



Telecom Decision CRTC 2004-50

Ottawa, 22 July 2004

Follow-up to Telecom Decision CRTC 2002-76 – Location of the CSG and regulatory safeguards for affiliated carriers

Reference: 8638-C12-79/02

In this decision, a follow-up to Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters, Telecom Decision CRTC 2002-76, 12 December 2002 (Decision 2002-76), the Commission applies the determinations made in Decision 2002-76, with respect to the location and operation of Bell Canada's Carrier Services Group (CSG), to other large incumbent local exchange carriers (ILECs). The Commission determines that such ILECs must be the operators of the CSG for their tariffed services, and that no employee of any of the other large ILECs' affiliates can have any responsibility for the ILEC's CSG operations. The Commission also confirms its preliminary view set out in Decision 2002-76 that a Canadian carrier subject to common control with an ILEC (affiliated carrier) will be required to comply with section 25 and other applicable provisions of the Telecommunications Act whenever the affiliated ILEC would be required to do so. When examining a proposed tariff filed by an affiliated carrier, the Commission will apply the same criteria, with respect to the imputation test and the bundling rules, as it would apply if the tariff were filed by the affiliated ILEC.

Introduction

1. In *Regulatory safeguards with respect to incumbent affiliates, bundling by Bell Canada and related matters*, Telecom Decision CRTC 2002-76, 12 December 2002 (Decision 2002-76), the Commission disposed of an application by GT Group Telecom Services Corp. related to certain activities of Bell Canada and its affiliate, Bell Nexxia Inc. (Bell Nexxia) and to the adequacy of the affiliate rule.
2. Among other things, in Decision 2002-76, the Commission ordered that the Carrier Services Group (CSG) for Bell Canada's tariffed services be moved from Bell Nexxia to Bell Canada and further ordered that no employee of any of Bell Canada's affiliates have any responsibility for its CSG operations. The Commission noted that if Bell Canada chose to provision Bell Nexxia forborne services via Bell Canada's CSG, it would have had to file a revised CSG agreement for Commission approval by 27 January 2003.
3. The Commission directed Aliant Telecom Inc. (Aliant Telecom), MTS Communications Inc. (MTS), Saskatchewan Telecommunications (SaskTel), Société en commandite Télébec (Télébec), TELUS Communications Inc. (TCI) and TELUS Communications (Québec) Inc. (TELUS Québec) [collectively, the other large incumbent local exchange carriers (ILECs)] to confirm that they had not transferred their CSGs to affiliates and further directed those carriers to show cause why the Commission's conclusions with respect to the location and operation of Bell Canada's CSG should not also apply to them.

4. In addition, in Decision 2002-76, the Commission proposed certain regulatory safeguards with respect to Canadian carriers under common control with an ILEC (affiliated carriers). The Commission initiated a proceeding, directing Bell Canada and the other large ILECs to:
 - i) identify any and all affiliated carriers; and
 - ii) show cause why the Commission's proposed safeguards should not be implemented.
5. In Decision 2002-76, the Commission also implemented an interim regime, under which an affiliated carrier was not permitted to resell any tariffed services offered by the affiliated ILEC, except pursuant to a tariff filed by the affiliated carrier and approved by the Commission¹. The Commission specified that the interim regime would remain in effect until it had rendered a final determination in the show cause proceeding.

Process

6. With respect to the location and operation of the CSG, the Commission received submissions from Aliant Telecom, MTS, SaskTel, Télébec, TCI and TELUS Québec on 27 January 2003 and a submission from Bell Canada on 10 February 2003.
7. In accordance with the procedural directives with respect to the matter of the regulation of affiliated carriers, the Commission received submissions on 27 January 2003 from Aliant Telecom, Bell Canada, SaskTel, Télébec, TCI and TELUS Québec, each of which included a list of affiliated carriers. Also on 27 January 2003, MTS filed a submission stating that it had no affiliated carriers.
8. AT&T Canada Corp., on behalf of itself and AT&T Canada Telecom Services Company, [collectively, now Allstream Corp. (Allstream)], Call-Net Enterprises Inc. (Call-Net), François D. Ménard (Mr. Ménard), Vidéotron Télécom ltée (VTL), Bell Canada and TCI filed comments on 10 February 2003.
9. Bell Canada, SaskTel and TCI filed reply comments on 17 February 2003.
10. On 18 February 2003, Mr. Ménard filed comments responding to Bell Canada's reply.
11. At the Commission's request, Télébec filed, on 10 October 2003, additional information regarding its list of affiliated carriers.

