



## Telecom Decision CRTC 2019-94

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Ottawa, 3 April 2019

*Public record: 8662-A151-201807471*

### **Allstream Business Inc. and Zayo Canada Inc. – Application to review and vary Telecom Decision 2018-200**

*The Commission **denies** Allstream Business Inc. and Zayo Canada Inc.'s request to review and vary Telecom Decision 2018-200.*

#### **Application**

1. The Commission received an application from Allstream Business Inc. and Zayo Canada Inc. (collectively, Allstream Business) to review and vary Telecom Decision 2018-200. Specifically, Allstream Business requested that the Commission reverse its determination to forbear from the regulation of unbundled local loops (ULLs)<sup>1</sup> in 88 exchanges in Bell Canada's operating territory.
2. The Commission received interventions regarding Allstream Business's application from Bell Canada and the Independent Telecommunications Providers Association (ITPA).

#### **Background**

3. In Telecom Decision 97-8, the Commission required the incumbent local exchange carriers (ILECs) to unbundle their local access facilities to make ULLs available on a wholesale basis to competitive local exchange carriers to support local competition.
4. In Telecom Regulatory Policy 2015-326, the Commission determined that ULLs were no longer essential and should therefore cease to be mandated. In its analysis, the Commission considered that the primary relevant downstream retail market for ULLs to be the local wireline voice market, including both residential and business markets, and that the withdrawal of mandated access to ULLs would not substantially affect retail competition.
5. The Commission indicated that in exchanges where there was existing demand for ULLs, ULLs were to be made available for a three-year phase-out period, which would ensure that competitors would have had adequate time to migrate away from ULLs. As well, this would mitigate any negative impacts that forbearance could have

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<sup>1</sup> ULLs provide a transmission path by means of copper facilities between an end user's premises and an ILEC's central office that can be used by competitors to provide local telephony and Internet access services to residential and business customers.

on their operations. If an ILEC intended to continue to make ULLs available in concerned exchanges after the expiry of the phase-out period, the ILEC could choose to file a forbearance application regarding the provision of its ULLs. The ILECs, in filing such applications, were encouraged to put forth an analytical framework that the Commission could use to assess forbearance in an administratively efficient manner, and were required to justify why their request for forbearance would not impact local forbearance decisions that the Commission had previously made on the basis of ULLs being available.

6. On 26 July 2017, Bell Canada filed an application in which it requested that the Commission forbear from regulating the provision of ULLs in 88 exchanges in its operating territory where demand for ULLs continued to exist.
7. Pursuant to subsection 34(1) of the *Telecommunications Act* (the Act), the Commission may forbear from the regulation of any service where it finds that to do so would be consistent with the Canadian telecommunications policy objectives. Pursuant to subsection 34(2) of the Act, the Commission shall forbear where it finds that there is competition sufficient to protect the interests of users. Finally, pursuant to subsection 34(3), the Commission shall not forbear where it finds that to do so would be likely to impair unduly the establishment or continuance of a competitive market for the service. In Telecom Decision 2018-200, the Commission found that Bell Canada's ULLs met the criteria for forbearance under subsections 34(1) and 34(3) of the Act.

### **Review and vary criteria**

8. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate 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.

### **Issues**

9. The Commission has identified the following issues to be addressed in this decision:
  - Is there substantial doubt as to the correctness of the relevant downstream market set out in Telecom Decision 2018-200?
  - Is there substantial doubt as to the correctness of Telecom Decision 2018-200 due to an error in law in the Commission's interpretation and application of subsection 34(1) of the Act?

- Is there substantial doubt as to the correctness of the Commission’s analytical approach in Telecom Decision 2018-200 under subsection 34(2) of the Act?
- Is there substantial doubt as to the correctness of the Commission’s analysis in Telecom Decision 2018-200 under subsection 34(3) of the Act?

**Is there substantial doubt as to the correctness of the relevant downstream market set out in Telecom Decision 2018-200?**

