



## Telecom Decision CRTC 2010-897

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Ottawa, 2 December 2010

### **TBayTel – Application for relief regarding provision of competitor digital network services**

File number: 8661-T8-201011692

*In this decision, the Commission directs TBayTel to continue to provide competitor digital network (CDN) services only to MTS Allstream and TCC for existing circuits at existing CDN rates, subject to certain phase-out periods. Any new circuits ordered by new or existing customers should be provided at digital network access (DNA) rates.*

*The Commission denies TBayTel's request to re-rate existing CDN-rated circuits to DNA rates.*

#### **Introduction**

1. The Commission received an application by TBayTel, dated 22 July 2010, in which the company requested permission to either remove the Competitor Digital Network (CDN) Services section of its Carrier Access Tariff (CDN services tariff) or amend the CDN services tariff with respect to certain large carriers' entitlement to CDN services and rates.
2. TBayTel also requested permission to re-rate all existing and future CDN services it provides to MTS Allstream Inc. (MTS Allstream) and TELUS Communications Company (TCC) to enable it to charge retail digital network access (DNA) rates for those services. TBayTel requested compensation for this re-rating, retroactive to 23 October 2009 for MTS Allstream and 3 December 2009 for TCC.
3. The Commission received comments from MTS Allstream and TCC. The public record of this proceeding, which closed on 20 September 2010, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca) under "Public Proceedings" or by using the file number provided above.
4. The Commission has identified the following issues to be addressed in this decision:
  - I. Should TBayTel continue to provide CDN services?
  - II. Should existing CDN-rated circuits be re-rated retroactively to DNA rates?

## I. Should TBayTel continue to provide CDN services?

5. In Telecom Decision 2005-6, the Commission determined that the large incumbent local exchange carriers (ILECs)<sup>1</sup> should provide CDN services to competitors. The Commission also specified which services comprise CDN services; set the rates, terms, and conditions applicable to CDN services; and established the appropriate compensation to the ILECs for their provision of CDN services to competitors.
6. In Telecom Decision 2006-14, the Commission revised the regulatory framework for the small ILECs and permitted local competition in their territories. The Commission determined that a small ILEC is required to file proposed tariffs for competitor services if it receives a *bona fide* request in this regard from a competitor.
7. On 31 March 2006, TBayTel received a *bona fide* request from ExaTEL Inc. (ExaTEL) to compete in TBayTel's territory. As part of its request, ExaTEL provided a list of the network components and services it required, one of which was CDN services.
8. In Telecom Decision 2007-78, the Commission approved TBayTel's implementation plan for local competition with ExaTEL and directed TBayTel to file all related required tariffs within 30 days of the date of that decision.
9. In Telecom Order 2007-398, the Commission approved on an interim basis TBayTel's CDN services tariff, pursuant to ExaTEL's request. Prior to that order, TBayTel had only offered DNA services and rates, pursuant to its DNA services tariff. The Commission approved TBayTel's CDN services tariff on a final basis in Telecom Order 2010-294.
10. TBayTel requested removal of its CDN services tariff. TBayTel submitted that Telecom Decision 2005-6 did not apply to it and that it should therefore not be subject to the CDN service requirements established for the large ILECs in that decision. TBayTel noted that in that decision, the Commission established compensation for the large ILECs, through their deferral accounts, due to the loss of retail revenues caused by the shift from DNA rates to CDN rates, while no mechanism to compensate TBayTel for such losses has ever been examined.
11. TBayTel submitted that CDN service is not an essential service required by competitors for local competition and that, in any event, the CDN services tariff should not apply for competitors that were not party to Telecom Decision 2007-78.
12. TBayTel proposed, as an alternative to removing its CDN services tariff, amending the tariff to specify that a large carrier providing services to national and provincial clients in TBayTel's territory is not a competitor for the purposes of the Carrier Access Tariff and is therefore not entitled to receive CDN services and rates.

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<sup>1</sup> Bell Aliant Regional Communications, Limited Partnership; Bell Canada; MTS Allstream; Saskatchewan Telecommunications; and TCC

TBayTel submitted that, given its status as a small ILEC operating in a mainly municipal territory, it is unable to participate in requests for proposals issued by businesses that purchase telecommunications services on a provincial or national basis. TBayTel submitted that it should therefore not be considered a competitor of MTS Allstream and TCC for those customers, and that MTS Allstream and TCC should not have access to CDN rates in TBayTel's territory.