Location and operation of the CSG

Background

12. In Decision 2002-76, the Commission stated that it was important to ensure that all service providers, including ILEC affiliates, were subject to the same procedures to access ILEC tariffed services. The Commission considered that this goal could best be achieved if the ILEC were the

¹ The Commission noted that Bell Nexxia resold Bell Canada's asymmetric digital subscriber line service to competing Internet service providers. The Commission suspended the prohibition in respect of this resale activity by Bell Nexxia, as well as in respect of any comparable resale activity by any affiliated carrier.

operator of the CSG and noted that this approach would minimize the opportunity and incentive for anti-competitive behaviour, while also ensuring that the CSG was located in an entity subject to the Commission's full regulatory overview under the *Telecommunications Act* (the Act).

Position of parties

13. Bell Canada confirmed that its entire CSG organization had been transferred from Bell Nexxia to Bell Canada and that no employee of Bell Nexxia any longer had any responsibility for Bell Canada's CSG operations.
14. Bell Canada was of the view that the current CSG and interconnection agreements effectively covered the provisioning of Bell Nexxia's forborne services via Bell Canada's CSG and, as a consequence, Bell Canada saw no need to file a revised CSG agreement for Commission approval. Bell Canada stated that it expected that Bell Nexxia would be amalgamated into Bell Canada by 1 April 2003, at which time, this consideration would disappear.
15. The other large ILECs confirmed that they had not transferred their CSGs to affiliates and presented no arguments as to why the Commission's conclusions regarding the location of Bell Canada's CSG, as set out in Decision 2002-76, should not apply to them.

Commission analysis and determination

16. Based on the record of this proceeding, the Commission considers that there are no valid reasons why the conclusions set out in Decision 2002-76 with respect to the location and operation of Bell Canada's CSG should not apply to the other large ILECs. Further, the Commission notes that none of the other large ILECs challenged these conclusions.
17. Accordingly, the Commission determines that each of the other large ILECs must be the operator of the CSG for its tariffed services and that no employee of any of the other large ILECs' affiliates can have any responsibility for the CSG operations.

Proposed regulatory safeguards with respect to affiliated carriers

Background

18. In Decision 2002-76, the Commission stated that, in its view, the primary opportunity for abusive behaviour in the provision of ILEC tariffed services arose when an entity was subject to common control with an ILEC. Further, the Commission stated that the record of the proceeding that led to Decision 2002-76 demonstrated that, from a regulatory perspective, in situations of common control, there was no meaningful distinction between the actions of the affiliate and the actions of the ILEC, since the actions of both entities were ultimately subject to control by a single person. In the Commission's view, if the affiliate and the ILEC were subject to common control, the activities of the affiliate were, from a regulatory perspective, equivalent to the activities of the ILEC and, consequently, the Commission stated that the affiliate's activities should be subject to the same rules as were applicable to the activities of the ILEC.