**Positions of parties**

10. Allstream Business submitted that the Commission erred in Telecom Decision 2018-200 by not properly identifying the relevant downstream market for ULLs as the market for wireline time-division multiplexing (TDM)-based residential and business telecommunications services.<sup>2</sup> Allstream Business added that these TDM-based services include dedicated wireline voice, lower-speed data, and signal services (e.g. alarm services) delivered using a dedicated copper loop. Specifically, Allstream Business indicated that it typically uses ULLs to provide downstream TDM-based services to businesses and that most of its ULLs are used for voice services.
11. Allstream Business submitted that cable and wireless transmission facilities are not substitutes for the provision of TDM-based services in downstream residential and business telecommunications service markets. The company was particularly concerned for the business market where there is no dual cable network to offer widespread competing upstream and/or downstream services.
12. Allstream Business submitted that its TDM-based services are unique and provide customers with greater security, reliability, and quality of service since the services are wholly dedicated and offered over a network that is self-powered and not reliant on an alternative source of power. As a result, these services are not, or are only minimally, interrupted in the event of power outages. Allstream Business indicated that customers of TDM-based services include governments, banks, and public health and public safety institutions. The company stated that it undertook an initiative to migrate some of its TDM/ULL-based voice business customers to voice over Internet Protocol (VoIP)-based alternatives. Based on its experience with this migration initiative, Allstream Business submitted that there continues to be a strong demand for TDM-based services among certain customers.
13. Bell Canada noted that Allstream Business did not propose the above-mentioned relevant downstream market and definition for TDM-based services in submissions to various proceedings filed prior to this application. Therefore, in Bell Canada’s

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<sup>2</sup> Time-division multiplexing is a type of digital multiplexing in which two or more bit streams or signals are transferred apparently simultaneously as sub-channels in one communication channel, but are physically taking turns on the channel.

opinion, the Commission did not err by failing to consider something that was never raised.

14. In reply, Allstream Business disagreed with Bell Canada and submitted that a review and vary application is not limited to arguments raised in the original proceeding.

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

15. In the proceeding that led to Telecom Decision 2018-200, Allstream Business did not raise the issue of the relevant downstream market. This issue was raised only in the context of the company's review and vary application, where it submitted that the relevant downstream market should have been identified as TDM-based services. Since this information was not submitted during the record of the proceeding that led to Telecom Decision 2018-200, the Commission could not have considered it in rendering its determinations in that decision. This information also does not represent a new principle which has arisen as a result of the determinations set out in Telecom Decision 2018-200, or a fundamental change in circumstances or facts since that decision. Accordingly, the information does not fall within the Commission's review and vary criteria.
16. Nevertheless, the Commission considered both the upstream and downstream product markets for ULLs in Telecom Regulatory Policy 2015-326. With respect to the relevant upstream market, the Commission considered that ULLs form their own distinct upstream product market. With respect to the relevant downstream market, the Commission considered that ULLs were a legacy service used primarily to support retail competition for local phone services and, to a lesser extent, for lower-speed Internet access services. As a result, the Commission considered that the primary relevant downstream market for ULLs is the local wireline voice market, including both residential and business markets. The Commission therefore considered this market in determining whether ULLs should be deemed essential and therefore mandated.
17. The Commission considers that while other services can be provided using ULLs, it did not need to analyze all relevant downstream markets for ULLs. Such a task would not have been practical, would have caused significant administrative burden for the industry, and would not have been consistent with past Commission practice. The Commission considers that it was sufficient to assess only the primary relevant downstream market.
18. Regardless, the Commission considered whether the TDM-based services referenced in Allstream Business's submission could constitute the primary relevant market for ULLs. While there continues to be some demand for ULLs, and while some of that demand is likely attributable to other TDM-based services, the majority of this demand is still driven by local wireline voice services. Further, the extent to which overall ULL demand is driven by the unique characteristics associated with TDM-based services, rather than by local wireline voice services, was not demonstrated.

19. In light of the above, the Commission finds that Allstream Business failed to demonstrate that there was substantial doubt as to the correctness of the relevant downstream market set out in Telecom Decision 2018-200.

**Is there substantial doubt as to the correctness of Telecom Decision 2018-200 due to an error in law in the Commission's interpretation and application of subsection 34(1) of the Act?**

**Positions of parties**

20. Allstream Business submitted that according to Telecom Decision 94-19, the Commission's discretion under subsection 34(1) of the Act is limited, and that the Commission may consider refraining from regulating in monopoly markets only where it has considered and made determinations that after forbearance (i) rates are likely to be just and reasonable, and (ii) the potential for unjust discrimination or undue preference will likely be mitigated. Allstream Business submitted that the Commission did not consider these limitations in Telecom Decision 2018-200.
21. With respect to just and reasonable rates, Allstream Business submitted that the elimination of competitors from the downstream retail market for TDM-based services exposes downstream customers to unjust and unreasonable rates. Further, it submitted that there is a danger that Bell Canada will abuse its dominance in the provision of ULLs by offering unregulated ULLs at rates, terms and conditions that are unjust and unreasonable.
22. With respect to the potential for unjust discrimination and undue preference, Allstream Business submitted that the incentive to discriminate unjustly is driven by the ability to profit from unjust discrimination. It submitted that the ability to discriminate unjustly is greater if Bell Canada, as the supplier of the upstream ULL service, has a monopoly.
23. Allstream Business also argued that the Commission erred when it determined that forbearance from the regulation of ULLs would encourage migration to, and investment in, more advanced technologies. The company submitted that the Commission failed to take into consideration the factors that drive investment in advanced technologies and the evolution of upstream and downstream services. Allstream Business submitted that these factors are technology advances, competitive necessity, customer demand, business synergies, and scale. It also submitted that the decline in ULLs is the result of migration by ILECs and wholesale customers to more technologically advanced substitutes to provide voice and Internet services. The company argued that forbearance from the regulation of the provision of ULLs during the transition to a fibre access network architecture will eliminate competitive choice for customers that are currently serviced using the copper access network architecture, which will lessen competition.
24. The ITPA agreed with Allstream Business that forbearance from the regulation of ULLs in the 88 exchanges will lessen customer choice and reduce opportunities for

