



Telecom Decision CRTC 2013-399

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Ottawa, 9 August 2013

Bell Aliant Regional Communications, Limited Partnership, and Bell Canada – Application to review and vary determinations made in Telecom Decisions 2013-72 and 2013-73 regarding the use of a common billing model for both residential and business wholesale high-speed access (HSA) services and the markup associated with business wholesale HSA services

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In this decision, the Commission denies the requests from the Bell companies to review and vary Telecom Decisions 2013-72 and 2013-73 with regard to the use of a common billing model for both residential and business wholesale high-speed access (HSA) services and the markup associated with business wholesale HSA services, respectively. This decision will ensure that independent service providers will continue to benefit from the implementation of a common billing model thereby reducing disruption to end-users and additional costs to the independent service providers.

Background

1. Wholesale high-speed access (HSA) services of large incumbent local exchange carriers (ILECs) and cable carriers enable independent service providers to offer retail Internet and other services to their own end-users. As a result of the availability of wholesale HSA services, residential and business end-users have greater choice in the Internet services that are available to them. Wholesale HSA services are offered under terms and conditions that must be approved by the Commission, whereas the Commission has refrained from regulating the rates and most terms and conditions applicable to retail Internet and other service offerings.
2. In Telecom Regulatory Policy 2013-70, the Commission described the policy considerations that it used to decide the outcome of a number of Part 1 applications regarding the rates, terms, and conditions applicable to wholesale HSA services provided by large ILECs and cable carriers. Specific decisions regarding the issues raised in these applications were detailed in a group of decisions associated with Telecom Regulatory Policy 2013-70, including Telecom Decisions 2013-72 and 2013-73. In those decisions, the Commission, among other things, decided to amend the rates, terms, and conditions applicable to residential and business wholesale HSA services in response to various issues raised by the Canadian Network Operators Consortium Inc. (CNOc).

Application

3. The Commission received an application from Bell Aliant Regional Communications, Limited Partnership and Bell Canada (collectively, the Bell companies), dated 25 March 2013, requesting that the Commission review and vary certain determinations in Telecom Decisions 2013-72 and 2013-73. The Bell companies alleged that two aspects of these decisions were errors in law and/or errors in fact that raised substantial doubt about the correctness of these decisions. More specifically, the Bell companies submitted that there is substantial doubt regarding the Commission's decisions to impose a common billing model for both residential and business wholesale HSA services (Telecom Decision 2013-72) and reduce the markup¹ applicable to business wholesale HSA services (Telecom Decision 2013-73).
4. The Commission received submissions regarding the application from CNOC, MTS Inc. and Allstream Inc. (collectively, MTS Allstream), Primus Telecommunications Inc. (Primus), the Public Interest Advocacy Centre (PIAC), TELUS Communications Company (TCC), and Vaxination Informatique (Vaxination). The public record of this proceeding, which closed on 9 May 2013, is available on the Commission's website at www.crtc.gc.ca under "Public Proceedings" or by using the file number provided above.
5. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications that are filed pursuant to section 62 of the *Telecommunications Act* (the Act). Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, due to, for example, one or more of the following: 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.

Issues

6. The Commission has identified the following issues to be addressed in this decision:
 - I. Did the Commission err by deciding to impose a common billing model for both residential and business wholesale HSA services in Telecom Decision 2013-72?
 - II. Did the Commission err in setting the markup for business wholesale HSA services in Telecom Decision 2013-73?

¹ "Markup" is defined as the difference between the cost and the rate of a service. For example, if the service cost is \$100 and the markup is 15 percent, then the service rate is \$115. Markup provides for the recovery of fixed and common costs, such as corporate overheads, that do not vary with the offering of a service. These costs are not incremental to providing wholesale services and hence are not recovered in incremental wholesale cost studies. Markup should not be confused with profit margin, which may include consideration of corporate overheads that are not included in incremental costing analysis.

I. Did the Commission err by deciding to impose a common billing model for both residential and business wholesale HSA services in Telecom Decision 2013-72?