19. In Decision 2002-76, the Commission noted that affiliated carriers fell within the scope of section 25 of the Act. Section 25 prohibits a Canadian carrier from providing a telecommunications service except in accordance with a tariff filed with and approved by the Commission. This prohibition applies to every telecommunications service provided by every Canadian carrier, including a Canadian carrier that is affiliated with an ILEC, unless: (a) the Canadian carrier is within a class of carriers that has been exempted from the application of the Act pursuant to section 9 of the Act; or (b) the Commission has made a determination pursuant to section 34 of the Act to refrain from exercising its powers under section 25 in respect of the relevant telecommunications service and Canadian carrier.
20. In Decision 2002-76, the Commission noted that it had not exempted any class of Canadian carrier from the application of the Act.
21. With respect to the application of section 34, the Commission noted that it had issued several forbearance decisions that have been interpreted as applying to affiliated carriers.
22. In Decision 2002-76, the Commission noted that in order to forbear under subsection 34(1), the Commission must first make a finding of fact that to so refrain would be consistent with the Canadian telecommunications policy objectives. Given its finding that, from a regulatory perspective, there was no meaningful distinction between the activities of an ILEC and its affiliated carrier, the Commission was of the view that forbearance under subsection 34(1) would be justified for a telecommunications service of an affiliated carrier if, and only if, it would also be justified if the service were provided by the ILEC.
23. Similarly, the Commission expressed a preliminary view that if a service offered by an ILEC were not entitled to forbearance under subsection 34(2), then the same service offered by an affiliated carrier would not be entitled to forbearance under subsection 34(2). This followed from the fact that the services in question would be subject to the same degree of competition, since the ILEC and the affiliated carrier would not compete against each other. The Commission also expressed the preliminary view that if a service offered by an ILEC were subject to sufficient competition to justify forbearance for the ILEC, then forbearance would also be justified in respect of the same service offered by an affiliated carrier.
24. Consistent with this approach, the Commission stated its preliminary view that an affiliated carrier should be required to comply with section 25 and other applicable provisions of the Act whenever the affiliated ILEC would be required to do so. The Commission proposed to apply the same criteria when examining a proposed tariff filed by an affiliated carrier as it would apply if the tariff were filed by the affiliated ILEC. In particular, proposed tariffs would be required to comply with the Commission's bundling rules and imputation test requirements.

Position of parties

ILECs' comments

25. Bell Canada submitted that the Commission's proposed safeguards would have negative implications for development of competition in the provision of local access services by affiliated carriers that sell telecommunications services to national customers that are primarily based out-of-territory, but which may have incidental telecommunications requirements

in-territory. Bell Canada submitted that if Bell West Inc. (Bell West), an affiliated carrier of Bell Canada, wished to offer services to a large national account, the entire contract would require tariff approval from the Commission if it included any local access component in Ontario or Quebec as a bundled component of the national contract. Bell Canada submitted that this would impose a significant operational and competitive disadvantage on Bell West, rendering Bell West less responsive to customers' requirements in a market where it operates as a non-dominant carrier.

26. Bell Canada submitted that the requirement that affiliated carriers must comply with bundling rules and imputation test requirements would produce a result that was contrary to *Forbearance from regulation of incumbent local exchange carriers' out-of-territory services*, Decision CRTC 2001-534, 31 August 2001 (Decision 2001-534), in which the Commission noted that no party contested that ILECs do not have market power outside their traditional service territories. Bell Canada also noted that in Decision 2001-534, the Commission was of the view that where a company that operated as an ILEC in its local serving territory provided local exchange services outside its ILEC serving territory, it should be considered as operating as a competitive local exchange carrier (CLEC).
27. Bell Canada proposed an alternative measure whereby it would file an annual report setting out the proportion of revenues generated by each out-of-territory affiliated carrier from the sales of services within Bell Canada's serving territory, as a percentage of total revenues of the affiliated carrier. Bell Canada submitted that this report would provide conclusive evidence that the resale of telecommunications services within Bell Canada's territory represented only an incidental component of the affiliated carrier's overall business, as well as a modest component of the national services business of that carrier. As well, Bell Canada was prepared to file any other information that the Commission considered relevant to the assessment of market power, or lack thereof, by out-of-territory affiliated carriers.
28. Aliant Telecom expressed concern about the potential harm to affiliated carriers providing national services and harm to their national customers. Aliant Telecom concurred with Bell Canada's submission and its proposed alternative measure.
29. Télébec submitted that, in a competitive market where activities relied on a bid process, the presence of regulatory delay could strongly hurt the competitiveness of a company like its affiliate, Télébec Solutions Évoluées.
30. SaskTel submitted that the Commission's proposed safeguards could impose significant extra regulatory burdens and cost and that the increased regulatory control could come at the price of competition. SaskTel further submitted that if the Commission proceeded with its proposed safeguards, its affiliated carrier, Navigata Communications Inc. (Navigata), would be in a position where it would be difficult or almost impossible to compete, for national or regional business, with carriers unencumbered by these rules. SaskTel argued that the additional time delays and uncertainty of the ability to deliver on a contract until the Commission's approval of a tariff would be harmful to Navigata's ability to compete. SaskTel submitted that it would be a step backward to impede, through regulation, smaller facilities-based entrants such as Navigata who were providing meaningful competition and alternatives to the larger carriers.