13. MTS Allstream and TCC opposed TBayTel's request to remove its CDN services tariff. MTS Allstream submitted that TBayTel had received a *bona fide* request for competitor services and that, as a result, it was obligated to file the related tariffs, including the CDN services tariff.
14. TCC conceded that in Telecom Decision 2005-6, the Commission did not mandate TBayTel to issue a CDN services tariff. MTS Allstream and TCC submitted that they had made business plans based on the presence of the CDN services tariff, which was filed by TBayTel and approved by the Commission as per subsection 25(1) of the *Telecommunications Act*. TCC noted that it had entered into contracts with end-users based on the availability of CDN services and rates. MTS Allstream and TCC argued that they would suffer economic hardship if CDN services and rates were removed. They added that permitting the removal of the CDN services tariff would signal to the industry that tariffs could not be relied upon and would thus undermine regulatory certainty.
15. MTS Allstream and TCC also opposed TBayTel's proposal to amend its CDN services tariff. They argued that basing the eligibility of TBayTel's competitors to receive CDN services and rates on their size, customer base, and intentions would be unprecedented and unjustly discriminatory. They submitted that, in such a situation, large competitors would be at a significant disadvantage when trying to compete in TBayTel's territory against smaller, local carriers that are eligible to receive CDN services and rates, and against TBayTel itself.

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

16. The Commission notes that the small ILECs were not parties to the proceeding that led to Telecom Decision 2005-6, which established the CDN services framework, and that the determinations set out in that decision do not apply to the small ILECs. The Commission also notes that the implementation of local competition in the territories of the small ILECs did not address the inclusion of CDN services.
17. The Commission notes that of the small ILECs' territories where local competition has been implemented, TBayTel's territory is the only one in which a CDN services tariff has been implemented. However, the Commission notes that ExaTEL, the only company that requested the CDN services tariff in TBayTel's territory as part of a *bona fide* local competition request, is not currently making use of that tariff. Accordingly, the Commission considers that TBayTel's CDN services tariff was implemented as a result of a unique set of circumstances, not in response to a regulatory requirement.

18. As a result of this unique set of circumstances, the Commission notes that it has not examined the issue of compensating TBayTel for the loss of retail revenues due to the introduction of CDN services in its territory. However, as per the determinations set out in Telecom Decision 2005-6, the Commission notes that the large ILECs subject to that decision, with the exception of Saskatchewan Telecommunications (SaskTel), were compensated for such losses through their deferral accounts. Because SaskTel's deferral account did not contain sufficient funds to compensate the company, the Commission established alternative rules to minimize related revenue impacts.
19. The Commission also notes that TBayTel's CDN services tariff was implemented without consideration of the essentiality of CDN services in a small ILEC territory.
20. Given the foregoing circumstances, the Commission considers that TBayTel's CDN services tariff should continue to be available, but limited to the services that TBayTel is currently providing. In the Commission's view, this solution achieves an appropriate balance between the interests of existing customers who have negotiated contracts and/or developed business plans based on existing rates, and TBayTel's interests in ensuring that it does not suffer undue economic harm.
21. The Commission notes that in Telecom Decision 2008-17, it established phase-out periods for several CDN services provided by the large ILECs. The Commission considers that TBayTel's CDN services should be phased out, consistent with the large ILECs' phase-out plan. The phase-out periods are set out in the Appendix to this decision.
22. In light of all the above, the Commission directs TBayTel to continue to provide CDN services only to MTS Allstream and TCC for existing circuits at existing CDN rates, subject to the phase-out periods provided in the Appendix to this decision. Any new circuits ordered by new or existing customers should be provided at DNA rates.

## **II. Should existing CDN-rated circuits be re-rated retroactively to DNA rates?**

23. TBayTel proposed to re-rate current CDN-rated circuits to DNA rates, retroactive to 23 October 2009 for services provided to MTS Allstream and 3 December 2009 for services provided to TCC.
24. MTS Allstream and TCC opposed TBayTel's proposal. MTS Allstream submitted that no compensation should be expected for past application of the Commission-approved CDN services tariff.

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

25. The Commission considers that TBayTel charged CDN rates, and MTS Allstream and TCC paid these rates, in accordance with the CDN services tariff, which was in force at the time. The Commission therefore considers that there is no basis upon which to revisit those rates in order to refund TBayTel.

26. Accordingly, the Commission **denies** TBayTel's request to retroactively re-rate CDN-rated circuits to DNA rates for MTS Allstream and TCC.

Secretary General

### **Related documents**

- Telecom Order CRTC 2010-294, 19 May 2010
- *Revised regulatory framework for wholesale services and definition of essential service*, Telecom Decision CRTC 2008-17, 3 March 2008
- Telecom Order CRTC 2007-398, 29 October 2007
- *Implementation of local competition in TBayTel's serving territory – ExaTEL Inc. and Shaw Communications Inc.*, Telecom Decision CRTC 2007-78, 31 August 2007
- *Revised regulatory framework for the small incumbent local exchange carriers*, Telecom Decision CRTC 2006-14, 29 March 2006
- *Competitor Digital Network Services*, Telecom Decision CRTC 2005-6, 3 February 2005, as amended by Telecom Decision CRTC 2005-6-1, 28 April 2006

## Appendix

### CDN services by category

#### a) Conditional essential

- CDN DS-0 and DS-1 access – No phase-out period

#### b) Non-essential subject to phase-out

- DS-0 and DS-1 intra-exchange transport; DS-3, OC-3, and OC-12 access; and associated channelization – Five years from the date of Telecom Decision 2008-17
- All other CDN services – Three years from the date of Telecom Decision 2008-17