7. The Bell companies, supported by TCC, argued that the interim billing model for wholesale HSA services,² which provided for separate and different billing models for residential and business wholesale HSA services, allowed a level of billing flexibility that is simple to implement because it is already in use. The Bell companies further argued that, though the interim model is flawed in some respects, it is widely supported by the industry. The Bell companies submitted that they were prepared to live with the model's flaws without further regulatory process. According to the Bell companies, the decision in Telecom Decision 2013-72 to replace the interim model with a single billing model would require changes to billing systems, and hence the decision violates the Policy Direction³ requirement that regulation should be minimally intrusive. On that basis, the Bell companies submitted that the decision to mandate a single billing system for wholesale HSA services is an error in law.
8. The Bell companies also argued that the requirement to implement a single billing model effectively requires them to apply capacity-based billing (CBB) to business wholesale HSA services. According to the Bell companies, the application of CBB to business wholesale HSA services is inappropriate because CBB is a traffic management system intended to apply to peak period traffic whereas business traffic occurs mostly in off-peak periods.⁴ As such, the Bell companies submitted that the Commission's decision to apply CBB to business wholesale HSA services is an error in fact.
9. CNOC, MTS Allstream, PIAC, and Vaxination submitted that the interim billing model, which permits multiple billing models for wholesale HSA services, is more intrusive and unjustly burdensome for the independent service providers that use these services. Vaxination argued that the use of multiple billing models for wholesale HSA services results in discrimination between independent service providers that serve only business customers relative to those serving both business and residential customers. CNOC further submitted that its membership's support for the interim billing model was conditional on the successful resolution of many outstanding billing issues through further regulatory process.
10. CNOC, supported by other parties, also noted that the Commission's decision to apply a single billing model, and to make residential and business wholesale HSA rates uniform, made further regulatory processes unnecessary, and hence resulted in less intrusive regulation than under the interim model.

² Approved in Telecom Decision 2012-60.

³ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006

⁴ Further, according to the Bell companies, the application of CBB to business wholesale HSA services runs counter to statements made by the Commission's Chairman to the Standing Committee on Industry, Science and Technology that usage-based billing systems would only apply to residential wholesale HSA services.

11. CNOC also argued that the application of CBB to business wholesale HSA services makes both economic and regulatory sense whether or not it is combined with residential traffic. As noted by CNOC, CBB establishes rates based on costs caused by the peak traffic of independent service providers.

Commission's analysis and determinations

12. The Commission notes that while the Bell companies indicated that they were prepared to work with the interim billing model for wholesale HSA services without further changes, other parties to this proceeding did not share that position. CNOC provided evidence that further ongoing regulatory processes would be required to ensure the viability of the interim model. The Commission also notes concerns that the interim model creates the potential for service disruptions to end-users, and raises the potential for discriminatory treatment of independent service providers based on the type of end-users that they elect to serve.
13. In light of the evidence, the Commission finds that maintaining the flexibility to apply different billing models to different segments of the wholesale HSA market would require a greater level of regulatory intervention in this market than would come about if the same billing model were applied to the entire wholesale HSA market. As such, the Commission finds that its decision in Telecom Decision 2013-72 to require that the same billing model be applied to both residential and business wholesale HSA services is consistent with the Policy Direction requirement to interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives of the Act.
14. The Commission further notes that its decision to require the use of a single billing model does not prevent a provider of wholesale HSA services from negotiating an off-tariff agreement based on a different billing model should parties to such an agreement find such an arrangement advantageous. Telecom Regulatory Policy 2009-19 permits off-tariff agreements on a forbearance basis for conditional essential and conditional mandated non-essential services.
15. With regard to the Bell companies' submissions regarding the application of CBB to business wholesale HSA services, the Commission notes that CBB requires an independent service provider to determine the network capacity needed to satisfy the demands of its end-users and leaves the management of that capacity to the independent service provider. The Commission does not agree that this billing model could be described as a traffic management tool. Further, the Commission can find no evidence to support the Bell companies' position that CBB should not be applied to the business wholesale HSA market segment.
16. In light of the above, the Commission finds that there is no error in law or in fact that raises substantial doubt as to the correctness of the Commission's decision in Telecom Decision 2013-72 to require that providers of residential and business wholesale HSA services use the same billing model for these services. The

Commission therefore **denies** the Bell companies' application to rescind this requirement.