competitive innovation in the provision of retail services. The ITPA submitted evidence that many of its member companies still rely on ULLs to serve customers, often in rural population centres where there are little or no other options for wholesale services.

25. Bell Canada submitted that the Commission did not err by concluding that ULLs could be forborne from regulation on the basis of subsection 34(1) of the Act. Bell Canada disagreed with Allstream Business's interpretation of Telecom Decision 94-19. In Bell Canada's view, the Commission's discretion must be read in the context of retail service markets, not wholesale ones. It submitted that in cases where retail markets are subject to competition sufficient to protect the interests of users, there is no reason for the Commission to refrain from forbearing a wholesale input under subsection 34(1) of the Act.

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

26. In Telecom Decision 94-19, the Commission established a policy framework that provided a structured means of determining whether competition is sufficient to protect the interests of users. It stated that forbearance from regulation under subsection 34(1) of the Act, either in monopoly markets or in markets that are not, or will not be, subject to competition sufficient to protect the interests of users, should be limited to situations where rates would remain just and reasonable and where rates and services would remain available without unjust discrimination, regardless of the lack of either regulation or sufficient competitive market forces. The Commission considered that failure to limit forbearance under subsection 34(1) of the Act in such a fashion would be inconsistent with its overall mandate and would imply the use of a lower threshold, in terms of consumer protection, for forbearance in monopoly markets than in competitive markets.
27. Notwithstanding this statement of its general policy, the Commission retains, and must retain, the discretion to forbear from regulation or reach any other decision within its jurisdiction in a given matter, where the evidence on the record of a proceeding justifies such a decision.
28. In Telecom Decision 2018-200, the Commission reiterated that ULLs are a non-essential service that ILECs should no longer be required to provision on a mandated basis and that these determinations were based on a substantial amount of evidence and arguments concerning, among other things, the availability of substitutes for ULLs. The Commission noted that alternatives to ULLs, such as wholesale high-speed access, were available and were being used. Therefore, there is a competitive alternative available for wholesale customers if ULLs were to be withdrawn from services or if there were to be significant price increases to the price for ULLs. Further, the Commission considered that alternatives to ULLs do not necessarily have to be perfect substitutes for one another in each and every situation in order to provide pricing discipline.

29. Since the Commission already determined that ULLs were not essential and that alternative services were available to serve the relevant downstream market, regardless of any lack of competition for ULLs, the Commission considers that it applied its discretion correctly and did not err in law when it decided, in Telecom Decision 2018-200, to forbear from regulating Bell Canada's ULLs under subsection 34(1) of the Act.
30. Accordingly, the Commission finds that Allstream Business has failed to demonstrate that there was substantial doubt as to the correctness of Telecom Decision 2018-200 due to an error in law in the Commission's interpretation and application of subsection 34(1) of the Act.

**Is there substantial doubt as to the correctness of the Commission's analytical approach in Telecom Decision 2018-200 under subsection 34(2) of the Act?**

**Positions of parties**

31. Allstream Business submitted that the Commission's analytical approach in Telecom Decision 2018-200 under subsection 34(2) of the Act was inconsistent. Allstream Business submitted that the Commission stated that it need not undertake a subsection 34(2) analysis because the Commission had already applied a similar market power test<sup>3</sup> to ULLs as part of the Essentiality Test<sup>4</sup> in Telecom Regulatory Policy 2015-326. The company submitted that (i) the Commission did not analyze market power for wholesale ULLs and downstream TDM-based telecommunications services in Telecom Regulatory Policy 2015-326, (ii) subsection 34(2) of the Act applies only to competitive or soon-to-be competitive markets, and (iii) the Commission wrongly suggested that the reason why subsection 34(2) of the Act cannot be applied to wholesale ULLs was due to the presence or likely emergence of a competitive market. Allstream Business indicated that there is no competition in the upstream ULL market and therefore in the relevant downstream market for TDM-based services, and that there never would be.
32. Bell Canada replied that the Commission determined that forbearance from the regulation of ULLs was justified under both subsections 34(1) and 34(2) of the Act since the Commission already applied a similar market power test to ULLs as part of the Essentiality Test in Telecom Regulatory Policy 2015-326.