31. SaskTel argued that the current regulation of Canadian carriers was appropriate and that it was not necessary to change the entire approach to regulation of these carriers in response to a complaint regarding a single ILEC affiliate. SaskTel submitted that there was no evidence or even allegation that the activities subject to complaint had occurred with respect to any other ILEC affiliate and stated that the fact that someone had contravened a rule did not mean that the rules themselves were wrong. SaskTel further noted that this proceeding was the third follow-up proceeding in which there had been a proposal to increase regulation for SaskTel and/or its affiliates in reaction to a complaint or breach of existing rules in another part of the country.
32. TCI submitted that it generally supported the Commission's approach to the regulation of wireline affiliated carriers.
33. TCI, however, submitted that the proposed safeguards should not apply, or should be modified as they apply to wireless affiliated carriers. TCI cited in *Forbearance – Services provided by non-dominant Canadian carriers*, Telecom Decision CRTC 95-19, 8 September 1995 (Decision 95-19), arguing that, in that decision, the Commission had expressly extended forbearance relief to affiliated carriers that were mobile service providers for services, other than wireless services, provided both within and outside of the affiliated ILEC's traditional serving territory.
34. TCI further submitted that wireless affiliated carriers operated in substantially different markets than wireline affiliated carriers and that wireless affiliated carriers neither competed against the ILEC, nor against the wireline competitors of the ILEC. TCI argued that these differences warranted different regulatory treatment.
35. TELUS Québec supported TCI's position.

Other parties' comments

36. Allstream submitted that Bell Canada, SaskTel and TCI had failed to show cause why the Commission's proposed safeguards should not be implemented. Allstream disagreed with SaskTel's argument regarding regulatory burden and submitted that the proposed safeguards merely ensured that regulatory protections were not circumvented. Allstream submitted that the purpose of the Commission's proposed safeguards was to prevent the strategic use of an affiliated carrier for anti-competitive purposes within the ILEC's territory. Allstream argued that to permit Bell West to avoid regulatory scrutiny over its national accounts would re-invite the very type of abuse that resulted in Decision 2002-76.
37. Call-Net submitted that the Commission's proposed safeguards were conceptually and practically sound and absolutely necessary in order to ensure fair and effective competition. Call-Net was of the view that Bell Canada was seeking to replace Bell Nexxia with Bell West, to the same regulatory purpose and objective, and submitted that because of the potential use of affiliates such as Bell West for anti-competitive purposes, the Commission must make the interim and proposed regimes permanent.
38. VTL also supported the Commission's proposed safeguards, submitting that the circumstances leading to Decision 2002-76 clearly demonstrated that it was necessary to regulate the services of affiliated carriers in the same way as those services offered directly by the ILEC. VTL

further submitted that the use of affiliates could provide an ILEC and its affiliated carrier with the possibility of thwarting the development of a competitive market in the ILEC's territory and could provide an opportunity for anti-competitive cross-subsidization practices.