II. Did the Commission err in setting the markup for business wholesale HSA services in Telecom Decision 2013-73?

17. The Bell companies, supported by TCC, submitted that the Commission erred in law when it decided in Telecom Decision 2013-73 to impose a common markup on both its residential and business wholesale HSA services, thus setting the rates for the Bell companies' business wholesale HSA services provided on fibre-to-the-node (FTTN) facilities at the same level as the rates for comparable residential wholesale HSA services. In this regard, the Bell companies submitted that this leads to a reduction in their revenues, and that any reduction in their revenues reduces their incentives to invest in new infrastructure. In the Bell companies' view, the Commission failed to consider the impact that its decision would have on the Bell companies' incentives to invest in new infrastructure, as is required under Order in Council 2009-2007.⁵
18. Further, the Bell companies argued that if the Commission determines that a common rate for residential and business wholesale HSA services provided on FTTN facilities is to be provided, the common rate should be at a higher markup for both residential and business wholesale HSA services in order to provide the Bell companies with the same revenues.
19. The Bell companies estimated that a markup of 50 percent on wholesale HSA services provided over FTTN facilities would achieve revenue neutrality and would therefore not impair their incentives to invest in new infrastructure. However, the Bell companies were, for the time being, prepared to accept the higher markup only on business wholesale HSA services provided over FTTN facilities, but they reserved the right to apply for the higher markup on residential wholesale HSA services provided over FTTN networks at some future date.
20. CNOc, MTS Allstream, PIAC, and Vaxination took issue with the arguments raised by the Bell companies. PIAC noted that Order in Council 2009-2007 was not a general policy direction applicable to future Commission proceedings and decisions. Further, in PIAC's submission, the Bell companies misrepresented the Order in Council by only referencing its direction to consider the impact of regulatory measures on incentives to invest, and not referencing the other directions cited in the Order in Council, such as the need to encourage competition, innovation, and consumer choice.
21. PIAC also argued that the Bell companies completely overlooked the Commission's findings in Telecom Regulatory Policy 2013-70, which presented the range of issues that were balanced by the Commission in its decisions regarding the rates for residential and business wholesale HSA services in Telecom Decision 2013-73.

⁵ P.C. 2009-2007, 10 December 2009

22. CNOc, supported by MTS Allstream and Vaxination, submitted that the 40 percent markup approved for wholesale HSA services provided on FTTN facilities appropriately compensates for the costs incurred in providing these services. These parties submitted that the Bell companies had presented no evidence to suggest that a markup of 40 percent on wholesale HSA services provided on FTTN facilities would provide inadequate compensation or an insufficient incentive to invest. MTS Allstream submitted that the Bell companies acknowledged that 40 percent is a reasonable markup for these wholesale HSA services when they amended their request for a 50 percent markup on all wholesale HSA services provided on FTTN facilities to request that the higher markup only apply to business wholesale HSA services.

Commission's analysis and determinations

23. The Commission notes that Order in Council 2009-2007, which directed the Commission to undertake a proceeding to reconsider its previous speed-matching decisions in 2008 and 2009, was not a general policy direction binding on future proceedings of the Commission. Nonetheless, the Commission notes that its statutory mandate to achieve the policy objectives of the Act requires that the Commission ensure that its decisions promote the use of efficient and competitive Canadian networks. In this regard, the question of the appropriate level of compensation provided to incumbent carriers in the provision of wholesale services is germane.
24. The Commission also notes that the decision it made in Telecom Decision 2013-73 to require incumbents to provide business wholesale HSA services to independent service providers at the same rates as those approved for the equivalent residential wholesale HSA services was made under the policy considerations set out in Telecom Regulatory Policy 2013-70, which included consideration of the appropriate level of compensation to be provided to incumbent carriers for the provision of wholesale HSA services.
25. In light of the above, the Commission considers that the impact of the decision on incentives to invest in new infrastructure was taken into account in determining the appropriate markup.
26. The Commission notes that a reduction in the level of markup on business wholesale HSA services may negatively affect the revenues of the Bell companies, but the reduction is not in and of itself sufficient to establish that the Bell companies' incentive to invest in new network infrastructure would be impaired. In the Commission's view, the Bell companies did not provide evidence of such impairment on the record of this proceeding.

27. In light of the above, the Commission finds that there is no error in law or in fact that raises substantial doubt as to the correctness of its decision in Telecom Decision 2013-73 concerning the appropriate markup for business wholesale HSA services. The Commission therefore also **denies** the Bell companies' request that the markup on business wholesale HSA services provided on FTTN facilities be increased to 50 percent.

Secretary General

Related documents

- *Canadian Network Operators Consortium Inc. – Application to review and vary Telecom Regulatory Policies 2011-703 and 2011-704*, Telecom Decision CRTC 2013-73, 21 February 2013
- *Canadian Network Operators Consortium Inc. – Application requesting relief to address implementation of the capacity model approved in Telecom Regulatory Policy 2011-703*, Telecom Decision CRTC 2013-72, 21 February 2013
- *Disposition of review and vary applications with respect to wholesale high-speed access services: Introductory statement*, Telecom Regulatory Policy CRTC 2013-70, 21 February 2013
- *Implementation date for the wholesale high-speed access services capacity model approved in Telecom Regulatory Policy 2011-703*, Telecom Decision CRTC 2012-60, 27 January 2012
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Bell Canada et al.'s application to review and vary Telecom Decision 2008-17 with respect to negotiated agreements*, Telecom Regulatory Policy CRTC 2009-19, 19 January 2009