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<sup>3</sup> The market power test, as set out in Telecom Decision 94-19, consists of several evaluation criteria, including market share, supply and demand, barriers to entry, availability of substitutes, and technological factors.

<sup>4</sup> The Essentiality Test, set out in Telecom Regulatory Policy 2015-326, includes three components—namely, the input component, the competition component, and the duplicability component, which the Commission assesses to determine if a given competitive wholesale service is essential.

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

33. In Telecom Decision 2018-200, the Commission indicated that it typically uses a market power test to determine whether the requirements under subsection 34(2) of the Act are met. The Commission further stated that, since it had already applied a similar test of market power to ULLs as part of the Essentiality Test in Telecom Regulatory Policy 2015-326 and determined that withdrawal of the service would not result in a substantial lessening or prevention of competition, it was not necessary to reapply a full market power test under subsection 34(2) of the Act. As such, the Commission stated that it would examine Bell Canada's forbearance request pursuant to subsection 34(1) of the Act.
34. Allstream Business's arguments appear to address the Commission's approach to assessing ULLs in the proceeding that led to Telecom Regulatory Policy 2015-326, in which the Commission determined, based on a substantial amount of evidence and arguments, that ULLs were no longer essential and would no longer be mandated.
35. While the Commission often uses the market power test established in Telecom Decision 94-19 in assessing the competitiveness of a market, pursuant to subsection 34(2) of the Act, the Commission is within its powers to adopt any framework it considers to be appropriate in applying section 34 of the Act. In Telecom Decision 2018-200, the Commission made a determination under subsection 34(1) of the Act. The Commission did not indicate that forbearance was granted pursuant to subsection 34(2) of the Act. The Commission considers that it applied its discretion appropriately when it decided not to conduct a market power test under subsection 34(2) of the Act.
36. Accordingly, the Commission finds that Allstream Business failed to show substantial doubt as to the correctness of Telecom Decision 2018-200 regarding the Commission's analytical approach to subsection 34(2) of the Act.

## **Is there substantial doubt as to the correctness of the Commission's analysis in Telecom Decision 2018-200 under subsection 34(3) of the Act?**

### **Positions of parties**

37. Allstream Business submitted that there is substantial doubt as to the correctness of the Commission's analysis in Telecom Decision 2018-200 under subsection 34(3) of the Act given the Commission's flawed definition of the relevant downstream market and the fact that the Commission erred in considering cable and wireless services to be adequate substitutes for TDM-based services in downstream business telecommunications service markets.
38. Bell Canada submitted that there was no evidence on the record of the proceedings that led to Telecom Decision 2018-200, Telecom Decision 2016-246, or Telecom Regulatory Policy 2015-326 that suggested that TDM-based services formed a relevant retail market that would be affected by forbearance from the regulation of ULLs.

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

39. Given that the Commission has determined above that it did not err in its identification of the relevant downstream market in Telecom Decision 2018-200, the Commission finds that Allstream Business has failed to demonstrate that there is substantial doubt as to the correctness of Telecom Decision 2018-200 due to an error in law or fact in the Commission's analysis in its interpretation and application of subsection 34(3) of the Act.

## **Conclusion**

40. In light of all the above, the Commission **denies** Allstream Business's request to review and vary Telecom Decision 2018-200.

Secretary General

## **Related documents**

- *Bell Canada – Application for forbearance from the regulation of unbundled local loops*, Telecom Decision CRTC 2018-200, 5 June 2018
- *Allstream Inc. – Application to review and vary certain determinations set out in Telecom Regulatory Policy 2015-326 concerning the phase-out of mandated access to unbundled local loops*, Telecom Decision CRTC 2016-246, 29 June 2016
- *Review of wholesale wireline services and associated policies*, Telecom Regulatory Policy CRTC 2015-326, 22 July 2015; as amended by Telecom Regulatory Policy CRTC 2015-326-1, 9 October 2015
- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *Local competition*, Telecom Decision CRTC 97-8, 1 May 1997
- *Review of regulatory framework*, Telecom Decision CRTC 94-19, 16 September 1994