39. Mr. Ménard submitted that all of the ILECs had failed to show cause as to why the proposed safeguards should not apply and further submitted that the proposed safeguards contemplated by the Commission would ensure that out-of-region affiliated carriers provided services that could be guaranteed to meet an imputation test for the services they procured from their affiliated ILEC.
40. Allstream, VTL, Mr. Ménard and Call-Net objected to Bell Canada's proposed alternative measure. Allstream submitted that it was a wholly inadequate measure, which would be ineffectual to prevent Bell Canada from using its affiliated carriers to strategically target key national accounts, the in-territory sales from which might nonetheless appear modest in the overall context of the affiliate's undertaking. VTL submitted that the proposed alternative measure did not allow the blocking or monitoring of cross-subsidization practices for specific cases, where the revenues, on an annual basis, appeared incidental to the total revenues generated by that enterprise. Mr. Ménard submitted that the Commission should reject Bell Canada's proposed alternative measure.
41. Call-Net was of the view that an annual review with no process to monitor and prevent potential anti-competitive conduct throughout the year would be ineffective to safeguard the competitive market. Call-Net stated that this approach was based on the assumption that out-of-region affiliated carriers would only earn minimal revenues in-territory and argued that these revenues would not always be minimal.
42. Allstream and Call-Net argued that the Commission's proposed safeguards should apply to wireless affiliated carriers. Allstream submitted that by imposing the proposed safeguards on all other affiliated carriers, but not on the ILECs' wireless carriers, both the incentive and the opportunity would be created for the ILECs to employ their wireless arms in order to circumvent the regulatory restrictions. Allstream noted that unique conditions applied to the mobile wireless telecommunications services market, but that the features of this market did not necessarily extend to all services provided by wireless affiliated carriers, regardless of the facilities used to provide the services.

ILECs' reply comments

43. Bell Canada, SaskTel and TCI reiterated their concerns regarding potential harm to the competitiveness of their affiliated carriers. In response to Allstream's submission, Bell Canada submitted that Bell West was an entirely different business model than Bell Nexxia. Bell Canada submitted that although Bell West would provision services to some national customers that may have some operations in Ontario and Quebec, it was expected that those national accounts would represent an incidental, rather than a substantive, percentage of Bell West's overall business. Bell Canada further submitted that the approach that Allstream advocated would create an unfair competitive playing field, where one class of carrier, as well as system integrators, would have an advantage in supplying telecommunications services to national accounts.

44. SaskTel responded to Allstream's argument that the proposed safeguards did not impose an additional regulatory burden, by submitting that the proposed safeguards were excessive and likely to cause more harm than the harm they sought to address.
45. TCI supported Bell Canada's explanations and characterizations of the constraints resulting from Decision 2002-76 and, in particular, the interim measure imposed on affiliated carriers. TCI also agreed with Bell Canada that the bundling rules and imputation test requirements represented a significant competitive disadvantage for the ILECs and/or their affiliated carriers vis-à-vis new entrant CLECs.
46. In response to comments from interested parties, Bell Canada revised its proposed alternative measure to incorporate a two-pronged test, which included a general market condition test and an individual contract condition test, to be imposed on affiliated carriers. First, Bell Canada proposed that affiliated carriers would provide, on both a retrospective and prospective basis, financial information that established that in-region regulated services of the affiliated carrier represented only an incidental amount of total revenues of the affiliated carrier. Bell Canada further proposed that, even where the affiliated carrier could satisfy the general market test, it would nevertheless file tariffs and imputation tests for specific individual contracts where the in-region regulated services represented more than one-third of the total revenues on an individual contract basis.
47. TCI indicated that it did not have any objections, in principle, to Bell Canada's proposed alternative measure, but submitted that the Commission should be mindful that any alternative measure adopted should be competitively neutral so as not to favour the adoption by ILECs of one corporate structure over another. Additionally, TCI submitted that any threshold or test, or any other set of rules, should be crafted with sufficient precision to promote certainty as to when the rules, restrictions or requirements apply.
48. In response to arguments against the exemption of certain affiliated carriers, TCI and SaskTel reiterated their concerns with the application of the Commission's proposed safeguards to all affiliated carriers.
49. TCI argued that none of the arguments raised by interested parties seriously challenged or undermined TCI's submission, stating that no party challenged the assertion that wireless affiliated carriers operated in a different market. TCI submitted that this view was consistent with that expressed by the Commission when it declined to accept that wireless services were substitutes for wireline services.
50. To address concerns raised by interested parties, TCI proposed two alternative approaches, which it considered preferable to the wholesale denial of the application of forbearance relief granted in Decision 95-19. One approach was to include wireless affiliated carriers in the category of affiliates that are subject to the affiliate resale rule set out in Decision 2002-76. Alternately, TCI submitted that the Commission could consider a modification to the forbearance relief granted in Decision 95-19, by requiring wireless affiliated carriers to obtain tariff approval of any resold ILEC tariffed service and to comply with the same bundling rules that applied to the ILECs.

