and Bell Canada, and reflected in Telecom Decision 2006-71, would involve using the same approach that applies under the existing contribution regime, including a \$10 million revenue threshold and the same revenue deductions as apply under that regime. Accordingly, in that decision, the Commission stated that the share of fees paid by each telecommunications service provider (TSP) would, under the new fees formula, be calculated using the approach that is used under the existing contribution regime.
8. To implement this proposal, the formula, $A/B \times C$, would remain the same, but the numerator, "A", of the fraction would become Line D.13 (Contribution-eligible revenues), as calculated in Part A to Telecom Circular 2007-15. The denominator, "B", of the fraction would be the total of all fee payers' Contribution-eligible revenues. The "C" in the formula would remain the same as in the current Fees Regulations, and the adjustment amount would be calculated using the final figures of Contribution-eligible revenues for the year. The Circular also explains how the concept of the threshold level of TSPs, or groups of related TSPs, having annual Canadian telecommunications service revenues equal to or greater than \$10 million has been built into the calculation of Contribution-eligible revenues.

9. The *User Fees Act* came into effect on 31 March 2004. A "user fee" is defined in section 2 of the *User Fees Act* as follows:

"user fee" means a fee, charge or levy for a product, regulatory process, authorization, permit or licence, facility, or for a service that is provided only by a regulating authority, that is fixed pursuant to the authority of an Act of Parliament and which results in a direct benefit or advantage to the person paying the fee.

10. In turn, the term "direct benefit or advantage" is defined as follows in the *User Fees Act*:

"direct benefit or advantage" means a benefit to the client paying the user fee with that benefit being either unique to that client or distinct from and greater than benefits that could also accrue to any other person or business as a result of that user fee being paid.

11. Sections 4 and following of the *User Fees Act* set out consultation requirements to be established when a regulating authority fixes, increases, expands the application of, or increases the duration of a "user fee." These requirements include the obligation to establish service standards which are comparable to those established by other countries with which a comparison is relevant and against which the performance of the regulating authority can be measured. The requirements also include the obligation to table a proposed user fee before Parliament and to establish complaint resolution processes.