51. Bell Canada supported TCI's position, submitting that there was no evidence before the Commission to demonstrate or suggest that wireless affiliated carriers had been, or would be, used to circumvent the existing regulatory regime with respect to the offering of in-region tariffed services. Bell Canada further submitted that there was no competitive or business rationale to support an extension of the proposed safeguards to wireless affiliated carriers.
52. In support of its argument that the Commission's proposed safeguards should not be applied to the affiliated carriers of all ILECs, SaskTel submitted that its incumbent territory only covered approximately 3% of the population of the country, and therefore that SaskTel and Navigata could not be viewed as dominant in the national telecommunications marketplace.

Commission analysis and determination

53. The Commission notes the submissions of the ILECs with respect to the impact of the proposed safeguards on the competitiveness of affiliated carriers competing for national or regional accounts. The Commission also notes that other interested parties argued that the proposed safeguards were appropriate and necessary to allow fair and effective competition, and to ensure that regulatory obligations were not circumvented.
54. The Commission considers that to the extent that the application of the proposed safeguards would result in reduced pricing flexibility and greater regulatory oversight for affiliated carriers, such constraints must be weighed against the objectives and benefits, including the clarity, simplicity and effectiveness, of the proposed safeguards.
55. With respect to SaskTel's submission, the Commission considers that the rationale underpinning the proposed safeguards was not dependent on the actions of a particular affiliated carrier or ILEC. Rather, the conclusions were based on the fact that from a regulatory perspective, in situations of common control, there is no meaningful distinction between the actions of the affiliate and the actions of the ILEC, since the actions of both entities are ultimately subject to control by a single person.
56. With respect to TCI's submission that the proposed safeguards should not apply to wireless affiliated carriers, the Commission considers that, in the provision of tariffed services, there is no meaningful distinction between the actions of an ILEC and the actions of its wireless affiliated carrier. The Commission therefore considers that if the proposed safeguards are to apply, they should apply regardless of whether the affiliated carrier is a wireless or a wireline carrier. The Commission notes that the application of the proposed safeguards would not prevent wireless affiliated carriers from continuing to provide wireless telecommunications services on a forborne basis.
57. With regard to TCI's proposed alternative approaches for modifying the application of the proposed safeguards to wireless affiliated carriers, the Commission notes that these alternative approaches are limited to the resale of ILEC tariffed services. In the Commission's view, an affiliated carrier's regulatory obligations are not limited to resold tariffed services, but are equally present in circumstances where, using their own facilities, affiliated carriers provide services that, if provided by the ILEC, would be subject to Commission approval. Accordingly, the Commission considers that TCI's proposed alternative approaches are not sufficiently comprehensive.

58. The Commission acknowledges that Bell Canada's proposed alternative measure has some merit. However, the Commission considers that, in practice, the proposed alternative measure would lead to complexity, competitive disputes and additional regulatory burden for the industry and the Commission. The Commission therefore considers that, on balance, the company's proposal is not appropriate.
59. In light of the above, the Commission is not persuaded by the ILECs' submissions.
60. Based on the record of this proceeding, the Commission confirms its preliminary view set out in Decision 2002-76 and determines that, with respect to new, renewed or renegotiated agreements or arrangements entered into subsequent to the date of this decision, an affiliated carrier will be required to comply with section 25 and other applicable provisions of the Act whenever the affiliated ILEC would be required to do so. Further, the Commission will apply the same criteria when examining a proposed tariff filed by a Canadian carrier under common control as it would apply if the tariff were filed by the affiliated ILEC. In particular, proposed tariffs will be required to comply with the Commission's bundling rules and imputation test requirements.

Other matters

61. The Commission notes SaskTel's submission that the Commission should state in this decision that affiliated carriers may purchase services through retail channels, rather than through the CSG. The Commission has not addressed that submission in this decision as it is outside the scope of this proceeding.

Secretary General

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